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EMBRYONIC STEM CELL RESEARCH AND THE THEORY OF MEDICAL SELF-DEFENSE

Kristin M. Hicks[*]

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I. INTRODUCTION

Human embryonic stem cell research has been heralded as a miraculous discovery that will one day help cure some of humanity's most devastating illnesses, such as Huntington's disease and Parkinson's disease.[1] Though still in its early stages,[2] stem cell

* Harvard Law School, Candidate for J.D., 2008; A.B., Biology, Harvard College, 2005. The Author would like to thank the members of the *Harvard Journal of Law & Technology* Student Writing Committee for their helpful suggestions.

1. *See* David M. Panchision, *Repairing the Nervous System with Stem Cells*, *in* REGENERATIVE MEDICINE 35 (Dep't of Health & Human Servs. ed., 2006), *available at* http://stemcells.nih.gov/info/scireport/2006report.htm (discussing research using stem cells to treat neurodegenerative disorders); Olle Lindvall, Zaal Kokaia, & Alberto Martinez-Serrano, *Stem Cell Therapy for Human Neurodegenerative Disorders — How to Make It Work*, 10 NATURE MED. S42 (2004) (discussing the potential for stem cell therapies to treat Parkinson's disease, damage caused by stroke, amyotrophic lateral sclerosis (also known as Lou Gehrig's disease), and Huntington's disease).

2. *See* Nicholas Wade, *Some Scientists See Shift in Stem Cell Hopes*, N.Y. TIMES, Aug. 14, 2006, at A18, *available at* http://www.nytimes.com/2006/08/14/washington/

research holds the potential to help scientists understand the mechanisms of cell development and to provide effective models for developing new drugs and testing them for safety and efficacy.[3] Furthermore, because stem cells can develop into many different types of cells, further research may enable the generation of organs and tissue for transplantation.[4]

Despite the promise of stem cell research, it has nevertheless been the subject of considerable controversy since the technology was first developed. Much of this controversy has centered on the moral status of human embryos. Currently, researchers create stem cell lines by extracting cells from a pre-implantation embryo approximately five days after fertilization.[5] This process destroys the embryo.[6] Some people believe an embryo has the moral status of a person and consequently view stem cell research as killing human beings.[7] As a result of strongly held views on both sides of this debate, supporters and opponents of stem cell research in Congress have reached an impasse; although President Bush has announced that federal funds may only be used for research on a limited number of stem cell lines,[8]

14stem.html ("Many researchers now see human embryonic stem cells as part of a long-term research program, with any sort of cell therapy being at least 5 or 10 years off.").

3. *See Stem Cell Research, Part 3: Hearing Before the Subcomm. on Labor, Health and Human Services, and Education of the S. Comm. on Appropriations*, 105th Cong. 56 (2000) (statement of Gerald D. Fischbach, M.D., Director, National Institute of Neurological Disorders and Stroke and Allen M. Spiegel, M.D., Director, National Institute of Diabetes and Digestive and Kidney Diseases), *available at* http://www.ninds.nih.gov/news_and_events/congressional_testimony/testimony_stemcell_090700.htm.

4. *See id.* at 55 (arguing that the self-renewal property of stem cells and their "ability to differentiate into the full spectrum of other cell types make them ideal candidates for repairing and replacing tissues and organs ravaged by disease").

5. At this stage of development, the embryo is termed a "blastocyst." NAT'L ACADEMIES, UNDERSTANDING STEM CELLS 4–5 (2006), *available at* http://dels.nas.edu/dels/rpt_briefs/Understanding_Stem_Cells.pdf.

6. Scientists have recently developed a technique for deriving pluripotent stem cells from adult human skin cells, suggesting that researchers may one day be able to create stem cell lines without destroying an embryo. *See* Gina Kolata, *Scientists Bypass Need for Embryo to Get Stem Cells*, N.Y. TIMES, Nov. 21, 2007, at A1, *available at* http://www.nytimes.com/2007/11/21/science/21stem.html. Currently, however, many experts maintain that traditional embryonic stem cell research should continue due to safety concerns about the new method. *See* Colin Nickerson, *Caution Urged in New Method for Stem Cells: Harvard Sticks to Cloning*, BOSTON GLOBE, Dec. 17, 2007, at A1, *available at* http://www.boston.com/news/science/articles/2007/12/17/caution_urged_in_new_method_for_stem_cells/ ("The so-called induced pluripotent stem cells, or IPS, made by the process may never be safe for humans, making it vital to maintain the pace of research on more controversial fronts.").

7. *See* NAT'L BIOETHICS ADVISORY COMM'N, ETHICAL ISSUES IN HUMAN STEM CELL RESEARCH: VOLUME I, at 50 (1999), *available at* http://www.bioethics.gov/reports/past_commissions/nbac_stemcell1.pdf ("The fundamental argument of those who oppose the destruction of human embryos is that these embryos are human beings and, as such, have a right to life.").

8. President Bush announced this funding policy in 2001. *See* Press Release, The White House, President Discusses Stem Cell Research (Aug. 9, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html. Federal funds may only be awarded for research using cell lines that satisfy the following criteria: (1) the derivation process was initiated prior to August 9, 2001; (2) the stem cells were derived

currently no federal law supports or bans embryonic stem cell research.[9]

State legislatures have filled the void left by the lack of federal regulation concerning stem cell research. The resulting state laws vary widely. Some states authorize or fund stem cell research,[10] while others ban research on embryonic stem cells from some or all sources, including existing stem cell lines, aborted or miscarried embryos, embryos created for in-vitro fertilization, and cloned embryos.[11] Many of the restrictions focus on therapeutic cloning,[12] one of the most promising methods of creating stem cell lines for research.[13] The restrictions appear to be motivated in part by an apparent fear that engaging in this process will lead scientists down a slippery slope towards reproductive cloning.[14] Currently, at least five states prohibit

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from a discarded embryo that was created for reproductive purposes; (3) informed consent was obtained for the donation of the embryo; and (4) the donation did not involve financial inducements. Nati'l Insts. of Health, Stem Cell Information: NIH's Role in Federal Policy, http://stemcells.nih.gov/policy/NIHFedPolicy.asp (last visited May 12, 2008). Congressional attempts to expand federal funding for stem cell research have been vetoed by President Bush. *See* Stem Cell Research Enhancement Act of 2005, H.R. 810, 109th Cong. (vetoed on July 19, 2006); Stem Cell Research Enhancement Act of 2007, S. 5, 110th Cong. (vetoed on June 20, 2007).

