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## Right to Medical Self-Defense, The

By CHRISTOPHER SHEA

If laws banning the use of force are relaxed when an intruder crawls in your window and you're home, shouldn't stringent F.D.A. regulations bend when you're backed into a dark corner by a terminal illness? That was the gist of an argument made by the U.C.L.A. law professor Eugene Volokh in the May issue of *The Harvard Law Review*. Citing the concept of "medical self-defense," Volokh contended that a dying American should have the right to buy any drug that has passed the F.D.A.'s preliminary safety tests. Currently, the F.D.A. insists that most terminally ill patients await, like everyone else, full proof of a drug's safety and efficacy.

Volokh's inspiration for the article was a court decision. In 2006, a panel of the United States Court of Appeals for the District of Columbia Circuit ruled 2 to 1 that the terminally ill ought to be able to buy drugs that have passed Phase 1 F.D.A. testing (of three phases). One judge in the majority was a staunch conservative, the other a Clinton appointee. The full Court of Appeals, however, set aside the panel decision and then, in August, ruled 8 to 2 against the plaintiff, the Abigail Alliance for Better Access to Developmental Drugs. The court agreed with the F.D.A.'s arguments that the government has a strong interest in protecting even the terminally ill from brutal side effects and a premature death, and that only the full testing regimen can do that. The court also stressed that the states' efforts to regulate drugs dated to 1736 and observed that the [Supreme Court](#) had rejected a "medical necessity" argument in the case of medical marijuana. And it wondered where the right to self-defense would end — could a dying patient force a drug company to hand over drugs? In a vigorous dissent, Justice Douglas Ginsburg said it was "startling" that the court failed to give the right to self-defense its due.

Volokh continues to hold that both the common law and the Constitution support a right to obtain the best available medicine, despite the risks. In his view, a terminal cancer patient is in precisely the same situation as a home-intrusion victim or, you might add, a victim of a rampaging bear, both of whom are exempted from certain legal prohibitions. (You don't have to check endangered-species regulations before knifing or shooting the bear.) "Medical self-defense is not an analogy," Volokh says. "It is self-defense."

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