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ESSAY

A CALL FOR DRUG-TESTING OF HIGH SCHOOL STUDENT-ATHLETES

SCOTT A. ANDRESEN*

Taylor Hooton was your average sixteen-year-old high school athlete. He was popular, outgoing, polite, and committed to achieving a high level of athletic success. Despite being an athletic 6' 2" and 180 pounds, Taylor heard the words no athlete wants to hear from a coach: "[You] need[] to be bigger in order to effectively compete next year."¹ Though it can only be assumed that the coach meant for Taylor to hit the weight room and consume as much protein as he could get his hands on, Taylor believed that something extra might be required to get him where he "needed" to be as quickly as possible. That "something extra" was anabolic steroids. Though Taylor had stopped using some or all of the steroids he was taking, it was the post-steroid depression that likely caused him to commit suicide by hanging himself in his family's home.²

It would be easy to question why family, coaches, and teammates were not more active in addressing Taylor's situation, but the answers are not so simple. Parents are generally not educated in the warning signs of steroid use until it is too late. Parents often attribute emotional swings, growth spurts, and acne to the normal progress of a child matriculating through the teen years. Coaches and teammates are wired to be supportive of a "gym rat" who from all outward appearances is simply working hard to achieve his or her goals—and to suggest that steroids or other forms of cheating might be at play would be a great personal insult to such a person.

*

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1. Taylor Hooton Foundation, <http://www.taylorhooton.org> (last visited Oct. 28, 2008).

2. *Id.*

The Taylor Hooton story is just one of hundreds of cautionary tales that illustrate why testing of high school athletes for steroids, performance-enhancing drugs, and recreational drugs is not only desirable, but absolutely necessary. This Article will discuss the United States Supreme Court decisions that give the right to test high school athletes, the state testing programs that are presently in place, and a suggested testing program that would effectively incorporate the pros and address the cons of the programs presently in place.

I. SUPREME COURT DECISIONS: *ACTON* AND *EARLS*

The first United States Supreme Court decision upholding the constitutionality of suspicionless random drug testing of high school students involved in athletic programs was *Vernonia School District v. Acton*.³ Moved to action by the realization that student-athletes were at the forefront of a growing drug culture and the concern that drug usage would increase the risk of sports-related injuries, the Vernonia School District implemented a policy that authorized random urinalysis drug testing of students who participated in athletics.⁴ Acton filed suit asserting that the policy violated the Fourth (unreasonable search and seizure) and Fourteenth (due process) Amendments and state constitutional law.⁵ In a 6-3 decision penned by Justice Scalia, the Court reasoned that the searches under the Vernonia policy were reasonable as (i) the students being tested had been committed to the temporary custody of the state, thus enabling the state to exercise a degree of supervision and control greater than it could exercise over free adults, (ii) student-athletes have a lesser expectation of privacy than other students as "an element of communal undress is inherent in athletic participation," (iii) the privacy interests compromised by the collection of urine samples were negligible as they were nearly identical to conditions found in a public restroom, and (iv) the nature and immediacy of the state's need to deter drug use among schoolchildren in general, and athletes in particular.⁶

The Supreme Court strengthened the holding of *Vernonia* in 2002 with the case of *Board of Education v. Earls* by stating that school districts were not required to demonstrate an identifiable drug problem among a sufficient number of those tested in order to implement a suspicionless drug testing

3. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

4. *Id.* at 649-50.

5. *Id.* at 651.

6. *Id.* at 654-65.

program.⁷ The *Earls* Court expanded the holding of *Vernonia* by applying it to all students who participate in extracurricular activities, not just to athletes.⁸ Following the reasoning of *Vernonia*, the Court held in a 5-4 decision authored by Justice Thomas that (i) students who voluntarily participate in school extracurriculars have reason to expect intrusions upon normal rights and privileges, and therefore have a limited expectation of privacy;⁹ (ii) given the minimally intrusive nature of the sample collection and the limited uses to which the test results were put, the invasion of the students' privacy was not significant;¹⁰ and (iii) testing students who participate in extracurricular activities is a reasonably effective means of addressing the legitimate concerns in preventing, deterring, and detecting drug use among students (noting that "[w]hile in *Vernonia* there might have been a closer fit between the testing of athletes and the trial court's finding that the drug problem was 'fueled by the "role model" effect of athletes' drug use,' such a finding was not essential to the holding").¹¹