9. *See* Richard Guerra, *States Take the Initiative to Regulate and Resolve the Stem Cell Debate*, 7 FLA. COASTAL L. REV. 35, 39 (2005). On one hand, Congress could not garner enough support to override President Bush's veto of a bill that provided federal funding for stem cell research. *See* Stem Cell Research Enhancement Act of 2007, S. 5. On the other hand, a proposal to ban human cloning, including cloning for stem cell research, has been repeatedly introduced in Congress without success. *See, e.g.*, Human Cloning Prohibition Act of 2007, H.R. 2560, 110th Cong. (2007); Human Cloning Research Prohibition Act, H.R. 222, 109th Cong. (2005); Human Cloning Prohibition Act of 2003, H.R. 534, 108th Cong. (2003); Human Cloning Prohibition Act of 2001, H.R. 2505, 107th Cong. (2001); Human Cloning Prohibition Act, H.R. 923, 105th Cong. (1997).

10. In 2004, for example, California voters passed Proposition 71, which established a constitutional right to conduct stem cell research. CAL. CONST. art. XXXV. The initiative also authorized the issuance of three billion dollars in bonds to fund such research. CAL. HEALTH & SAFETY CODE § 125291.30 (West 2008). *See generally* Molly Silfen, Note, *How Will California's Funding of Stem Cell Research Impact Innovation? Recommendations for an Intellectual Property Policy*, 18 HARV. J.L. & TECH. 459 (2005) (analyzing Proposition 71 and its possible implications for innovation).

11. Nat'l Conference of State Legislatures, State Embryonic and Fetal Research Laws (Jan. 2008), http://www.ncsl.org/programs/health/genetics/embfet.htm. South Dakota, for example, prohibits research that destroys human embryos. *See* S.D. CODIFIED LAWS § 34-14-16 (2008). South Dakota also prohibits a person from performing subsequent research using tissues or cell lines that the person knows were obtained by destroying a human embryo. *See id.* § 34-14-18.

12. Therapeutic cloning is the process of creating embryonic stem cells by inserting the nucleus of a differentiated adult cell into a donated egg that has had its nucleus removed. *See* NAT'L ACADEMIES, *supra* note 5, at 6–7.

13. This technique is especially promising because it may enable scientists to create stem cells that are genetically matched to the patient needing a transplant, reducing the chance that the patient's body will reject the transplanted cells. *See id.* at 7.

14. *See, e.g.*, 144 CONG. REC. S601 (daily ed. Feb. 11, 1998) (statement of Sen. Bond) ("Once you start creating those cloned human embryos, it is a very simple procedure to implant them. Implantation of embryos is going along in fertility research now, and it would be impossible to police, to make sure they didn't start implanting them.").

therapeutic cloning.[15] Furthermore, the Food and Drug Administration ("FDA") has claimed authority to regulate cloning as an investigational new drug ("IND").[16] Research sponsors are required to submit an IND application to FDA that describes the proposed cloning research, and FDA has stated that it will not approve any human cloning IND applications until an IND appropriately addresses the safety concerns related to the use of cloning technology.[17]

Recent attacks on regulations limiting access to experimental drugs have cast doubt on the legitimacy of stem cell research restrictions. Notably, the Abigail Alliance for Better Access to Developmental Drugs and the Washington Legal Foundation ("Abigail Alliance") recently brought suit against FDA, claiming that agency regulations denying access to drugs that had successfully completed Phase I clinical trials violated the constitutional rights of terminally ill patients.[18] Abigail Alliance argued that for patients who have life-threatening conditions and no other treatment options, restrictions on pre-approval drugs amount to a death sentence, which violates the Fifth Amendment protection against deprivation of life without due process.[19] This type of claim rests upon a line of cases that the Court has characterized as "interpret[ing] the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government from any infringement upon certain 'fundamental' liberty interests, no matter

15. Arkansas, Indiana, Michigan, North Dakota, and South Dakota currently prohibit therapeutic cloning. ARK. CODE ANN. § 20-16-1002 (2008); INDIANA CODE §§ 35-46-5-2, 16-18-2-56.5 (2006); MICH. COMP. LAWS ANN. §§ 333.16274–.16275, 333.20197, 750.430a (West 2008); N.D. CENT. CODE § 12.1-39-01 to -02 (2007); S.D. CODIFIED LAWS § 34-14-26 to -27 (2008). Virginia may also ban therapeutic cloning, though it is not clear whether the state's prohibition on creating a "human being" through cloning includes creating a blastocyst. Nat'l Conference of State Legislatures, *supra* note 11; *see also* VA. CODE ANN. § 32.1-162.21 to 162.22 (2007).

16. *See* Dear Colleague Letter from Stuart L. Nightingale, Assoc. Comm'r, FDA (Oct. 26, 1998) [hereinafter Nightingale Letter], *available at* http://www.fda.gov/oc/ohrt/irbs/irbletr.html ("Clinical research using cloning technology to create a human being is subject to FDA regulation under the Public Health Service Act and the Federal Food, Drug, and Cosmetic Act."); *see also* Richard A. Merrill & Bryan J. Rose, *FDA Regulation of Human Cloning: Usurpation or Statesmanship?*, 15 HARV. J.L. & TECH. 85 (2001) (examining the legal and policy issues surrounding the FDA's claimed authority to regulate cloning); Elizabeth C. Price, *Does the FDA Have Authority to Regulate Human Cloning?*, 11 HARV. J.L. & TECH. 619 (1998) (discussing possible statutory bases for the FDA's authority to regulate cloning).

17. *See* Nightingale Letter, *supra* note 16 ("Since FDA believes that there are major unresolved safety questions pertaining to the use of cloning technology to create a human being, until those questions are appropriately addressed in the IND, FDA would not permit any such investigation to proceed."); *see also* 21 C.F.R. § 312.20–38 (2007) (setting forth the procedures and requirements for the submission and review of INDs).

18. Complaint at 10–11, Abigail Alliance for Better Access to Developmental Drugs v. McClellan, No. 03-1601, 2004 U.S. Dist. LEXIS 29594 (D.D.C. Aug. 30, 2004), *available at* http://www.wlf.org/upload/Abigail%20Alliance%20complaint.pdf.

