

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

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I. INTRODUCTION

Three sisters lie in adjoining hospital rooms. A fourth lives a block away. All are in deadly peril.

Alice is seven months pregnant, and the pregnancy threatens her life. Her fetus has long been viable, so she no longer has the *Roe/Casey* right to abortion on demand. But because her life is in jeopardy, she has a constitutional right to save her life by hiring a doctor to perform a post-viability abortion, though it means the death of a viable fetus. She would even have such a right if the pregnancy were only posing a serious threat to her health, rather than threatening her life.¹

Katherine lives next door to the hospital. A person comes into her home and seems to be about to try to kill her (or perhaps to seriously injure, rape, or kidnap her). Katherine may protect her life by killing the invader, even if the invader isn't morally culpable, for instance if he's insane or if he mistakenly believes that he's the one defending himself.² Just as Alice may protect herself by killing an innocent fetus who is threatening her life, so Katherine may protect herself by killing even a morally innocent attacker who is threatening her life. And Katherine has a right to self-defense even though recognizing this right increases the chance that some people can use false claims of self-defense to get away with killing the innocent.³

Ellen, back in the hospital, is terminally ill. No proven therapies offer help. An experimental therapy seems relatively safe, because it has

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

² See *infra* notes 39-41 and accompanying text.

³ See *infra* text accompanying note 43.

passed Phase I FDA testing, yet federal law bars its use outside clinical trials because it hasn't been demonstrated to be effective (and further checked for safety) through Phase II testing. Nonetheless, under the D.C. Circuit's decision in *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*,⁴ Ellen has a constitutional right to try to save her life by hiring a doctor to administer the therapy.

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

But the federal ban on payment for organs sharply limits the number of available matching kidneys, and Olivia will likely die if she must wait for a donated kidney. Barring compensation for goods or services makes them scarce, and denies many people access to them. Alice and Ellen would be in jeopardy if doctors were only allowed to perform abortions or experimental treatments without compensation. Katherine wouldn't be able to defend herself with a gun or knife if such weapons could only be donated and not sold. If organ providers, or the heirs of posthumous providers, could be compensated for the organs, many more such organs would be available, and Olivia would be much likelier to get the life-saving kidney. But federal law bans organ sales, and thus frustrates her ability to protect her life.

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.⁵

Such a right may be constitutionally founded: Given that Alice has such a right to defend herself by getting an abortion,⁶ Ellen and Olivia

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

⁵ The most distinguishable case here is Katherine's, though I hope it is still persuasive—for reasons given in Part III—to those who are more moved by claims of a right to use lethal self-defense than by claims of medical autonomy. But even if Katherine's case is set aside, the other three cases remain analogous.

Some might characterize protection against a life-threatening pregnancy, an animal attack, or an attack by an insane person, as "necessity" rather than "self-defense," reserving "self-defense" for defense against someone who is morally culpable. See, e.g., Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475, 511-21 (2006) (suggesting this as to the use of lethal force against an insane attacker). Not much logically turns on such a label, but I prefer "self-defense" because it's a common lay term for the conduct—people, for instance, would readily say "I had to kill that rattlesnake in self-defense" (see cases cited *infra* note 41 for examples) though no-one would see the rattlesnake as morally culpable. Moreover, the self-defense defense is recognized in all states, just as abortion-as-self-defense is a nationwide constitutional norm, and just as lethal force may be used throughout the country to protect one's life against an animal or an insane person. The necessity defense, on the other hand, is recognized only in about half the states, see *infra* note 52.

⁶ Abortion-as-self-defense may involve very different emotions in the defender (likely deep sorrow) than lethal self-defense usually would (justifiable rage, as well as the acute fear that imminent attack causes). See Nicholas Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 111 (1997) (making this

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should have the same right to defend themselves by getting other medical procedures. Alice is entitled to have surgery in which a doctor inserts surgical devices into her body to excise a fetus that, tragically, is threatening her life. Ellen should therefore likewise be entitled to have a procedure in which a doctor inserts chemicals into her body in order to destroy (say) a tumor that is threatening her life.⁷ And Olivia should similarly be entitled to have a procedure in which a doctor inserts a replacement organ into her body in order to replace an organ the failure of which is threatening her life. It can't be that a woman is constitutionally entitled to protect her own life, but only when doing so kills a viable fetus.

And in any event, such a presumptive right should be recognized as a moral matter. 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 self-defense rights, and just as public opinion overwhelmingly supports women's abortion-as-self-defense rights.⁸ While a legislature need not fund the exercise of people's self-defense, it generally ought not enact laws that substantially burden people's ability to protect their lives.

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

In particular, while the right may be regulated in some ways—for instance, to prevent the killing of people by organ robbers—such regulations can and should be far less burdensome than a total ban on organ sales would be. We respect and value self-defense rights enough that we allow lethal self-defense, even given the risk that false claims of self-defense can be used as a cloak for murder: Rather than prophylactically banning all use of lethal force, we make certain uses illegal and rely on case-by-case decisionmaking to discover these improper uses and to deter them. The same should apply to payments for organ transplants.

point). Nonetheless, the moral principle at the heart of both is similar—it is the right to defend one's life against those who threaten it, whether the threat is wrongful or innocent. To see this, consider a case of self-defense against an acquaintance who is attacking you under what you know to be an insane delusion, or against a beloved pet that you suspect is rabid. *See generally infra* Part III.A. The emotions in these cases may be complex, and may often involve sorrow more than wrath. But the moral entitlement to engage in self-defense is present notwithstanding that.

⁷ That Ellen's surgery is riskier, because less proven, than Alice's might be relevant if Ellen had other reliable alternatives. But if Ellen is terminally ill, the state's interest in protecting her short remaining lifespan against her own bad decision should be no weightier than the state's interest in protecting the fetus's long remaining lifespan against Alice's decision. *See infra* p. 2.

⁸ *See infra* p. 22.

I will begin in Part II by discussing in more detail the existing right to medical self-defense. I'll argue that *Roe* and *Casey* have to be understood as securing not just a pre-viability right to abortion as reproductive choice, but also a post-viability right to abortion as medical self-defense when a woman's life is threatened by her pregnancy. And if you support this right, I'll argue, you should also support a similar medical self-defense right for people whose lives are threatened by other medical conditions.

I will go on in Part III to discuss the right to lethal self-defense: the right to protect your life against attack even if it means killing the attacker. This right has long been recognized by American law. I will argue that it has constitutional foundations, in substantive due process, in state constitutional rights to defend life, in state constitutional rights to bear arms, and possibly in the Second Amendment.⁹

But even if the right to lethal self-defense is simply a common-law and statutory right rather than a constitutional right, our recognition of it should counsel in favor of recognizing a similar common-law and statutory right to defend one's life against medical threats as well as against human threats. If you support people's right to lethal self-defense—and especially, though not only, if you support law-abiding citizens' right to carry guns in self-defense—you should also support their right to medical self-defense. My hope is that this may help persuade those (largely conservative) readers who are otherwise skeptical about the more traditionally liberal abortion rights analogy.

In Part IV, I'll argue that the right of medical self-defense offers an extra foundation—one the court didn't even mention—for the *Abigail Alliance* holding that there is indeed a constitutional right to use experimental therapies to protect one's life. And in Part V, I'll argue that the right makes the ban on organ sales presumptively improper and presumptively unconstitutional, when the organs are needed to protect people's lives. In the process, I'll analyze various anti-organ-market arguments, and explain why these at most justify regulations of the market, rather than total prohibitions.

Finally, in Part VI, I'll briefly touch on whether such a right to medical self-defense, even if logically supportable, is likely to be politically plausible. I think it can be and should be, both in the political process and in the judicial.

First, I hope that the political case for medical self-defense will be strengthened by connecting it both to abortion rights (which are broadly

⁹ The right to bear arms has historically been justified as a check on government authority, not just as a tool for self-defense against criminals, *see, e.g.*, 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 143 (1803); 2 *id.* app. 300; JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264-65 (1840). But most state constitutional rights to bear arms also cover individual self-defense, *see infra* note 2, and most modern defenders of Second Amendment rights care about individual self-defense at least as much about the broader social justifications for gun ownership.

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supported by most liberals, and supported by nearly everyone, including most conservatives, when a woman's life is in danger), and to lethal self-defense rights (which are broadly supported by most conservatives, and supported in considerable measure by the majority of Americans, including many liberals).

Second, I think there's reason for hope even in constitutional litigation. Despite the Justices'—especially the conservative Justices'—stated hesitance about recognizing unenumerated constitutional rights, Justice Kennedy provided the swing vote for recognizing an unenumerated right to sexual autonomy.¹⁰ Justice O'Connor suggested support for recognizing an unenumerated right for the terminally ill to receive pain-killing medication even when that medication hastens death.¹¹

The second vote in the *Abigail Alliance* case came from Judge Douglas Ginsburg, who had been nominated to the Supreme Court by President Reagan. The case itself was brought by the Abigail Alliance joined by a prominent conservative public interest firm, the Washington Legal Foundation. Even then-Justice Rehnquist in *Roe v. Wade* suggested that it would be unconstitutional to ban abortion when the abortion was needed to save the mother's life.¹² The battle for recognizing a constitutional right to medical self-defense, especially as to organ transplant markets, may be uphill. But it's not hopeless, and it's worth fighting.

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

A. *The Presumptive Right To Be Free of Government Interference With Your Medical Attempts To Protect Your Life*

Roe and *Casey* hold that the Constitution protects the right to an abortion, but this right actually consists of two different rights—different in scope, justification, and popular support.

The first, highly controversial, right is the right to abortion as reproductive choice: Under this right, the woman may get an abortion on demand before viability, simply by choosing not to bear the child.

The government may regulate the exercise of the right, such as by requiring a waiting period, or by requiring doctors to say certain things about the abortion to the woman.¹³ But such regulations are constitutional only if they don't create a substantial obstacle to the woman's right to choose an abortion.¹⁴ Any attempts to broadly prohibit abortions before viability are, given *Roe* and *Casey*, unconstitutional.

The second right is the right to abortion after viability but only when necessary “to preserve the life or health of the mother.”¹⁵ This is

¹⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹¹ *Washington v. Glucksberg*, 521 U.S. 702, 737 (1997) (O'Connor, J., concurring).

¹² See *infra* note 17.

¹³ *Casey v. Planned Parenthood*, 505 U.S. 833 (1992).

¹⁴ *Id.* at 877.

¹⁵ *Roe v. Wade*, 410 U.S. 113, 163-64 (1973); *Casey*, 505 U.S. at 846.

not the right to abortion on demand, since a woman must show a particular reason for a post-viability abortion. Nor is the right justified by the woman's right to choose whether to bear a child: If the dangerous medical condition hadn't arisen, the woman would have been obligated to bear the child to term. The time for her reproductive choice is past.

Rather, the right is a right to medical self-defense—the right to protect your own life using medical care, even when this requires destroying that which is threatening your life.¹⁶ And this right is largely uncontroversial. Even Chief Justice Rehnquist, who dissented in *Roe*, wrote that “If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy,” he had “little doubt” that the statute would be unconstitutional.¹⁷ Likewise, even during the pre-*Roe* era, when abortion was illegal throughout the country, “[t]he criminal abortion laws passed in every state by 1880 made exceptions for therapeutic abortions performed in order to save a woman's life.”¹⁸

Recent public opinion similarly overwhelmingly endorses the abortion-as-self-defense right,¹⁹ even while abortion-on-demand remains ex-

¹⁶ See, e.g., Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 51-53 (1971); John T. Noonan, *An Almost Absolute Value in History*, in THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 1, 58 (John T. Noonan, Jr. ed., 1970); Martha A. Field, *Killing “the Handicapped”—Before and After Birth*, 16 HARV. WOMEN'S L.J. 79, 95 n.53 (1993).

The fetus usually threatens the mother's life directly, but may sometimes also threaten it by interfering with treatment for a disease from which the mother is suffering. In both instances, though, the life-saving abortions are properly described as actions taken against a fetus that is threatening the woman's life, and should thus be seen as morally and constitutionally identical (just as there's no moral difference between killing an insane captor who's threatening to kill you himself, and killing an insane captor who's keeping you from being able to get life-saving treatment).

Professor Davis has argued that abortions aimed at preventing the mother's death are not justifiable under normal self-defense principles, chiefly because (1) while the fetus's existence may threaten the woman's life, the fetus is morally innocent, unlike the aggressor in the typical self-defense case, and (2) even if it's permissible for a woman to kill someone who's a morally innocent threat to her, this permission doesn't extend to those (like the abortion provider) who would help the woman do this. Nancy Davis, *Abortion and Self-Defense*, 13 PHIL. & PUB. AFF. 175, 189-95 (1984). Yet the law rightly allows self-defense generally even against nonculpable attackers (such as an attacker who is delusional, or innocently mistaken, see *infra* note 37), tragic as the need for such self-defense may be; and it imposes no limitation on others' right to help in this defense. See, e.g., MODEL PENAL CODE § 3.05. Nonetheless, this disagreement doesn't affect the core of my thesis in this article: Even if the abortion-as-self-defense right gives a woman more rights than normal self-defense concepts would entitle her to (perhaps because it rests on the notion that a fetal life, even after viability, is less valuable than a woman's), the right still provides ample authority for medical self-defense using procedures other than abortion: If a woman may protect her life against medical threats even by aborting a viable fetus, she should be at least as able to protect her life against medical threats using procedures that don't involve such jeopardy to a compelling government interest.

¹⁷ *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting).

¹⁸ LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME 5 (1997).

¹⁹ I use the term “abortion-as-self-defense” to highlight the close connection between the overwhelmingly popular right to protect one's life against threat from a fetus and the overwhelmingly publicly popular right to protect one's life against threat from an attacker

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tremely controversial. In polls from the 1970s to the 2000s, only 9% to 15% of respondents endorse the view that abortions should be banned even when the woman's life is in danger.²⁰ Compare this to the 42% to 58% of respondents who endorse the view that abortion should be generally banned, and available at most to protect the woman's life or in cases of rape or incest,²¹ and the 33% to 46% who endorse the view that abortion should be generally banned, and available at most to protect the woman's life, with no mention of any exception for rape or incest.²²

Similarly, even when people are specifically asked about third-trimester abortions, only 22% say they would ban these abortions even when the mother's life is in danger.²³ Compare that to the 74% of respondents who say they would reject abortion on demand during the third trimester.²⁴

Moreover, this right exists even in the face of the compelling government interest in protecting the fetus's life. *Roe* and *Casey* hold that at viability, this interest becomes compelling, compelling enough to trump the abortion-as-choice right.²⁵ But the same cases hold that this compelling interest does not trump the abortion-as-self-defense right: The woman may get an abortion to protect her life (or even her health)

(even a morally innocent one, *see infra* text accompanying notes 39-41). I am not referring to the broader (and more controversial) argument that even the *Roe* abortion-on-demand right can be justified by analogy to self-defense against serious bodily injury (on the theory that an 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).

²⁰ *See* Opinion Dynamics, Feb. 28-Mar. 1, 2006, acc. no. 1644508 (12%); Gallup Org., May 19-21, 2003, acc. no. 0431679 (15%); ABC News & Washington Post, Jan. 16-20, 2003, acc. no. 0419810 (10%); NBC News & AP, Sept. 24-25, 1979, acc. no. 0084373 (9%); Roper Org., Aug. 20-27, 1979, acc. no. 0115959 (12%). All surveys listed in this footnote and the following ones are available on LEXIS, in the RPOLL file of the NEWS database.

²¹ CBS News, Jan. 5-8, 2006, acc. no. 1639924 (55%); Princeton Survey Res. Ass. Int'l, Dec. 7-11, 2005, acc. no. 1638948 (42%); L.A. Times, July 17-21, 2004, acc. no. 1603030 (51%); L.A. Times, Jan. 30-Feb. 2, 2003, acc. no. 0420087 (54%); L.A. Times, June 8-13, 2000, acc. no. 0361573 (54%); Market Strategies, Feb. 19-25, 1998, acc. no. 0326766 (54%); CBS News & N.Y. Times, Apr. 13-16, 1989, acc. no. 0016255 (48%); CBS News & N.Y. Times, Apr. 25, 1989, acc. no. 0016257 (53%); N.Y. Times, Dec. 14-18, 1985 (56%); CBS News & N.Y. Times, Nov. 18-19, 1985, acc. no. 0020612 (47%); CBS News & N.Y. Times, Jan. 14-17, 1985, acc. no. 0014055 (58%); Gallup Org., Sept. 28-Oct. 1, 1984, acc. no. 0032647 (50%).

²² Opinion Dynamics, Feb. 28-Mar. 1, 2006, acc. no. 1644506 (35%); Harris Interactive, Apr. 4-10, 2006, acc. no. 1651042 (44%); CBS News & New York Times, Sept. 30-Oct. 4, 1984, acc. no. 0014239 (43%); Roper Org., May 5-12, 1979, acc. no. 0118970 (46%); Roper Org., Aug. 20-27, 1977, acc. no. 115959 (33%); Roper Org., Feb. 27-Mar. 1, 1976, acc. no. 0046661 (45%). I have seen only one survey that falls outside these results, and reports only 23% support for this view, see Market Strategies, Feb. 19-25, 1998, acc. no. 0326766; but even it reports 54% support for the view that abortion-on-demand should generally be banned (the 31% difference between the two figures represents people who say abortion "[s]hould be legal only in the cases of rape, incest, or to save the life of the mother").

²³ *See* Gallup Org., May 19-21, 2003, acc. no. 0431684.

²⁴ *See* Gallup Org., May 19-21, 2003, acc. no. 0431688.

²⁵ 410 U.S. at 163; 505 U.S. at 860.

even when this means killing the fetus.²⁶ Modest burdens on the right to abortion as self-defense, such as informed consent or waiting period requirements, would likely be constitutional; but substantial burdens would not be.²⁷

As a doctrinal matter, the abortion-as-self-defense right has been recognized only as to abortion. It's hard to see, though, how it can be logically limited to that.²⁸ The right to decide whether to bear a child, which is the foundation for the abortion-as-reproductive-choice right, is no longer in play. After viability the time to choose has passed; the power to choose not to bear the fetus after viability is only a side effect of the woman's right to protect her life.

The ability to get an abortion, before or after viability, involves a woman's control over her own body. But a patient's adding substances (such as medicines or a donated organ) to her body, as well as removing substances from her body (say, through drugs that kill cancer cells), also involves her control over her body. If the addition and removal are aimed at the same goal as the late-term abortion—saving the woman's life—there's no reason to treat the abortion more favorably than the other procedures.²⁹

²⁶ Naturally, the right to abortion-as-self-defense, like other self-defense rights and like other rights more broadly, is in some measure constrained by the rights of others who aren't threatening the woman's life. No woman has a constitutional right to force a doctor to perform an abortion at gunpoint, even to save her life. Likewise, Ellen's constitutional right to medical self-defense wouldn't entitle her to steal the experimental drugs from the drugmaker, if the drugmaker chooses not to sell them to her. But this is no different from the way other indisputably recognized constitutional rights operate: My Free Press Clause rights don't allow me to steal a printing press, though they guarantee me broad freedom to publish what I wish on my lawfully owned printing press. *See infra* note 53.

²⁷ *Casey*, 505 U.S. at 877.

