



**PennState**  
Dickinson Law

**DICKINSON LAW REVIEW**  
PUBLISHED SINCE 1897

---

Volume 97  
Issue 1 *Dickinson Law Review - Volume 97,*  
1992-1993

---

10-1-1992

## The Anabolic Steroids Control Act of 1990: A Need for Change

Jeffrey A. Black

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

---

### Recommended Citation

Jeffrey A. Black, *The Anabolic Steroids Control Act of 1990: A Need for Change*, 97 DICK. L. REV. 131 (1992).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol97/iss1/6>

This Comment is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact [lja10@psu.edu](mailto:lja10@psu.edu).

# The Anabolic Steroids Control Act of 1990: A Need for Change

Mr. President, today the Senate will take action on a bill to address one of America's most serious drug problems: the abuse of anabolic steroids. Though we do not hear much about it, the fact is that steroid abuse is nearly as widespread as the use of crack cocaine is among male high school students.<sup>1</sup>

Steroids will remain a part of an athlete's training, whether we want it or not, but they should be administered by competent doctors, openly and non sub rosa by coaches.<sup>2</sup>

## I. Introduction

On February 5, 1991, Dr. George T. Zahorian III, an osteopath and urological surgeon from suburban Harrisburg, was indicted by the United States Attorney for knowingly distributing anabolic steroids "for use in humans other than the treatment of disease pursuant to the order of a physician," in violation of the Anabolic Steroids Control Act of 1990.<sup>3</sup> Dr. Zahorian's trial gained national attention

---

1. 136 CONG. REC. S16615-03 (1990) (statement of Senator Biden).

2. Janke J. Robertson, et al., *Medical and Nonmedical Uses of Anabolic-Androgenic Steroids*, 264 JAMA 2925 (1990).

3. Defendant's Brief in Support of Motion to Dismiss Indictment at 1, *United States v. Zahorian*, Criminal No. 1:CR-91-023 (M.D. Pa. Mar. 13, 1991). Specifically Dr. Zahorian was charged with five separate counts of violating 21 U.S.C. § 841(a)(1), as well as ten separate counts of knowingly distributing anabolic steroids in violation of 21 U.S.C.A. § 333(e)(1) which provided:

(e) Anabolic steroids

(1) [A]ny person who distributes or possesses with the intent to distribute any anabolic steroid for any use in humans other than the treatment of disease pursuant to the order of a physician shall be imprisoned for not more than three years or fined under Title 18, or both . . . .

Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 333(e)(1) (1988). *United States of America v. Zahorian*, Criminal No. 1:CR-91-23 (M.D. Pa. June 14, 1991) (mem.) (quoting The Crime Control Act of 1990 implicitly repealed Section 333(e)(1) when the Act was passed on November 29, 1990, and replaced it with an almost identical provision, except that it regulates the distribution of human growth hormone. 21 U.S.C. § 333(e) now provides as follows:

(e)(1) Except as provided in paragraph (2), any person who distributes or possesses with the intent to distribute any anabolic steroid for any use in humans other than the treatment of disease, pursuant to the order of a physician shall be imprisoned for not more than 3 years or fined under title 18, United States Code, or both.

(2) Any person who distributes or possesses with the intent to distribute to an individual under 18 years of age, any anabolic steroid for any use in humans other than the treatment of disease pursuant to the order of a physician shall be

when it was revealed that he allegedly supplied anabolic-androgenic steroids to World Wrestling Federation stars such as "Superstar" Billy Graham.<sup>4</sup> With the simultaneous revelation by former NFL lineman Lyle Alzado that he believed steroid use helped cause his cancer, the "steroid issue" was placed into national prominence.<sup>5</sup>

To date, Dr. Zahorian remains the only physician indicted and convicted of violating the Anabolic Steroids Control Act of 1990 for "prescribing" anabolic steroids for a purpose other than the treatment of disease.<sup>6</sup> Unfortunately, at this time there has yet to be any published judicial opinion on the effect of the Anabolic Steroids Control Act or how it will be applied to physicians as a group. However, the conviction of Dr. Zahorian has revealed the inherent defect of the Act: its overbreadth and resultant non-conformity with the Legislature's stated purpose.

The Anabolic Steroids Control Act of 1990 makes it a criminal offense for a physician to knowingly distribute human growth hormone (steroids) "for any use in humans other than the *treatment of a disease* (emphasis added) or other recognized medical condition."<sup>7</sup> The author feels that the statutory mandate allowing a physician to distribute steroids to a patient only for the treatment of a disease or for a medical condition recognized by the Secretary of Health and Human Services is unconstitutional. This statutory language is so overdrawn that it is not rationally related to the stated, legitimate government purpose.

This Comment begins with a brief history of anabolic-androgenic steroids and their beneficial and adverse effects. The Comment then investigates the history of the Anabolic Steroids Control Act of 1990 and its stated purpose of alleviating the perceived threat posed

imprisoned for not more than six years or fined under title 18, United States Code, or both.

Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. §333(e)(1) (1991). The Crime Control Act also enacted sections 802(41), 812(c), Schedule III (e), and section 290aa-6(b)(12) of Title 42, The Public Health and Welfare Act, amended section 844 of this title, repealed section 333a of this title and enacted provisions set out as notes under sections 802 and 829 of this title. The statutory language states that these enactments may be cited as the Anabolic Steroids Control Act of 1990. 21 U.S.C. § 333(e)(1) (1988).

4. Dave Meltzer, *The Sham is a Sham*, SPORTS ILLUSTRATED, July 8, 1991, at 9, 10.

5. *Id.* at 10. Alzado admitted that there is no written, documented proof that steroids and/or human growth hormone caused his cancer. Lyle Alzado, as told to Shelly Smith, *I'm Sick and I'm Scared*, SPORTS ILLUSTRATED, July 8, 1991, at 21. Alzado died on May 14, 1992 at the age of 43. Maryann Hudson, *Lyle Alzado is Dead at 43 of Cancer*, L.A. TIMES, May 15, 1992, at C-1.

6. *United States v. Zahorian*, Criminal No. 1:CR-91-23 (M.D. Pa. June 14, 1991) (mem.). Dr. Zahorian was convicted and the case was affirmed on appeal, *United States v. Zahorian*, No. 92-7003, 1992 U.S. App. LEXIS 18933 (3d Cir. July 17, 1992).

7. 21 U.S.C. § 333(e)(1) (1988) (emphasis added).

by steroids. The Comment then explores the overall constitutionality of the Act and its constitutionality as imposed against physicians. Finally, this Comment discusses the various public policy reasons for invalidation of the Anabolic Steroids Control Act of 1990.

*A. History of Anabolic-Androgenic Steroids*

The first reported use of anabolic-androgenic steroids occurred during World War II when German combat troops were given anabolic steroids to increase their aggressiveness.<sup>8</sup> Anecdotal reports indicate that the Russians initiated their use in athletics in 1954.<sup>9</sup> Since that time, the use of anabolic steroids has increased dramatically with an "abuse explosion" occurring in the 1980's.<sup>10</sup>

Anabolic-androgenic steroids are prescription drugs that have many legitimate medical uses.<sup>11</sup> Prior to the enactment of the Ana-

8. Christopher Carl Oliva, *Anabolic Steroid-Induced Psychiatric Reactions*, 24 DICP THE ANNALS OF PHARMACOTHERAPY 388 (1990).