19. *Id.*

what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[20]

Somewhat surprisingly,[21] a three-judge panel of the D.C. Circuit agreed with Abigail Alliance and held that terminally ill patients, acting on a doctor's advice, had a fundamental right "to obtain potentially life-saving medication when no alternative treatment approved by the government is available."[22] The D.C. Circuit later vacated the decision, however, and granted FDA's motion for a rehearing en banc.[23] The en banc panel held that there was no constitutional right of access to experimental drugs for the terminally ill,[24] and the Supreme Court recently denied certiorari.[25]

In addition to Abigail Alliance, several commentators have argued that there may be a substantive due process right to pursue medical treatment. Notably, Professor Eugene Volokh proposed a constitutional right to protect one's life using medical procedures, a right he termed "medical self-defense."[26] Drawing upon the medical self-defense theory and applying it in the stem cell context, some commentators have suggested that the right of access to stem cell treatments may also be protected as a fundamental right.[27]

A fundamental right of access to stem cell therapies would have important implications for state laws restricting stem cell research. Upon finding that a law implicates a fundamental right, courts must analyze government regulations interfering with that right under

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20. Reno v. Flores, 507 U.S. 292, 301–02 (1993) (citing Collins v. Harker Heights, 503 U.S. 115, 125 (1992); United States v. Salerno, 481 U.S. 739, 746 (1987); Bowers v. Hardwick, 478 U.S. 186, 191 (1986)).

21. *See, e.g.*, Susan Okie, *Access Before Approval — A Right to Take Experimental Drugs?*, 355 NEW ENG. J. MED. 437, 437 (2006).

22. Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 445 F.3d 470, 486 (D.C. Cir. 2006). The panel remanded the case to the district court for a determination of whether there was a compelling state interest justifying the regulation. *Id.* at 486.

23. Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, No. 04-5350, 2006 U.S. App. LEXIS 28974 (D.C. Cir. Nov. 21, 2006).

24. Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695, 697 (D.C. Cir. 2007) (en banc).

25. 76 U.S.L.W. 3189 (U.S. Jan. 14, 2008) (No. 07-444).

26. Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813 (2007).

27. *See* RUSSELL KOROBKIN WITH STEPHEN R. MUNZER, STEM CELL CENTURY 81 (2007); *cf.* Michael Bellinger, *The Constitutional Right to Therapeutic Cloning*, 7 J. MED. & L. 37, 41–42 (2002) (finding a substantive due process right to be treated with therapeutic cloning based on "the right of a patient to a medical treatment that will preserve their life or health"); Yvonne Cripps, *The Art and Science of Genetic Modifications: Re-Engineering Patent Law and Constitutional Orthodoxies*, 11 IND. J. GLOBAL LEGAL STUD. 1, 25 (2004) (suggesting that legislation banning human cloning may infringe a fundamental right by blocking life-saving treatment); John A. Robertson, *Embryo Culture and the "Culture of Life": Constitutional Issues in the Embryonic Stem Cell Debate*, 2006 U. CHI. LEGAL F. 1, 7 ("ESC supporters might plausibly argue that a ban on the use of ESC therapies that will save lives or ameliorate pain and disability would violate a person's Fifth and Fourteenth Amendment rights to life and liberty.").

"strict scrutiny" — a rigorous standard famously characterized as "'strict' in theory and fatal in fact."[28] To survive strict scrutiny, laws must be "both necessary and narrowly tailored to serve a compelling governmental interest."[29] While analysis of the governmental interests in regulating stem cell research is beyond the scope of this Note, it is possible that state bans on stem cell research would fail such a stringent test.[30]

This Note analyzes the threshold question of whether terminally ill patients have a fundamental right of access to stem cell treatments. Because Professor Volokh's theory of medical self-defense is the most relevant concept to this issue, and the one that has attracted the most attention in the legal community,[31] this Note focuses on whether a right of access to stem cell treatments can be defended under his theory of medical self-defense. It also examines how such a right might be extended to protect the ability to conduct stem cell research. Part II provides background on Professor Volokh's theory of medical self-defense and explains how it would theoretically apply in the stem cell research context. Part III goes on to conclude that the theory of medical self-defense does not create a fundamental right of access to stem cell treatments for three reasons: First, Part III.A argues that the general theory of medical self-defense is not supported by the Supreme Court's substantive due process jurisprudence, including the abortion case law. Second, Part III.B contends that application of the medical self-defense theory is even weaker in contexts, such as stem cell therapy, that do not implicate family and intimate association

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28. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also* Laurence H. Tribe & Michael C. Dorff, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1057–58 (1990) ("Because the 'strict' scrutiny which applies to laws that affect fundamental rights in either of these two ways is usually 'fatal,' whether to designate a right as fundamental poses a central substantive question in modern constitutional law." (internal footnote omitted)). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 822 tbl.3 (2006) (finding a strict scrutiny survival rate of 50% in federal courts).

29. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 929 (1992).

30. Federal funding restrictions on stem cell research do not implicate the Due Process Clause and will not be considered in this Note. Even if such a substantive due process right exists, the state has no affirmative duty to fund stem cell research. Due process serves as a restraint on the government's power to infringe on individual liberty; it does not confer any positive right to have the government help individuals achieve a fundamental right. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) ("[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").

31. For example, after reading a draft of the article, lawyers for the Abigail Alliance edited their petition for certiorari to include some of Volokh's arguments. *See* Christopher Shea, *Why Can't You Buy a Kidney to Save Your Life?*, BOSTON GLOBE, July 1, 2007, at D1, *available at* http://www.boston.com/news/education/higher/articles/2007/07/01/why_cant_you_buy_a_kidney_to_save_your_life/.

interests. Third, Part III.C argues that the current Supreme Court would be unlikely to frame the right of access to stem cell treatments as an abstract right to engage in medical self-defense. Finally, Part IV briefly summarizes and concludes.