²⁸ *Cf.* Yvonne Cripps, *The Art and Science of Genetic Modification: Re-Engineering Patent Law and Constitutional Orthodoxies*, 11 *IND. J. GLOB. LEG. STUD.* 1, 24 (2004) (suggesting that *Roe* may generally secure a right to be free from prohibitions that interfere with life-saving treatment, and suggesting that this may make bans on human cloning unconstitutional).

²⁹ One might be able to distinguish abortion-as-self-defense from other procedures if the abortion right were justified on a sex equality rationale, as a means of preventing women from having to bear certain burdens when men aren't required to bear comparable burdens. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 *N.C. L. REV.* 375 (1983); Regan, *supra* note 19. But this is not the justification that the Court has generally given for the abortion right. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 177 (1973) (recognizing an abortion rights based on reproductive rights precedents, such as *Skinner v. Oklahoma*, 316 U.S. 535, 541-542 (1942), and family rights precedents, such as *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1925), and *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), that protected men as well as women); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (citing *Roe* as support for a right to live with one's family members, a right that protects men as well as women); *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (citing *Roe* as support for a right to sexual autonomy, a right that protects men as well as women); *cf.* *Casey v. Planned Parenthood*, 505 U.S. 833, 856 (1992) (noting the sex equality implications of *Roe*, but reaffirming *Roe* based mostly on other justifications).

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The other procedures may cause harm to some government interests. Ellen's experimental drug may shorten Ellen's already short expected lifespan. It may also cost her money for what the government thinks may well be a false hope (though note that the pharmaceuticals in the *Abigail Alliance* case were merely not proven to be effective, rather than proven to be ineffective).

Likewise, Denise's paying for an organ might pressure some people into donating organs even when they might have preferred not to (though that likely isn't that serious a harm if the donations are posthumous, as they often are). It would lead Denise to have more access to organs than poorer patients would (though a market for organs would likely increase the number of available organs, and would thus benefit poor patients as well as rich ones). It might also be seen by some as immoral and socially harmful in the long term because it turns human body parts into commodities. Any of these concerns is enough to let an organ sales ban, or a ban on the unapproved use of potentially lifesaving but unproven medicines, pass the rational basis test.

Yet *Roe* and *Casey* demand much more than a rational relationship to a legitimate government interest before Alice's right to abortion-as-self-defense may be restricted. Even the otherwise compelling interest in protecting the life of a viable fetus—a fetus that is in many ways indistinguishable from a born baby—doesn't suffice to overcome Alice's rights.

The same should hold for other medical procedures used to protect one's own life. Modest burdens on the right to medical self-defense, such as an informed consent requirement or a waiting period (at least one short enough not to materially increase the risk to the patient's life), would be constitutional. But if the government imposes a substantial burden on the patient's ability to protect her life through medical procedures, the burden should be presumptively unconstitutional.

At the very least the government should have to show an extremely powerful reason for burdening people's medical self-defense rights, and to show that the burden is genuinely necessary, because the government's goals can't be accomplished in some less burdensome ways.³⁰ And perhaps even when the interest is powerful in the abstract, it might still sometimes be rejected in favor of a person's right to protect her own life, as the interest in protecting fetal life is rejected in the face of the abortion-as-self-defense right.

³⁰ See, e.g., *Abigail Alliance*, 445 F.3d at 486 (concluding that the terminally ill have a presumptive constitutional right to get potentially lifesaving experimental drugs, but remanding to the district court to decide "whether the FDA's policy barring access to post-Phase I investigational new drugs by terminally ill patients is narrowly tailored to serve a compelling government interest").

There is, of course, at least one important limitation on the right to medical self-defense (or to self-defense more broadly³¹): The right is in some measure constrained by the rights of others who aren't threatening the woman's life. No woman has a constitutional right to force a doctor to perform an abortion at gunpoint, even to save her life. Likewise, Ellen's constitutional right to medical self-defense wouldn't entitle her to steal the experimental drugs from the drugmaker, if the drugmaker chooses not to sell them to her.

But this is no different from the way other indisputably recognized constitutional rights operate: My Free Press Clause rights don't allow me to steal a printing press, though they guarantee me broad freedom to publish what I wish on my lawfully owned printing press. My Free Speech Clause rights don't give me a right to speak on your property (with some narrow exceptions that aren't relevant here).³² Likewise, even during the *Sherbert/Yoder* era of constitutionally mandated exemptions from generally applicable laws, I doubt that the Free Exercise Clause would have been read to allow religious pilgrims to trespass on private property, even if they believed that it was the site of a miraculous apparition that they had a religious duty to observe.³³

This is not because property rights are more important than free speech rights, free exercise rights, or self-defense rights; rather, it's because even important rights are bounded by the rights of others. Naturally the exact scope of those rights of others—do they include the right to reputation? to freedom from emotional distress? to freedom from offense? to freedom from interferences with business relations?—has long been the subject of constitutional debates.³⁴ But in our legal system an inherent, and I think necessary, aspect of constitutional rights is that they are bounded by at least some rights of others. And the existence of such boundaries by no means contradicts the existence of the right, or weakens the right's force when exercise of the right does not conflict with the rights of others.

³¹ See also *infra* text accompanying notes 48-53 (discussing how the rights of others limit the lethal self-defense right).

³² *Hudgens v. NLRB*, 424 U.S. 507 (1976).

³³ See generally Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1510-12 (1999); Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 621-23 n.89 (1999).

³⁴ 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) (generally concluding that the right to free speech mostly includes the right to harm others' interests through the communicative impact of speech—with some exceptions—but not the right to harm them through the noncommunicative impact of speech, such as noise or trespass on private real estate).

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

The judicial and popular acceptance of the abortion-as-self-defense right should be no surprise. Throughout American history, protecting one's life has also been an adequate justification for violating many other laws, including laws against homicide, battery, potentially dangerous discharge of firearms, cruelty to animals, killing of endangered species, and destruction of another's property. If a person (or an animal) is threatening you with death, serious physical injury, rape, or kidnapping, you are entitled to defend yourself even using what would otherwise be unlawful killing.

The analogy between lethal self-defense and medical self-defense is necessarily not as close as the analogy between one form of medical self-defense (via abortion) and another; but, I will argue, it's close enough. As a 1939 English case held,³⁵ in reading a "life of the mother" exception into an abortion ban that didn't expressly provide such an exception, "as in the case of homicide, so also in the case where an unborn child is killed, there may be justification [meaning self-defense] for the act." My hope is that people who feel strongly about the right to lethal self-defense (as do I), but who are skeptical of what they see as newly minted rights, such as abortion rights or medical rights justified on pure autonomy grounds,³⁶ will come to agree that the moral case for medical self-defense is at least as strong as the case for lethal self-defense.

A. *The Legal Status of Lethal Self-Defense—Generally*

American law has always recognized people's rights to use deadly force to protect themselves against death or serious physical injury, and generally against rape or kidnapping as well.³⁷ Many states even allow the use of deadly force to protect against robbery or burglary.³⁸

This right, of course, is the right to kill another, not just a right to introduce potentially lifesaving but potentially dangerous substances into one's own body, or to acquire organs through a consensual transac-

³⁵ King v. Bourne, 1 K.B. 687, 690 (C.C.C. 1939).

³⁶ See Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily*, 55 OHIO ST. L.J. 1, 59-64 (1994) (discussing a possible constitutional privacy right to sell one's organs); compare Karen L. Johnson, Note, *The Sale of Human Organs: Implicating a Privacy Right*, 21 VAL. U. L. REV. 741, 754-55 (1987) (arguing that there is such a privacy right), with Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 456-57 (2000) (arguing the contrary).

³⁷ See, e.g., 2 AM. LAW INST., MODEL PENAL CODE AND COMMENTARIES § 3.04, at 48 & n.35 (1985); N.Y. PENAL LAW (McKinney) § 35.15(2)(a)-(b) (2004).

³⁸ See, e.g., N.Y. PENAL LAW (McKinney) § 35.15(2)(b) (2004) (allowing the use of deadly force in defense against robbery); ALA. CODE § 13A-3-23 (2006) (likewise as to burglary). Cf. MODEL PENAL CODE § 3.06(3)(d)(ii)(B) (allowing the use of deadly force against a burglar or robber if "the use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor . . . to substantial danger of serious bodily injury"); N.Y. PENAL LAW (McKinney) § 35.20(3) (2004) (likewise).

tion. And this right covers even killing those who caused the danger through no moral fault (or minimal moral fault) of their own. You may kill those who are threatening your life negligently, or even through an unfortunate nonnegligent accident.³⁹ You may kill attackers who are insane or mentally retarded and thus not morally culpable.⁴⁰ You may use self-defense against animals, even when such actions would otherwise violate endangered species law, animal cruelty laws, or laws barring destruction of others' property.⁴¹

Moreover, the existence of lethal self-defense as a defense to charges of murder endangers even those who aren't attacking anyone. Say that I cold-bloodedly want to murder you. If the self-defense defense were unavailable, I would know that if I killed you, and physical evidence linked me to the attack, I would be convicted. But the existence of the self-defense defense gives me a potential way to escape: "He threatened

³⁹ See, e.g., MODEL PENAL CODE §§ 3.04, 3.11(1) (stating that deadly force may be used against "unlawful force" that imperils one's life, and defining "unlawful force" as nonconsensual force that "would constitute [an] offense or tort"); 2 AM. LAW INST., MODEL PENAL CODE AND COMMENTARIES § 3.11, at 159 (1985) (elaborating on this).

⁴⁰ See, e.g., MODEL PENAL CODE §§ 3.04, 3.11(1) (stating that deadly force may be used against "unlawful force" that imperils one's life, and defining "unlawful force" as nonconsensual force that "would constitute [an] offense or tort except for a defense (such as the absence of intent, negligence, or mental capacity [or such as] . . . youth)"); 2 AM. LAW INST., MODEL PENAL CODE AND COMMENTARIES 159 (1985) (noting that self-defense must be allowed even "against attacks by lunatics or children," as well as against those who are merely negligent); 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(b), n.13 (1984 & Supp. 2005); Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law*, 32 UCLA L. REV. 61, 62 n.2 (1984); cf. JUDITH JARVIS THOMSON, SELF-DEFENSE AND RIGHTS 6 (1977) (expressing the same view as a matter of moral philosophy).

⁴¹ See, e.g., 16 U.S.C.A. § 1540(b)(3) (providing self-defense defense in prosecutions for violating Endangered Species Act); 50 C.F.R. § 1740(b)(i)(B) (2004) (same); *People v. Lee*, 131 Cal. App. 4th 1413 (2005) (holding that self-defense against an animal is a defense in an illegal discharge of firearm prosecution); *People v. Wicker*, 357 N.Y.S.2d 597 (1974) (holding same as to cruelty against animals prosecution); *Grizzle v. State*, 707 P.2d 1210 (Okla. Crim. App. 1985) (same); *Credit v. Brown*, 10 Johns. 365 (N.Y. Sup. Ct. 1813) (holding that self-defense against an animal is a defense in a trespass action);

Some might argue that we recognize self-defense only as a concession to human nature, on the theory that the threat of immediate death exerts such a powerful compulsion on a person that she can't be held responsible for her actions. Under such a theory, self-defense would be akin to the excuse of duress—not a right as such, but rather a circumstance that makes it cruel to punish the defender. Yet the law treats self-defense (at least when it's genuinely necessary, rather than founded on mistake) as justifying the act, rather than merely excusing it. See, e.g., 2 ROBINSON, *supra* note 40, § 131, at 69. Moreover, the law lets people use lethal force to defend others, including acquaintances and strangers rather than just relatives or close friends, even though the third party is unlikely to feel a duress-like compulsion to defend the person who needs defending. See, e.g., MODEL PENAL CODE § 3.05; 2 ROBINSON, *supra* note 40, § 133, at 101. This shows that defending life against attack is treated as a positive good, not just a concession to human frailty. Cf. Regan, *supra* note 19, at 1618 (likewise noting that comparing self-defense with voluntary manslaughter, in which a tolerance of human frailty leads to mitigation of the offense, and of duress, in which a tolerance of human frailty leads to recognition of an excuse rather than justification, "makes it clear that the right of self-defense is not merely a concession to predictable human weakness").

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me, and I thought he was reaching for a gun,” I would falsely say, and the only other witness—you, the victim whom I am painting as the attacker—won’t be there to contradict me.

Such a defense isn’t guaranteed to prevail, since the jury could see through my lie. But some jurors might believe me, or at least conclude that they lack enough reason to disbelieve me, especially if I’m a sympathetic-seeming character (say, a police officer) and the person I killed is not.⁴²

I mention this because opponents of paid organ transplants sometimes argue that the availability of such transplants, even among entirely consenting parties, risks fostering murder of people for their organs.⁴³ Of course we should worry about such murders, and take steps to prevent them and minimize their risks. But the right to lethal self-defense likewise risks fostering murder—yet we deal with this risk through case-by-case evaluation of the defender’s credibility, not by flatly banning lethal self-defense.⁴⁴

The right to lethal self-defense against humans, as opposed to the right to medical self-defense, protects not just our right to life but also our right to be free of domination by other people. There may be an extra indignity in dying by another human’s despotic will, as opposed to from disease or through an animal’s attack.

Yet a similar indignity exists when the law shackles you when you’re dying, through disease or animal attack, and denies to you the ability to fight back. If there is a distinction between such a situation and the law’s barring people from lethally resisting criminal human attack, it’s a distinction too gossamer to make a constitutional or moral difference.

⁴² See, e.g., Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 SO. CAL. L. REV. 777, 796 (1985).

⁴³ See sources cited *infra* note 162.

⁴⁴ Thus, even if you think that the right to lethal self-defense is justified largely by the conclusion that attackers have forfeited some of their rights by their attack, see, e.g., Sangero, *supra* note 5, at 507-11 (describing this argument)—even if they aren’t culpable, because they’re insane or mistaken—the exercise of lethal self-defense still causes harm. Such self-defense may cause the death of a criminal attacker, whose life may be worth less, but is presumably worth more than nothing. It may involve the death of an innocent attacker, whose life is quite valuable even though his actions (but not his intentions) may be wrongful. It may involve the death of an animal, the life of which is in my view worth much less than the life of a human, but again is not worth nothing (either because higher animals’ life generally has some value, because the animal’s owner has property rights, or because endangered species have some value). And it may make it easier to kill the entirely innocent with impunity, by making up a false story of self-defense.

That we recognize self-defense despite these social costs suggests that we do treat self-defense as a right that trumps some nontrivial government interests. And, as I argue in Parts IV and V, the government interests behind limits on experimental drug treatments and on organ sales are no more capable of categorically trumping the self-defense right than are the government interests in protecting fetuses, criminal attackers, nonculpable attackers, animal attackers, or innocents who could be killed using false claims of self-defense.

The right to lethal self-defense is in some ways limited, as are other rights, and as the right to medical self-defense would be as well. First, the right is firmly and broadly accepted only when the actor is defending his life, or some other very important interest: You generally can't kill to prevent a bruise or a petty theft.⁴⁵ Similarly, I am arguing for medical self-defense against deadly or at least radically debilitating threats (such as paralysis or dementia), not the common cold.

Second, in a minority of states, a person may not use lethal self-defense outside his home when he could safely avoid the threat by retreating.⁴⁶ Yet this is just a reflection of the necessity requirement; because lethal self-defense remains available when a safe retreat is impossible, the retreat rule (if applied properly) doesn't substantially burden a person's right to defend his life against attack. Likewise, if the law bans a procedure that is not medically necessary to protect a person's life or avert a grave threat to the person's health, such a ban wouldn't violate the person's medical self-defense right.⁴⁷

Third, the right to lethal self-defense, like other rights, doesn't in my view include the right to injure the life, liberty, and property rights of third parties who aren't threatening your life. If I'm starving to death on a lifeboat, I have no right to kill and eat my fellow passengers.⁴⁸ If a criminal forces me at gunpoint to kill someone, my actions won't be legally justified.⁴⁹ Even if I merely want to take another's property to save my life, that isn't, I think, part of my medical self-defense rights.

The law may reduce my sentence (as has sometimes happened in the lifeboat scenario⁵⁰), provide a formal excuse (such as the duress defense, in cases where one is forced to commit a crime that doesn't involve another's death⁵¹), or even treat my action as justified (which the necessity defense recognized in about half the states would do, at least

⁴⁵ See 2 ROBINSON, *supra* note 40, § 131(d), at 81-84.

⁴⁶ See *id.* § 131(c), at 79-81.

⁴⁷ As I note below, I don't think that all aspects of current self-defense law are mandated by the Constitution or by a basic moral right to self-defense. Most states, for instance, do not impose a duty to retreat, even when retreating is quite safe; that may well be wise policy, but it's part of the constitutionally and morally optional component of self-defense, not part of the mandatory component. In my view, the mandatory component, both of the constitutional and moral right to self-defense, is the right to do what is necessary to prevent death (or serious bodily injury, rape, or a few other serious harms) without infringing the rights of others who aren't attacking you, *see infra* note 53

⁴⁸ See *Regina v. Dudley & Stephens*, 14 Q.B.D. 273, [1881-5] All E.R. Rep. 61, 1 T.L.R. 118 (1884), *aff'd* 1 T.L.R. 29 (1884), *amended* 14 Q.B.D. 560 (1885). *But see* *United States v. Holmes*, 26 F. Cas. 360, 367 (C.C. E.D. Pa. 1840) (suggesting that "sailor and sailor may lawfully struggle with each other for the plank which can save but one").

⁴⁹ See 2 ROBINSON, *supra* note 40, § 177(g)(1), at 367-68.

⁵⁰ A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW: THE STORY OF THE TRAGIC LAST VOYAGE OF THE MIGNONETTE AND THE STRANGE LEGAL PROCEEDINGS TO WHICH IT GAVE RISE* 247 (1984) (noting that Dudley's and Stephens' sentences for killing and eating their fellow lifeboat passenger were commuted to six months' imprisonment).

⁵¹ See 2 ROBINSON, *supra* note 40, § 177, at 347.

as to mere injury to another's property⁵²). Yet this, I think, flows from the legal system's sympathy and mercy towards the actor, not because the actor's behavior is justifiable as part of the minimum right to self-defense that a state should have to allow. If the legal system sets aside this sympathy, and takes the view that deliberate harm to innocent third parties can never be permitted even when someone is trying to defend his life, this wouldn't violate the defender's moral rights.⁵³

But while this limitation is both conceptually important and in some measure controversial (some might define the right to self-defense more broadly than I would, and include within it the right to inflict at least some harms on third parties), it doesn't affect the standard medical self-defense scenarios that I discuss. Ellen doesn't want to steal the drugs from the pharmaceutical company. Olivia doesn't want to cut an organ from a kidnap victim. Even Alice is killing the fetus who is threatening her life, albeit threatening it with no moral culpability.

B. *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 a death that's likely in months. But for medical self-defense, it makes sense to treat imminence as simply requiring a present medical condition that seriously threatens life in the relatively near future—that is to say, as an application of a necessity requirement⁵⁴—not as requiring that death be likely within the hour.

The imminence requirement in lethal self-defense is aimed at serving several functions. First, imminence is a proxy for availability of alternatives, and thus for the necessity of lethal response—the further away the harm, the likelier it is that nonlethal means (escape, calling the police, and the like) will protect the actor's life.⁵⁵

Second, imminence is a proxy for likelihood of harm, and thus again for necessity of lethal response: Humans change their minds, and a threat made in anger will often fade away as the threatener's passions cool.⁵⁶

⁵² See 2 ROBINSON, *supra* note 40, §124(a), at 45; *id.* § 124(g), at 63 (noting that some states bar the necessity defense for charges of murder, or even for other serious felonies).