II. STATE DRUG TESTING PROGRAMS

A. New Jersey

On June 7, 2006, the State of New Jersey became the first state to require statewide drug testing of high school student-athletes. The testing policy was the end result of then-Governor Richard J. Codey's¹² Executive Order 72 issued on December 20, 2005, and is administered by the New Jersey State Interscholastic Activities Association through the assistance of The National Center for Drug Free Sport.¹³ The New Jersey plan has an annual budget of \$100,000 and randomly selects 500 athletes participating in state championship competitions for testing.¹⁴ Sixty percent of the testing occurs in

7. Bd. of Educ. v. Earls, 536 U.S. 822 (2002).

8. *Id.* at 838.

9. *Id.* at 831-32.

10. *Id.* at 832-34.

11. *Id.* at 834-38.

12. Now the President of the New Jersey State Senate, former Governor Codey is the sponsor of a bill (S752) that would expand and make permanent the current random drug testing program in place for student athletes in New Jersey. The bill would combine testing, education, institutional training and advertising for students from elementary school up through high school. The bill was unanimously passed 36-0 by the Senate on April 7, 2008, and is presently awaiting approval by the Assembly. S.B. 752, 2008-09 Leg. (N.J. 2008).

13. Exec. Order No. 72, 38 N.J. Reg. 361(b) (Dec. 20, 2005).

14. N.J. State Interscholastic Athletic Ass'n, *NJSIAA Steroid Policy Frequently Asked Questions*, NJSIAA.ORG, <http://www.njsiaa.org/NJSIAA/steroid-FAQ.pdf> (last visited Oct. 28, 2008).

the sports of football, wrestling, track and field, swimming, lacrosse, and baseball.¹⁵ Similar to the policy implemented by the National Collegiate Athletic Association (NCAA) and testing for the same types of substances that are banned by the International Olympic Committee and the World Anti-Doping Agency, this policy tests athletes for anabolic agents and steroids, diuretics, and peptide hormones and analogues (e.g., growth hormones).¹⁶ Any individual who tests positive, refuses to take a test, or self-reports taking a banned substance forfeits any individual honors earned and loses athletic eligibility for a period of one year.¹⁷ Counseling and a negative test result are required for reinstatement of eligibility.¹⁸

B. Texas

Texas became the second state to implement a statewide steroid testing policy on June 15, 2007.¹⁹ Provided with a budget of \$3,000,000, the University Interscholastic League (UIL) has tested approximately 10,000 student-athletes as of the writing of this Article.²⁰ Under the policy implemented by the UIL and The National Center for Drug Free Sport, approximately three percent of students involved in athletics at thirty percent of the state's high schools are tested for anabolic steroids (students are not tested for recreational drugs).²¹ Any individual who tests positive or refuses to take a test is suspended from participating in all UIL athletic activities for thirty school days (during that athlete's competitive season) for the first violation, one calendar year for a second violation, and is permanently suspended from participation in UIL athletic contests for a third violation.²² A negative test result is required for any reinstatement of eligibility.²³

C. Florida

Under a one-year pilot program approved by Governor Charlie Crist on June 19, 2007, approximately one percent of all in-season high school student-

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. S.B. 8, 80th Leg. (Tex. 2007).

20. Univ. Interscholastic League, *UIL Anabolic Steroid Testing Program Questions and Answers*, http://www.uil.utexas.edu/athletics/health/pdf/steroid_testingQ&A.pdf (last visited Oct. 28, 2008).

21. *Id.* at 2.

22. *Id.* at 5.