II. THE ARGUMENT FOR MEDICAL SELF-DEFENSE IN THE STEM CELL CONTEXT

A. The Theory of Medical Self-Defense

Self-defense has long been recognized as a valid justification for the violation of criminal laws.[32] It allows would-be victims to use lethal force against an attacker, and it is not limited to defense against attackers that are morally culpable, or even human.[33] Many commentators have argued that self-defense is constitutionally protected as a fundamental right because it is an extension of the "right to life" recognized by the Due Process Clauses of the Fifth and Fourteenth Amendments.[34] The Supreme Court has never directly addressed the issue, though some commentators have hypothesized that the near-universal acceptance of the self-defense doctrine obviates the need for this type of judicial review.[35] In addition, some state courts have held that the right to self-defense is protected under state constitutions.[36]

Drawing upon the traditional right of self-defense to defend oneself against an attacker, Professor Volokh posits that the logical extension of that right would be the ability to use medical means to defend oneself against lethal medical threats such as cancer or organ failure.[37] Volokh finds his primary support for the medical self-defense right in the abortion context. Noting that the Supreme Court has continuously held that abortion regulations must contain an exception for the life or health of the mother,[38] Volokh argues that this

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32. *See, e.g.*, MODEL PENAL CODE § 3.04 (2001) ("[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.").

33. *See* Volokh, *supra* note 26, at 1817.

34. *See, e.g.*, Nicholas J. Johnson, *Self-Defense?*, 2 J.L. ECON. & POL'Y 187, 188 (2006) (arguing that self-defense is "in the first echelon of fundamental constitutional rights").

35. *See, e.g.*, Volokh, *supra* note 26, at 1818 ("Lethal self-defense is so broadly accepted that courts have rarely encountered grave restrictions on it, and thus haven't squarely decided whether the federal Constitution protects it.").

36. *Id.*; *see also* Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399, 409–10 (2007) (discussing state court decisions finding a constitutional right to self-defense in criminal cases).

37. *See* Volokh, *supra* note 26, at 1818.

38. *See* Stenberg v. Carhart, 530 U.S. 914, 931 (2000) ("[T]he governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation for the life or health of the mother,' for this Court has made clear that a State

requirement is grounded in a theory of medical self-defense.[39] He characterizes the exception as "a right to defend oneself using medical care, even when this requires destroying the source of the threat,"[40] and reasons that such a right to defend oneself using medical procedures cannot be limited to abortion; it should instead extend to other types of medical self-help.[41] In short, he concludes that medical self-defense shares a "moral core" with traditional self-defense: "people should be free to defend themselves against that which is threatening their lives."[42]

B. Application of Medical Self-Defense to Stem Cell Treatments and Stem Cell Research

Assuming the validity of medical self-defense,[43] applying the theory to the right of access to stem cell therapies is relatively straightforward. For medical self-defense to be applicable, one must conceptualize the disease as an aggressor and conceptualize access to stem cell therapies as a method of combating this aggressor.[44] Under this formulation, patients would have a right of access to stem cell therapies even if the therapies had not yet been shown to be safe or effective because "the law has never required proof that self-defense measures are certain or even likely to succeed."[45] As long as self-defense is directed at the source of the threat, victims have a right to defend themselves "even in circumstances or ways that government officials might consider futile, imprudent and excessively dangerous."[46]

The application of medical self-defense in the stem cell therapy context is nevertheless subject to some limitations. First, because the self-defense justification is limited to threats that are imminent, any

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may promote but not endanger a woman's health when it regulates the methods of abortion." (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992))).

39. Volokh, *supra* note 26, at 1824; *see also* KOROBKIN, *supra* note 27, at 80 ("The implication of this reasoning is that a pregnant woman has a constitutionally cognizable right to pursue medical treatment (in this case, an abortion) when her health is in jeopardy.").

40. Volokh, *supra* note 26, at 1824.

41. *Id.* at 1816 ("[I]t can't be that a woman has a constitutional right to protect her life using medical procedures, but only when those procedures kill a viable fetus . . . .").

42. *Id.* at 1825–26.

43. Many commentators have argued that there is a fundamental right to traditional self-defense. *See supra* notes 34–36 and accompanying text. Rather than rehash these arguments, this Note assumes that a fundamental right to lethal self-defense exists.

44. *Cf.* Petition for Writ of Certiorari at 16, Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, No. 07-444 (U.S. Sept. 28, 2007) [hereinafter Abigail Cert. Petition], *available at* http://www.wlf.org/upload/09-28-07Abigail%20 ceriorari%20petition.pdf ("There is no moral or legal difference between attack by an animal and attack by mutated cancer cells.").

45. *Id*. at 17.

46. *Id.*

right of access is limited to those patients that face an immediate threat — namely, terminally ill patients. This Section begins by applying the imminence requirement to the right of access to stem cell treatments. Second, stem cell therapies are arguably distinguishable from other medical self-defense measures because the process of producing stem cell treatments destroys embryos. This Section addresses this argument and concludes that injury to embryos does not impact the existence of a fundamental right to access therapies. Third, this Section addresses the current reality that stem cell research is still in its basic stages, making it unclear when, if ever, stem cell technology will translate into effective treatments.[47] Thus, it is the ability to conduct *research* that is important to patients at this time. This Section concludes by discussing how protection for stem cell research might arise if terminally ill patients have a fundamental right of access to stem cell treatments.

1. The Imminence Requirement

Some commentators argue that a substantive due process right of access to medical treatments would be too broad and unlimited, effectively destroying the government's regulatory power.[48] However, applying the imminence requirement of traditional self-defense to medical self-defense can mitigate these concerns. The imminence requirement mandates that lethal force is justified only when "such force is immediately necessary" to prevent "death [or] serious bodily injury."[49] Of course, the threat in the medical self-defense context is almost never as temporally imminent as in the lethal self-defense context. To address the differences between traditional and medical self-defense rights, Professor Volokh suggests viewing the imminence requirement in light of its purposes: it is a "rough proxy" for the necessity of lethal defense, and is therefore intended to minimize false or erroneous claims of necessity.[50] In the case of stem cell therapies, these purposes are satisfied by a terminal illness. A terminal disease is

47. *See, e.g.*, *Stem Cell Research: Hearing Before a Subcomm. of the S. Comm. on Appropriations*, 105th Cong. 14 (1998) (statement of James Thomson, Ph.D., Associate Research Animal Veterinarian, Wisconsin Regional Primate Research Center) ("Although the long-term potential for human therapies resulting from human ES cell line research is enormous, these therapies will take years to develop. Significant advances in developmental biology and transplantation medicine are required, but I believe that therapies resulting from human ES cell research will become available within my lifetime.").