⁵³ See text accompanying notes 31-34 (discussing this in more detail).

⁵⁴ Cf. 2 ROBINSON, *supra* note 40, § 131(b)(3) (so describing the proper function of the imminence requirement); WAYNE R. LAFAVE, CRIMINAL LAW 495 (3d ed. 2000) (likewise); Stephen J. Morse, *Neither Desert nor Disease*, 5 LEG. THEORY 265, 292-93 (1999) (likewise); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 380 (1993) (likewise); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, out of the Battered Woman*, 81 N.C. L. REV. 211, 276-82 (2002) (likewise).

⁵⁵ See, e.g., LAFAVE, *supra* note 54, at 495; David Gauthier, *Self-Defense and the Requirement of Imminence*, 57 U. PITT. L. REV. 615, 616-17 (1996); George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570 (1996).

⁵⁶ See, e.g., Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormenters: Reflections on Maintaining Respect for Human Life While Killing Monsters*, in CRIMINAL

Third, imminence is a proxy for the accuracy of the defender's judgment that lethal response is necessary: You're usually less likely to be mistaken about the intentions of a man pointing a gun at you than about the intentions of someone who merely said that he'd like to kill you one day.⁵⁷

Fourth, the imminence requirement helps constrain mass gang warfare; without the requirement, opposing gang members would be free to kill each other with (legal) impunity, since they could always plausibly argue that their mortal enemies in the other gang may attack them on some future occasion.⁵⁸

Fifth, the imminence requirement helps cabin people's ability to get away with murder by falsely pleading self-defense. This ability is potentially present even under a self-defense regime that requires imminence; "I thought he was reaching for a gun" is already an available lie that the pretend defender can use. But the risk of such false claims of self-defense would be even greater if "he had told me some time before that he wanted to kill me" were justification enough. Anyone whom you had recently threatened in a heated moment would have a continuing ability to kill you, even if he doesn't sincerely believe that you're threatening him but instead has a murderous motive that he will cloak in a claim of self-defense.

Sixth, generally insisting on tools that help show necessity, help show aggression on the killed person's part, and help weed out false claims is especially important because the harm of unnecessary self-defense is so grave—a death that could have been averted.

For medical self-defense, all these functions would best be served by seeing imminence as simply requiring a present medical threat. It is the presentness of the medical threat (your kidneys are actually sick, as opposed to your wanting to take medicine prophylactically to prevent possible future sickness) and the lack of a satisfactory approved therapy that are the best proxy for necessity. You can't run away from a failing kidney that can be repaired only through a transplant, or call the police to protect you

Moreover, present medical threats of future harm, while never completely certain, are much more reliably diagnosable than human threats. There is no need to worry about self-defense claims being used as a justification for street warfare by rival gangs. There is little need to screen out insincere or unreliable claims of danger, especially since the diagnosis is usually made by a trained and objective medical expert, not the patient. And even if an error happens, the error will likely endanger others much less than erroneous lethal self-defense would.

LAW THEORY: DOCTRINES OF THE GENERAL PART 259, 274-75 (Stephen Shute & A.P. Simester eds., 2002).

⁵⁷ See, e.g., Gauthier, *supra* note 55, at 617.

⁵⁸ See Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 255 (2004).

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

C. Substantial Burdens on Lethal Self-Defense

The chief, and most controversial, substantial burden on people's ability to practice lethal self-defense is found in certain kinds of gun control laws: (a) total bans on all guns, and (b) bans on the carrying of guns on one's person. Such laws don't ban self-defense, but they do substantially decrease people's ability to defend themselves, by denying them a tool that is more effective for self-defense than other tools would be.⁵⁹ (An analogy would be a law that allows abortion-as-self-defense, but bars women from using the safest and most reliable late-term abortion procedures, and leaves them only with other, much less life-protective procedures.⁶⁰)

Yet even these laws are generally politically justified on a theory that they are necessary to protect innocent lives (sometimes coupled with claims that guns really aren't on balance effective defensive tools), because any lesser regulations wouldn't do the job.⁶¹ Guns, the argument often goes, kill 30,000 Americans a year (13,000 if we exclude suicide and shootings by the police),⁶² and protect many fewer Americans than they kill;⁶³ we could reduce the aggregate death toll only by banning them, or banning the carrying of them.⁶⁴ The analogy would be a

⁵⁹ See GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 167-75 (1997). This makes sense, largely because a gun is a more powerful deterrent than most other options. If you were a rapist or a robber, what would be most likely to lead you to run away—the victim's saying "I have a can of mace" or "I have a gun"? If you were a burglar, which would deter you more: a sign saying "protected by armed patrol" or one saying "protected by unarmed patrol"?

⁶⁰ See *Stenberg v. Carhart*, 530 U.S. 914, 937 (2000) (holding that "[w]here a significant body of medical opinion believes [an abortion] procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view," a woman is entitled to get such a procedure performed in order to protect her life or health, even if there is a "division of medical opinion" about the value of the procedure).

⁶¹ See, e.g., JOSH SUGARMANN, *EVERY HANDGUN IS AIMED AT YOU: THE CASE FOR BANNING HANDGUNS* (2002).

⁶² Nat'l Ctr. for Injury Prevention & Control, *WISQARS Injury Mortality Reports, 1999-2003*, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html (query for All Intent, Firearms, 2003); *id.* (query for Homicide); *id.* (query for Unintentional); *id.* (query for Undetermined Intent).

⁶³ See, e.g., SUGARMANN, *supra* note 61, at 55-70.

⁶⁴ *Id.* at 177-201.

restriction on medical self-defense that's aimed at preventing (say) the spread of communicable diseases, or serious and unavoidable risk of widespread murder aimed at involuntarily harvesting people's organs—a risk more serious than the risk to sick patients of *not* allowing organ sales.

Moreover, even in the face of the harm to innocents from private gun possession (a harm I can't deny, though I generally think that most serious gun controls would on balance cause more harm than they avoid⁶⁵), American law has generally come out in favor of gun ownership rights. Here's the broad shape of gun control law in America:

(1) In all jurisdictions except one—the District of Columbia—law-abiding adults are legally entitled to possess loaded shotguns in their own homes.⁶⁶ Even the most restrictive other jurisdictions, such as Chicago, ban only the possession of handguns, and leave people the right to possess shotguns,⁶⁷ which are on balance about as effective as handguns for home defense (and are even more lethal).⁶⁸

(2) In about three-quarters of the states (38 of the 50), law-abiding adults are entitled to carry guns in most places outside the home either without a license or with a license that the police department is generally required to issue,⁶⁹ though this number has varied considerably over the years.⁷⁰ Moreover, self-defense is a valid defense to charges of unlawful firearms possession, so long as the defendant armed himself temporarily in response to an imminent threat.⁷¹ In many states that don't automatically allow law-abiding adults firearms carry licenses,

⁶⁵ See generally KLECK, *supra* note 59.

⁶⁶ Even in D.C., one is free to keep a shotgun unloaded and locked, D.C. CODE § 7-2507.02, so that it's available (with a little effort) when needed for immediate self-defense, see *Horton v. United States*, 541 A.2d 604, 608 n.5 (D.C. 1988) (noting that self-defense is a defense to weapons charges).

⁶⁷ See, e.g., CHI. MUN. CODE § 8-20-040, -050 (generally requiring registration of firearms, barring registration of most handguns and thus making their possession illegal, but allowing registration of shotguns).

⁶⁸ See GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 463 (1991).

⁶⁹ See Nicholas Johnson, *A Second Amendment Moment*, 71 BROOKLYN L. REV. 715, 753-54 & nn.217-252 (2005) (collecting statutes).

⁷⁰ As recently as the 1980s, the number was only six of the 50 states, though many other states had discretionary policies under which individual police departments could be quite free with permits. See Richard Getchell, *Carrying Concealed Weapons in Self-Defense: Florida Adopts Uniform Regulations for the Issuance of Concealed Weapons Permits*, 15 FLA. ST. U. L. REV. 751, 757 & n.30, 758 (1987) (reporting that immediately before 1987 there were five states that allowed all law-abiding adults meeting certain broad objective criteria to get licenses, and citing ME. REV. STAT. ANN. tit. 25, § 2003(1)(D), (4), MINN. STAT. ANN. §§ 624.713-714 (West Supp. 1987), S.D. CODIFIED LAWS ANN. § 23-7-7.1 (Supp. 1987), UTAH CODE ANN. § 75-10-513(2) (Supp. 1987), and WASH. REV. CODE ANN. § 9.41.070(1) (Supp. 1987)); Clayton E. Cramer & David B. Kopel, "Shall Issue": *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 682 (1995) (noting that Vermont has always allowed people to carry concealed firearms without a license).

⁷¹ See, e.g., 18 PA. CONS. STAT. ANN. § 6107(1) (allowing the otherwise illegal carrying of a firearm when actively engaged in self-defense); TENN. CODE ANN. § 39-17-1322 (same).

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even nonimminent danger—so long as it's well above what the average person faces—is a factor in favor of granting the license, or of rendering the license requirement inapplicable.⁷² In other states, the concealed weapons restrictions are waived for people who have shown sufficient threat from an identifiable potential attacker.⁷³

(3) The only serious restrictions on the possession of guns for home defense are on special categories of people—felons, sometimes violent misdemeanants, sometimes drug addicts and the insane, and minors—who are seen as especially likely to use guns irresponsibly.⁷⁴ Nonetheless, even these groups of people remain free to defend themselves in their homes with many other lethal weapons. And even members of these groups are entitled to possess firearms when they are in truly imminent danger.⁷⁵

This pattern generally fits well with the lethal self-defense right I describe—a right that (a) is generally available, that (b) presumptively may neither be banned nor substantially burdened, but that (c) may be substantially burdened when the danger to others' lives is so grave as to overcome the right's value in protecting lives. In law-abiding citizens'

⁷² See, e.g., OHIO REV. CODE § 2923.12(D) (providing exception from concealed carry prohibition when “the actor was engaged in or was going to or from the actor’s lawful business or occupation, which business or occupation was of a character or was necessarily carried on in a manner or at a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent person in going armed,” or when “the actor was engaged in a lawful activity and had reasonable cause to fear a criminal attack upon the actor, a member of the actor’s family, or the actor’s home, such as would justify a prudent person in going armed”); Orange County (Calif.) Sheriff’s Department, Requirements [for Concealed Carry Permits], <http://www.ocsd.org/CCWPermit/Requirements.asp> (noting various factors that would constitute “good cause” for issuance of the permit, most of which focus on the applicant’s exposure to a greater than normal risk of attack).

⁷³ See, e.g., CAL. PENAL CODE § 12025.5 (providing that concealed carrying, even without a permit, “is justifiable when a person who possesses a firearm reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety”); OHIO REV. CODE § 2923.1213 (providing that people may get temporary emergency concealed carry licenses when they “reasonable cause to fear a criminal attack upon the person or a member of the person’s family, such as would justify a prudent person in going armed,” and noting the existence of a protective order as possible evidence supporting such reasonable cause); see also N.C. GEN. STAT. § 14-415.15(b) (providing for a special emergency concealed carry permit, exempted from the possible 90-day delay for issuance of standard permits, when “the sheriff reasonably believes is in an emergency situation that may constitute a risk of safety to the person, the person’s family or property,” with “proof of a protective order” being specifically listed as being “evidence of an emergency situation”; N.C. GEN. STAT. § 50B-3(c1) (requiring the clerk of court to tell people who receive protection orders about their rights to apply for the emergency concealed carry permit).

⁷⁴ See, e.g., 18 U.S.C. § 922(g)(1), (3), (4), (9).

⁷⁵ For cases holding that state or federal bans on possession of firearms by felons don’t apply when the felon picked up the gun for self-defense against an imminent deadly threat, see, e.g., *United States v. Panter*, 688 F.2d 268 (5th Cir. 1982); *United States v. Gomez*, 92 F.3d 770, 774-75 (9th Cir. 1996); *People v. King*, 582 P.2d 1000, 1001 (Cal. 1978); *State v. Crawford*, 521 A.2d 1193 (Md. 1987); *State v. Hardy*, 397 N.E.2d 773 (Ohio App. 1978); *Conaty v. Solem*, 422 N.W.2d 102, 104 (S.D. 1988).

homes, American law has almost always struck the balance in favor of the possession of guns (the most effective lethal self-defense tools) for self-defense. Outside the home, where the threat to others is seen as greater, the balance is today usually struck in favor of allowing guns, but not in all states. And guns are allowed to all except those categories of people that are seen as posing extraordinarily serious threats.

Moreover, even those who disagree with this result generally do so either on the grounds that guns aren't really that useful for self-defense, so that a ban is no great burden, or that private gun possession is so dangerous that the burden on self-defense is justified. And adopting either of these views by no means undermines a right to medical self-defense: The public safety reasons for limiting armed lethal self-defense just don't apply to medical self-defense.

One can thus support gun bans and yet oppose restrictions on life-saving medical procedures. It's much harder to justify the opposite position (which is the position at which our legal system has arrived): the position that everyone should be free to own a gun for lethal self-defense, yet that people shouldn't be free to engage in medical self-defense.

D. Is Self-Defense a Constitutional Right?

Abortion-as-self-defense, the Court has held, is a constitutional right. The status of lethal self-defense is not as clear, especially because lethal self-defense has been so broadly recognized by common law and statute that courts have rarely had occasion to confront grave restrictions on the right.

In two categories of cases, a few courts have categorically rejected the existence of a federal constitutional right to self-defense. A few states place the burden on defendants to prove self-defense by a preponderance of the evidence;⁷⁶ this was also the common-law rule,⁷⁷ though nearly all states have retreated from it. Some courts that have upheld this rule have reasoned that there's no constitutional right to self-defense.⁷⁸

But such a broad ruling isn't required to decide the matter—one can have a constitutional right, and yet be required to prove that the conditions for the exercise of the right are satisfied.⁷⁹ When the Supreme

⁷⁶ See *Martin v. Ohio*, 480 U.S. 228, 236 (1987) (noting that in 1987, only Ohio and South Carolina had such a rule); *State v. Bellamy*, 359 S.E.2d 63, 64-64 (S.C. 1987) (retreating from this rule).

⁷⁷ 4 BLACKSTONE'S COMMENTARIES *201.

⁷⁸ See, e.g., *White v. Arn*, 788 F.2d 338, 347 (6th Cir. 1986).

⁷⁹ See, e.g., *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (stating that the defendant bears the burden of proving denial of the Sixth Amendment right to effective assistance of counsel); *Caston v. State*, 823 So. 2d 473, 504 (Miss. 2002) (stating that the defendant bears the burden of showing that his Due Process Clause rights were violated by prejudicial pre-indictment delay); WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING, CRIMINAL PROCEDURE § 11.10 & n.58, § 18.5 & n.47 (2006) (noting both these points).

Court upheld these rules,⁸⁰ it did so without opining on whether there's a constitutional right to self-defense. On the other hand, some opinions have suggested that there is such a right,⁸¹ and a recent four-Justice plurality opinion—authored by Justice Scalia, usually no friend of unenumerated constitutional rights—suggested the same.⁸²

Some prisons' disciplinary proceedings also categorically reject self-defense as a defense to the charge of battery or attempted murder among prisoners, even when the charged person claims he was trying to protect himself from murder or rape. Some courts have upheld these rules, and in the process broadly asserted that there's no constitutional right to self-defense.⁸³ Yet even if prisoners ought to lack a constitutional right to self-defense,⁸⁴ this should tell us little about the constitutional right to self-defense outside prison. Prisoners are subject to far greater constraints on most of their constitutional rights (such as free speech, freedom from religious discrimination, and protection from searches and seizures) than are those who are outside prison.⁸⁵

Moreover, the Court's unenumerated rights caselaw provides a strong case for recognizing a presumptive federal constitutional right to self-defense (at least outside prison). The right to self-defense is important to people's lives, and firmly rooted in American tradition, from before the Framing to the present.⁸⁶ Like the right to bear and raise chil-

⁸⁰ *Martin v. Ohio*, 480 U.S. 228 (1987).

⁸¹ *See, e.g., Taylor v. Withrow*, 288 F.3d 846, 851-52 (6th Cir. 2002) (concluding that “the right of a defendant in a criminal trial to assert self-defense is one of those fundamental rights” that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental”); *Isaac v. Engle*, 646 F.2d 1129 (6th Cir. 1980) (Merritt, J., dissenting) (“I believe that the Constitution prohibits a state from eliminating the justification of self-defense”), *rev'd on other grounds*, 456 U.S. 107 (1982); opinions cited *infra* note 84.

⁸² *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (plurality) (dictum) (suggesting that “the historical record may support” the proposition that “the right to have a jury consider self-defense evidence . . . is fundamental”).

⁸³ *E.g., Rowe v. DeBruyn*, 17 F.3d 1047, 1052-53 (7th Cir. 1993).

⁸⁴ *See id.* at 1054-56 (Ripple, J., dissenting) (concluding that even prisoners have a constitutional right to self-defense); *see also DeCamp v. N.J. Dep't of Corrections*, 2006 WL 2068082, *5-*6 (N.J. Super. App. Div. 2006) (endorsing Judge Ripple's dissent and mandating that prisoners be allowed a self-defense defense in prison disciplinary hearings; the opinion is ambiguous, though, on whether this judgment was a matter of “State due-process guarantees,” i.e., state constitutional law, or “State laws” more broadly).

⁸⁵ *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (free speech); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (religious freedom); *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 simply that no such right can be asserted in prison disciplinary proceedings, citing *Turner v. Safley*); *Sack v. Canino*, 1995 U.S. Dist. LEXIS 12093, at *3 (E.D. Pa. 1995) (relying on *Rowe*, but only for the proposition that a prisoner “had no constitutional right to assert a claim of self-defense within the context of a prison disciplinary hearing”).

⁸⁶ *See Washington v. Glucksberg*, 521 U.S. 702 (1997) (stressing that the Due Process Clause protects rights that are “deeply rooted in this Nation's history and tradition”); *see generally* Nicholas H. Johnson, *Self-Defense?*, __ GEO. MASON. L. REV. __ (forthcoming 2006) (arguing for recognizing a constitutional right to self-defense, both under the Second

dren, or the right to live with one's family members, it has been recognized throughout American history, and throughout the breadth of the nation. Framing-era documents refer to it as a natural right.⁸⁷ Blackstone wrote of the right to prevent "any forcible and atrocious crime," even with lethal force, as "justifiable by the law of nature";⁸⁸ St. George Tucker, one of the leading American commentators of the first half of the nineteenth century,⁸⁹ described "[t]he right of self defence" as "the first law of nature."⁹⁰

The right has certainly been more broadly accepted than the right to an abortion, or even than the right to use and buy contraceptives.⁹¹

Amendment and under the Ninth Amendment); Victoria Dorfman & Michael Koltonyuk, *When the Ends Justify the Reasonable Means: Self-Defense and the Right to Counsel*, 3 TEX. REV. L. & POL. 381, 382-89 (1999) (arguing that the Constitution secures an unenumerated right to self-defense).