9. JOHN R. MAY, STATE LAWS/REGULATIONS PERTAINING TO THE CONTROL OF ANABOLIC STEROIDS 1 (1989). A copy of this compilation may be found in the offices of the *Dickinson Law Review*.

10. *Id.*

11. Robertson, *supra* note 2, at 2923; *see also* May, *supra* note 9. Anabolic steroids are defined as synthetic derivatives of the male hormone testosterone, having pronounced anabolic properties and relatively weak androgenic properties (i.e., producing masculine characteristics), which are used clinically to promote growth and to repair body tissue in people who are in states of senility, debilitating illness, and convalescence. The FDA has approved a relatively small number of anabolic steroids as prescription drugs, which may be prescribed only by licensed practitioners for legitimate medical purposes. Under the Anabolic Steroids Control Act, steroids are defined as follows:

(41) term 'anabolic steroids' means any drug or hormonal substance, chemically and pharmacologically related to the testosterone (other than estrogens, progestins, or corticosteroids) that promotes muscle growth, and includes —

- (i) boldenone,
- (ii) chlorotestosterone,
- (iii) clostebol,
- (iv) dehydrochlormethyltestosterone,
- (v) dihydrotestosterone,
- (vi) drostanolone,
- (vii) ethylestrenol,
- (viii) fluoxymesterone,
- (ix) formebolone,
- (x) mesterolone,
- (xi) methandienone,
- (xii) methandranone,
- (xiii) methandriol,
- (xiv) methandrostenolone,
- (xv) methenolone,
- (xvi) methyltestosterone,
- (xvii) mibolerone,
- (xviii) nandrolone,
- (xix) norethandrolone,
- (xx) oxandrolone,
- (xxi) oxymesterone,

bolic Steroids Control Act of 1990, androgens and anabolic steroids were commonly used to accelerate irregular childhood growth, increase libido and maintain secondary sexual characteristics in aging men, improve calcium balance; treat endometriosis, treat anemia, promote postoperative recovery or aid in terminal diseases, treat breast cancer, promote muscle growth in elderly individuals, and correct deficient endocrine function of the testes.<sup>12</sup> Prior to the enactment of the Anabolic Steroids Control Act, the Food and Drug Administration (FDA) approved steroids for both disease and non-disease conditions.<sup>13</sup>

The most frequent use of steroids, however, is as an aid in body building and/or to provide skeletal muscle enlargement or increased strength by persons in good health.<sup>14</sup> It has been estimated that "as many as 500,000 male high school seniors use, or have used, steroids; one-third of these users are 15 or younger; and 40 percent of these users are hard-core or weekly users."<sup>15</sup> Various steroids have been used by athletes for more than thirty years in an attempt to enhance

- 
- (xxii) oxymetholone,
  - (xxiii) stanolone,
  - (xxiv) stanozolol,
  - (xxv) testolactone,
  - (xxvi) testosterone,
  - (xxvii) trenbolone, and
  - (xxviii) any salt, ester, or isomer of a drug or substance described or listed in this paragraph, if that salt, ester, or isomer promotes muscle growth.

Title 21 U.S.C. § 802(41)(A) (Supp. II 1990).

12. See also Robert C. Hickson, et al., *Adverse Effects of Anabolic Steroids*, MED. TOXICOL. ADVERSE DRUG EXPERIMENT 4(4):254, 258-60 (1989). Although steroids have been used to treat numerous growth problems, disorders, and diseases, the results have been contradictory and difficult to replicate. However, several researchers have found steroids to be helpful in the treatment of patients. *Id.*

13. See generally, Ferid Murad and Robert C. Haynes, *Androgens* in GOODMAN & GILMAN. PHARMACOLOGICAL BASIS OF THERAPEUTICS, 1140, 1451-54 (1985).

14. 136 CONG. REC. S16615-03 (1990). See also W.E. Buckley, et. al., *Estimated Prevalence of Anabolic Steroid Use Among Male High School Seniors*, 260 JAMA 3441 (1988). A national study, conducted in 1987, indicated that as many as 6.6 percent of the 12th grade males in the United States use or have used anabolic steroids. According to this and other studies, athletes are the most common users of anabolic steroids among high school and college students. One high school study found that 84 percent of anabolic steroid users participated in sports. Mimi D. Johnson, et. al., *Anabolic Steroid Use by Male Adolescents*, 83 PEDIATRICS 922 (1989). According to a 15-year study of college students at five universities, between 15 and 20 percent of the college athletes reported using anabolic steroids. J. Dezelsky, et. al., *United Nations Non-Medical Drug Use Behavior at Five United States Universities: A 15-Year Study*, 37 BULLETIN ON NARCOTICS 49, 51 (1985).

Less information is available on the prevalence of anabolic steroid use outside of high school and college. The two above-mentioned studies addressed use in relatively small samples of weightlifters. The results show that a high percentage of weightlifters studied use steroids. However, the results cannot be projected beyond the weightlifters included in the studies. *Id.*

15. 136 CONG. REC. S16615-03 (1990); see also Mimi D. Johnson, *Anabolic Steroid Use in Adolescent Athletes*, 37 PEDIATRICS 1111 (1990).

athletic prowess.<sup>16</sup> The use of steroids has become so prevalent in sports that the International Olympic Committee, the NCAA, and several professional sporting organizations have enacted stringent steroid testing procedures.<sup>17</sup> Nevertheless, many athletes have admitted publicly that the use of performance-enhancing drugs, such as steroids, remains widespread.<sup>18</sup>

Although anabolic steroids have been used by athletes for the past few decades, evidence is conflicting and inconclusive as to whether they significantly increase athletic performance by increasing muscle strength or muscle size.<sup>19</sup> There is also a lack of definitive research on the adverse effects of prolonged steroid use.<sup>20</sup> However, the research available states that there *may* be severe adverse effects such as liver abnormalities, reproductive disorders, virilisation, feminisation, development of diabetes, cardiovascular effects, cerebral dangers, musculoskeletal injuries, and prostatic cancer.<sup>21</sup> It should be noted, however, that the physicians who conducted this research caution that their findings are not conclusive without further research.<sup>22</sup>

### *B. State and Federal Legislation Regulating the Prescription of Anabolic-Androgenic Steroids*

In recognition of the possible adverse effects of steroids and their abuse for non-therapeutic purposes, there has been considerable legislative and administrative activity in this area. For example, in 1988 Congress passed the Anti-Drug Abuse Act of 1988, which included several provisions to control the use of anabolic steroids and human growth hormone.<sup>23</sup> FDA data show that as of June 16, 1989,

16. J. Otis Cochran, *Drug Testing of Athletes and the United States Constitution: Crisis and Conflict*, 92 DICK. L. REV. 571, 571-74 (1988).

17. *Id.* at 575.