48. *See, E.g.*, Peter D. Jacobsen & Wendy E. Parmet, *A New Era of Unapproved Drugs: The Case of* Abigail Alliance v Von Eschenbach, 297 JAMA 205, 207 (2007) ("[T]he fundamental rights analysis, rooted in patient autonomy, could easily apply to medications expected to prevent pain or disability. As the dissent noted, why would the majority's reasoning not apply to pharmaceuticals for patients with serious but not terminal medical conditions?").

49. MODEL PENAL CODE § 3.04 (2001).

50. Volokh, *supra* note 26, at 1823–24.

lethal and necessitates treatment, and an objective medical expert makes the determination, reducing the chances of false or erroneous self-defense claims.[51] Thus, by analogy to traditional self-defense, the fundamental right in the stem cell context should be a right of access to stem cell therapies, with this right limited to terminally ill patients.

2. Injury to the Embryo

Another argument against the application of medical self-defense in the stem cell context is that the medical procedures cited by Professor Volokh are distinguishable from stem cell therapies because none of his cited procedures threaten the life of a third party. "If I may kill a human or an animal to protect my life," his argument goes, "why shouldn't I be presumptively free to protect my life using medical procedures that *don't involve killing*, such as compensated organ transplants or the use of experimental drugs?"[52] If one believes that embryos have full moral status, then stem cell therapies fall outside this argument because they are produced by destroying an embryo to extract stem cells — a process tantamount to murder. Indeed, Volokh recognizes that "lethal self-defense, like other rights, doesn't include the right to injure the life, liberty, or property of people who aren't the source of the threat."[53]

While this argument should be considered when examining the ethics of stem cell research, it plays no role in the threshold inquiry of whether a fundamental right exists. While the moral status of the embryo has been widely debated, the Supreme Court has declared that a fetus is not a "person" subject to due process protection.[54] Therefore, an embryo does not have a right to life that is violated by extracting stem cells. While the government's interest in protecting potential life is relevant to the "compelling state interest" prong of the due process analysis,[55] a fetus' moral status does not implicate the existence of a fundamental right.

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51. For a more detailed explanation of the imminence argument, see *id.* at 1824 ("You can't flee kidney disease that can be cured only through a transplant, nor can you call the police to protect you. Present medical threats of future harm are generally more reliably diagnosable than human threats are.").

52. Volokh, *supra* note 26, at 1818 (emphasis added).

53. *Id*. at 1821.

54. Roe v. Wade, 410 U.S. 113, 158 (1973) ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn."); *see also* Davis v. Davis, 842 S.W.2d 588, 595 (Tenn. 1992) ("Nor do preembryos enjoy protection as 'persons' under federal law.").

55. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) ("[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.").

3. Protection for Stem Cell Research

Laws that restrict the right to conduct stem cell research arguably violate the constitutional rights of terminally ill patients because they restrict the right of access to stem cell therapies. If the Supreme Court found a fundamental right to access treatments, government regulations infringing on that right would be analyzed under strict scrutiny, a stringent standard requiring that the regulation be narrowly tailored to serve a compelling state interest.[56] If challenged, current regulations of stem cell research would be subject to strict scrutiny.

Laws that limit research, especially those that forbid research on embryonic stem cells obtained from any source,[57] restrict terminally ill patients' access to stem cell treatments because of the proximate relationship between research and therapy.[58] Stem cell research is still in its early stages; therefore, restrictions on research have the effect of foreclosing therapies at the outset. As Professor John Robertson has argued, if the fundamental right to access did not protect research, "a paradox would exist: a patient has a right to use an [embryonic stem cell] treatment once developed, but no one has a right to do the research necessary to develop it."[59]

Restrictions on research therefore infringe on a patient's right of access to stem cell treatments. Because research is necessary to achieve treatment, it is analogous to third-party assistance to self-defense, such as a doctor performing a therapeutic abortion.[60] Just as the government cannot place a substantial obstacle in the path of a woman seeking an abortion,[61] it also cannot bar patients' access to stem cell treatments by preventing the discovery of such treatments unless the regulations are narrowly tailored to serve a compelling state interest. While analysis of the government interest in regulating stem cell research is beyond the scope of this Note, it is unlikely that

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56. *See, e.g.*, Reno v. Flores 507 U.S. 292, 301–02 (1993) (stating that the Due Process Clause "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored").

57. South Dakota, for example, prohibits research that uses tissues or cell lines that the person knows were obtained by destroying a human embryo. *See* S.D. CODIFIED LAWS § 34-14-18 (2008).

58. However, because the right of access exists only for terminally ill patients, *see supra* Part II.B.1, laws restricting research directed at patients who are not terminally ill would not infringe a fundamental right.

59. Robertson, *supra* note 27, at 33.

60. *See* KOROBKIN, *supra* note 27, at 81–82 ("The issue is whether the government may prohibit the individual from using the assistance of others to intervene in that internal condition to restore health.").

61. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.) ("[W]here state regulation imposes an undue burden on a woman's ability to make this decision . . . the power of the State reach[es] into the heart of the liberty protected by the Due Process Clause.").

complete bans on stem cell research are sufficiently narrow to survive strict scrutiny.[62]

Lower court decisions regarding third-party rescues also suggest that bans on stem cell research may be constitutionally prohibited. These decisions have held that government action that blocks others from rescuing a person may unconstitutionally deprive that person of his or her life without due process.[63] By analogy, a scientist conducting stem cell research is a third-party rescuer attempting to save the life of terminally ill individuals. Under the medical self-defense theory, obstructing the researcher's efforts would be unconstitutional.

Of course, one could argue that the medical self-defense analogy is inappropriate because stem cell research has not yet yielded therapies capable of effectively defending against disease — and thus is not a rescue attempt. For example, after rehearing en banc, the court of appeals in *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*[64] rejected an analogy between providing patients with experimental drugs and third-party rescue because the drugs had not been shown to be safe or effective at prolonging life.[65] However, by adding an efficacy requirement in the context of medical self defense, the court of appeals failed to recognize that "the law has never required proof that rescue efforts would be certain or even likely to succeed; it is interference with the *chance* of rescue that is tortious."[66] Indeed, the underlying rationale of self-defense is not premised on success.[67] Thus, by analogy, the right to medical self-defense should not require that stem cell research be the best or only effective mechanism to combat a patient's illness.[68]

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62. For a more complete analysis of government interests in banning stem cell therapies, see Robertson, *supra* note 27, at 17 (arguing that regulations limiting access to embryonic stem cell therapies would fail strict scrutiny because "none of the asserted state interests is sufficiently robust to justify the health loss to individuals denied safe and effective ESC therapies").