⁸⁷ See, e.g., Samuel Adams, *The Rights of the Colonists: The Report of the Committee of Correspondence to the Boston Town Meeting*, Nov. 20, 1772; PENN. CONST. art. 1, § 1 (1776); VT. CONST. ch. I, art. I (1777); MASS. CONST. pt. 1, art. 1 (1780); N.H. CONST. pt. 1, art. 2 (1784); DEL. CONST. pmbl. (1792).

⁸⁸ 4 BLACKSTONE'S COMMENTARIES *180. Part of Blackstone's logic was that offenses which carried the death penalty (and no other offenses)—offenses that in 1765 England included murder, rape, and robbery—could be resisted with death, *id.* at *182; but this limitation rapidly fade away in America with the reduction in the number of capital offenses, see, e.g., 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 189 n.* (John L. Wendell ed. 1847) (specifically noting this shift); see also, e.g., *State v. Baynard*, 1 Del. Cas. 662 (Oyer & Ter. 1794) (noting that "defense against a felonious attempt on a man's person or dwelling house, attended with force" would justify homicide, though petty felonies might not). Blackstone also reports that defensive homicides committed in the midst of a fight were generally treated as mere excusable homicide, rather than justifiable, but only on the grounds that "in quarrels both parties may be, and usually are, in some fault," whereas "where I kill a thief that breaks into my house" (to Blackstone, a classic case of justifiable homicide, alongside killing rapists, robbers, and murderers), "the original default can never be upon my side." 4 BLACKSTONE'S COMMENTARIES *187; see also WILLIAM O. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 667 (5th ed. 1850) (treating as justifiable homicide a person's "repel[ling] force by force in defence of his person, habitation, or property, against one who manifestly intends and endeavours by violence or surprise, to commit a known felony upon either"); *United States v. Travers*, 28 F. Cas. 204, 211 (C.C. D. Mass. 1814) (Story, J., charging jury) (explaining that excusable self-defense in "a sudden combat" "differs from justifiable self-defense, properly so called, in this, that the necessity has in some measure arisen from [the defender's] own fault" in getting involved in the fight); Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 472, 473 (1987) (likewise concluding that self-defense in a mutual combat "was excusable because the actor was at least partially to blame for the ultimate melee which resulted in death," while outside "mutual combat," "the ultimate slayer . . . was the innocent and unprovoking victim of a violent assault or other crime, such as robbery").

⁸⁹ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 296 n.2 (1964) (Black, J., concurring); CRAIG EVAN KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 13, 31-50, 74 (1993); David M. Golove, *Treaty-Making And The Nation: The Historical Foundations Of The Nationalist Conception Of The Treaty Power*, 98 MICH. L. REV. 1075, 1206 (2000); Vasam Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1178 (2002).

⁹⁰ 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES app. 300 (1803).

⁹¹ See, e.g., *Roe v. Wade*, 410 U.S. 113, 139-40 & n.37 (1973) (noting that most states outlawed many abortions by the late 1800s, that nearly all did by the late 1950s, and that

Even if due process or the Ninth Amendment is interpreted as protecting only those rights that were recognized as important common-law rights in 1791 (or possibly 1868), self-defense would qualify.⁹² It has never been absolute, but in this respect it is like most constitutional rights, enumerated or unenumerated.

Finally, the right is secured, either expressly or by strong implication from expressly secured rights to keep and bear arms, by forty-three state constitutions. Twenty-one of these forty-three, dating back to the 1776 Pennsylvania Bill of Rights,⁹³ expressly list the right to “defend[] life” as one of their foundations.⁹⁴ Thirty-nine of the forty-three secure a right to keep and bear arms in defense of self, for instance, “The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose,” added to the Wisconsin Constitution in 1998, and “Every citizen has a right to bear arms in defense of himself and the state,” enacted in 1818 in Connecticut’s first state constitution.⁹⁵ Such a right presupposes the existence of at least the traditional core of lethal self-defense.⁹⁶

by 1973, only a few states had generally legalized most early-term abortions); Comment, *The History and Future of the Legal Battles Over Birth Control*, 49 CORNELL L.Q. 275, 278-79 (1964) (noting that by 1964, only two states prohibited the sale of contraceptives).

⁹² For a view that American history and the original meaning of the Ninth Amendment support reading it as protecting even a right to self-defense using firearms, see Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992). For my purposes, it is enough that American law has consistently, including in 1791 and 1868, recognized a right to self-defense generally, even if that right is interpreted to tolerate a great deal of weapons controls.

⁹³ See PENN. CONST. art. 1, § 1 (1776).

⁹⁴ See ARK. CONST. art. 2, § 2; CAL. CONST. art. I, § 1; COLO. CONST. art. 2, § 3; DEL. CONST. pmbl.; FLA. CONST. art. 1, § 2; IDAHO CONST. art. I, § 1; IOWA CONST. art. 1, § 1; KY. CONST. art. 1; MAINE CONST. art. 1, § 1; MASS. CONST. pt. 1, art. 1; MONT. CONST. art. 2, § 3; NEV. CONST. art. 1, § 1; N.H. CONST. pt. 1, art. 2; N.J. CONST. art. 1, ¶ 1; N.M. CONST. art. 2, § 4; N.D. CONST. art. 1, § 1; OHIO CONST. art. I, § 1; PENN. CONST. art. 1, § 1; S.D. CONST. art. 6, § 1; UTAH CONST. art. 1, § 1; VT. CONST. ch. I, art. 1; *People v. McDonnell*, 163 P. 1046 (Cal. App. 1917) (holding that, given the California Constitution’s “defending life” provision, the legislature cannot “deprive a person—at least a person who is not a wrongdoer—of the right of self-defense,” because “[t]he right to defend life is one of the inalienable rights guaranteed by the constitution of the state”); *Escalante v. Wilson’s Art Studio, Inc.*, 135 Cal. Rptr. 2d 187 (Cal. App. 2003) (dictum) (likewise), *depublished without opinion*; *People v. Rich*, 2002 WL 1609058 (Cal. App. 2002) (dictum) (likewise), *depublished without opinion*. This formulation dates back at least to Samuel Adams, who began his *The Rights of the Colonists: The Report of the Committee of Correspondence to the Boston Town Meeting*, Nov. 20, 1772, with very similar language, which he characterized as self-evidently true: “Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can. These are evident branches of, rather than deductions from, the duty of self-preservation, commonly called the first law of nature.”

⁹⁵ Provisions that protect every person’s (or every citizen’s) “right to bear arms in defense of himself,” or something similar (19 states): ALA. CONST. art. I, § 26; ARIZ. CONST. art. II, § 26; COLO. CONST. art. II, § 13; CONN. CONST. art. I, § 15; DEL. CONST. art. I, § 20; MICH. CONST. art. I, § 6; MISS. CONST. art. III, § 12; MISSOURI CONST. art. I, § 23; MONT. CONST. art. II, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 11(1); N.H. CONST. pt. 1,

If the Court accepts the Second Amendment as securing an individual right aimed partly at self-defense, thus endorsing the view expressed several times by Congress⁹⁷ and in 2004 by the Office of Legal

art. 2-a; N.M. CONST. art. II, § 6; N.D. CONST. art. I, § 1; OKLA. CONST. art. II, § 26; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; WASH. CONST. art. I, § 24; W. VA. CONST. art. III, § 22.

Provisions that protect “[t]he right of the people to keep and bear arms in defense of themselves and the state,” or something similar, and that have been interpreted as protecting a right to keep firearms for self-defense (8 states): FLA. CONST. art. I, § 8; *Alexander v. State*, 450 So.2d 1212 (Fla. App. 1984); IND. CONST. art. I, § 32; *Kellogg v. City of Gary*, 562 N.E.2d 685, 694 (Ind. 1990); KY. CONST. § 1; *Posey v. Commonwealth*, 185 S.W.3d 170, 180 (Ky. 2006); PENN. CONST. art. I, § 21; *Sayres v. Commonwealth*, 88 Pa. 291 (1879); S.D. CONST. art. VI, § 24; *Conaty v. Solem*, 422 N.W.2d 102, 104 (S.D. 1988); VT. CONST. ch. I, art. 16; *State v. Rosenthal*, 55 A. 610 (Vt. 1903); WISC. CONST. art. I, § 25; *State v. Fisher*, 714 N.W.2d 495 (Wis. 2006); WYO. CONST. art. I, § 24; *State v. McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986).

Provisions that mention the right to bear arms without expressly mentioning self-defense, but that have been interpreted as protecting individuals’ right to keep firearms for self-defense (11 states). ARK. CONST. art. II, § 5; *Arkansas Game and Fish Com’n v. Murders*, 327 Ark. 426 (1997); *Wilson v. State*, 33 Ark. 557 (1878); GA. CONST. art. I, § VIII; *McCoy v. State*, 157 Ga. 767 (1924); IDAHO CONST. art. I, § 11; *In re Brickey*, 70 P. 609 (Idaho 1902); ILL. CONST. art. I, § 22; *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 273 (Ill. 1984); LA. CONST. art. I, § 11; MAINE CONST. art. I, § 16; *State v. Chaisson*, 457 So.2d 1257, 1259 (La. App. 1984); *State v. Brown*, 571 A.2d 816 (Me. 1990); N.C. CONST. art. I, § 30; *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921); OHIO CONST. art. I, § 4; *Arnold v. Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993); ORE. CONST. art. I, § 27; *State v. Hirsch*, 114 P.3d 1104, 1110 (Ore. 2005); R.I. CONST. art. I, § 22; *Mosby v. Devine*, 851 A.2d 1031, 1043 (R.I. 2004); TENN. CONST. art. I, § 26; *State v. Foutch*, 34 S.W. 1, 1 (Tenn. 1896).

Provision that protects the right to bear arms, specifically describes the right as individual, and was enacted in 1994, a time when the individual right to bear arms was generally understood as aimed at protecting self-defense (1 state): ALASKA CONST. art. I, § 19.

Three state constitutional provisions speak generally of a right to bear arms in terms quite similar to those in the Second Amendment, and state courts have not decided whether or not they secure an individual right. HAW. CONST. art. I, § 17; S.C. CONST. art. I, § 20; VA. CONST. art. I, § 13. Two state constitutional provisions have been interpreted as not securing an individual right. KAN. CONST. Bill of Rights, § 4; *City of Salina v. Blaksley*, 83 P. 619 (Kan. 1905), *adhered to by City of Junction City v. Lee*, 532 P.2d 1292 (Kan. 1975), MASS. CONST. pt. I, art. 17; *Commonwealth v. Davis*, 343 N.E.2d 847 (Mass. 1976). *But see City of Junction City v. Mevis*, 601 P.2d 1145, 1151 (Kan. 1979) (striking down a gun control law, challenged by an individual citizen, on the grounds that it was “unconstitutionally overbroad,” and thus implicitly concluding that the right to bear arms did indeed belong to individual citizens); MINN. STAT. ANN. § 624.714(22) (stating, in a statute providing that any law-abiding adults who meet certain objective criteria may get a license to carry concealed guns, that “The legislature of the State of Minnesota recognizes and declares that the second amendment of the United States Constitution guarantees the fundamental, individual right to keep and bear arms”; Minnesota is one of the six states that doesn’t have a right-to-bear-arms provision in its constitution).

⁹⁶ For cases treating the state constitutional right to bear arms for defense of self-guarantee as securing a right to self-defense, *see, e.g., McKellar v. Mason*, 159 So.2d 700, 702 (La. App. 1964); *State v. Hirsch*, 114 P.3d 1104, 1110 (Ore. 2005); *Webb v. State*, 439 S.W.2d 342, 343 (Ct. Crim. App. Tex. 1969); *State v. Buckner*, 377 S.E.2d 139, 142, 146 (W. Va. 1988).

⁹⁷ Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901(a)(2) (enacted 2005) (finding that “The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in mili-

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Counsel,⁹⁸ though only by a minority of federal circuit judges,⁹⁹ then some right to self-defense might be inherently protected through the Second Amendment. But even if the Court doesn't endorse the view that the Second Amendment presupposes (perhaps among other things) an individual right aimed at self-defense against criminals, the Court might still protect at least some sort of lethal self-defense—even if self-defense potentially limitable by stringent gun control laws—under the Ninth Amendment or the Due Process Clause.¹⁰⁰ The longstanding history of legal allowance of lethal self-defense, coupled with the state constitutional tradition of “defending life” provisions and right to bear arms provisions, strongly supports treating the right as no less protected than parental rights, contraceptive rights, and abortion rights.

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

Let us then turn from Alice and Katherine to Ellen, who is terminally ill. Existing therapies, doctors say, are useless. An experimental drug offers some hope, and has been shown to be safe in FDA Phase I

tary service or training, to keep and bear arms”); Firearms Owners' Protection Act, Pub.L. 99-308, sec. 1(b) (1986), quoted at 18 U.S.C. § 921 Historical and Statutory Notes (finding that “the rights of citizens . . . to keep and bear arms under the second amendment to the United States Constitution . . . require additional legislation to correct existing firearms statutes and enforcement policies”); Freedmen's Bureau Act, 39th Cong. sess. I, ch. 200 (1866) (providing that “to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery”); H.R. 5013, 109th Cong., 2d Sess., sec. 2(1) (July 26, 2006) (finding that “Congress has repeatedly recognized [the] language [of the Second Amendment] as protecting an individual right”) (passed by the House of Representatives, now being considered by the Senate).

⁹⁸ *Whether the Second Amendment Secures an Individual Right*, 2004 WL 2930974 (O.L.C. Aug. 24, 2004).

⁹⁹ See *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001); *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003) (noting that Judges Gould, Kleinfeld, Kozinski, T.G. Nelson, O'Scannlain, and Pregerson endorsed the individual rights view in dissenting from denial of rehearing en banc); *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982) (Coffey, J., dissenting) (endorsing the individual rights view); cf. *United States v. Parker*, 362 F.3d 1279, 1288 (10th Cir. 2004) (Kelly, J., concurring) (noting that the individual rights view “is deserving of serious consideration,” though concluding that the case can be resolved without deciding whether the Second Amendment protects an individual right, and that “there is no need to dilute prematurely what many consider to be one of the most important amendments to the United States Constitution”); *Runnebaum v. NationsBank of Maryland, N.A.*, 123 F.3d 156, 170 n.8 (1997) (en banc) (noting off-handedly that “individuals have the constitutional right to peaceably assemble, see U.S. Const. amend. I; and to ‘keep and bear Arms,’ U.S. Const. amend. II,” though the Fourth Circuit generally adheres to the collective rights view of the Amendment, see *United States v. Hager*, 22 Fed. Appx. 130, 132 (4th Cir. 2001); *Love v. Peppersack*, 47 F.3d 120, 124 (4th Cir. 1995)).

¹⁰⁰ For a brief discussion of the general objections to recognizing unenumerated rights, even traditionally recognized ones, see the text following note 107.

tests; but it is outlawed by federal drug law, because it has not yet been shown effective.

As I've suggested, Ellen's right to medical self-defense should exempt her—and the doctors and pharmaceutical companies whose assistance she needs—from the FDA's ban. Alice may kill her viable fetus to protect her life, and may enlist her doctor's help in doing so. Katherine may kill her attackers, whether guilty humans, morally innocent (insane, retarded, or mistaken) humans, or morally innocent animals. Ellen should have at least an equal right to simply ingest certain medicines, without threatening anyone else's life.

This is not a general autonomy argument, premised on the theory that all people should be entitled to ingest whatever they choose into their body; such an argument would strike down a wide range of medical regulations, including most laws banning recreational drugs, and would do so with little support in the Court's precedents and in American legal tradition.¹⁰¹ Rather, it's an argument specifically focused on the right to self-defense, a right supported both by the Court's caselaw (*Roe* and *Casey*) and by the longstanding acceptance of the right to lethal self-defense.¹⁰²

What justification can the government have for limiting Ellen's rights? Ellen's use of experimental drugs may potentially jeopardize what little time she has.¹⁰³ Yet if people are free to try to protect their lives even by taking a viable fetus's life, or by taking an attacker's life, they should be as free to risk their own short remaining spans in the service of trying to lengthen those spans.¹⁰⁴

¹⁰¹ Cf. *Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (rejecting a claimed constitutional right to use laetrile merely as a nutritional supplement to prevent cancer, a claim that focuses on medical autonomy rather than self-defense against a present life-threatening disease).

¹⁰² This helps show, I think, why the *Abigail Alliance* dissent, 445 F.3d at 494-95 (Griffith, J., dissenting), erred in pointing to the longstanding regulation of the distribution of pharmaceuticals as evidence that the right to medical self-defense can't be constitutionally recognized under the *Glucksberg* tradition test. See *supra* note 86 and accompanying text (briefly discussing *Glucksberg*). Indeed, pharmaceutical distribution has long been subject to regulation. But so has abortion, and so has the use of lethal force. The right to self-defense has long coexisted with such regulations, precisely because it has been a narrow exception to the regulations. We can have a tradition of self-defense (medical or lethal) in cases where the self-defense is needed to protect the rightsholder's life, while still having a tradition of regulation in all the other cases.

¹⁰³ Government Brief in *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 445 F.3d 470, 2005 WL 1900323, *45 (D.C. Cir. 2006) (No. 04-5350).

¹⁰⁴ The interest in protecting the patient's life may be more applicable if Ellen wanted to use risky experimental drugs to avoid (or cure) serious but non-life-threatening injury—blindness, paralysis, and the like. The abortion-as-self-defense right and the lethal self-defense right both apply even when the rightsholder is trying to protect herself from serious bodily injury, not just from death; the medical self-defense right may presumptively apply in such situations, too. But in such non-life-threatening situations, the government can at least 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 dramatically harming her quality of life—trumps the patient's medical self-defense rights. When the patient is

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Paternalistic government interests are adequate where no constitutional rights are involved; but they shouldn't justify an interference with a person's right to protect her own life. And while I think this is so even if the drugs haven't been tested for safety, it should be especially clear when the drugs have passed the Phase I safety trials, as they did in *Abigail Alliance*.

Ellen's use of experimental drugs may also cost her money, which may prove to be wasted. Yet this risk, too, doesn't measure up to the harms that have proven to be insufficient to trump one's self-defense rights.

Bans on the use of experimental drugs might also interfere with randomized clinical drug studies.¹⁰⁵ It's possible that so many terminally ill patients will insist on getting a not fully tested but promising drug that it will be impossible to scientifically test the drug's effectiveness—if people can just buy the drug, they won't want to enroll in a study in which they might get a placebo instead of the drug.

Yet even if this is a serious concern that justifies some government action, it doesn't mean that people lack medical self-defense rights—rather, it merely points the possibility that these rights may sometimes be trumped by a strong enough justification. Scientific medical testing is tremendously important for protecting people's lives, and one could argue that protecting the lives of many in the future should justify jeopardizing the rights and lives of some (by legally denying them access to potentially life-saving drugs) today.¹⁰⁶ But even if this argument is accepted, that would give a reason for limiting medical self-defense only when such a limitation is really necessary for conducting clinical studies, and when no other alternatives will do.

Thus, for instance, if the studies require 200 patients, and there are 10,000 who seek the experimental therapy, there's little reason to constrain the self-defense rights of all 10,000. Likewise, if the drug is only being studied now on people who suffer from a particular kind or stage of a disease, it shouldn't be legally barred to those who would fall outside those studies in any event. If we really do need to strip people of their rights, and deny them something that might save their lives in the name of saving many others' lives in the future, this tragic obligation should be imposed on as few people as possible and to as small an extent as possible.