18. Paul J. Perry, et. al., *Illicit Anabolic Steroid Use in Athletes*, AMER. J. OF SPORTS MED. 422 (1990).

19. *Anabolic Steroids (Systemic)*, USP DI 71 (1990) (physician pamphlet detailing pharmacology and adverse effects of systemic anabolic steroids). A copy of this pamphlet is available in the offices of the *Dickinson Law Review*.

20. Hickson, *supra* note 12, at 261.

21. Hickson, *supra* note 12, at 261-66.

22. Robertson, *supra* note 2, at 2925.

23. See e.g., The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 (current version codified as The Anabolic Steroids Control Act of 1990, 21 U.S.C. § 801 (Supp. II 1990)). The Anti-Drug Abuse Act of 1988 provided for the forfeiture of specified property of an individual convicted of a violation of the Federal Food, Drug, and Cosmetic Act involving anabolic steroids or human growth hormone, if the violation is punishable by imprisonment for more than 1 year. The Anti-Drug Abuse Act of 1988 also specified that violators are subject to imprisonment for up to 3 years or a fine or both if they distribute or possess anabolic steroids with the intent to distribute for any use in humans other than the treatment of disease based on the

31 states have enacted laws or promulgated regulations to control the use of anabolic steroids.<sup>24</sup> Five of these states have enacted laws or promulgated regulations controlling the use of human growth hormone.<sup>25</sup>

Information provided by FDA also shows that some states have classified anabolic steroids as controlled substances, and at least one state has promulgated rules regarding the medical profession's responsibility in prescribing, dispensing, or delivering these drugs.<sup>26</sup> Anabolic steroids are regulated as controlled substances under state law in nine states; in addition, six states have legislation pending that would classify anabolic steroids as controlled substances.<sup>27</sup> One state has classified human growth hormone as a controlled substance.<sup>28</sup>

### C. *History of the Anabolic Steroids Control Act of 1990*

In response to the public's growing concern over the use of anabolic-androgenic steroids for nonmedical purposes, Congress enacted The Anabolic Steroids Control Act of 1990.<sup>29</sup> The Act placed anabolic steroids on Schedule III of the Controlled Substances Act thus making illegal possession of these drugs punishable by up to one year in prison and possession with the intent to distribute punishable by up to five years imprisonment.<sup>30</sup> The Act also amended the Food,

order of a physician.

24. MAY, *supra* note 9, at 2.

25. 137 CONG. REC. E450-02 (1991). See also, H.R. REP. NO. 681(I), 101st Cong., 1 Sess. 6472, 6473 (1990) (Anabolic Steroid Control Act passed as Title III of the Crime Control Act of 1990 to address criminal actions which endanger the physical safety or health of our fellow citizens).

26. 137 CONG. REC. E450-02 (1991).

27. *Id.* at 94.

28. *Id.*

29. Federal Food, Drug and Cosmetic Act found at 21 U.S.C. § 333(e)(1) (1988).

30. Anabolic Steroids were placed under schedule III of the Controlled Substances Act under 21 U.S.C. § 812, which provides in relevant part as follows:

§ 812. Schedules of controlled substances

(a) Establishment

There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this title [enacted October 27, 1970] and shall be updated and republished on an annual basis thereafter.

(b) Placement on schedules; findings required

Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I

## ANABOLIC STEROIDS CONTROL ACT

Drug and Cosmetic Act by making distribution of, and possession with the intent to distribute, human growth hormone without a doctor's order punishable by up to three years imprisonment. If the recipient is under 18, the maximum punishment for the prescriber is six years in prison.<sup>31</sup>

- 
- (A) The drug or other substance has a high potential for abuse.
  - (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
  - (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

### (2) Schedule II

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.
- (C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

### (3) Schedule III

- (A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.
- (B) The drug or other substance has a currently accepted medical use in treatment in the United States.
- (C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

### (4) Schedule IV

- (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.
- (B) The drug or other substance has a currently accepted medical use in treatment in the United States.
- (C) Abuse of the drug or other substance may lead to limited physical dependence relative to the drugs or other substances in schedule III.

### (5) Schedule V

- (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.
- (B) The drug or other substance has a currently accepted medical use in treatment in the United States.
- (C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in Schedule IV.

21 U.S.C. § 812 (1988).

31. 21 U.S.C. § 333 (1988). Chapter 9 of the Federal Food, Drug, and Cosmetic Act, as amended to include Human Growth Hormone, now reads in relevant part as follows:

### § 333. Penalties

#### (a) Violation of 21 U.S.C. 331

(1) Any person who violates a provision of section 301 [21 U.S.C. 331] of this title shall be imprisoned for not more than one year or fined not more than \$1,000, or both.

(2) Notwithstanding the provisions of paragraph (1) of this section, if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than \$10,000, or both.

(e) Distribution of or possession with intent to distribute anabolic steroids; exception.

(1) Except as provided in paragraph (2), any person who distributes or pos-



The stated Legislative purpose for creating the Act was to respond to the various aspects of the problem of crime in the United States.<sup>32</sup> In particular the Legislature believed that because of the suspected health risks associated with the misuse of anabolic steroids as well as indications from the Department of Justice that steroid misuse was a growing problem, legislation had to be enacted to exercise greater control over distribution and use of steroids.<sup>33</sup> The Legislature first became aware of the need for legislation through reports that enumerated the pervasive nature of steroid use in the United States and in particular its use by young people.<sup>34</sup> Thus, the Legislature believed that because of the reported significant adverse health consequences, both physical and psychological,<sup>35</sup> it was required to take action to control the non-therapeutic use of steroids.

## II. Constitutional Infirmity of the Anabolic Steroids Control Act of 1990

The Anabolic Steroids Control Act of 1990 makes it a criminal offense for a physician to knowingly distribute human growth hormone (steroids) "for any use in humans other than the treatment of a disease or other recognized medical condition."<sup>36</sup> The requirement that a physician can distribute steroids to a patient only for the treatment of a disease or for a medical condition recognized by the Secretary of Health and Human Services is unconstitutional since it is so overdrawn that it is not rationally related to the stated, legitimate government purpose.

The stated Legislative purpose for enacting the Anabolic Ster-

---

esses with intent to distribute any anabolic steroid for any use in humans other than the treatment of disease pursuant to the order of a physician shall be imprisoned for not more than three years or fined under title 18, United States Code, or both.

(2) Any person who distributes or possesses with the intent to distribute to an individual under 18 years of age, any anabolic steroid for any use in humans other than the treatment of disease pursuant to the order of a physician shall be imprisoned for not more than six years or fined under title 18, United States Code, or both.

Federal Food, Drug and Cosmetic Act, found at 21 U.S.C. § 333 (1988 & Supp. II 1990).

32. H. REP. NO. 681(I), 101st Cong., 1 Sess., 6472, 6473 (1990).

33. 137 CONG. REC. E450-02 (1991).

34. *Id.*

35. *Id.* See also Perry, et. al., *supra* note 18, at 422-428 ([T]he real experts on anabolic steroid use and their adverse effects are not medical clinicians but the athletes who actually have used steroids for prolonged periods.). H. REP. NO. 681(I), 101st Cong., 1 Sess., 6473 at 94 (1990). Adverse effects include cardiovascular problems, liver toxicities, changes in sex characteristics and reproductive capacities, increases in blood pressure and cholesterol levels, and psychological changes. Perry, *supra*.