23. *Id.* at 8.

athletes participating in baseball, girls' flag football, boys' tackle football, girls' softball and boys'/girls' weightlifting were tested for anabolic steroids (students were not tested for recreational drugs, nor were they tested out of season) during the 2007-08 school year.²⁴ Any individual who tested positive was suspended from practice and competition in all sports for ninety school days.²⁵ Counseling and a negative test result were required for reinstatement of eligibility.²⁶ It is interesting to note that students who did not consent to testing were not allowed to participate in the listed six sports, but were allowed to participate in other, non-listed sports.²⁷ The Florida program was discontinued after the 2007-08 school year after the Florida legislature discontinued funding for the program.²⁸

D. Illinois

The most recent state to undertake testing of its high school athletes is Illinois. Unlike the states previously discussed, the Illinois program was conceptualized and mandated not through legislative intervention, but through the efforts of the Illinois High School Association (IHSA), a non-governmental entity that serves as the governing body of high school extracurricular activities within the state.²⁹ The Illinois program will begin testing athletes during the 2008-09 school year for stimulants, anabolic agents and steroids, diuretics, and peptide hormones and analogues. Any individual who tests positive, refuses to take a test, or self-reports forfeits any individual honors earned and athletic eligibility for a period of one year (with a possible reduction to ninety days with a negative test result and participation in an educational program).³⁰ It is anticipated that approximately 700 tests will be given to a random selection of athletes participating in state series competitions in all sports.³¹ Counseling and a negative test result are required for reinstatement of eligibility.³² Additionally, the Executive Director of the

24. FLA. HIGH SCH. ATHLETIC ASS'N, 2007-2008 FHSA ANABOLIC STEROID TESTING PROGRAM (2008), *available at* http://www.fhsaa.org/compliance/steroid_testing/drug_test_prog_info.pdf.

25. *Id.* at 3.

26. *Id.* at 3-4.

27. *Id.*

28. *See id.*

29. Illinois High School Association (IHSA), <http://www.ihsa.org> (last visited Oct. 28, 2008).

30. ILL. HIGH SCH. ASS'N, 2008-2009 IHSA HANDBOOK: CONSTITUTION, BY-LAWS WITH ILLUSTRATIONS, AND POLICIES, *available at* <http://www.ihsa.org/org/policy/index.htm> (last visited Oct. 28, 2008).

31. *Id.*

32. *Id.*

IHSA shall have the authority to evaluate each positive test situation on a case-by-case basis to determine if any team/school penalty is appropriate.³³ The IHSA has earmarked \$150,000 for its program and testing will be conducted through the National Center for Drug Free Sport.³⁴

III. SUGGESTIONS FOR CURRENT AND FUTURE PROGRAMS

Though it is freely acknowledged and admitted that any number of unique circumstances would make complete implementation of the following suggested considerations unlikely, the goal here is to at least stimulate discussion. With that being said, it is my belief that a sound high school drug testing policy implemented on a statewide level should take the following into consideration:

The aim of any program is not to "catch" cheaters, but rather to serve as a deterrent against drug use.

One need look no further than the comments of a Boca Raton high school athletic director who grouched that it "cost us \$100,000 to find that one student" (in reference to the fact that the Florida drug testing program encountered only a single positive test result during the year of its implementation) to see that there needs to be a dramatic change in mindset about what drug testing is meant to accomplish at the high school level.³⁵ While catching cheaters and retribution may be appropriate goals at the professional and even collegiate levels, the same cannot be said for high school testing. Testing at the high school level must primarily be utilized as a deterrent against drug use. In fact, positive test results should not be seen as a program victory, but rather as a program defeat. By their nature, high school-aged individuals have a certain sense of invincibility and a lack of forward thought beyond the next holiday vacation or spring break. Such lack of aforethought about the long-term implications of any action makes it completely reasonable for one to experiment with steroids and other drugs, especially in the absence of education. To quote—perhaps for the first time in a law review article—Kevin Costner's *Bull Durham* character Crash Davis, "They're kids. Scare

33. *Id.*

34. *Id.*; see also Matt Daniels, *IHSA to Implement Drug Testing Program During 2008-09 School Year*, LEDGER SENTINEL, Aug. 21, 2008, at Sports.

35. Ben Volin, *Prep Drug Testing Runs Out of Juice*, PALM BEACH POST, May 19, 2008, available at <http://www.palmbeachpost.com/sports/content/sports/epaper/2008/05/19/0519steroids.html>.

