

Expanded Right to Try

Enabling the Federal Right to Try Law to Work as Intended

Jared Rhoads

The federal Right to Try Act of 2018 has been heralded as a breakthrough in medical freedom and patient empowerment. Championed by liberty- and market-oriented policy advocates, passed with strong bipartisan support, and signed into law by President Trump, it grants patients with life-threatening diseases the legal right to seek access to investigational treatments outside of traditional FDA clinical trials. In the years since its enactment, however, legal overcautiousness and institutional inertia have made actual use of the federal law relatively rare. According to the FDA, the law has only been invoked about 16 times—which is certainly an undercount given that companies are not required to report cases, but probably not *too* much of an undercount.¹

This has prompted the emergence of a follow-up movement at the state level called “Expanded Right to Try,” which seeks to augment the federal law. One of the most promising expressions of this movement is currently unfolding in New Hampshire, where lawmakers are considering House Bill 701 ([HB 701](#)). If enacted, this legislation would expand patient access to investigational treatments by addressing two of the most persistent barriers to the effective use of Right to Try: civil liability for providers and ambiguity around informed consent.

The Federal Law’s Unrealized Promise

To be clear, despite its name, Right to Try does not mean that patients can *force* drugmakers to let them try their experimental products and therapies. If that were the case, the law would actually violate rights instead of protect rights (in that case it would be the rights of the producers that would be violated). Rather, what Right to Try does is let patients deal directly with drugmakers without the possibility of interference by the government. It creates a bypass in which there is one less entity that might say “no.”

One reason why the promise of the federal law has been largely unrealized is that many physicians are either unaware of the law or unaware of how it is different from the FDA’s Expanded Access pathway.² But the deeper reason has to do with concern over the lack of legal protection for the individuals and institutions who might be involved in the care of a patient who wishes to try an experimental drug. Patient families have reported and testified that hospitals, physicians, and pharmaceutical companies often refuse to participate. Hospital legal departments

advise caution to their employed physicians, malpractice insurers signal unease, and drug manufacturers—seeing more downside risk than upside gain for themselves—decline requests. Though data are incomplete, it is probably fair to say that the original Right to Try law has benefitted fewer patients than advocates had hoped.

Addressing Consent and Liability Protection

New Hampshire's HB 701 is an example of a state bill that aims to correct this problem by creating a more functional legal framework within which the right to try can be meaningfully exercised. It would establish strong but appropriately limited civil liability protections for hospitals, physicians, and manufacturers who act in good faith when providing or recommending access to investigational treatments for patients. (The original federal Right to Try law did include a liability shield, but unless clarified, state courts might interpret the federal shield narrowly, especially in areas such as medical negligence, failure to warn, or lack of informed consent.) By offering a well-defined liability shield—while still preserving remedies for cases of gross negligence or intentional misconduct—HB 701 makes granting access to investigational drugs more attractive without abandoning accountability.

The bill also improves the situation surrounding informed consent. Unlike the vague or minimal protections in earlier laws, HB 701 outlines a detailed consent process that ensures that patients understand the risks, potential side effects, and the alternative treatment options they have, as well as acknowledge the lack of FDA approval of the experimental drug or therapy. These changes align with recommendations from ethicists, who argue that any ethically defensible expansion of Right to Try must include informed consent as a central pillar.³

A New Policy Model for a New Medical Frontier

Not only does Expanded Right to Try offer an option for patients navigating the status quo system of drug development, it is also fitting for a world in which therapies shift toward personalization, as is starting to happen in oncology and the treatment of rare genetic diseases. The more personalized medicine becomes, the less suitable the FDA's traditional approval pipeline, based on large-scale randomized trials, becomes for many patients. Although HB 701 does not explicitly incorporate language about individualized treatments tailored to a patient's genomic data, the bill nevertheless provides the kind of flexibility that could prove to be essential to advancing the next generation of personalized care.

To be sure, the positive potential of Right to Try should not blind us to the genuine risk of exploitation. Throughout medical history, desperate patients have been targets for charlatans peddling false hope under the guise of miracle cures. As investigational therapies become more accessible, it will inevitably attract dishonest actors seeking to exploit legal reforms for personal gain, offering unproven or outright fraudulent treatments at great cost to the most vulnerable. But

this danger is not unique to Right to Try—it is a perennial risk in any open society. The proper response is not to retreat away from patient empowerment but to keep existing laws against fraud and false advertising in place and enforce them rigorously and objectively.

The case for Expanded Right to Try is not about making inflated promises or unrealistic guarantees. It may be that even with an improved legal framework only a small number of patients ultimately benefit from these laws in any given year. But the significance is that with Expanded Right to Try in place, we will know that no government-imposed approval process can stand in the way of a person's effort to seek hope, healing, or dignity in the face of terminal illness. Like the original Right to Try movement, this next chapter is grounded in respect for the moral agency of individuals. It affirms the principle that rational adults possess the sovereign right to make consequential decisions about their own lives, even when those choices entail risk. And it reflects a deeper truth, which is that the advancement of medicine, like all meaningful human progress, depends not on permission, but on freedom.

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Declaration of Conflicting Interests

The author has declared no potential conflicts of interest with respect to the research, authorship, or publication of this article.

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