36. 21 U.S.C. § 333(e)(1), *supra* note 3 (emphasis added).

## ANABOLIC STEROIDS CONTROL ACT

oids Control Act was to protect the public from the dangerous threat of physical and mental harm that steroids have been alleged to cause.<sup>37</sup> Congress believed that since steroids were prescribed legally for “a small number of medical conditions such as certain anemias, hereditary angioedema, and breast cancer,” it was in the best interest of the public to make criminal any prescription of steroids except for these limited “disease” uses.<sup>38</sup> Thus, the only time a physician may prescribe steroids is for treatment of a disease, since the laws of statutory construction require that when a statute contains a specifically enumerated exception, the specifically enumerated exception must be exclusive.<sup>39</sup>

Based on Congress’ stated intention of enacting the Anabolic Steroids Control Act to protect the public health,<sup>40</sup> and on its ability to regulate steroids under the Commerce power,<sup>41</sup> the constitutionality of the statute must be tested under a rational basis standard.<sup>42</sup> The Supreme Court has held that such a standard is appropriate when Congress is regulating such an important purpose in a nondiscriminatory manner.<sup>43</sup> To defeat a statute under the rational basis standard, it must be shown that in enacting the statute, Congress acted irrationally, or that the enacted statute is not rationally related to a legitimate legislative purpose granted to Congress under the Constitution.<sup>44</sup> The Anabolic Steroids Control Act does not pass muster under this rational basis test.

Although Congress’ intentions appear to have been proper, the enacted statute seems to disregard the vast purposes for which steroids are used that would not fall under the statutory definition of disease.<sup>45</sup> Further, criminalization of steroid prescription for athletes to aid in body building and/or to provide skeletal muscle enlarge-

---

37. See *supra* note 25.

38. See *supra* note 25.

39. See e.g., *Russello v. United States*, 464 U.S. 16, 23 (1983).

40. See 134 CONG. REC. H7907 (Sept. 22, 1988) (statement of Congressman Baker of Louisiana).

41. *United States v. Kinsey*, 843 F.2d 383, 393 (9th Cir. 1988), *cert. denied*, 487 U.S. 1223 (1988), *reh’g denied*, 488 U.S. 880 (1988).

42. See, e.g., *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1 (1988); *McDonald v. Board of Election Comm’rs*, 394 U.S. 802 (1969); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (holding that person attacking constitutionality of a statute based on such legislative interests as preserving the health must show that the legislature acted irrationally and use a rational basis test).

43. See cases cited *infra* note 44.

44. *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. at 312 (1976); *Malmed v. Thornburgh*, 621 F.2d 565, 573 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980).

45. See *Robertson, supra* note 2, at 2923; *May, supra* note 9, at 258-60.

ment or increased strength by persons in good health may actual defeat Congress' stated intentions.<sup>46</sup> By forbidding trained physicians from administering steroids in a controlled manner, the Legislature has forced athletes to either buy steroids off the black-market or seek out un-ethical and possibly incompetent physicians to supply them steroids.<sup>47</sup> The criminalization of "recreational" steroid use has already led athletes to seek medically unproven and possibly dangerous advice from such sources as the *Underground Steroid Handbook*.<sup>48</sup> Without arguing that steroids should be legalized for "recreational use," it still appears that Congress' attempt at preventing steroid prescription has at best been futile and at worst harmful.<sup>49</sup>

The narrow language of the statute also presents individuals who may prescribe steroids with a severe dilemma when deciding whether to prescribe steroids for a legitimate medical purpose: what is a disease? A disease is defined as a "deviation from the healthy or normal condition of any of the functions or tissues of the body . . . illness; sickness; disorder; malady; bodily infirmity."<sup>50</sup> Congress' prohibition of steroid prescription except for the treatment of a recognized disease is in contradiction of the accepted medical use of anabolic steroids for disease and non-disease conditions.<sup>51</sup> The Food and Drug Administration has approved steroid use for non-disease conditions such as allergies, stunted growth in childhood, and maintaining muscle mass for geriatric patients who, although not suffering from a specific disease treatable by anabolic steroids, are in a state of debilitation.<sup>52</sup> Congress, however, has stated that the Secretary of Health and Human Services may only exempt steroids from the prohibition if it meets the following criteria (1) the substance must be accepted treatment for a rare disease or condition; and (2) the substance must have no significant potential for abuse.<sup>53</sup> Thus, under the Act, a physician would be held criminally liable for prescribing steroids for treatment of a legitimate "non-disease" condition. Such

---

46. R. Gilbert, *Steroid Use and Society*, J ADDICT RES FOUNDATION 5-6 (1989).

47. Perry, *supra* note 18, at 427.

48. Perry, *supra* note 18, at 427.

49. It should be noted that historically steroid use was opposed by medical organizations and sports groups on the grounds that these substances were ineffective. Robertson, *supra* note 2, at 2923. With the evidence that steroids may be effective, many of these groups now oppose steroids for their adverse effects and on the basis of ethics (fair play). Nevertheless, since in athletics today "winning is everything," it appears that athletes will stop at nothing to gain an edge, including the continued use of steroids. C. McCollister Evarts, *Sports Medicine — the Profession/The Physician*, 18 THE AMER. J. OF SPORTS MED. 438, 438-41 (1990).

50. BLACK'S LAW DICTIONARY 244 (5th ed. 1975).

51. See *supra* note 48.

52. GOODMAN & GILMAN, *supra* note 13.

53. 137 CONG. REC. E450-02 (1991).

a prohibition is not rationally related to the stated governmental interest of protecting the public health.

Further, in treating athletes, a physician may be faced with possible criminal prosecution for the treatment of a recognized disease. One could easily imagine an injured athlete receiving steroids for restorative purposes. It is a sports medicine physician's duty to treat injured athletes with restorative drugs to aid in their rapid recovery.<sup>54</sup> There is a possibility, however, that under the Act, a physician prescribing steroids for restorative purposes may be held liable if the athlete actually uses the drugs for additive purposes; such as increasing muscle mass.<sup>55</sup> The prescribing physician who is indicted under the Act may have the burden of providing evidence that his prescription was for the restorative purpose, but obviously in such a situation it becomes the athlete's word against the physician's. Congress' Act has taken away the physician's broad discretion and has exposed the profession to possible criminal liability for innocent "malpractice." Such action is sure to have a chilling effect on the medical community and on a physician's decision whether to enter a sports medicine practice.

As mentioned previously, a question still to be resolved under the Act is whether an indicted physician has the burden of proving that his treatment of the patient was for a disease condition. At the least, it appears that a physician would bear the burden of producing some evidence that his prescription falls within the limited exclusions.<sup>56</sup> In various illegal distribution of prescription drug cases, courts have held that since physicians are registered to dispense prescription drugs, the government must prove beyond a reasonable doubt that the physician's actions were outside of the bounds of his "professional medical practice."<sup>57</sup> Thus, the courts have customarily assumed that a physician's medical decisions are reasonable and the prosecutor bears the burden of proof that the physician's actions were outside the bounds of professional medical practice.<sup>58</sup> Such a presumption provides a physician with a reasonable and constitutionally necessary defense to an allegation of illegal prescription.<sup>59</sup>

---

54. Morley B. Pitt, *Malpractice on the Sidelines: Developing a Standard of Care for Team Sports Physicians*, 2 COMM/ENT L.J., 590, 591 (1980).