‘em.’”³⁶ Whether you call it education or “scaring ‘em”, it is important to deter use by reminding student-athletes that steroid and drug use could not only affect their reputation, high school eligibility, and collegiate scholarship offers, it can also lead to permanent medical conditions and death.

Make education as important as testing.

Any program that seeks to deter drug use rather than punish it must devote as many, if not more, resources to education as it does to testing. For all of their impetuosity, high school students are also capable of making good decisions when given the information necessary to do so. The legislation presently pending before the New Jersey Assembly outlines perhaps the most comprehensive educational program to date. To that end, the legislation would require: (i) that coaches who participate in interscholastic athletics must incorporate both male- and female-specific programs into their athletic programs that are aimed at reducing the use of steroids, performance-enhancing supplements, alcohol, and recreational drugs, as well as promoting healthy nutrition, body image, and exercise; (ii) annual workshops for all middle and high school coaches on steroid and performance-enhancing supplement use prevention; (iii) the provision of anti-steroid and anti-performance-enhancing supplement advertisements in any brochure, pamphlet, handout, program, or book offered for sale or distribution at athletic tournaments; (iv) posters for display in gyms and locker rooms that warn of potential health risks of steroids and penalties for their use and possession; (v) establishment of a “Steroids Awareness Week” wherein schools would be required to hold school-wide assemblies and opportunities for discussion on the health hazards and legal consequences of using steroids and performance-enhancing substances; (vi) frequent student surveys on steroid use, and reports detailing their results; and (vii) that steroid education be part of core educational curriculums.³⁷

While the foregoing program suggestions are a good start, they may not go far enough. In particular, the program needs to address performance-enhancing and recreational drugs. The program further neglects the very people on the “front lines” in the battle against steroid and drug use: parents and youth coaches. Taylor Hooton’s father, Don, stated the following after the death of his son, “There is a checklist of symptoms (of steroid use), and he

36. BULL DURHAM (MGM Studios 1988); see also *Top Sports Movie Quotes*, THELOVEOFSPORTS.COM, http://www.theloveofsports.com/index.php/site/commentstop_sports_movie_quotes (last visited Oct. 28, 2008).

37. S.B. 752, 2008-09 Leg. (N.J. 2008).

was showing almost all of them. . . . We didn't know any better. We should have."³⁸ Additionally, any educational program must include, to the extent that arrangements can be made with applicable governing bodies (e.g., American Legion, Pop Warner, AAU), mandatory educational programs for coaches involved with individuals above the ages of thirteen or fourteen.

Test for steroids AND recreational drugs.

Though only New Jersey and Illinois presently test for anything other than steroids, a recent study leaves no doubt that excluding testing for recreational drugs is only dealing with a very small part of the high school drug issue.³⁹ The University of Michigan's most recent *Monitoring the Future* study revealed that a relatively low 1.4% of twelfth graders had used steroids in the preceding year, but that the following was also true of twelfth graders during the same period:

- 66.4% had used alcohol (with 46.1% getting drunk).
- 31.7% had used marijuana.
- 9.6% had used Vicodin.
- 6.2% had used barbiturates and tranquilizers.
- 5.4% had used hallucinogens.
- 5.2% had used cocaine and OxyContin.
- 4.5% had used Ecstasy.⁴⁰

Another recent study undertaken by the NCAA found the following to be true among collegiate athletes surveyed:

- The percent of student-athletes using ergogenic drugs (those that increase capacity for physical or mental exertion by eliminating symptoms of fatigue) during high school or before has increased significantly.
- Over two-thirds of amphetamine, ephedrine, and nutritional supplement use appears to start prior to college.
- Over one-half of anabolic steroid use begins mostly in high school.
- Over one-half of cocaine users indicated first trying cocaine in high school or before.

38. Don Hooton, *Taylor Hooton – Steroid Stories: Symptoms Overlooked*, TAYLORHOOTON.ORG http://www.taylorhooton.org/taylor_hooton (last visited Oct. 28, 2008).

39. University of Mich., *Monitoring the Future*, MONITORINGTHEFUTURE.ORG, <http://www.monitoringthefuture.org> (last visited Oct. 28, 2008).