There is of course one difference between Alice and Ellen: Most life-threatening complications of pregnancy can be cured quite reliably through a therapeutic abortion. The therapy that Ellen wants is, by definition, much more speculative; the chance of recovery may be low,

terminally ill, the government's interest in protecting this life against the patient's attempts to lengthen the life is as its weakest.

¹⁰⁵ See, e.g., *id.* at 35; Ezekiel J. Emanuel, *Drug Addiction*, NEW REP., July 3, 2006, at 9.

¹⁰⁶ See, e.g., Emanuel, *supra* note 105.

and may even be impossible to reliably estimate, precisely because the therapy is experimental.

Yet there's no reason why the right to self-defense should be limited to sure self-defense. Lethal self-defense, after all, is often not completely reliable; even if Katherine tries to use lethal force, she may be overcome by the home invader. But Katherine nonetheless has this right, both because some increase in the chance of survival is better than none, and because her autonomy entitles her to protect herself without regard to whether the protection is perfect.

Similarly, imagine a woman who is sure to die without an abortion, but who faces only a small chance of survival with an abortion. Would her abortion-as-self-defense right disappear simply because the abortion is no longer guaranteed? I would think not; her situation may be especially tragic, but even a fairly small (or uncertain) increase in chance of survival should suffice for her to retain her rights.

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

The D.C. Circuit's decision in *Abigail Alliance* rested in part on the traditionally recognized right to defend one's own life; yet it didn't cite the very close analogy to abortion-as-self-defense, or discuss the state constitutional protections for the right to self-defense. These analogies, I think, substantially add to the case the *Abigail Alliance* panel made.¹⁰⁷

Finally, some might reject these arguments for a constitutional right to medical self-defense on the grounds that courts generally ought not create constitutional rights. The right to abortion—even abortion-as-self-defense—was a mistake, they might argue, and ought not be broadened by analogy. Lethal self-defense ought to be seen as a common-law or statutory right subject to legislative control rather than as a constitutional right. Let's stick with judicial minimalism, at least where

¹⁰⁷ Abigail Alliance's response to the government's petition for rehearing does note the abortion analogy, but the Alliance's lawyer reports that this was based on a blog post of mine in which I described this theory. See Appellants' Response to Appellees' Petition for Panel Rehearing and Rehearing En Banc, No. 04-3530 (D.C. Cir. July 21, 2006); Telephone Conversation between J. Scott Ballenger and me; Eugene Volokh, *Terminally Ill Patients' Right to Get Potentially Life-Saving Medication*, <http://volokh.com/posts/1146601925.shtml>.

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unenumerated rights are concerned, and leave as much as possible to the democratic process.

This is a plausible argument, but not one the Supreme Court has adopted. *Casey v. Planned Parenthood* shows that even the most controversial unenumerated right, the right to abortion, remains endorsed by the Court. *Troxel v. Granville* shows that the Court remains willing to protect unenumerated family rights.¹⁰⁸

Lawrence v. Texas shows that the Court is willing not only to preserve unenumerated rights that the Court had already recognized, but to recognize new ones.¹⁰⁹ *Cruzan v. Director*, the 1990 case that recognized a “liberty interest . . . in refusing unwanted medical treatment”—an interest that the Court noted may indeed constrain government action, and that was thus tantamount to a presumptive constitutional right—shows the same.¹¹⁰ There’s no need to reprise the entire unenumerated rights/Ninth Amendment/substantive due process debate here, and little profit in so reprising it. My point is simply that the Court’s common-law-like process for recognizing unenumerated rights by analogy remains active, and so long as it does remain active, there is a strong case for using this process to recognize a medical self-defense.

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

V. MEDICAL SELF-DEFENSE AND THE CONSTITUTIONAL PROBLEM WITH BANS ON PAYMENT FOR ORGANS

A. *The Problem*

To live, Denise needs a kidney transplant. Kidney dialysis is keeping her alive for now, but it’s far from a sure solution: If Denise is in her twenties, her expected lifespan on dialysis is 30 years less than her expected lifespan with a transplant.¹¹¹

¹⁰⁸ 530 U.S. 57 (2000).

¹⁰⁹ 539 U.S. 558 (2003).

¹¹⁰ 497 U.S. 261, 278 (1990); *see also* *Washington v. Glucksberg*, 521 U.S. 702 (1997) (treating *Cruzan* as “assum[ing], and strongly suggest[ing], that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment”). Only Justice Scalia rejected this view. 497 U.S. at 293 (Scalia, J., concurring).

¹¹¹ Akinlolu O. Ojo, *Survival in Recipients of Marginal Cadaveric Donor Kidneys Compared with Other Recipients and Wait-Listed Transplant Candidates*, 12 J. AM. SOC. NEPHROL. 589, 589 (2001) (“The estimated additional life-years gained from renal transplantation [compared to remaining on dialysis] vary from 8 yr in a diabetic recipient who is 60 yr or older to 31 yr in a nondiabetic recipient who is 20 to 44 yr old.”); Robert A. Wolfe et al., *Comparison of Mortality in All Patients on Dialysis, Patients on Dialysis*

The trouble is that Denise is one of the 67,000 people on the American kidney transplant waiting lists, and 25,000 more waiting for other organs.¹¹² The average wait for adult recipients in 2001-02 was over four years.¹¹³ Each year, about 6% of the people on the kidney waiting list die, despite being on dialysis.¹¹⁴ And each year, only 6500 living Americans donate kidneys,¹¹⁵ and only 45% of the 26,000 usable cadaveric kidneys—kidneys harvested from the bodies of people who die through accidents or other events that leave their organs still young and healthy—are actually donated.¹¹⁶

Nor should this shortage be surprising: Since 1984, “knowingly acquir[ing], receiv[ing] or otherwise transfer[ing] any human organ for valuable consideration for use in human transplantation” has been a federal felony.¹¹⁷ Price controls diminish supply; setting the price at zero diminishes it dramatically.

Lack of compensation naturally makes living donors less likely to incur the pain, modest risk, lost time, and lost wages that accompany the extraction of an organ.¹¹⁸ The relatives of the recently dead have less to lose tangibly from authorizing the extraction of the decedent’s organs; but even they may be put off by what strikes many as a macabre

Awaiting Transplantation, and Recipients of a First Cadaveric Transplant, 341 NEW ENG. J. MED. 1725 (1999) (reporting that “[t]he long-term mortality rate was 48 to 82 percent lower among transplant recipients . . . than patients on the waiting list, with relatively larger benefits among patients who were 20 to 39 year old, white patients, and younger patients with diabetes”); Charlotte Medin et al., *Survival of Patients Who Have Been on a Waiting List for Renal Transplantation*, 15 NEPHROL. DIAL. TRANSPLANT 701 (2000). Immediate transplantation, without long-term dialysis, also appears to lead to better transplant survival than does transplantation after dialysis. See Kevin C. Mange et al., *Effect of the Use or Nonuse of Long-Term Dialysis on the Subsequent Survival of Renal Transplants from Living Donors*, 344 N. ENGL. J. MED. 726 (2001).

¹¹² See Organ Procurement & Transplantation Network, <http://www.optn.org/latestData/step2.asp> (category Waiting List, count Candidates, report Overall by Organ) (based on data as of Aug. 11, 2006) (reporting that people are waiting in the U.S. for 67,000 kidneys, 17,000 livers, 1700 pancreases, 2500 kidney/pancreas combinations, 2900 hearts, 2900 lungs, 150 heart/lung combinations, and 230 intestines). The data does not include people waiting for bone marrow transplants or skin transplants.

¹¹³ See Organ Procurement & Transplantation Network, <http://www.optn.org/latestData/step2.asp> (category Median Waiting Time, organ Kidney, report Waiting Time by Age).

¹¹⁴ See Wolfe, *supra* note 111, at 1725.

¹¹⁵ See Organ Procurement & Transplantation Network, <http://www.optn.org/latestData/step2.asp> (category Donor, organ Kidney, report Living Donors By Donor Age).

¹¹⁶ See *infra* note 185.

¹¹⁷ National Organ Transfer Act, 42 U.S.C. § 274e(a) (2006). The statute applies only “if the transfer affects interstate commerce,” but under modern law such provisions are interpreted very broadly, and would likely cover any sale of an organ. A minority of states have also adopted the Uniform Anatomical Gift Act of 1987, which bars sales of cadaveric organs for transplant. UNIFORM ANATOMICAL GIFT ACT § 10(a) (1987) (“A person may not knowingly, for valuable consideration, purchase or sell a part for transplantation or therapy, if removal of the part is intended to occur after the death of the decedent.”).

¹¹⁸ See LLOYD R. COHEN, INCREASING THE SUPPLY OF TRANSPLANT ORGANS: THE VIRTUES OF AN OPTIONS MARKET 25-29 (1995).

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idea, may be likely to err on the side of refusing consent if they're not sure what the decedent wanted,¹¹⁹ or may not want to even discuss the matter in their time of grief.¹²⁰ The prospect of (say) \$100,000 for the children's college education may lead them to overcome these psychological barriers.¹²¹

Some people, of course, do donate organs. Such donations are usually for relatives, friends, or some other known recipients, when there's a tissue match.¹²² But a few people also donate anonymously to strangers.

Yet kindness to strangers is generally not as strong a motivation as the desire for some financial reward (or perhaps a combination of the desire to help strangers and at the same time to put money aside for your children's education). We pay hospitals and transplant doctors handsomely for their part in the transplant. If we didn't, there'd likely not be nearly enough transplant services provided, even though many hospitals are charitable institutions and many doctors routinely donate their time to free medical care.¹²³ Why should we expect that organ suppliers would provide an adequate number of organs based solely on charity?¹²⁴

¹¹⁹ See, e.g., Laura A. Siminoff et al., *Factors Influencing Families' Consent for Donation of Solid Organs for Transplantation*, 286 JAMA 71, 74 (2001) (noting that families were significantly more likely to approve a transplant if they "had enough information regarding [the decedent's] donation wishes").

¹²⁰ Similarly, people who don't sign a donor card may be turned off because of emotional concerns, though far less intense ones. See, e.g., Hansmann, *infra* note 170, at 67 (noting people's "slight distaste for considering the subject"); COHEN, *supra* note 118, at 25-26. The prospect of essentially getting a free (though modest) life insurance policy for one's relatives may be enough to help overcome this slight distaste. *Id.*

¹²¹ I draw the number \$100,000 from Crespi, *supra* note 36, at 44, who suggested—based on a pretty detailed analysis—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 speaking of the price needed to sustain a futures market, in which people are paid a modest sum (\$200) during their lives for the right to extract their organs at death, and I speak instead mostly of payment to the next of kin at time of death; but my sense is that Professor Crespi's arguments make \$30,000 a plausible back-of-the-envelope estimate for the price of an organ in either case.

¹²² See Organ Procurement & Transplantation Network, <http://www.optn.org/latestData/step2.asp> (category Transplant, organ All, report Living Donor Transplants by Donor Relation) (reporting data showing that in 2005, 76% of donations were to relatives or spouses, 21% were other directed but nonanonymous donations, <1% were donation exchanges, <1% were unknown, and only 1.3% were known to be purely anonymous donations to strangers).

¹²³ See Peter J. Cunningham & Jessica H. May, *A Growing Hole in the Safety Net: Physician Charity Care Declines Again*, Center for Studying Health System Change, Tracking Report No. 13, Mar. 2006, <http://www.hschange.org/CONTENT/826/> (estimating that American doctors in full-time nonfederal practice—excluding residents and fellows—spend over 6% of their practice time on charity care).

¹²⁴ Even people who have nothing tangible to lose from an organ donation—relatives of the recently dead—often decline to donate, see *infra* note 185, presumably because when one gets no benefit other than the satisfaction of charity towards strangers, even a small emotional cost (stemming from the perceived macabreness or insensitivity of the donation request) can lead people to say no.

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

B. *Limits on Sales as Substantial Burdens*

The organ sales ban doesn't expressly ban transplants: It bans people from being paid for organs (such as kidneys) transplanted during the provider's life, and it bans providers' estates from being paid for organs (hearts, kidneys, and more) transplanted after the provider's death. Recipients may not pay the providers; neither may anyone else—if Bill Gates and Warren Buffett decided to contribute a billion dollars to pay providers' estates \$10,000 per donated organ,¹²⁵ that transaction would still be a felony: It would involve organ providers' "transfer[ing a] human organ for valuable consideration for use in human transplantation," the hospitals' "acquir[ing or] receiv[ing]" such an organ, and Gates' and Buffett's conspiring with the providers and the hospitals to do so.

So though this restriction isn't a total transplant ban, it is a substantial obstacle¹²⁶ to people's exercise of their medical self-defense rights. It substantially reduces the number of available organs. It substantially decreases the chance that there'll be an available organ that matches the recipient's tissue. And it substantially increases the chance that the recipient will die before a match is found.

Where most other constitutional rights are concerned, this point—that bans on using money to help exercise a right are substantial burdens on the right—is so obvious that we rarely discuss it. Say, for instance, that a legislature allowed abortions (whether post-viability abortions-as-self-defense or pre-viability abortions-as-reproductive-choice) to be performed only by doctors who volunteer their services. Perhaps the rationale would be that, even if a woman must have the right to kill her future child, it is immoral or socially corrosive for people to earn money from such killing, or for an industry to arise that is devoted to such killing.¹²⁷

¹²⁵ Cf. Thomas G. Peters, *Life or Death: The Issue of Payment in Cadaveric Organ Donation*, 265 JAMA 1302 (1991) (proposing a \$1000 payment, which would likewise be felonious under the current system, and taking the view that such a payment will provide a substantial incentive).

¹²⁶ Cf. *Casey v. Planned Parenthood*, 505 U.S. 833, 877 (1992) (concluding that to be a presumptively unconstitutional undue burden on abortion rights, a law must set up a "substantial obstacle" to exercise those rights).

¹²⁷ Cf. *Abortion Veto*, NEWSHOUR WITH JIM LEHRER, Apr. 11, 1996 (quoting Rep. Chris Smith condemning "the abortion industry, a multimillion dollar industry that is making its money by killing babies [through late-term abortions]").

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Surely we would agree that this creates a substantial burden on abortion rights. Though some doctors may indeed provide their services for free, the payment ban would dramatically reduce the number of abortion providers and the time the providers would be willing to spend on performing abortions. Some women would thus be unable to get abortions, or would have to wait a long time (perhaps past the point of viability) to get them. If a ban on one scarce input into the exercise of a constitutional right (doctors' time) is a substantial burden on the right, then a ban on another scarce input (providers' organs) should be as well.

Likewise, a requirement that contraceptives be distributed only for free would obviously burden people's right to use contraceptives. A requirement that all private lawyers appear in criminal trials for free would obviously burden people's right to assistance of counsel.¹²⁸ A law that barred parents from paying private school tuition or barred the private schools from paying salaries to teachers—thus essentially requiring the schools to operate strictly using volunteer teaching providers, just as the organ donation system now must use volunteer organ providers—would substantially and unconstitutionally burden the right to private education. Such restrictions would so clearly make a mockery of the rights, and would so clearly create a substantial obstacle to their exercise, that to my knowledge they haven't even been tried.

The one area where courts have squarely confronted limits on the payment of money as part of the exercise of constitutional rights is the Free Speech Clause. And here, courts have held that such payment limits are presumptively unconstitutional.

A publisher, for instance, may not be barred from paying money to authors, because that would substantially burden the publisher's ability to procure the authors' speech, and thus substantially interfere with the publisher's own speech.¹²⁹ A ballot measure campaign may not be barred from paying money to signature gatherers.¹³⁰ Speakers who want to advocate for or against a candidate or a ballot measure are entitled to spend their money to do so.¹³¹ People who want to contribute

¹²⁸ See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25 (1989) (noting that "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire," though upholding pretrial forfeiture of allegedly ill-gotten funds—including funds that the defendant wanted to use to pay his lawyer—because "A defendant has no Sixth Amendment right to spend another person's money," and the forfeited funds are treated as not being rightfully defendant's). *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), upheld a \$10 limit on what a veteran may pay a lawyer who represents the veteran in Veterans Administration proceedings, but only because there's no constitutional right to counsel in such proceedings in the first place, *id.* at 323-24, 332, 334-35.

¹²⁹ *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

¹³⁰ *Meyer v. Grant*, 486 U.S. 414 (1988).

¹³¹ *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976).

money to ideological causes have a constitutional right to do so.¹³² Even limits on paying government employees for their off-the-job speech are presumptively unconstitutional, though they may sometimes be upheld if the government acting as employer can show that such payments disrupt the government's operation.¹³³

The two spending limits that the Court has upheld are the limits on giving money to a political candidate,¹³⁴ and on corporate spending in support of or opposition to a political candidate.¹³⁵ Yet the Court upheld these limits only after concluding that the limits imposed only a modest burden on free speech rights—because the contributor remained free to express his views by spending the money directly or by pooling resources with others but independently of the candidate, and the corporation remained free to speak through a segregated fund—and because there were very strong government interests justifying these modest burdens.¹³⁶

Some constitutional rights may be protected because they promote values that are served only by noncommercial exercise of the rights. Sexual autonomy is likely one example: Though consenting adults are entitled to have sex with each other, they likely aren't entitled to pay for that sex.¹³⁷ But this is so because the purpose of the sexual autonomy right is to let people develop emotional relationships,¹³⁸ and buying sex for cash in hand seems unlikely to lead to an emotional connection. (The sexual autonomy right may incidentally protect purely recreational sex, but that's a side effect of the broader purpose, and of the law's usual inability to distinguish recreational noncommercial sex from emotionally significant noncommercial sex.)

The ban on buying sex thus doesn't substantially burden the sexual autonomy right, because bought sex isn't constitutionally valuable in the way that unbought sex is. Likewise, the Compulsory Process Clause right to subpoena witnesses and the Due Process Clause right to call willing witnesses in criminal cases¹³⁹ don't allow the defendant to pay percipient witnesses for their testimony. But this is likewise because bought testimony is seen as unreliable and thus not constitutionally valuable in the way that unbought testimony is.

¹³² NAACP v. Alabama *ex rel.* Patterson, 360 U.S. 240 (1959).

¹³³ United States v. National Treasury Employees Union, 513 U.S. 454 (1995).

¹³⁴ Buckley v. Valeo, 424 U.S. 1, 28 (1976).

¹³⁵ Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

¹³⁶ *Austin*, 494 U.S. at 659, 660; *Buckley*, 424 U.S. at 28, 29.

¹³⁷ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *State v. Freitag*, 130 P.3d 544, 546 (Ariz. Ct. App. 2006); *People v. Williams*, 811 N.E.2d 1197 (Ill. Ct. App. 2004); *State v. Thomas*, 891 So. 2d 1233 (La. 2005).

¹³⁸ *Lawrence*, 539 U.S. at 566; *Commonwealth v. Walter*, 446 N.E.2d 707, 710 (Mass. 1983); Carolyn J. Frantz, *Should The Rules of Marital Property Be Normative?*, 2004 U. CHI. LEG. F. 265, 287.

¹³⁹ *Washington v. Texas*, 388 U.S. 14 (1967).