63. *See, e.g.*, Ross v. United States, 910 F.2d 1422, 1432 (7th Cir. 1990) (holding that a police officer who prevented private volunteers from rescuing a drowning boy deprived life in violation of the Due Process Clause); Beck v. Haik, 234 F.3d 1267 (6th Cir. 2000) (stating in dicta that an official action that prevents private rescue arbitrarily deprives the victim of his right to life if a state-sponsored alternative is not available).

64. 495 F.3d 695 (D.C. Cir. 2007) (en banc).

65. *Id.* at 708.

66. Abigail Cert. Petition, *supra* note 44, at 18 (discussing *Ross*, 910 F.2d 1422, in which interference with third-party rescue was found to have violated the due process rights of a boy who had already been underwater for ten minutes); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 382 (5th ed. 1984) (arguing that protection of third-party rescue "has been carried even to the length of holding that there is liability for interfering with the possibility of such aid").

67. *See supra* notes 45–46 and accompanying text.

68. *See* KOROBKIN, *supra* note 27, at 82 ("[W]hether patients have a fundamental right not to have the government impede their search for a cure should not depend upon the likelihood of a cure's being available.").

III. THE FUNDAMENTAL RIGHTS ANALYSIS

Many persons in the United States approve of stem cell research and are frustrated by current laws prohibiting embryonic stem cell research and therapeutic cloning.[69] As the previous Part has shown, it is tempting to characterize laws restricting stem cell research as infringing on a fundamental right to access therapies, which would make restrictions on research subject to strict scrutiny. This Part, however, explains why this characterization is ultimately inapt — the underlying right of access to stem cell therapies, which research restrictions would infringe, cannot be derived from medical self-defense. First, this Part explains how the medical self-defense theory itself suffers weaknesses and may not be supported by the health exception in abortion jurisprudence. Second, this Part reasons that even if medical self-defense is valid, it may be unique to the abortion context, where interests of intimate association and bodily integrity provide dual pillars of support for the right. Finally, this Part argues that the Supreme Court is unlikely to articulate the right of access to stem cell therapies as a right to engage in medical self-defense. Instead, the Court might narrowly describe the asserted right as the right to access existing stem cell treatments, and conclude that such a right is not "deeply rooted in this Nation's history and tradition."[70]

A. Weaknesses of the Medical Self-Defense Theory

The theory of medical self-defense depends on a line of cases in which the Supreme Court has held that a woman has a right to terminate her pregnancy, even after the point of viability, when her life or health is threatened.[71] Indeed, Professor Volokh concedes that "[t]he Supreme Court has so far recognized the medical self-defense right only in abortion cases."[72] The scope of the abortion "health" exception, however, extends beyond the traditional right to self-defense, which is limited to those situations where "the actor believes

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69. *See* Press Release, Coalition for the Advancement of Medical Research, Nearly Three-Quarters of America Supports Embryonic Stem Cell Research (May 16, 2006), *available at* http://www.stemcellfunding.org/camr_news.aspx?rid=051606B (announcing a nationwide poll "revealing that nearly three-quarters of Americans support embryonic stem cell research and want the Senate to vote on federal funding for stem cell research").

70. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

71. *See* Volokh, *supra* note 26, at 1824–28. The health exception requirement has existed since *Roe v. Wade*, 410 U.S. 113 (1973), in which the Court held that after the point of viability, the government "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *Id.* at 163–64; *see also* Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 846 (1992) (confirming "the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health").

72. Volokh, *supra* note 26, at 1826.

that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat."[73] By strict analogy, a self-defense exception should only extend to cases in which the mother's life is threatened.[74] Yet the health exception is actually quite broad, extending to "physical, emotional, psychological, familial, and . . . age" considerations.[75]

The Court's opinion in *Stenberg v. Carhart*[76] also calls into question whether the health exception is rooted in a self-defense rationale. In *Stenberg*, the Court overturned a Nebraska statute banning certain methods of partial birth abortion, unless "necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury."[77] The Court held that the lack of a health exception rendered the statute unconstitutional.[78] In his dissent, Justice Thomas maintained that a health exception is only required when the pregnancy itself threatens the mother's health.[79] The majority, on the other hand, took the view that abortion laws must make an exception for a particular method of abortion when the alternative procedures could endanger the mother's health. Responding to Justice Thomas's argument, the majority stated:

> Justice Thomas says that the cases just cited limit this principle to situations where the pregnancy *itself* creates a threat to health. He is wrong. The cited cases, reaffirmed in *Casey*, recognize that a State cannot subject women's health to significant risks both in that context, *and also* where state regulations force women to use riskier methods of abortion.[80]

Essentially, the majority maintained that states must allow women to choose a particular method of abortion if it would be safer than other available methods, regardless of whether the pregnancy itself endangers the woman's health.[81] The *Stenberg* articulation of the

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73. MODEL PENAL CODE § 3.04 (2001).

74. O. Carter Snead, *Unenumerated Rights and the Limits of Analogy: A Critique of the Right to Medical Self-Defense*, 121 HARV. L. REV. F. 1, 2–4 (2007), http://www.harvardlawreview.org/forum/issues/120/may07/snead.shtml.

75. Doe v. Bolton, 410 U.S. 179, 192 (1973).

76. 530 U.S. 914 (2000).

77. *Id.* at 921–22 (quoting NEB. REV. STAT. ANN. § 28-328(1) (LexisNexis 1999)).

78. *See id.* at 931.

79. *Id.* at 1009–10 (Thomas, J., dissenting).

80. *Id.* at 931 (majority opinion) (internal citations omitted).

81. *See* B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 279 (2007). ("[T]he Supreme Court broadly recognized an almost absolute right of a woman to choose a particular abortion procedure when her physician believes, in the physician's reasonable medical judgment, that the procedure is safer for the woman than any other available abortion procedures."); Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV.

health exception survived the Court's later decision in *Gonzales v. Carhart*,[82] which upheld the federal Partial-Birth Abortion Ban Act of 2003,[83] despite the Act's lack of a health exception. The Court distinguished the federal ban from the state statute at issue in *Stenberg* partly on the grounds that Congress had made specific factual findings in the federal statute that the banned procedure was "never medically necessary."[84] Stating that legislatures have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty,"[85] the Court held that the Act was not facially invalid in light of the uncertainty over whether the banned procedure was ever necessary to preserve a woman's health.[86] The *Carhart* opinion did not, however, question the fundamental premise of *Stenberg* that a woman must be allowed to choose a particular method of abortion if it would be safer than other available methods.