40. LLOYD D JOHNSON ET AL., *MONITORING THE FUTURE NATIONAL RESULTS ON ADOLESCENT DRUG USE: OVERVIEW OF KEY FINDINGS*, 2007, 59 (2008), available at <http://monitoringthefuture.org/pubs/monographs/overview2007.pdf>.

- The percent of student-athletes trying alcohol, marijuana, or cigarettes in junior high or before is increasing.⁴¹

With the health and well-being of the student-athlete being the most important objective of any testing program, to ignore the most frequently abused drugs would not only be foolish, it would be reckless. While there can be no doubt that many lives have been negatively impacted by steroids, can there be any doubt that the number of lives negatively impacted by alcohol, marijuana, cocaine, prescription medication, and otherwise is exponentially higher?

Test all sports at all levels.

To truly serve as a deterrent to *all* student-athletes, any testing program must not be predominantly limited to men's sports at the state championship series level. Testing must necessarily include women (even for steroids) and must include student-athletes at all levels of the win-loss continuum. While a higher percentage of testing can, and probably should, be devoted to sports in which use of banned substances is more likely (e.g., football, baseball, wrestling, and weightlifting), to completely ignore other sports creates an unnecessary gap in enforcement. It is also foolish to think that there are not student-athletes at risk on winless teams at the bottom of their conference standings. In fact, a team that does not garner much interest might be exactly where a student-athlete looking to attract attention from college recruiters would be more likely to take a chance on improving his on-field performance through steroids or performance-enhancing shortcuts.

Implement no-notice or short-notice testing in and out of season.

A key element of any testing program is no-notice or short-notice testing. To that end, independent third-party testers should be utilized and given access to schools, events and the like without the need for prior arrangements or scheduling of visits. In order to serve as a deterrent, testing must have the feel of being imminent and always lurking "just around the corner." Any sort of advance notice to school administration, coaches and/or students would likely lead to student violators physically avoiding testing through absences from school or events or disappearing while testers are on-site. In furtherance of creating a feeling of imminence, testing should also be conducted in and out of season throughout the entire school year (it being acknowledged that testing

41. Nat'l Collegiate Athletic Ass'n, *NCAA Study of Substance Use Habits of College Student-Athletes*. NCAA.ORG, Jan. 2006, http://www1.ncaa.org/membership/ed_outreach/health-safety/drug_ed_progs/2005/DrugStudy2005_ExecutiveSummary.pdf.

during the summer months would be difficult logistically and, perhaps, legally). In addition to avoiding "cycling" or other periods of non-use to avoid positive results, such no-notice or short-notice testing would help eliminate periods of time in which student-athletes deciding whether or not to use a banned substance could do so without fear of detection.

Devote sufficient resources to the program.

For a program to be an effective deterrent, it must have the finances and resources necessary to achieve its objectives. Just as important as it is to educate student-athletes as to the dangers of using steroids and other drugs, it is equally important to have them feel that there is a statistically realistic chance that they may get caught if they try to circumvent the rules. What percentage equates to "statistically realistic" is probably impossible to determine with any certainty. However, it is reasonable to believe that one to three percent does not meet this threshold. Whether a one-in-ten or a one-in-twenty chance of getting tested is sufficient is up for individual states to determine based on the other circumstances surrounding their respective programs. Though most states would not be willing or able to devote \$3,000,000 to their programs like Texas, one would think that any state legislature-approved program could and should devote more than \$100,000. If a single life is saved, the price would be negligible at any level.

Make the punishment fit the crime.

Three of the four state programs detailed above had provisions under which violators could be reinstated within ninety days. While everyone deserves a second chance, ninety days seems insufficient to deter use of drugs and steroids—especially when coupled with the very low percentage of student-athletes actually being tested. Further, there is no apparent justification for giving anyone *three* strikes during their four-year high school career, as is the case in Texas. In order to operate as a true deterrent, initial violations should be met with a minimum penalty of six to twelve months, with permanent disqualification being the response to a second violation. Additionally, the provision of the Illinois program allowing for a case-by-case review to determine applicable team and school penalties⁴² is necessary to give any program extra teeth (even if there is the potential to open up a Pandora's box of appeals and legal challenges). It is only appropriate to put some of the burden of enforcement, vis-à-vis a shared risk of punishment, on

42. ILL. HIGH SCH. ASS'N, *supra* note 30.

the teammates and school administration who have the most access to and ongoing interaction with the student-athletes to be tested.