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But paid-for books, private school educations, legal counsel, abortions, and contraceptives are fully constitutionally valuable, because they serve the purposes of the underlying constitutional rights. So it is with the paid-for organ, which will save a person's life as surely as a donated organ.¹⁴⁰ In fact, these paid-for products or services serve the purposes of the rights more often, and more reliably, than if these goods or services were 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."¹⁴¹ Likewise, relying solely on the benevolence of others, whether lawyers, doctors, teachers, or organ providers, offers little protection for our rights.

Of course, the right involved remains the right not to have substantial governmental burdens imposed on one's ability to protect one's life through medical care. It's not a "right to pay for organs," just as the right to get an abortion when needed for self-defense is not a "right to a postviability abortion," much less a "right to postviability dilation and extraction procedure." Rather, bans on organ sales are presumptively unconstitutional only because they substantially burden people's ability to engage medical self-defense.

If some technical or social change allowed all people with failing organs to protect their lives without having organ suppliers compensated—for instance, if a mechanical kidney became as effective as a transplanted kidney, or if cadaveric organ donation became so popular (without compensation) that the waiting lists were cleared off—then the ban on such compensation would stop being a substantial burden. Likewise, if some new medical procedure protected a pregnant woman's life just as well as an abortion of the viable fetus would, then the woman need not be allowed to get the abortion. But so long as a ban on payment for organs (or a ban on postviability abortions) jeopardizes a patient's life, the patient should be presumptively entitled to defend his life notwithstanding the ban.

C. Reasons To Limit the Right?

While I've stressed the importance of self-defense, I've acknowledged that this right, like others, 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 scope of the right may well be limited to situations where self-defense is genuinely necessary to avoid threat of death, or perhaps threat of very serious injury. The right is also inherently limited to situations where it

¹⁴⁰ While the charitable impulse behind an organ donation (or pro bono provision of education, or of abortion services) may give both the donor and the recipient extra gratification, this is peripheral to the core constitutional value that the right to medical self-defense (or private education or abortion) protects.

¹⁴¹ ADAM SMITH, *THE WEALTH OF NATIONS* 18 (Edwin Cannan ed., 1976) (1776).

doesn't directly infringe the rights of others who are not threatening the person's life.¹⁴²

Moreover, the self-defense right may be limitable in other ways, if the harm from allowing it is too great; in the lethal self-defense context, for instance, this is the foundation for many pro-gun-control arguments. While I'm skeptical of these arguments on empirical grounds, and while I think that it should take a great deal of harm to justify interfering with people's right to defend themselves, I agree that in principle the right to possess the tools for lethal self-defense may be limitable. To give one example, felons may need to defend themselves at least as much as nonfelons; yet I agree that restrictions on felons' gun ownership are constitutional and morally permissible.¹⁴³ Likewise, the D.C. Circuit in *Abigail Alliance* remanded the case so that the district court could hear arguments about whether the FDA rules were narrowly tailored to a compelling government interest.¹⁴⁴

Yet, as the abortion-as-self-defense and lethal self-defense examples show, self-defense ought only be limitable for the most pressing of reasons. Protecting a viable fetus isn't enough. Protecting the life of an animal isn't enough. Protecting the life of an attacker, even one who's not morally culpable (for instance, because he's insane) isn't enough. All these reasons can't justify denying people the right to protect their own lives.

And even if there is a pressing reason for restricting self-defense rights, the restriction ought to be narrowly limited to minimize the burden on self-defense.¹⁴⁵ For instance, the risk that self-defense would be falsely pled, so as to mask a murder, is a serious risk. The risk may well justify certain procedural devices that may constrain people's legitimate self-defense rights: The government may, for instance, make self-defense an affirmative defense, and perhaps even one that must be proven by the defendant by a preponderance of the evidence (which will foreseeably lead to the erroneous conviction of some people who were genuinely acting in self-defense).¹⁴⁶

But the legal system must still resolve self-defense claims on a case-by-case basis, even though resolving them by flatly rejecting self-defense as a defense may be a more efficient tool for preventing murders cloaked

¹⁴² See *supra* text accompanying note 48.

¹⁴³ See, e.g., *People v. Blue*, 544 P.2d 385 (Colo. 1975).

¹⁴⁴ *Abigail Alliance*, 445 F.3d at 486.

¹⁴⁵ Cf., e.g., *Rutan v. Republican Party*, 497 U.S. 62, 74 (1990) (holding that where the constitutional right to free speech is involved, restrictions must be as narrow as possible).

¹⁴⁶ The Court so held in *Martin v. Ohio*, 480 U.S. 228 (1987), though without considering whether there's a substantive constitutional right to self-defense. I'm not sure that this result is correct, or that such a regime is morally proper even if it's constitutionally permissible; and my misgivings fit with the laws in the forty-nine states that do not impose such a burden on defendants, *supra* note 76. Yet I agree that some burdens on defendants, for instance placing the burden of production on them, or even requiring the government to rebut the affirmative defense of self-defense by mere clear and convincing evidence, may be permissible (or at least it's a close call whether they are permissible).

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as self-defense. Some sacrifice of the interest in preventing murder of people who are falsely claimed to be attackers must yield to the constitutional and moral interest in preventing murder (or rape or serious injury) of people who are truly being attacked. In my view, even if there are some good reasons to substantially restrict organ sales in ways that may interfere with medical self-defense rights, those reasons can't justify anything close to the flat ban on sales that we have now.

1. Preventing Commodification

One reason often given for banning organ sales is preventing commodification: “[T]he integrity of the human body should never be subject to trade,”¹⁴⁷ or because, like “a desired legal verdict, a Pulitzer Prize, or a child,” organs are good that “have a meaning and value that places them outside the market.”¹⁴⁸ In the words of leading conservative bioethicist Leon Kass (a University of Chicago Professor and for three years the chair of the President's Council on Bioethics),

The idea of commodification of human flesh repels us, quite properly I would say, because we sense that the human body especially belongs in that category of things that defy or resist commensuration—like love or friendship or life itself. . . . [T]he bulk of [these things'] meaning and their human worth do not lend themselves to quantitative measures; for this reason, we hold them to be commensurable, not only morally but factually. . . .

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

We surpass all defensible limits of such conventional commodification when we contemplate making the convention-maker—the human being—just another one of the commensurables. Selling our bodies, we come perilously close to selling out our souls. *There is even a danger in contemplating such a prospect—for if we come to think about ourselves like pork bellies, pork bellies we will become.*¹⁴⁹

¹⁴⁷ Ignazio R. Marino et al., *Market of Organs Is Unethical Under Any Circumstances*, 325 *BMJ* 835 (2002) (formerly the *British Medical Journal*); see also *Human Organ Transplantation: A Report on Developments Under the Auspices of WHO*, 42 *INT'L DIG. OF HEALTH LEG.* 389, 393 (1991) (simply asserting that “The human body and its parts cannot be the subject of commercial transactions,” with no detailed justification).

¹⁴⁸ C.J. Dougherty, *Body Futures: The Case Against Marketing Human Organs*, 68 *HEALTH PROG.* 512-53, June 1987.

¹⁴⁹ See, e.g., Leon R. Kass, *Organs for Sale? Propriety, Property, and the Price of Progress*, 107 *PUB. INT.* 65, 81-83 (1992) (emphasis added); Murray, *infra* note 178, at 115-18. Margaret Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849 (1987), is the classic legal work on preventing commodification as a justification for rules barring sales of certain

Yet once one sets aside the vivid imagery, Professor Kass's analysis strikes me as quite unpersuasive. It's true that some things "defy" sales, such as love or friendship; but this is because sold love just isn't "love" as we define the term. A kidney is still a kidney, just as a kidney transplant operation is still a kidney transplant operation, whether provided for money or for free. In either case, it has the same meaning and human worth—it can save a human life.

Nor is compensation for providing kidneys morally similar to selling "the human being." We generally condemn selling humans because it involves slavery and violent control of the unwilling slaves. Even voluntary slavery, we suspect, would involve misery and degradation for the living person who is selling himself into slavery, because it would subject him to the new master's despotic control. And even the least slave-like of human sales—the selling of children to adoptive parents—risks harm to an unconsenting living human.

None of these concerns apply to paid transplants. When an organ is taken from a cadaver, the organ's source is dead. The death may be a tragedy, but there's no selling out of the soul in using the organs, whether the organs are paid for or not. The soul has fled, and what is left is a cadaver to be buried, plus precious organs that can save living soulbearers' lives.

Likewise, when an organ is provided by a living person, it is the organ being provided, not the soul (just as when an organ is provided for free, it is the organ being given away, not the soul). The noblest of labor—the work of a surgeon, a teacher, a nanny—is often sold, without being degraded, or without the laborer's soul being sold. Great art is sold, without being degraded. And more of these noble services or goods become available precisely because they can be sold. That an organ provider is paid money doesn't jeopardize his soul any more than the doctor's soul is jeopardized by his being paid money for performing the operation.

But I don't want to go into more detail about this here. Others have responded to the commodification argument at length;¹⁵⁰ yet such responses have limited persuasiveness. The anticommodification claim may be at bottom a philosophical and spiritual axiom—a premise for an argument rather than a conclusion. Leon Kass's vision of the human soul rebels against payment for transplants. "writes: "[T]he human soul finally rebels against the principle [of homogenization of worth] whenever it strikes closest to home," for instance "when we contemplate making the convention-maker—the human being—just another one of the commensurables."¹⁵¹ My human soul rebels against price controls that limit the supply of transplantable organs and thus cause people to

goods or services; but Professor Radin doesn't take a stand on whether the commodification objection should apply to organ sales, *id.* at 1855 n.23.

¹⁵⁰ See, e.g., COHEN, *supra* note 118, at 68-76; Hansmann, *infra* note 170, at 74-78.

¹⁵¹ Kass, *supra* note 2, at 82-83.

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die needlessly. At the level of a soul's rebellion, argument can only go so far.

But I think that the presence of a constitutional and moral right—a constitutional and moral right that justifies both defensive abortions and defensive use of lethal force—ought to resolve such an impasse. Philosophical preferences such as Professor Kass's suffice to justify a law under the rational basis test; but where a constitutional right is involved, something more demonstrably compelling must be required.

Some people may believe that killing innocent fetuses is immoral, even when done defensively, or that killing criminal attackers is immoral. They may think that society would benefit from promoting a culture of life that is so deep and uncompromising that it never allows people to use deadly force against viable fetuses or born humans.¹⁵² Yet the premise of the abortion-as-self-defense component of *Roe* and *Casey* is that such moral and attitude-molding concerns can't justify limiting people's abortion-as-self-defense rights. The same should go for medical self-defense more broadly.

2. Equalizing Access for Rich Recipients and Poor Recipients

Organs are now allocated based on a combination of the patient's medical need and the patient's ability to get relatives or friends to provide a directed organ donation. Paying for organs, the argument goes, would instead let rich patients (even relatively low-need ones) buy up all the available organs, and leave high-need poor or middle-class patients without the chance of a transplant.¹⁵³ Therefore we should maintain our current donation-only system.

Yet even if letting rich people get more access to organs is unfair, the "therefore" doesn't follow. A donation-only system doesn't just keep the rich from cutting in line. It also prevents everyone—including insurance companies and charities—from paying for organs that would go into the existing need-based system, and that would save more lives within that system.

Organs aren't plug-and-play: Organ transplants are complex, expensive procedures, with expensive post-operative care. They are already available only to those who are rich, who have health insurance, or who have government-provided health care.¹⁵⁴

Moreover, kidney transplants are actually about \$100,000 *less* expensive (if you don't count the prospective organ cost) than long-term dialysis. This means that those health plans, private or governmental,

¹⁵² Cf. Aaron Fortune, *Violence as Self-Sacrifice: Creative Pacifism in a Violent World*, 18 J. SPECUL. PHIL. 184, 189 (2004) (endorsing violence in certain situations, but generally rejecting the principle that self-defense can itself justify violence).

¹⁵³ See, e.g., Dougherty, *supra* note 148, at 53 (making this as an argument against organ sales); Gorovitz, *infra* note 172, at 11 (likewise); COHEN, *supra* note 118, at 56-64 (discussing and criticizing this argument).

¹⁵⁴ Hansmann, *infra* note 170, at 80.

that pay for the organs could save money by paying up to \$100,000 per kidney. If they were allowed to do that, (1) they likely would do that, (2) such a payment would likely substantially increase the pool of available organs, and (3) the organs could still be distributed through the same need-based system we have today. Even if InsuranceForTheRichCorp saves money by paying \$80,000 per kidney, this needn't give its rich policyholders any leg up over policyholders for other companies, since the other companies would be willing to pay the same amount. So there could still be rules mandating that organs be distributed to the patients with the greatest medical need; there would just be more organs to be distributed, since each received organ would be paid for.

Even if for some organ, transplants wouldn't save money, and the insurance company would have to pay an extra \$30,000 per organ to compensate providers,¹⁵⁵ this will hardly be a huge burden for companies to absorb. Each year, about 15,000-20,000 Americans are added to transplant waiting lists; even if that number doubles once organs becomes more available, that would still only constitute about .015% of the 250 million Americans with health insurance.¹⁵⁶ If each organ cost \$30,000, and this price wasn't offset by any savings in alternative treatment costs, this would mean an increase in insurance costs of \$5 per year per insured.

The "rich outbidding others" concern only arises if (1) the rich or their insurance companies pay so much that other health care funders can't match this, and (2) the payments the other funders offer don't suffice to make enough organs available. Even if we think this is likely—if we think that the rich would pay \$200,000 per kidney, other health care funders wouldn't pay any more than \$100,000 per kidney, and at this \$100,000 payment there still wouldn't be enough organs available for everyone—this at most counsels in favor of a cap on payments, not a total ban. (The cap would be set at the level that pretty much all the health care funders would pay, perhaps because even at that level they'll be saving money by getting the kidney rather than paying for long-term dialysis.)

So the ban on payment for organs is not the least restrictive means of preventing the rich from having more access to organs; a (fairly high) cap on payments would maintain equality while imposing less of a burden on patients' self-defense rights.

¹⁵⁵ See Crespi, *supra* note 36, at 44 (suggesting that \$30,000 would be a plausible price for each major organ).

¹⁵⁶ See Organ Procurement & Transplantation Network, <http://www.optn.org/latestData/step2.asp> (category Waiting List Additions, organ All, count Candidates, report Waiting List Additions by Age); Organ Procurement & Transplantation Network, <http://www.optn.org/latestData/step2.asp> (category Waiting List Additions, organ Kidney, count Candidates, report Waiting List Additions by Age); U.S. Census Bureau, *Income Stable, Poverty Rate Increases, Percentage of Americans Without Health Insurance Unchanged*, Aug. 30, 2005, http://www.census.gov/Press-Release/www/releases/archives/income_wealth/005647.html.

Of course, even this lesser burden may still be a substantial burden, if the capped payment leaves some people on the organ waiting list. And this burden may well be improper if we conclude that preventing inequality isn't a strong enough reason to interfere with medical self-defense. Where other rights are concerned, we generally don't let the government impose such payment caps. The rich, for instance, can send their children to schools that the poor can't afford, though this increases' rich children's competitive advantage over poor children.¹⁵⁷ If the government wants to deal with this inequality, it must do so by spending money, either on public schools or on school choice programs—it must level people up by spending, not level them down by banning.

Likewise, the rich can spend their money to express their views, or to start churches, even though the poor can't. Even those who would limit paid-for speech about candidates or ballot measures would still leave any rich person with the right to buy a newspaper, and thus leave the rich with far greater influence than the poor or middle-class would have.¹⁵⁸

The same also applies when people's life or liberty is on the line. A rich defendant who's facing the death penalty or life in prison can hire a better lawyer than a poor defendant can; what's more, this right may decrease the availability of top lawyers to the poor and the middle-class. A requirement that all criminal defense lawyers charge the same low fixed rate would make things more equal, but it would violate the clients' constitutional rights.

The rich people may also hire bodyguards to protect their lives; poor people can't, and middle-class people might find it too expensive because the rich in some measure bid up the prices. Rich patients who want experimental procedures that health insurance doesn't cover, or who want top doctors who charge more than health insurance will reimburse, aren't barred from spending their own money, even though this means that the rich are more likely to save their lives than the poor.¹⁵⁹

¹⁵⁷ See, e.g., Denise C. Morgan, *The Devil Is in the Details: Or, Why I Haven't Yet Learned To Stop Worrying and Love Vouchers*, 59 N.Y.U. ANN. SURV. AM. L. 477, 483 (2003) (noting that the constitutional right to send one's child to a private school helps "ensure that the children of relatively wealthy and powerful parents will have an educational leg up on everyone else").

¹⁵⁸ See, e.g., 2 U.S.C. § 431(9)(B)(i) (exempting the institutional media from various campaign finance rules).

¹⁵⁹ Concerns about this disparity have led, in some countries, to bans on the private payment for some medical procedures. Cf. Colleen M. Flood, Mark. Stabile & Carolyn Hughes Tuohy, *The Borders of Solidarity: How Countries Determine the Public/Private Mix in Spending and the Impact on Health Care*, 12 HEALTH MATRIX 297, 306-07 (2002) (reporting that Quebec had banned private health insurance for services that fell within the public health insurance plan); Physicians for a National Health Program, *Single-Payer FAQ*, http://www.pnhp.org/facts/singlepayer_faq.php (asking "Why shouldn't we let people buy better health care if they can afford it?" and responding that "Whenever we allow the wealthy to buy better care or jump the queue, health care for the rest of us suffers"). But there seems to be little prospect that the United States will accept such an approach.

Part of the reason for all this is a general respect for property rights—notwithstanding the inequality that property rights necessarily cause—and the view that substantive rights (the right to educate one's children, the right to speak, the right to get an abortion, the right to hire a lawyer) include the right to spend one's money to exercise the right. And part is the economic principle that there'll be much less provision of valuable services, such as education, legal assistance, protection against crime, and medical care, if those services must be provided for free or subject to a price cap. Equality that is achieved by leveling everyone down to the same low level of protection is generally not a worthwhile equality. In the organ transplant context, it proves for many to be the equality of the graveyard.

Nonetheless, perhaps I'm wrong: Perhaps the interest in making sure that the rich get no preferential access to organs is strong enough to trump the medical self-defense right, and this would therefore justify barring rich patients from paying extra for such organs. But this equality interest can justify only a cap on payments to organ providers, not the much more burdensome total ban on such payments.

3. Preventing Murders Committed To Harvest Organs

My friend's cousin's hairdresser's father woke up one morning in a tub filled with ice, missing both his kidneys: He had been drugged by organ thieves, who then extracted the kidneys and sold them on the black market. True story!

Usually that's just repeated as a macabre tale, but it may well be what comes to many people's minds when they hear about organ sales.¹⁶⁰ And while there's no reason to think that this particular incident ever happened,¹⁶¹ we may worry that allowing unlimited organ sales may lead to forcible dismemberment and often murder.¹⁶²

Yet this concern should no more lead us to ban all organ sales than a concern about self-defense claims cloaking murder should lead us to categorically repeal the self-defense defense. Rather, if the forced dismemberment risk can be nearly eliminated while imposing a much lesser burden on legitimate medical self-defense, we should use that less restrictive approach instead of the total sales ban.