This broad health exception cannot be explained on the basis of self-defense; self-defense is only justifiable against an aggressor.[87] If the pregnancy does not threaten the mother's health, then the fetus is not the source of the threat from which the self-defense right would otherwise arise. Thus, as currently formulated, the abortion health exception cannot be neatly described as a pure extension of the self-defense right. This mismatch makes clear that concerns other than medical self-defense form the basis of the health exception requirement. Speculating on the identity of these concerns is beyond the scope of this Note, but a brief review of the literature and case law suggests that they may include a woman's "well-being, broadly understood,"[88] her right to make medical treatment choices,[89] or a woman's dignity and equality.[90] In any case, a right of medical self-defense finds only tenuous support in abortion case law. Thus the theory is without a clear analogue in Supreme Court jurisprudence and rests on unstable footing.

641, 664 (2001) ("After viability, Nebraska's problem was that it failed to require that the woman's health be the decisive variable in choosing an abortion method.").

82. 127 S. Ct. 1610 (2007).

83. Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (Supp. V 2005)).

84. *Id.* at 1624.

85. *Id.* at 1366.

86. *See id.* at 1638.

87. *See supra* note 32 and accompanying text.

88. Snead, *supra* note 74, at 3.

89. *See* Hill, *supra* note 81, at 291.

90. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); *see also* Stenberg v. Carhart, 530 U.S. 914, 920 (2000) ("[M]illions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risk of death and suffering."). *But see* Volokh, *supra* note 26, at 1826 n.66 (claiming that sex equality "is not the justification that the Court has generally given for the abortion right").

B. The Medical Self-Defense Right May Be Unique to Abortion

Even assuming that medical self-defense forms the basis for the abortion health exception, the unique rationales underlying the abortion right may render the theory not extensible to other contexts. While Professor Volokh maintains that his theory can be extended beyond abortion to support a right of access to other types of life-saving treatments,[91] abortion may be distinguishable from other therapies because it implicates both a woman's right to reproductive freedom and her right to preserve bodily integrity.

The abortion right recognized in *Roe v. Wade*[92] derives from two branches of case law regarding substantive due process rights: one recognizing a right to be free from government interference in family decisions and intimate association,[93] and one recognizing personal autonomy and bodily integrity.[94] According to the Supreme Court:

> *Roe* stands at an intersection of two lines of decisions . . . . The *Roe* Court itself placed its holding in the succession of cases most prominently exemplified by *Griswold v. Connecticut* . . . . *Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.[95]

Combined, a woman's right to freedom in intimate decisions under *Griswold* and her right to bodily integrity form a right to

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91. Volokh, *supra* note 26, at 1826 (arguing that "[n]othing about therapeutic postviability abortion makes it deserve protection more than any other medical self-defense procedure.")

92. 410 U.S. 113 (1973).

93. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (invaliding a law that prevented single persons from obtaining contraceptives by finding that it violated the equal protection clause); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that the miscegenation statute violated the Equal Protection and Substantive Due Process clauses); Griswold v. Connecticut, 381 U.S. 479, 481–82 (1965) (holding that a law forbidding use of contraceptives violated the right of marital privacy).

94. *See* Nancy Pham, Note, *Choice v. Chance: The Constitutional Case for Regulating Human Germline Genetic Modification*, 34 HASTINGS CONST. L.Q. 133, 139 (2006) ("Additionally, *Roe* and *Casey* were decided not only on values of procreative liberty, but also on rules of bodily integrity. That is, bodily integrity was doing some of the work along with a woman's right to make reproductive decisions." (footnote omitted)).

95. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992).

reproductive choice that the government cannot infringe prior to the point of viability.[96]

These dual interests, which combine to form a right to reproductive choice, also support the health exception requirement. Though Professor Volokh asserts that a woman's right to reproductive choice does not underlie the abortion health exception because "[a]fter viability, the time for that choice has passed,"[97] a woman's right to reproductive choice is merely outweighed post-viability by the government's "important and legitimate interest in potential life."[98] A woman's interests in autonomy and bodily integrity still remain intact after a fetus becomes viable, forming two legs of support for the life or health exception. In contrast, the medical self-defense right may not support a fundamental right to medical treatment unless both the issues of bodily integrity and family and intimate association are implicated. Bodily integrity most likely is implicated in the ability to access medical treatments to attack disease within one's body — removing a life-threatening disease is like removing a life-threatening fetus.[99] It is doubtful, however, that the family and intimate association interest is implicated by one's ability to receive medical treatment. Lacking the unique support provided in this context, the medical self-defense right does not extend to medical treatments beyond abortion.

C. Framing the Right of Access to Stem Cell Therapies as Medical Self-Defense

The Supreme Court has not provided a clear test to determine if an unenumerated right is fundamental, leaving substantive due process jurisprudence unsettled.[100] What structure there is to the substantive due process jurisprudence follows two strands. One

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96. *See id.* at 846 (affirming "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State").

97. Volokh, *supra* note 26, at 1826.

98. *Casey*, 505 U.S. at 871 (quoting Roe v. Wade, 410 U.S. 113, 163 (1973) (internal quotation mark omitted)); *id.* at 860 ("[V]iability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.").

99. Volokh, *supra* note 26, at 1826 ("A patient's adding substances (such as medications or an organ) to her body, as well as her removing substances from her body (say, through medications that kill cancer cells), involves her control over her body as much as does a doctor's inserting a surgical instrument to remove a fetus.").

100. *See* Alissa Puckett, Comment, *The Proper Focus for FDA Regulations: Why the Fundamental Right to Self-Preservation Should Allow Terminally Ill Patients with No Treatment Option to Attempt to Save Their Lives*, 60 SMU L. REV. 635, 636 (2007). The unsettled nature of the Supreme Court's due process analysis was one of the main arguments for certiorari in *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*. *See* Abigail Cert. Petition, *supra* note 44, at 26 ("[T]his case presents an opportunity to provide needed guidance about *Glucksberg*'s 'careful description' requirement.").

strand, yielding a restrictive test, focuses on legal history and tradition. The other strand, associated with a more lenient test, focuses on individual autonomy and liberty.