Give student-athletes what they want and need.

A recent study by Dr. Gary Green at the University of California at Los Angeles David Geffen School of Medicine revealed that a substantial majority of southern California high school athletes surveyed felt that drug testing would make their sports more fair, would effectively catch people using steroids, and would serve as a deterrent to steroid use.⁴³ With an overwhelming majority of student-athletes not using steroids or other performance enhancing drugs, it is important to prevent a culture in which they feel that they are forced to cheat in order to compete because “everyone else is doing it.” Further, student-athletes who truly want to do the right thing may often be pressured by teammates, coaches, and friends to take steroids and other drugs. The existence of an effective program would give these individuals the opportunity to say “no” with the realistic justification being a fear of getting caught and punished.

IV. CONCLUSION

In lieu of concluding this Article with a summation of its content, I have taken an excerpt from a recent piece by Taylor Hooton’s father, Don, which appeared in *The Dallas Morning News*, which sums up the prevailing theme of this article from the perspective of one who knows the importance of the subject matter better than most of us will ever have the extreme misfortune of knowing. To that end,

This month marks the tragic fifth anniversary of the suicide of my son Taylor Hooton, caused by steroid-induced depression. Taylor was only 17. His passing has forever affected our family, but in the wake of the tragedy, I formed the Taylor Hooton Foundation to spotlight the effects of performance-enhancing drugs on our children. The Foundation’s efforts led to a successful partnership with the Texas legislature to enact Taylor’s Law, signed into effect in June 2007 Out of the preliminary findings [as of July 2008], two positive tests resulted from more than 10,000 tests conducted But

43. Gary A. Green, *The Prevalence of Anabolic Steroid Use by Southern California High School Athletes*, Nov. 2007, LA84 FOUNDATION, <http://www.la84foundation.org/3ce/SteroidUseInSouthernCaliforniaHighSchools.doc>.

the law's primary purpose is to prevent our children from turning to steroids by providing a deterrent—the risk of getting caught gives our kids a solid reason to say no. Based on the preliminary results that we've read about, what we do know is . . . [a]t least two kids are going to get help before something tragic happens. (I can only wish that my son had been "caught" and been able to receive help.) Ten thousand kids know firsthand that we are taking this issue seriously here in Texas, [and] [m]illions of Texas families now know about the dangers of anabolic steroids. Those results are, to me, an excellent definition of success If the cost of the program can prevent our student-athletes from heading down the path that caused my son to take his life, I believe their family, friends and team would agree it is worth it.⁴⁴

44. Donald M. Hooton, *Donald Hooton: Taylor's Law Shows Steroid Enforcement Is Working*, DALLAS MORNING NEWS, July 14, 2008, available at http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-hooten_14edi.ART.State.Edition1.4d73876.html.

Table of State Drug Test Plans to Date

State	Who is Tested	Drugs Tested	Penalties	Cost
New Jersey	500 randomly selected athletes participating in state championship competitions. 60% tested in sports of football, wrestling, track and field, swimming, lacrosse and baseball. 40% tested in remaining sports	Anabolic steroids and anabolic agents, diuretics, and peptide hormones and analogues	One year ineligibility and forfeiture of individual honors	\$100,000
Florida	1% of in-season athletes participating in football, baseball, boys' and girls' weightlifting, flag football, and softball (2007-08 school year only)	Anabolic steroids and masking agents	90 days ineligibility and participation in a drug education program	\$100,000
Texas	3% of athletes in all sports at 30% of the state's schools	Anabolic steroids	30 days ineligibility for first offense; one year ineligibility for a second; and permanent ineligibility for third offense	\$3,000,000
Illinois	Approximately 700 athletes participating in state championship competitions in all sports (beginning with 2008-09 school year)	Stimulants, anabolic steroids and anabolic agents, diuretics, and peptide hormones and analogues	One year ineligibility, with possible reduction to 90 days with participation in drug education program and negative test. Team penalties decided on a case-by-case basis	\$150,000