55. *Id.* Restorative drugs are used to restore injured players' natural prowess. Additive drugs are employed to increase performance beyond natural limits.

56. See *United States v. Mayo*, 705 F.2d 62, 75 (2d Cir. 1983); *Patterson v. New York*, 432 U.S. 197, 211 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975).

57. *United States v. Hooker*, 541 F.2d 300 (1st Cir. 1976).

58. *Id.*

59. See *supra* note 56.

The Anabolic Steroids Control Act eliminates this reasonable assumption. It creates an irrebuttable presumption that the prescription of steroids for other than the treatment of disease is outside the bounds of professional medical practice. The physician is given no "reasonable degree of discretion" as under the other sections of the Controlled Substances Act.<sup>60</sup> The strict language of the Act states that absent authorization by the Secretary of Health and Human Services, any prescription of steroids is implicitly criminal.<sup>61</sup>

At least one court which considered such a theoretical presumption has stated that such a statute would place the burden of proving the applicability of the exception on the physician, and any physician charged with prescribing or administering a controlled substance would have the burden at trial of proving a legitimate medical purpose.<sup>62</sup> The effect of such a scheme would be a presumption that every physician who prescribes a drug does so without a legitimate medical purpose.<sup>63</sup> The court determined that Congress could not intend such an absurd result and therefore such a statute should be stricken as a violation of a physician's due process rights.<sup>64</sup>

Although Congress has the power to impinge on some aspect of a doctor's practice, this impingement must constitute a reasonable exercise of power vested in Congress under the Constitution.<sup>65</sup> An irrebuttable presumption which takes away a physician's primary defense in prescription of steroids violates the due process clause, by regulating the practice of medicine and not permitting physicians the discretion and flexibility necessary to treat individual patients.<sup>66</sup>

The Anabolic Steroids Control Act is also in direct contradiction to various state laws and the Uniform Controlled Substance Act, which has been adopted by 51 states and territories.<sup>67</sup> Under these legislative enactments, a physician is allowed to dispense controlled substances as long as it is in good faith in the course of his professional practice, within the scope of the doctor-patient relation-

60. *Id.*

61. 21 U.S.C. § 333 (1988).

62. *United States v. Outler*, 659 F.2d 1306 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982).

63. *Id.*

64. *Id.*

65. *Pharmaceutical Mfrs. v. Food & Drug Admin.*, 484 F.Supp. 1179, 1188 (D. Del.), *aff'd*, 634 F.2d 106 (3d Cir. 1980).

66. *Id.* *But cf.* *United States Dept. of Agric. v. Murry*, 413 U.S. 508, 518 (1973) (Douglas, J., concurring) (irrebuttable presumption analysis is appropriate only "where the private interests affected are very important"). *See also* *Weinberger v. Salfi*, 422 U.S. 749, 785 (1975) (distinguishing programs involving "affirmative Government action which seriously curtails important liberties cognizable under the Constitution").

67. *See e.g.*, 35 PA. CONS. STAT. § 780-111(d) (1988).

ship, and in accordance with the treatment principles accepted by a responsible segment of the medical profession.<sup>68</sup>

Many of the state legislatures anticipated the use of steroids for non-disease conditions and allowed prescription for non-disease conditions by allowing the practitioner in the usual course of his professional practice to provide steroids for "legitimate *medical* purposes."<sup>69</sup> The majority of state legislatures achieved this purpose by making it illegal to dispense steroids for "recreational use" but allowed the physician to make a good faith determination whether there is a "medical" need for prescribing the steroids.<sup>70</sup>

The Anabolic Steroids Control Act does not allow for good faith determinations by physicians. The Act creates a presumption that the only accepted use of steroids is for treatment of disease. Thus, the Anabolic Steroids Control Act would criminalize uses of anabolic steroids that the various state legislatures and the Uniform Controlled Substances Act have decided should be legal.

Congress' decision to criminalize all uses of anabolic steroids other than for the treatment of disease is in direct contradiction of the medical evidence and state legislative findings. Such a broad prohibition is not rationally related to the stated legislative objective of protecting the health and welfare of the citizens and thus, at the least infringes on an individual's constitutional right to be free from arbitrary and unreasonable government action.<sup>71</sup> The Fourteenth Amendment stands for the proposition that the government must act in a manner which is neither arbitrary nor unreasonable. If Congressional legislation is too broad, then the proper remedy is to call the matter to the attention of Congress.<sup>72</sup>

Although the Anabolic Steroids Control Act was meant to serve

68. *Id.*

69. See 1989 HAW. SESS. LAWS 1197 (not unlawful to prescribe steroids if issued for a legitimate medical purpose by a practitioner acting in the usual course of professional practice); 1989 TEX. GEN. LAWS 1507 (Anabolic steroid or human growth hormone can only be prescribed for a valid medical purpose and in the course of professional practice; bodybuilding, muscle enhancement, or increasing muscle bulk or strength through the use of an anabolic steroid or human growth hormone by a person in good health is *not* a valid medical purpose); 1989 N.Y. LAWS 3047 (practitioner may not prescribe anabolic steroids for other than therapeutic purposes); 1989 N.H. LAWS 264 1989 (any person who prescribes anabolic steroids for purposes other than treatment of a medical problem of injury shall be guilty of a felony); 1988 LA. ACTS 270 (prohibiting prescription of anabolic steroids unless required by demonstrable generally accepted medical practice).

70. May, *supra* note 9, at 1. A minority of states such as New Mexico make it a criminal offense to illegally possess or distribute steroids. 1987 N.M. LAWS 1987. Other states such as Arkansas forbid prescription other than for the treatment of disease. 1989 Ark. Acts 1231.

71. *Thompson v. Gallagher*, 489 F.2d 443 (5th Cir. 1973).

72. *United States v. 233 Tins*, 175 F.Supp. 694, 702 (D. Ark. 1959).

a legitimate governmental purpose, its irrational and arbitrary language, which only allows exceptions for "disease" conditions, is so overbroad that it does not achieve the stated governmental goal. Such a statute should not be upheld.<sup>73</sup> Although statutes need not be drawn with "mathematical exactitude," an overinclusive or underinclusive statute can be facially void if it does not achieve its legitimate purpose.<sup>74</sup> Judged in relation to the statute's plainly legitimate sweep, the overbreadth of the statute is not only real, but substantial as well.<sup>75</sup> Instead of promoting health and welfare, the Act may prevent individuals from receiving necessary treatment by limiting physicians to prescription of steroids only for disease. This prevents patients from receiving necessary steroid treatment for legitimate, non-disease medical purposes. Although the Supreme Court has held that a statute should be construed to avoid constitutional problems, the Act is not subject to such a limiting construction.<sup>76</sup> Since the statute is not subject to a narrowing construction, is impermissibly overbroad and is not severable, the statute should be stricken down on its face.<sup>77</sup>

Congress has already recognized that anabolic steroids can be useful as a medical aid, by allowing steroids to be legally used in the treatment of disease.<sup>78</sup> Congress must have determined that the benefits of use of steroids for this purpose must outweigh any possible adverse effects. This implicit balancing test should have led to the conclusion that steroids can also be used for non-medical purposes if the benefit outweighs the risk. Congress seems to have ignored this evidence and course of current professional practice and it criminalized all other uses, without taking into account the adverse effect on public health and welfare. Such a limitation could not rationally have been intended to promote the public health and thus the statute must be stricken.