A simple protocol should work: Require all organs to be initially sold to a hospital or some other well-established institution. If a living

¹⁶⁰ See Mike Holloway, *The Campaign Against Organ Donation*, <http://www.classkids.org/library/holloway.htm>; United States Information Agency, *The "Baby Parts" Myth: The Anatomy of a Rumor*, May 1996, http://usinfo.state.gov/media/Archive_Index/The_Baby_Parts_Myth.html.

¹⁶¹ See, e.g., <http://www.snopes.com/horrors/robbery/kidney.asp>, debunking this story, though noting that there apparently had been a kidney theft scam, though not outright forcible robbery, see *India Holds 10 in Plot to Steal Kidneys*, N.Y. TIMES, May 12, 1998, at A8.

¹⁶² See Dougherty, *supra* note 148, at 53; NUFFIELD COUNCIL ON BIOETHICS, *infra* note 188, at 51.

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person provides the organ, require that the provider sign a document before a notary or even a government official. If the organ is extracted from a cadaver, require that the decedent's relatives do the same. If necessary, bar the importation of organs from countries where we think these rules can't be properly followed. To make sure that no stolen organs are passed off as a willing provider's, take and securely store the provider's blood sample so that the organs' DNA can be matched against the provider's. Require all organ transfers after the extraction to be properly tracked, and done among well-established institutions.¹⁶³

Each organ, after all, is likely to be worth only \$10,000-\$50,000.¹⁶⁴ All of them put together are unlikely to be worth more than \$100,000. It should be the very rare American medical institution—and even the very rare individual American doctor—that would conspire to murder, and face the legal risks involved in such a conspiracy, for the sake of that amount of money, especially when the providers are closely tracked. And allowing a regulated market in organs may help dry up the existing illicit international black market in organs, a market that exists in large part because dying people find themselves unable to buy organs legally.¹⁶⁵

Of course, despite this, a murder might some day happen despite the regulations of the market. But preventing such murders isn't, I think, reason enough to maintain a system that causes 8000 deaths a year through lack of available organs.¹⁶⁶

This still leaves the risk that heirs, to whom \$100,000 might be worth more than to a hospital, would be tempted to kill a spouse, parent, or child to sell off the organs. But grisly as the prospect might be, it would just be a comparatively rare special case of the existing temptation to kill a relative to collect life insurance, or to inherit property.

The median net worth of American families in which the family head is 45 or older is over \$150,000;¹⁶⁷ a considerable fraction of that likely passes to heirs when both parents die. The average American life insurance policyholder has about \$150,000 worth of coverage.¹⁶⁸ Some people do kill their relatives to get their hands on this money.¹⁶⁹

Yet we don't ban life insurance, or ban inheritance, because we realize that even some small risk of providing an incentive to murder isn't

¹⁶³ See, e.g., Crespi, *supra* note 36, at 47 (describing a similar proposal).

¹⁶⁴ See, e.g., *id.* at 44.

¹⁶⁵ See, e.g., Brian Handwerk, *Organ Shortage Fuels Illicit Trade in Human Parts*, NAT'L GEOGRAPHIC ULTIMATE EXPLORER, Jan. 16, 2004, http://news.nationalgeographic.com/news/2004/01/0116_040116_EXPLorgantraffice.html; Peters, *supra* note 125, at 1303.

¹⁶⁶ See *supra* note 114.

¹⁶⁷ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, at 476 (2001 data).

¹⁶⁸ AM. COUNCIL OF LIFE INSURERS, LIFE INSURERS FACT BOOK 2005, at 84.

¹⁶⁹ See Kenneth Faig, *The Murder of the Insured by the Beneficiary: Attempting to Quantify One Moral Hazard Relating to Life Insurance Contracts*, 21 J. INS. REG. no. 3, at 3 (Spring 2003).

enough to justify interfering with families' economic well-being—and neither should it be enough to interfere with organ recipients' ability to protect their lives. In all these cases, we rely on the criminal law to deter the murder (and such deterrence is quite likely, since the greedy relatives know that they'll be among the first suspects).¹⁷⁰ The same should apply if a decedent's estate were to be increased in some measure by the salability of his organs.¹⁷¹

4. Undue Pressure to Hurt One's Health by Selling Organs

Allowing organ sales is supposed to provide an incentive to donate organs. Could it provide too much of an incentive, and put undue pressure on people, especially poor people, to put their health and their lives at risk?¹⁷²

All major surgery carries with it some risk. Giving a kidney carries a 0.03% risk of death or irreversible coma, a less than 2% risk of complications,¹⁷³ and some unknown but not high increase in susceptibility to some kidney diseases—the second kidney is nature's backup, and some-

¹⁷⁰ This analysis should also respond to the danger that the prospect of leaving more money to one's family will increase the risk of suicide (either by a relatively healthy adult, or by someone who's already terminally ill but who wants to die early to maximize the chance that his organs will be transplantable). See Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL. POL'Y & L. 57, 65 (1989). These risks are even more present with inheritance and with life insurance, which often involves sums that are much greater than the value of a person's organs. (Many life insurance policies don't have suicide exclusions, especially when the suicide happens more than two years after the policy is bought. See ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* 482, 506 (1988).) Yet we quite rightly don't ban insurance or inheritance, or return to the practice of forfeiting the property of suicides, because we don't believe in deterring suicide at all costs—the economic well-being of the decedent's family suffices to justify policies that do increase the risk of suicide. This should be even more true with organ sales, which help the decedent's family, help save recipients' lives, and help vindicate the recipients' self-defense rights.

¹⁷¹ If we really worry about the risk of murder by relatives, we can further decrease it—though not eliminate it—by barring sales of cadaveric organs from decedents killed by unknown assailants.

¹⁷² See, e.g., Dougherty, *supra* note 148, at 53; Marino et al. *supra* note 149, at 835; Stephen J. Wigmore et al., 325 BMJ 835 (2002); Samuel Gorovitz, *Against Selling Body Parts*, 4 REP. CENTER PHIL. & PUB. POL. 9, 10 (1984); Council of the Transplantation Society, *Commercialisation in Transplantation: The Problems and Some Guidelines for Practice*, THE LANCET, Sept. 28, 1985, at 715, 716; Speech by Richard N. Fine to World Transplant Congress 2006, July 19, 2006, <http://dynamist.com/tfaie/Fine-transplant-speech.html> (noting but rejecting the concern that “impoverished individuals will be exploited and/or coerced to donate part of their body” under an organ sales system); Radin, *supra* note 149, at 1910-11 (noting, though not endorsing, this argument as to sales of body parts); COHEN, *supra* note 118, at 56-64 (discussing and criticizing this argument).

¹⁷³ 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); Eric M. Johnson et al., *Complications and Risks of Living Donor Nephrectomy*, 64 TRANSPLANTATION 1124 (1997).

one who gives away that kidney loses the backup.¹⁷⁴ The liver regrows, which is why part of a liver may be extracted from one person and transplanted into another with a full recovery expected for both; but there seems to have been about a 0.25% incidence of provider death,¹⁷⁵ plus some risk of nonfatal complications.¹⁷⁶ A 1983 study reports that giving bone marrow led to life-threatening complications in 0.27% of reported cases from 1970 to 1983, though all the complications were cleared up with no long-term harm to the donors.¹⁷⁷

It's not clear to me that protecting organ sellers from these modest risks is reason enough to prohibit organ sales during a person's life.¹⁷⁸ It is certainly enough to justify detailed counseling, waiting periods, and requirements that part of the price for the organ include insurance against removal-related medical problems.¹⁷⁹ It may even justify barring donations by people who one thinks are likely to be unduly tempted, such as drug addicts (whose organs might not be useful in any event), or by people who are unusually vulnerable to complications from the surgery. These regulations may slightly increase the cost of organs, but not enough to create a substantial burden on recipients' self-defense rights.

¹⁷⁴ See Mary D. Ellison et al., *Living Kidney Donors in Need of Kidney Transplants: A Report from Organ Procurement & Transplantation Network*, 74 *TRANSPLANTATION* 1349 (2002).

¹⁷⁵ See Charles Miller et al., *Fulminant and Fatal Gas Gangrene of the Stomach in a Healthy Live Liver Donor*, 10 *LIVER TRANSPLANTATION* 1315 (2004) (noting ten donor deaths); Yasuhiko Sugawara & Masatoshi Makuuchi, *Safe Liver Harvesting from Living Donors*, 12 *LIVER TRANSPLANTATION* 902 (2005) (reporting that by July 2005, 2734 live donor liver transplants had been performed in the U.S., and between 1990 and 2003, 1473 live donor liver transplants had been performed in Europe).

¹⁷⁶ Shin Hwang, *Lessons Learned from 1,000 Living Donor Liver Transplantations in a Single Center: How to Make Living Donations Safe*, 12 *LIVER TRANSPLANTATION* 920 (2006) (reporting 6.7% donor major complication rate at one transplant center before 2001, reduced to 1.3% since 2002); Hani P. Grewal et al., *Complications in 100 Living-Liver Donors*, 228 *ANNALS OF SURGERY* 214 (1998) (reporting 13% major complication rate in 1989-96).

¹⁷⁷ M. M. Bortin & C. D. Buckner, *Major Complications of Marrow Harvesting for Transplantation*, 11 *EXP. HEMATOL.* 916 (1983).

¹⁷⁸ The matter may be different if an organ transplant involved a huge risk for the provider—but that's flows from the magnitude of the risk, not its existence. Thus, the hypothetical in Thomas H. Murray, *Organ Vendors, Families, and the Gift of Life*, in *ORGAN TRANSPLANTATION: MEANINGS AND REALITIES* 101, 103-04 (Stuart J. Youngner et al. eds., 1996), of a person's being paid to participate in a lottery in which the "winners" would have "every usable part of their bodies . . . removed" for transplantation misses the point: This lottery *guarantees* death for organ providers; even without payment, and without such a hypothetical lottery, we wouldn't cooperate with someone's committing suicide with an eye towards donating his organs (except possibly when a parent sacrifices his life to save a child's, though maybe not even then). The problem isn't payment but the certainty of many providers' death. See RONALD MUNSON, *RAISING THE DEAD: ORGAN TRANSPLANTS, ETHICS, AND SOCIETY* 120 (2002). The impropriety of any such lottery tells us nothing about the propriety of compensation for running a very small risk of death.

¹⁷⁹ See Hansmann, *supra* note 170, at 74.

But a broader prohibition, I think, would not be justified. If someone believes that the prospect of making some tens of thousands of dollars justifies a modest risk to his health, the government's interest in protecting him against his being overtempted by the money shouldn't suffice to trump the medical self-defense rights that I've discussed. This is especially so if the money will be spent by the recipient to treat his own unrelated health condition, or to treat his children's health problems—the sale of the organ might on balance *improve* his family's expected health, rather than slightly jeopardizing it.¹⁸⁰

Yet even if I'm mistaken, recognizing that the organ sales ban limits an important human right should invalidate such a substantial burden if the government can prevent the harm through lighter burdens. For instance, if we really think that \$30,000 is an undue temptation to some people,¹⁸¹ we might exclude some providers who are competent but likely to be excessively tempted. We might exclude, for instance, those who are adults but below 25, if we think they are likely to be too present-centered and too likely to ignore the risk of death or bodily injury. We might exclude foreign providers from very poor countries, for whom \$30,000 may be a lifetime's worth of savings.¹⁸²

We might exclude parents of minor children, who we might think may feel socially pressured to risk their health for their children's sakes. We might even exclude Americans who are very poor. One would want the money to mean something to the provider; offering \$30,000 for a somewhat risky procedure but only to multimillionaires wouldn't be much of an incentive. But perhaps we can conclude that people who make, say, at least \$40,000 per year and are over 25 are likely to make a sensible judgment about whether to run a modest health risk for \$30,000. And there may well be enough such people to supply the medical self-defense needs of all Americans who are suffering from organ failure.

Now some might balk at such limitations. Aren't 21-year-olds adult enough that we shouldn't treat them as second-class citizens who are unable to make intelligent decisions? Why should very poor people, or people who are trying to make a better life for their children, be denied a money-making opportunity that's given to people of greater means—and be denied this opportunity precisely because the money is especially

¹⁸⁰ See, e.g., MUNSON, *supra* note 178, at 117-19.

¹⁸¹ See Crespi, *supra* note 36, at 44 (suggesting that \$30,000 would be a plausible price for each major organ).

¹⁸² This may also respond to the concern that "our international credibility would be dealt a severe blow by our tolerance of a plan according to which the poor in underdeveloped countries were exploited as a source of spare parts for rich Americans," Gorovitz, *supra* note 172, at 11, if one thought such concerns justify substantially burdening people's self-defense rights, or if one thought a prohibition on imported organs wouldn't substantially burden those rights because enough such organs would be supplied in the U.S. once American organ providers start getting paid.

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valuable (so valuable as to be unfairly pressuring) to the poor and to parents?¹⁸³

If such objections are right, though, they only illustrate the problem with a paternalistic system that interferes with recipients' self-defense rights and with providers' freedom of choice. The response to these objections should be to give all adult, competent would-be organ providers the right to decide whether to sell their organs—as they now have the right to decide whether to give the organs away—and not to deny this ability to everyone.

Still, if people are not persuaded, and think there's always too much risk of undue pressure when living providers sell their organs—even when the transplant procedure is really quite safe, and complications quite unlikely—the solution should still not be a total ban. At most, we should ban organ sales during the provider's life, and allow them when the provider has just died.

Cadaveric organ transplants tend to be less effective than living provider transplants,¹⁸⁴ and there may not be enough transplant-eligible cadaveric organs available, since the organs of people who die when old or sick are generally considered unsuitable for transplantation.¹⁸⁵ Such a restriction may therefore still substantially burden some recipients' medical self-defense rights.

But at least it would be a far lesser burden than a total ban on organ sales, including on sales from cadavers, would be; and it would actually help serve the interest in protecting the health of living donors, because it would make living donations less necessary.¹⁸⁶ If we are to

¹⁸³ See Radin, *supra* note 149, at 1910-11 ("If we think respect for persons warrants prohibiting a mother from selling something personal to obtain food for her starving children, we do not respect her personhood more by forcing her to let them starve instead."); Barnett et al., *infra* note 186, at 213.

¹⁸⁴ See, e.g., Arthur J. Matas et al., *2,500 Living Donor Kidney Transplants: A Single-Center Experience*, 234 ANNALS OF SURGERY 149, 161-62 (2001); Paul I. Terasaki et al., *High Survival Rates of Kidney Transplants from Spousal and Living Unrelated Donors*, 333 NEW ENG. J. MED. 333 (1995) (reporting over 80% survival rates for people who received kidneys from living donors, and 70% for people who received kidneys from cadavers); Medin, *supra* note 111, at 704 (reporting 94% survival rates over 5 years for people who received kidneys from living donors, and 76% for people who received kidneys from cadavers).

¹⁸⁵ About 13,000 eligible sets of cadaveric organs become available in the U.S. each year, and only about 6000 are donated each year. See Ellen Sheehy et al., *Estimating the Number of Potential Organ Donors in the United States*, 349 NEW ENG. J. MED. 667, 669 (2003). Up to 7000 extra sets of organs, which would include up to 14,000 kidneys, might thus become available each year, depending on how many people will be motivated by the payment to make available their own organs (posthumously) or to make available their relatives' organs.

¹⁸⁶ See Andrew H. Barnett, Roger D. Blair & David L. Kaserman, *Improving Organ Donation: Compensation Versus Markets*, in THE ETHICS OF ORGAN TRANSPLANTS, *infra* note 206, at 208, 210.

impose a burden, we should impose this lesser one rather than the much greater one.¹⁸⁷

5. Maintaining Organ Quality

Some have argued that allowing organ sales would decrease the quality of organs available for transplants.¹⁸⁸ Some of the people who will be most tempted to sell their organs, for instance, might be intravenous drug users who are desperate for money yet more likely to be afflicted with certain diseases.¹⁸⁹ This has been one reason why blood banks prefer to get blood from donors rather than from sellers.¹⁹⁰

Yet here again the solution is to institute more modest regulations, rather than a flat ban. The diseases can generally be screened for (something that wasn't so decades ago, when the concern about paid blood arose¹⁹¹), and would in any case have to be screened for, since even charitable donors of organs—alive or dead—may be sick.¹⁹² Blood banks, including German blood banks that routinely buy blood, operate

¹⁸⁷ Note that even under the current system, there's pressure on people to donate organs: If your relative needs a kidney, you might feel strong family pressure to donate the kidney even if you don't feel close to the relative, and wouldn't want to donate but for the family pressure. See Jeffrey P. Kahn, *Would You Give a Stranger Your Kidney? The Ethics of "Unknown" Kidney Donors*, <http://www.cnn.com/HEALTH/bioethics/9807/stranger.kidney/> ("In practice, related donors who are an appropriate match often feel pressured to donate, and sometimes even request a 'medical' excuse from the transplant team so that they do not have to refuse to help a friend or loved one."); MARK J. CHERRY, *KIDNEY FOR SALE BY OWNER* 5 (2005) (noting this possibility); Richard A. Epstein, *The Sale of Organs for Transplants Should Be Legalized*, in *BIOMEDICAL ETHICS: OPPOSING VIEWPOINTS* 62, 64 (2003) (likewise). This isn't identical to the pressure of an offered \$30,000, but in many ways it might be more effective. Allowing sales of organs will diminish this pressure, and may largely eliminate it if enough organs will go on the market to satisfy demand; and allowing sales of cadaveric organs will diminish this social pressure on prospective living donors without creating financial pressure on such donors.

¹⁸⁸ See, e.g., Council of the Transplantation Society, *supra* note 172, at 716; Gorovitz, *supra* note 172, at 10; NUFFIELD COUNCIL ON BIOETHICS, *HUMAN TISSUE: ETHICAL AND LEGAL ISSUES* 51 (1995).

¹⁸⁹ Cf. Barnett et al., *supra* note 186, at 215 (noting the related problem that the prospect of compensation might tempt relatives of deceased drug users into concealing their drug use).

¹⁹⁰ See Ronald E. Domen, *Paid-Versus-Volunteer Blood Donation in the United States: A Historical Review*, IX *TRANSFUSION MED. REV.* no. 1, Jan. 1995, at 53.

¹⁹¹ See C.L. van der Poel, E. Seifried & W.P. Schaasberg, *Paying for Blood Donations: Still a Risk?*, 83 *VOX SANGUINIS* 285, 286 (2002).

¹⁹² See Peters, *supra* note 125, at 1303. Of course, "low quality" may be a matter of degree; many organs may offer recipients some chance of life, just much less than a "high-quality" organ. In such a situation, a patient who is nearly certain to die for want of an organ—so her choice is a low-quality organ or death—should have a medical self-defense right not to be legally blocked from using the best organ she can find. But the government could identify the low-quality organs and protect patients from unwittingly getting such organs, or even prohibit patients from getting such organs if their chance of survival without the organ (for instance, through dialysis) is greater than with the organ.