In *Washington v. Glucksberg*,[101] the Court articulated the more restrictive analysis, announcing a two-pronged test for the existence of a fundamental right. First, a court must articulate a "careful description" of the asserted fundamental right.[102] Second, a court must determine whether the right is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[103]

The more lenient test was used in *Lawrence v. Texas*, [104] in which the Court conducted a due process analysis that differed greatly from the one in *Glucksberg*. The Texas law at issue in *Lawrence* prohibited same-sex sodomy, and it was substantially similar to a law previously upheld by the Court in *Bowers v. Hardwick*.[105] *Bowers* defined the asserted fundamental right narrowly, as the right of gays and lesbians "to engage in sodomy."[106] The *Lawrence* Court, however, evaluated the sodomy statute at a higher level of generality than the *Bowers* Court, stating that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[107] The *Lawrence* opinion departed from *Glucksberg*'s emphasis on history and tradition, focusing instead on "emerging awareness" and on the laws and traditions of the last half century.[108]

The probability that the Court would find a fundamental right of access to stem cell treatments is greater under the autonomy-centric *Lawrence* framework than under *Glucksberg*. The *Lawrence* approach does not require history and tradition, making it more protective of emerging technologies — which, by definition, cannot have a long tradition of acceptance. However, it is unlikely that the Court would apply the *Lawrence* framework to stem cell research for several reasons.

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101. 521 U.S. 702 (1997).
102. *Id.* at 721.
103. *Id.* (internal citations omitted).
104. 539 U.S. 558 (2003).
105. 478 U.S. 186 (1986).
106. *Id.* at 190.
107. *Lawrence*, 539 U.S. at 572.
108. *Id.*; *see also* Note, *Last Resorts and Fundamental Rights: The Substantive Due Process Implications of Prohibitions on Medical Marijuana*, 118 HARV. L. REV. 1985, 1988 (2005) ("*Lawrence*, in overturning the holding of *Bowers v. Hardwick* that anti-sodomy laws do not violate substantive due process, emphasized that the Court must not take such a myopic view of the claimed right that it loses sight of the values at stake — the underlying fundamental freedoms that might be endangered if particular conduct is prohibited."(footnote omitted)).

First of all, commentators and the Justices themselves disagree over whether *Lawrence* actually recognized a fundamental right or applied strict scrutiny.[109] Second, a majority of current Justices have supported the *Glucksberg* approach, and have announced a reluctance to expand the scope of substantive due process.[110] For example, a recent study of post-*Lawrence* cases reported: "numerous courts apply[] the *Glucksberg* Doctrine to substantive due process claims as if *Lawrence* never happened. Even those relatively few cases that acknowledge *Lawrence*'s presence (usually suits regarding gay rights or sexual liberty) still find *Glucksberg* controlling."[111] Thus, the *Glucksberg* rubric would most likely be used by the current Supreme Court.

The right of access to stem cell treatments could survive the history and tradition prong of the *Glucksberg* test through a "careful description" of the asserted right that is broad in scope. One such framing of the right would be an abstraction of the right to access stem cell treatments as a right to engage in medical self-defense. As discussed earlier in this Note,[112] self-defense has long been a justification for violations of criminal laws, and there is a strong argument that such a right is "deeply rooted in this Nation's history and traditions."[113] The Court is unlikely to adopt this framing if it applies the logic of *Glucksberg*, in which the constitutionality of a Washington statute banning assisted suicide was at issue. Although respondents asserted a "liberty to choose how to die" and a right to "control of one's final days," the Court chose instead to frame the question as whether substantive due process protects "a right to commit suicide which itself includes a right to assistance in doing

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109. *Compare Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting), *with* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1915 (2004). Furthermore, a number of lower courts have concluded that the Court did not conduct a fundamental rights analysis in *Lawrence*. *See, e.g.*, Muth v. Frank, 412 F.3d 808, 818 (7th Cir. 2005) ("[W]e conclude that *Lawrence* did not announce a fundamental right of adults to engage in all forms of private consensual sexual conduct."); Lofton v. Sec'y of Dept. of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004) ("[I]t is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right.").

110. *See* KOROBKIN, *supra* note 27, at 83 ("As a practical matter, it seems unlikely that the Supreme Court would . . . determine that the due process clause provides patients with a right to seek therapeutic cloning. The majority of justices currently serving on the Supreme Court have, in previous opinions, articulated a relatively narrow view of the substantive due process doctrine."); Puckett, *supra* note 100, at 636–37 (noting that "[i]n the majority of cases not dealing with sexuality or same-sex marriage, courts have followed the two-part test provided in *Washington v. Glucksberg*"); *see also* Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.").

111. Brian Hawkins, Note, *The* Glucksberg *Renaissance: Substantive Due Process Since* Lawrence v. Texas, 105 MICH. L. REV. 409, 424 (2006).

112. *See supra* notes 32–36 and accompanying text.

113. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

so."[114] This holding confirmed the Court's tendency to describe asserted rights narrowly.[115]

Against this background, the Court is unlikely to frame the right of access to stem cell treatments as an abstract right to engage in medical self-defense. The current test imposes a fatal limitation on fundamental rights claims of this type; it is impossible to argue that there is a history or tradition of granting access to stem cell treatments. Indeed, quite the opposite is true — stem cell research has been embroiled in controversy since its conception. As a result, it is doubtful the Court would find a fundamental right for terminally ill patients to access stem cell therapies — leaving the door open for states (or Congress) to regulate stem cell research.

IV. CONCLUSION

In light of the considerable promise of stem cell research, it is tempting to try to protect scientists' ability to conduct such research by claiming that laws restricting research infringe on a fundamental right of terminally ill patients to access stem cell treatments. Professor Volokh's theory of medical self-defense, which has received considerable attention in the press and in the academic community,[116] provides an outwardly attractive foundation on which to base a fundamental right of access to stem cell therapies. Further analysis, however, demonstrates that application of the theory to stem cell research ultimately fails. The medical self-defense theory itself suffers some weaknesses and may not be consistent with the health exception required by the Court in its abortion case law. Even if a right to medical self-defense does exist, it may exist uniquely in the abortion context. Most importantly, however, the Supreme Court is unlikely to frame the right of access to stem cell treatments as a right to engage in medical self-defense.

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114. *Id.* at 722–23.

115. *See* Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2798 (2005).

116. *See, e.g.*, Shea, *supra* note 31.