---

73. See *Sadler v. Sullivan*, 748 F.2d 820, 824 (3d Cir. 1984) ("[h]eavy burden" of overcoming a presumption of rationality "by a clear showing of arbitrariness and irrationality"); *Hodel v. Indiana*, 452 U.S. 314, 332-33 (1981); *Alderman v. United States*, 394 U.S. 165, 174-75 (1969).

74. *Dandridge v. Williams*, 397 U.S. 471, 484, 486-87 (1970).

75. See *New York v. Ferber*, 458 U.S. 747 (1982).

76. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). *Accord* *Haynes v. United States*, 390 U.S. 85, 92, (1968) (dictum); *Schneider v. Smith*, 390 U.S. 17, 27 (1968); *United States v. Rumely*, 345 U.S. 41, 45 (1953); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J. concurring).

77. *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971).

78. See 21 U.S.C. § 333(e)(1) (Supp. II 1991).

*A. The Anabolic Steroids Control Act of 1990 Unconstitutionality by Intrusion upon the State's Traditional Regulation of the Practice of Medicine*

The right to practice one's chosen profession, including medicine, is protected by both the due process clause and the equal protection clause of the fourteenth amendment.<sup>79</sup> However, "[i]t is long settled that states have a legitimate interest in regulating the practice of medicine."<sup>80</sup>

Even though courts have held that the practice of medicine is an area traditionally regulated by the states, the provisions of a federal act are not invalidated solely because they may at times impinge on some aspect of a doctor's practice.<sup>81</sup> These courts have also held that a physician does have specific limited rights to practice medicine.<sup>82</sup> These rights include those that are necessary to facilitate the exercise of a right that patients were found to possess.<sup>83</sup> The physician's rights are thus derivative of patient rights and do not exist independent of those rights.<sup>84</sup>

However, a physician also has a specific right to administer medical care to his patients.<sup>85</sup> If a statute has a sufficient deleterious impact on the right of a patient to receive such care then this statute is a violation of the constitution.<sup>86</sup> Thus, the physician is granted a right based on the patient's right to make important decisions concerning all medical treatment, free of unwarranted governmental interference.<sup>87</sup> The statute has already interfered with a patient's right to receive medical treatment "free from unwarranted governmental interference."<sup>88</sup> By limiting a physician from prescribing steroids for a legitimate purpose, in the physician's good faith professional view, the statute irrationally eliminates a possible alternative treatment for patients. Such a statute is facially unconstitutional and must be stricken.

79. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957).

80. *Eatough v. Albano*, 673 F.2d 671, 676 (3d Cir.), cert. denied, 457 U.S. 1119 (1982); see also *Bigelow v. Virginia*, 421 U.S. 809, 827 (1975).

81. *Meier v. Anderson*, 692 F.Supp. 546, 549 (E.D. Pa. 1988), *aff'd without opinion*, 869 F.2d 590 (3d Cir. 1989).

82. *Id.* at 550.

83. *Id.* at 549.

84. See *Whalen v. Roe*, 429 U.S. 589, 593 (1977).

85. *Doe v. Bolton*, 410 U.S. 179, 197-99 (1973).

86. *Whalen*, 692 F. Supp. at 604 n.33.

87. *Meier*, 692 F. Supp. at 549. *But see*, *Paul v. Davis*, 424 U.S. 693, 713 (1976) noted by the Whalen Court thus suggesting that the areas of protection are more limited.

88. *Thompson v. Gallagher*, 489 F.2d 443 (5th Cir. 1973).



*B. Unconstitutionality of the Anabolic Steroids Control Act of 1990 as Applied to Physicians as a Group*

The right to practice one's profession is neither explicitly nor implicitly enumerated in the Constitution, and cannot, therefore, be considered a fundamental right.<sup>89</sup> Because health care providers are neither a suspect nor a quasi-suspect class, a rational relation test is the appropriate test of the constitutionality of the Anabolic Steroids Control Act.<sup>90</sup> To pass constitutional muster under this test, a statute must be rationally related to the achievement of a legitimate governmental interest.<sup>91</sup> The statute is overturned only if a court concludes that the legislature's actions in passing the statute were irrational.<sup>92</sup> The great deference given to legislatures under this standard is underscored by the courts' willingness to uphold a statute "if any state of facts reasonably may be conceived to justify it."<sup>93</sup>

Under the rational relation test, a court would require that the party seeking to void the statute must bear the burden of proving the unconstitutionality.<sup>94</sup> However, since a physician's right to practice his profession free from unreasonable governmental interference falls within the "liberty" and "property" concepts of the fifth and fourteenth amendments, legislation aimed at regulating the profession in the public interest must be aimed at furthering a legitimate governmental interest and must in fact be rationally related to such a purpose.<sup>95</sup> The corollary of this proposition is that the states may reasonably regulate the professions in the public interest without violating the due process clause of the fourteenth amendment.<sup>96</sup>

---

89. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) ("[A] standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities.'") (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)); *Harper v. Lindsay*, 616 F.2d 849, 854 (5th Cir. 1980).

90. *Eatough*, 673 F.2d at 676; *McCoy v. Commonwealth Bd. of Medical Educ. & Licensure*, 391 A.2d 723, 728 (1978); see also *Brandwein v. California Bd. of Osteopathic Examiners*, 708 F.2d 1466, 1470 (9th Cir. 1983); *Rabino v. Commonwealth State Registration Bd. for Professional Eng'rs*, 450 A.2d 773, 775 (Pa. Commw. Ct. 1982); *Kennedy v. Hughes*, 596 F. Supp. 1487, 1492-93 (D. Del. 1984).

91. *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. at 312; *Malmed v. Thornburgh*, 621 F.2d 565, 573 (3d Cir.), cert. denied, 449 U.S. 955 (1980).

92. *Eatough v. Albano*, 673 F.2d 671, 676 (3d Cir. 1989) (quoting *Vance v. Bradley*, 440 U.S. 93, 97, 99 (1979)).

93. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

94. *Parham v. Hughes*, 441 U.S. 347, 351 (1979); *Vance*, 440 U.S. 93, 111.

95. *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957). See also Note, *Within the States' Jurisdiction: Metropolitan, Northeast Bancorp, and the Equal Protection Clause*, 96 YALE L.J. 2109, 2123 (1987).