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quite well doing this.¹⁹³ Sperm banks and fertility clinics routinely buy sperm and ova. The same approach should work for other human body products. Moreover, if compensation generates more organs, doctors can *improve* average organ quality by being more selective about the organs they need to use, and by setting aside organs that are not infected with serious disease but also not optimal for transplantation.¹⁹⁴

6. Promoting Altruism

Paying for organs, the theory goes, will undermine the spirit of altruism that animates organ donation, and that organ donation in turn reinforces. Allowing organ sales would thus, the argument goes, “have a social cost destructive of the common good”:

It would sap the altruistic bonds that draw people together in solidarity and harmony. Some of the best moral lessons presented by the modern media are stories of persons donating their own organs and those of deceased loved ones to others who had been strangers but who now are bound to them and their families with a gratitude beyond expression. Human bonds of such profundity stand out against the background of an increasingly selfish and materialistic society. True, in a commercial system no one would be denied the right to confer this monumental gift of life without charge, but probably fewer and fewer would have the impulse to do so, as self-interest thrives and altruism atrophies.¹⁹⁵

Let’s think through this theory, though. Imagine that someone suggested that other inputs into the transplant process—doctor time, hospital equipment, pharmaceutical company products—had to be provided for free, too, as a means of promoting altruism and the common good. Such a mandate that organ transplants involve no transfer of money either to service and product providers or to organ providers, the argument would go, would “have a social benefit promoting the common good”:

It would promote the altruistic bonds that draw people together in solidarity and harmony. Some of the best moral lessons presented by the modern media will be stories of doctors donating their time to people who had been strangers but who now are bound to them and their families with a gratitude beyond expression. Human bonds of such profundity stand out against the background of an increasingly selfish and materialistic society. True, in a commercial system no one would be denied the right to confer this monumental gift of life without charge, but probably fewer and fewer doctors would have the impulse to do so, as self-interest thrives and altruism atrophies.

Would we really support such an “organ transplant services donation” system, in which doctors were in the same position in which pro-

¹⁹³ See, e.g., *Paid Vs. Unpaid Donors*, 90 VOX SANGUINIS 63, 66 (2006) (noting that German blood donors are paid from 20 to 25 euros for whole blood, and from 45 to 55 euros for plateletpheresis).

¹⁹⁴ See Barnett et al., *supra* note 186, at 215.

¹⁹⁵ Dougherty, *supra* note 148, at 55; COHEN, *supra* note 118, at 74-76 (discussing and criticizing a version of this argument).

viders now are? I take it that we wouldn't, for the simple reason that such a system would bring about the deaths of thousands of patients. Many doctors are altruistic, and do provide a good deal of free medical help.¹⁹⁶ Some of them might perform charitable organ transplants, if compensation for the transplants were prohibited. But we should expect that many fewer organ transplants would be provided—and many more sick people would die—if we were to rely on altruism rather than on self-interest.¹⁹⁷

More broadly, if I am right that banning organ sales interferes with an important human right (even a constitutional right) to self-defense, such an interference can't be justified by a desire to provide "moral lessons" counteracting the perceived harms of "increasing[] selfish[ness] and materialis[m]." We wouldn't accept bans on payment for private education, even if the bans were justified on the grounds that free private education (which some institutions, chiefly religious ones, might well provide) may foster "altruistic bonds" between teacher and student that provide extra "the best moral lessons." Such bans would unacceptably interfere with parents' constitutional right to educate their children. Likewise, the desire to teach moral lessons can't justify bans on payment for medical self-defense.

7. Avoiding Alienation of Donors

Some have also hypothesized a somewhat different altruism effect: that offering money for organs might alienate donors who would give the organs for free, and might therefore decrease (or not substantially increase) the aggregate donor supply. One can imagine some such mechanisms: If some people believe (whether rightly or wrongly) that an organ market is immoral or disgusting, they may refuse to participate.¹⁹⁸ If some people start thinking of the transaction in financial terms, they may conclude that \$30,000 is too low a price for parts of their bodies, even if they would have donated the body parts for free.

Likewise, some people might be turned off from the loss of the emotional benefit that accompanies a pure selfless act.¹⁹⁹ Or some people might donate organs under the current system because they seek the emotional reward that comes from doing something that can *only* be done by the charitably minded. Once organ provision becomes the sort of thing that is routinely done for money, they might no longer be interested in doing it.

¹⁹⁶ See *supra* note 123.

¹⁹⁷ Cf. Hansmann, *supra* note 170, at 78 ("If [considerations of promoting altruism] do not justify outlawing a commercial market in care of one's elderly parents . . . then why should they justify outlawing sale of the rights to one's organs, even after death?").

¹⁹⁸ See Murray, *supra* note 178, at 118 (making this argument).

¹⁹⁹ See Hansmann, *supra* note 170, at 67-68 & n.23 (discussing this concern); R.M. TITMUS, *THE GIFT RELATIONSHIP FROM HUMAN TO SOCIAL POLICY* (1970) (likewise); NUFFIELD COUNCIL ON BIOETHICS, *supra* note 188, at 51-52 (likewise).

Yet while one can imagine such reactions, my sense is that they'd be quite rare. To begin with, only about 1.5% of all U.S. living donor transplants—in 2005, 89 transplants in total—are purely unrelated anonymous donations. Even if all these unrelated anonymous donors become alienated by the prospect that others are being compensated for providing organs, and aren't mollified by the prospect of refusing compensation or donating the compensation to their favorite charity, this will be a very small loss to the organ pool. The remaining 98.5% are either donations to relatives, targeted donations (presumably mostly to acquaintances), or "paired exchange" donations in which the recipient's relative or acquaintance provides an organ in exchange to the donor's relative or acquaintance.²⁰⁰ These donors, I suspect, will care primarily about the welfare of the transplant beneficiary, and won't refuse to donate just because compensation is offered. The cadaveric organs do often go to strangers. But how likely is it a next-of-kin who would be willing to donate the decedent's organs under a pure donation system would instead refuse when offered money (even given the option of declining the money, or sending it to his favorite charity)?

On the other hand, the opposite reaction—a financial incentive doing what financial incentives usually do, which is stimulated the rewarded conduct—should, I suspect, sway quite a few people. We see some evidence of this in the supply of eggs to infertile couples: In America, where women routinely get \$5000 to \$15,000 for such eggs, the eggs are generally available; in England, where the compensation is capped at £250,²⁰¹ there is a years-long waiting list;²⁰² in Australia, where payment for eggs is banned, there is a five-year-long list.²⁰³ We also see plenty of evidence of this in our daily experience with the overwhelming majority of other goods and services, where offering money will get you much better results than asking for charity.²⁰⁴

²⁰⁰ See Organ Procurement & Transplantation Network, <http://www.optn.org/latestData/step2.asp> (category Transplant, organ All, report Living Donor Transplants by Donor Relation) (2005 data).

²⁰¹ Human Fertilisation & Embryology Auth., *FAQs for Donors*, <http://www.hfea.gov.uk/cps/rde/xchg/SID-3F57D79B-696D45B3/hfea/hs.xsl/1205.html>.

²⁰² David Derbyshire, *I Went to a Spanish Clinic and Was Pregnant Within Months*, DAILY TELEGRAPH, July 3, 2004, at 9 (reporting a two-year waiting list); Nic Fleming, *Payment of Pounds 1,000 To Ease Egg Donor Shortage*, DAILY TELEGRAPH, Nov. 12, 2004, at 1 (reporting waiting lists for up to five years); *Passport, Tickets, Suncream, Sperm . . .*, OBSERVER (U.K.), Jan. 15, 2006 (reporting a two-to-eight-year waiting list, though after an April 2005 ban on anonymous egg donation, which may have contributed to decreasing the availability of donated eggs).

²⁰³ Nick Papps, *Aussies Couples Buying Babies Made To Order*, Sept. 5, 2004, at 2.

²⁰⁴ One exception is sex: Offering \$10 to a stranger in a bar for sex will likely give you a worse result than trying to get the sex for free; even offering \$500 will get you a worse result with most people, though success with some. Yet this flows from matters peculiar to sex: Most people believe prostituting oneself is dishonorable; even those that don't share this view might therefore fear ostracism if they engage in prostitution; for related reasons, being paid money for sex may deprive the sexual act of the erotic and emotional pleasure that it might otherwise have; being paid money for sex largely forecloses

Moreover, the offer of money may easily be presented in ways that harness charitable people's charitable attitudes. Providing your (or your recently deceased relative's) kidney for money, after all, saves a person's life just as much as donating the kidney would;²⁰⁵ and then, if you have strong charitable impulses, you can just take that money and give it to your church, or your favorite charity.²⁰⁶

The recipient is no worse off because you took the money. (Under an organ market system, the cost of the organ would surely be paid by private or government insurance, just as the much greater cost of the other inputs into the transplant—doctor time, hospital space, pharmaceuticals and surgical supplies²⁰⁷—is now paid.) And if you are charitably minded, you can just take the money and give it to your church, or your favorite charity, or if you prefer some fund that will support organ transplants for the poor. You get to feel good about two things, the saving of a life and the donation of the proceeds, rather than just one.

What's more, many genuinely altruistic people understandably feel that their charity should begin at home. A father's death in an accident, which makes the organ donation possible, might at the same time strip away his wife's and children's main source of financial support. Getting money for the organs and using it for the children's benefit will likely seem far more appealing—even if the mother is generally charitably inclined—than just giving the organs away.²⁰⁸

This leaves one sort of person who might still be turned off, despite the option of declining payment or routing the payment to his favorite cause: someone who is deeply attached to the concept of doing the sort of

the possibility of viewing the sexual act as a potential (even if improbable) step to a more serious emotional relationship; because prostitutes usually have sex with very many partners, prostitution is connected in people's minds with disease, and this connection may deter people from engaging even in one-time acts of prostitution; and an approach that reveals that the approacher patronizes prostitutes might suggest the approacher himself is diseased. Little of this applies to the donation of organs.

²⁰⁵ See COHEN, *supra* note 118, at 74-75.

²⁰⁶ This helps illustrate why it's a mistake to reason that a compensation system will "eliminate altruism from decisions to donate organs," Edmund D. Pellegrino, *Families' Self-Interest and the Cadaver's Organs: What Price Consent?*, in THE ETHICS OF ORGAN TRANSPLANTS 205, 205 (Arthur L. Caplan & Daniel H. Coelho, eds. 1998), or "intrude violently on [an organ gift's ability to convey a sense of sympathy, to provide consolation to the decedent's family, or to honor the decedent's own generosity] and on the meaning of the relationship between the family and the newly dead person," Murray, *supra* note 178, at 117-18. The family remains free to donate the organ and not accept money from it, or to provide the organ and altruistically donate the revenue to the charitable cause that they most support.

²⁰⁷ See Arthur J. Matas & Mark Schnitzler, *Payment for Living Donor (Vendor) Kidneys: A Cost-Effectiveness Analysis*, 4 AM. J. TRANSPLANTATION 216, 218 (2003).

²⁰⁸ Cf. Peters, *supra* note 125, at 1303 (arguing that it is unfair to impose the pro-altruism-towards-strangers views of medical professionals who "are educated, well paid, and generally able to manage circumstances to the benefit of [them]selves and others"—and who are actually "mak[ing] money [them]selves" from the transplant operation—on next-of-kin who don't share such values).

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thing that *cannot* be done for compensation.²⁰⁹ Note that this person isn't the hyper-altruist who just wants to provide an organ to save a stranger's life; he can still do that if he gets paid. Nor is it the hyper-altruist who just wants to give the organ free; he can still do that by forgoing compensation. Rather, it's someone who won't want to save the stranger's life if such lifesaving is also done by others for compensation.

Yet how common are such people likely to be, compared to those who will see an offer of payment as an incentive? Consider the thought experiment from the last section: Imagine a requirement that doctors who do organ transplants do them for free, or not at all. Do we expect that such a requirement would on balance increase the number of doctors willing to perform such operations, since some doctors will be thrilled to do something that can only be done by the charitably minded? Would we say, "Sure, some doctors won't want to invest their time and effort with no compensation, but think of how many more doctors would want to perform such a public service"? Or would we expect that counting on a combination of incentives and conventional altruism (in which some doctors may contribute their time and effort while forgoing compensation²¹⁰) is a much surer bet than counting on pure altruism alone?

8. Saving Money for the Government / Insurers / Policyholders

Paying for organs will by definition increase the cost of organs. At the same time, it will save the cost of alternative care, such as kidney dialysis—on balance, it seems likely that this savings would be nearly \$100,000,²¹¹ more than enough to offset the organ cost. In those situations, then, the saving money argument can't justify the limitation on medical self-defense rights.

But even if, for certain organs, paying for the organs ends up meaning more expense,²¹² and mandating that organs be provided for free (which means they often won't be provided at all) will save money for the government and for policyholders, that's a poor justification for interfering with someone's self-defense rights. Even if we were to find that people's lethal self-defense on balance increases costs to the state,²¹³ I take it that we wouldn't allow this as a justification for banning such self-defense. Likewise, even if the government chooses not to fund certain expensive medical procedures, I take it that it couldn't ban

²⁰⁹ Thanks to Judy Daar for raising this issue with me.

²¹⁰ See *supra* note 123.

²¹¹ See Matas & Schnitzler, *supra* note 207, at 218.

²¹² See Hansmann, *supra* note 170, at 79 (noting this possibility, though not endorsing a ban on organ sales as a justification).

²¹³ For instance, if injuries to attackers who are hurt but not killed by victims' self-defense are more expensive to treat than injuries that the victims are averting, or if the attackers are more likely to be indigent and to require taxpayer-funded treatment while the victims are more likely to have private insurance.

private payment for those procedures on the theory that the ban would decrease overall medical insurance costs.

Such restrictions would save the government, or policyholders, cash, but only at the expense of denying individuals their lives, and the ability to defend their lives, something that is much more valuable to them and on balance more valuable to society. While some recipients—those who are lucky enough to get their organs for free under the current system—may end up paying more (sometimes out of pocket, more often through insurance) if organs have to be paid for, other recipients would get something much more valuable: their lives.

If we are to look at the aggregate benefit to all recipients, or to any particular person's preferences as determined behind the veil of ignorance, allowing organ sales is the far less costly solution.²¹⁴ And while sometimes aggregate social benefit may trump individual rights, surely when individual rights claims point in the same direction as aggregate social benefit, the government ought not be able to override the rights simply to save money for Medicare or even for health insurance policyholders generally.

VI. POLITICAL FEASIBILITY

I hope I've provided a sound precedential and ethical argument for recognizing a presumptive constitutional and moral right of medical self-defense, and for applying it to experimental treatments and to payment for organ transplants. Yet will the mostly conservative Supreme Court, or for that matter many voters or legislators, be receptive to such a right?

I surely can't predict that the answer is "yes." Perhaps the odds are against it. Yet it seems premature to answer "no."

Notwithstanding the Court's frequent rumblings of hostility to "activism" and to recognition of unenumerated rights, abortion rights still stand.²¹⁵ Unenumerated parental rights still stand.²¹⁶ Justice Scalia's argument for the rejection of parental rights got only his vote (though with a suggestion by Justice Thomas that the matter should still be seen as open).²¹⁷

A right to sexual autonomy has for the first time been recognized, with Justice Kennedy joining the liberals.²¹⁸ One of the two judges who voted for the *Abigail Alliance* decision was Douglas Ginsburg, whom Ronald Reagan had nominated for the Supreme Court seat that ultimately went to Justice Kennedy. The legal effort in *Abigail Alliance* was spearheaded by the Washington Legal Foundation, a conservative

²¹⁴ See Crespi, *supra* note 36, at 52.

²¹⁵ *Casey v. Planned Parenthood*, 505 U.S. 833 (1992).

²¹⁶ *Troxel v. Granville*, 530 U.S. 57 (2000).

²¹⁷ *Id.* at 80, 91.

²¹⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

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public interest firm that has on its Legal Policy Advisory Board conservatives like Dick Thornburgh, Ted Olson, and Ken Starr.²¹⁹ Justice Scalia himself suggested that there might be an unenumerated right to lethal self-defense;²²⁰ Chief Justice Rehnquist and Justices Kennedy and Thomas signed on to that opinion.²²¹ Seventh Circuit Judge Kenneth Ripple, a Reagan appointee, took the view that there is a constitutional right to self-defense even in prison;²²² Reagan appointee Joel Flaum and George H.W. Bush appointee Ilana Rovner joined Judge Ripple in voting to rehear the case en banc.²²³

The right to lethal self-defense is popular among conservatives (and is largely accepted, though with some reservations, by most liberals). The right to abortion-as-self-defense is popular among liberals (and is largely accepted, though with some reservations, by most conservatives). If the analogies I draw between these rights and a broader medical self-defense right are apt, then they offer the hope for a substantial coalition that will accept such a right.

More broadly, a dozen years of Court-watching have taught me the fallibility of my predictions that “Surely the Justices won’t do that.” When *United States v. Lopez* was pending, many people (including me) were confident that the Court would handily reject the argument that the Gun-Free School Zones Act was outside Congress’s enumerated powers.²²⁴ When *City of Boerne v. Flores* was pending, many people (including me) predicted that the Court would reject the challenge to the Religious Freedom Restoration Act’s constitutionality.²²⁵

Even when the Court had started reading the Jury Trial Clause as a limitation on the government’s power to impose rule-bound sentencing factors to be found by a judge, many people (including me) thought that the Court probably wouldn’t strike down the U.S. Sentencing Guidelines, which it had after all upheld against many other constitutional challenges, and which had been the mainstay of federal criminal practice for over a decade.²²⁶ Each time, we were proven wrong.

²¹⁹ See <http://www.wlf.org/Resources/Partners/legalpolicy.asp>.

²²⁰ *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (plurality) (dictum) (suggesting that “the historical record may support” the proposition that “the right to have a jury consider self-defense evidence . . . is fundamental”).

²²¹ *Id.*

²²² *Rowe v. DeBruyn*, 17 F.3d 1047, 1054-56 (7th Cir. 1993) (Ripple, J., dissenting) (concluding that even prisoners have a constitutional right to self-defense).

²²³ *Id.* at 1047 n.**.

²²⁴ See, e.g., Ann Althouse, *Inside the Federalism Cases: Concern About the Federal Courts*, 574 ANNALS 132, 133 (2001) (“Court watchers were surprised, even shocked, when, in 1995, *United States v. Lopez* struck down the federal Gun-Free School Zones Act”).

²²⁵ See Eugene Volokh, *Hats off to Abner Greene*, post to the RELIGIONLAW discussion list, June 23, 1997, <http://lists.ucla.edu/pipermail/religionlaw/1997-June/008800.html> (reporting that of the 22 law professors on the RELIGIONLAW list who made predictions about *Bonere*, including some of the leading Religion Clauses scholars in the country, 17 guessed wrong).

²²⁶ See, e.g., Douglas A. Berman, *Principle Versus Pragmatism*, Sentencing Law & Policy, Aug. 19, 2004, http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/

Some arguments may be so far-fetched, or may have been so roundly rejected, or may be so repugnant to most Justices' deeply held jurisprudential or philosophical commitments that the arguments can confidently be predicted to be losers. But it seems to me that the constitutional arguments articulated in this article fall into none of these categories. And in any event, I hope the moral arguments will be persuasive even to those who hesitate to see the matter constitutionalized.

VII. CONCLUSION

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

Abortion rights supporters have long defended the abortion-as-self-defense aspect of that right, and even many who are not zealous about abortion rights have agreed as to that particular aspect. Gun rights supporters have long stressed the lethal self-defense aspect of that right, and even many who are not zealous about gun rights have agreed that lethal self-defense ought to be allowed even if guns are heavily regulated or banned.

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

principle_versu.html (quoting Prof. Ron Wright as saying that “Various staff members of the U.S. Sentencing Commission now believe that it is most likely the Supreme Court will uphold the guidelines”).