96. See *McCoy v. Commonwealth Bd. of Medical Educ. & Licensure*, 391 A.2d 723, 727 (1978).

## ANABOLIC STEROIDS CONTROL ACT

“The right to practice one’s chosen profession, including medicine, is protected by both the due process clause and the equal protection clause . . . .”<sup>97</sup> “(T)he right to practice one’s chosen profession free from unreasonable government interference falls within the liberty and property concepts of the fifth and fourteenth amendments.”<sup>98</sup> Government action which is arbitrary or irrational violates the due process clause and cannot be sustained.<sup>99</sup>

A physician has a right to exercise judgment in prescribing treatment and to exercise his professional judgment in prescribing medication to his patients.<sup>100</sup> The Anabolic Steroids Control Act represents an unreasonable governmental interference with a physician’s liberty right to practice medicine without governmental interference, because the Act is overly restrictive and does not preserve a practitioner’s discretion to treat his patients in accordance with treatment principles accepted by a responsible segment of the medical profession. Although, the practice of medicine may be subject to limiting regulations, such regulation must further a legitimate state interest.<sup>101</sup> Courts throughout the United States have always given great deference to a physician’s reasonable medical decisions.<sup>102</sup> In matters concerning diagnosis and medical treatment, the courts allow the physician to make such a decision and defer to his judgment.<sup>103</sup> Congress’s refusal to defer to physicians’ informed medical decisions in regard to steroid prescription represents a significant interference with a physician’s ability to best care for his patients. In fact, the Act may force a physician to disregard the American Medical Association’s (AMA) Medical Ethics Code, which advises that the interest of the patient is paramount in the practice of medicine.<sup>104</sup>

Further, the AMA’s Medical Ethics Code provides that drugs may only be supplied or dispensed if it is in the best interest of the patient.<sup>105</sup> Even though it may be in the best interests of a physician’s patients, the physician may be precluded from prescribing

---

97. *Meier v. Anderson*, 692 F.Supp. 546, 549 (E.D. Pa. 1988) (citing *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957)).

98. *Id.* at 551-52 (citing *Greene v. McElroy* 360 U.S. 474, 492 (1959)).

99. *Neiderhiser v. Berwick*, 840 F.2d 213, 217 (3d Cir.), *cert. denied subnom.* *Berwick v. Neiderhiser*, 488 U.S. 822 (1988).

100. *Pharmaceutical Mfrs. v. Food and Drug Admin.*, 484 F. Supp. 1179 (D. Del.), *aff’d*, 634 F.2d 106 (3d Cir. 1980).

101. *Id.*

102. *See, e.g., Everett v. Franciscan Sisters Healthcare Inc.*, 882 F.2d 1383 (8th Cir. 1989).

103. *Id.*

104. OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL, AMERICAN MEDICAL ASSOCIATION 56 (1969).

105. *Id.* at 49.

steroids for "non-disease" problems or face criminal prosecution. Such a statute is unconstitutional in that it represents an unreasonable governmental interference with the practice of medicine, because it is overly restrictive and does not preserve a physician's discretion to treat his patients "in accordance with treatment principles accepted by a responsible segment of the medical profession."

Finally, the Anabolic Steroids Control Act is unconstitutional as it applies to physicians because it violates a physician's Due Process rights. The Act creates an irrebuttable statutory presumption that any use of steroids other than for the treatment of disease has no legitimate medical validity or purpose and does not amount to proper medical practice.<sup>106</sup> Such a presumption violates a physician's Due Process right to determine what is in the course of professional practice.<sup>107</sup>

### III. Public Policy Reasons for Invalidation of the Anabolic Steroids Control Act of 1990

Courts throughout the United States have given physicians the duty and the responsibility to give warnings about the side effects and consequences of using prescription drugs.<sup>108</sup> The physician has the task of weighing the benefits of any medication against its potential dangers.<sup>109</sup> It becomes the prescriber's duty to protect the consuming public from injury caused by prescription drugs and the prescriber will be held civilly liable for failure to give a warning that a reasonable medical practitioner in the community would make under the same or similar circumstances.<sup>110</sup> Thus, it has become the policy decision of courts throughout the United States that a physician is in the best position to protect his patients by giving adequate warnings and by exercising his medical judgment in prescribing medication.<sup>111</sup>

---

106. See *supra* note 3.

107. See *Everett v. Franciscan Sisters Health Care, Inc.*, 882 F.2d 1383 (8th Cir. 1989).

108. See, e.g., *Garside v. Osco Drug, Inc.*, No. 91-1915, 1992 WL 240679 (1st Cir. Sept. 30, 1992). A doctor's duty is to inform his patient what a reasonable prudent medical specialist would tell a person of ordinary understanding of the serious risks and the possibility of serious harm which may occur from a supposed course of therapy so that the patient's choice will be an intelligent one, based upon sufficient knowledge to enable him to balance the possible risks against the possible benefits. *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 523 (1984). The extent of disclosure is a matter of medical judgment. *Id.*

109. *Buckner v. Allegran Pharmaceuticals, Inc.*, 400 So.2d 820, 822 (Fla. Dist. Ct. App. 1981).

110. *Id.*

111. See, e.g., *Reyes v. Wyeth Lab.*, 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); *Chambers v. G.D. Searle and Co.*, 567 F.2d 269 (4th Cir. 1977); *Dalke v. Upjohn Co.*, 555 F.2d 245 (9th Cir. 1977); *Sterling Drugs, Inc. v. Cornish*, 370 F.2d 82 (8th Cir. 1966); *McCue v. Norwich Pharmacal Co.*, 453 F.2d 1033 (1st Cir. 1972). These cases all

## ANABOLIC STEROIDS CONTROL ACT

The Anabolic Steroids Control Act usurps the physician's medical judgment and replaces it with an overly restrictive, irrational governmental prohibition against prescription of steroids except in the treatment of disease. Since the purpose of the regulation of steroids is to promote public health, this unnecessary restriction defeats the current public policy protecting physicians' discretion in the care of their patients.<sup>112</sup> The Anabolic Steroids Control Act is in direct opposition to a physician's longstanding duty to utilize the ordinary knowledge and skill of his profession in undertaking the care and treatment of his patient.<sup>113</sup>

Courts have already held that the social utility derived from prescription medication such as anabolic steroids cannot be disputed and a physician should be able to prescribe steroids without fear of being exposed to liability.<sup>114</sup> Congress's action may have a detrimental effect on patient health care if physicians are forced to weigh their patient's needs against their potential for being held criminally liable for attempting to treat non-disease conditions.<sup>115</sup>

Exposing physicians to criminal liability for attempting to best care for their patients may result in physicians refusing to treat any individual with human growth hormone or anabolic steroids. Such a result would also defeat the Legislature's stated purpose of improving health care.<sup>116</sup> The Legislature should allow the medical community, the real experts, to decide when an individual should be allowed to consume steroids.

The AMA has already expressed strong views with regard to steroid use.<sup>117</sup> The AMA Council on Scientific Affairs recommended

---

hold that a manufacturer of prescription drugs must only give an adequate warning to prescribing members of the medical community, while the actual prescribers have the duty to inform patients of the risks and adverse effects of the drugs.

112. See, e.g., *Everett v. Franciscan Sisters Healthcare, Inc.*, 882 F.2d 1383 (8th Cir. 1989).

113. *Schwab v. Tolley*, 345 So.2d 747, 752 (Fla. 1977) (affirming jury instructions which stated that "the duty of a physician in connection with the diagnosis and treatment of a patient is that the physician must use the ordinary skills and means and methods that are recognized as necessary . . .").

114. *Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind. 1991) (physician held not liable for third person injury caused when physician's patient went into psychological rage as a result of the physician's prescription of steroids to patient).

115. *Id.*

116. 135 CONG. REC. S14519-06 (1990).

117. Robertson, *supra* note 2, at 2926-27. The AMA Council on Scientific Affairs recommended the following action with regard to steroid use prior to the enactment of the Anabolic Steroid Control Act of 1990:

1. The AMA reaffirm its concerns over the nonmedical use of drugs among athletes, its belief that drug use to enhance or sustain athletic performance is inappropriate, its commitment to cooperate with various other concerned organizations, and its support of appropriate education and rehabilitation programs.

increased criminal penalties for misprescribing steroids, but only for steroids that have been misprescribed for non-medical use.<sup>118</sup> Specifically, the AMA recognizes that the use of steroids for non-medical purposes presents a severe problem to the health of society, and that steroid use is inappropriate to enhance or sustain athletic performance.<sup>119</sup> The AMA recognized that scheduling of steroids under the federal Controlled Substances Act would not result in any reduction in non-medical use of steroids since the majority of improperly used steroids come from the black-market.<sup>120</sup>

In this regard, the AMA has given testimony to Congress opposing the scheduling of steroids under the Controlled Substances Act.<sup>121</sup> The AMA expressed its concerns over non-medical use of steroids, but also expressed its belief that congressional intervention would be ineffective.<sup>122</sup> The Legislature's failure to defer to the governing body of physicians in the United States was inappropriate and results in severe limitations on a physician's ability to practice medicine. The overbroad language of the Anabolic Steroids Control Act has created the problems anticipated by the AMA; ineffective regulation which ties the hands of the primary care givers in the

---

2. The AMA reaffirm its support of increased criminal penalties enacted as a part of the Anti-Drug Abuse Act of 1988 and its support of state legislation that addresses the problem of misprescribing.

3. The AMA reaffirm its opposition to scheduling of anabolic-androgenic steroids under the federal Controlled Substances Act.

4. The AMA reaffirm its willingness to work closely with sports groups, coaches, team owners, amateur and professional athletes, and parents.

5. The AMA continue to endorse the professional education campaign of the FDA.

6. The AMA make available to practicing physicians, legislators, sports organizations, educators, adolescents, and the public existing and proposed educational materials and model state legislation on the nonmedical use of anabolic-androgenic steroids.

7. The AMA identify and widely disseminate information on successful initiative and activities to curtail the problem of nonmedical use.

8. The AMA encourage survey efforts that provide a better understanding of the nature and prevalence of nonmedical use.

9. The AMA actively encourage further research on short- and long-term health effects and encourage reporting of suspected adverse effects to the FDA.

10. The AMA continue to work with sports organizations to increase understanding of health effects and to discourage the use of steroids on this basis.

*Id.*

118. *Id.*

119. *Id.*

120. *Id.* See also 135 CONG. REC. S14519-06 (1990). The Department of Justice estimates that on the black market, the annual sales of these drugs is about \$300 to \$400 million. The Justice Department believes that the source of black market steroids is divided evenly between clandestinely manufactured goods, smuggled products, and diverted legally manufactured products. *Id.*

121. *Id.*

122. *Id.*

United States.

Finally, physicians are held civilly liable for failure to give adequate warnings or for prescribing medication outside of the proper practice of medicine.<sup>123</sup> Various legislatures and society as a whole have been alarmed by the escalating costs of malpractice insurance.<sup>124</sup> The increase of civil suits and the rise in malpractice insurance has caused some physicians to be unable or unwilling to practice medicine.<sup>125</sup> Physicians are already punished for conduct that is contrary to the health and welfare of their patients by the availability of malpractice suits.<sup>126</sup> Thus, criminal penalties only provide an additional deterrent, not an exclusive deterrent.

A criminal deterrent may be desirable to protect the public from doctors acting outside of the scope of their professional conduct, but is clearly undesirable as applied against physicians acting within the scope of their professional conduct. Physicians acting outside of the scope of their professional conduct are already exposed to civil checks on their behavior and some have stated that the additional liability may result in their refusal to treat individuals with steroids.<sup>127</sup> Additional criminal measures only serve to confuse physicians and perhaps prevent them from being able to effectively treat their patients.

Thus, Congress disregarded the information submitted by the recognized authorities on prescription drugs. Instead, perhaps caught up in the strong public concern over steroids in general, Congress enacted an overly restrictive prohibition on steroid use. Such a statute achieves no stated governmental purpose other than to make voters aware that Congress has taken action.

#### IV. Conclusion

The Anabolic Steroids Control Act of 1990 should be stricken on its face as unconstitutionally overbroad and unconstitutional as it applies to physicians. The Legislature attempted to answer what it perceived as a growing problem; the non-medical use of anabolic-androgenic steroids. Unfortunately, the resulting legislative enact-

---

123. See, e.g., *Buckner v. Allegran Pharmaceuticals, Inc.*, 400 So.2d 820, 822 (Fla. Dist. Ct. App. 1981).

124. See *Fein v. Permanente Medical Group*, 474 U.S. 892, 895 (1985).

125. *Id.*

126. *Id.*

127. James H. Davis, "Fixing" the Standard of Care: Motivated Athletes and Medical Malpractice, 12 AM. J. TRIAL ADVOCACY 215, 230 (1988) (physician interviewed stated that he may be unwilling to treat athletes if possibility existed that he would be subject to more civil liability).

ment is overbroad and improperly defines what constitutes informed medical practice. The Act overrides the current public policy of granting great deference to a physician's judgment in matters of medicine concerning their patients.

The statute's vagueness and overbreadth is not rationally related to the Legislature's legitimate government interest and cannot withstand an attack even under the rational basis standard promulgated by the Supreme Court. Because of the statute's irrationality and the inability to construe it within a constitutionally permissible limitation, it must be stricken on its face.

The statute is also unconstitutional as it applies to physicians. It places an impermissible, irrebuttable presumption on physicians that makes the defense of a physician charged under the statute extremely difficult, if not impossible. Further, the act represents a serious interference with a physician's right to practice medicine, and with the patient's right to receive the best, informed medical care. Such a statute represents a violation of a physician's basic constitutional rights and as such must be stricken on its face.

Finally, the Act represents a departure from past and current public policy. The Legislature and the courts have always deferred to the medical community's decisions about what is in the best interest of their patients. The Anabolic Steroids Control Act eliminates this deference, with regard to steroid prescription, and instead represents a legislative opinion that is contrary to the opinion formed by the "real experts" in this field. Such a statute should be stricken as contrary to the best interests of society.

*Jeffrey A. Black*