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Eighth Annual Robert F. Boden Lecture: Drugs in Sports and the Law - Moral Authority, Diversity and the Pursuit of Excellence

Hayden Opie

EIGHTH ANNUAL ROBERT F. BODEN LECTURE

Drugs in Sports and the Law – Moral Authority, Diversity and the Pursuit of Excellence[†]

HAYDEN OPIE[*]

INTRODUCTORY REMARKS BY JOSEPH D. KEARNEY[**]

It is my privilege as Dean of the Law School to introduce this year's Boden Lecture. It is appropriate that, in doing so, I should say something first about Bob Boden, one of my predecessors as dean and the individual in whose memory the Boden Lecture stands.

Robert F. Boden was an especially long-serving dean of this Law School, holding that position from 1965 until his death in 1984. Although I did not have the advantage of knowing him, I have spoken with enough individuals who did that I can claim to have some sense of the man. Bob Boden was devoted to Marquette Law School and its advancement. He was a tireless promoter of the school to the Wisconsin bar and was known for his eloquent remarks outside of the school. He also remained an active colleague of his fellow faculty and a teacher of students throughout.

Hear the words of our own Professor Kircher, in a memorial essay in the Marquette Law Review in 1984 which I would commend to each of you: "Bob Boden made no secret of his philosophy of legal education. He believed that a law school was a professional school and existed for the purpose of training lawyers."[1] *Professor Kircher went on to explain that, despite the extraordinary demands on his time, Dean Boden somehow always found "time, abundant time, for bar association work, projects of law revision and*

[†] Marquette University Law School, Eighth Annual Robert F. Boden Lecture, September 24, 2003, David A. Straz, Jr., Hall, College of Business Administration building.

[*] Faculty of Law, The University of Melbourne, and member, National Sports Law Institute Board of Advisors.

[**] Dean and Professor of Law, Marquette University Law School.

1. John J. Kircher, *Dean Robert F. Boden: A Retrospective*, 67 MARQ. L. REV. xi, xiv (1984).

community service."[2] *It is thus no surprise that, upon his death at a relatively early age (in his late fifties), many of these former colleagues and students helped to establish and endow this Boden Lecture. Their efforts remain to the benefit of those of us who are part of Marquette Law School today.*

This year the Boden Lecturer is Professor Hayden Opie, who is here with us throughout this semester as our Boden Visiting Professor. Professor Opie studied at the University of Melbourne in Australia and at the University of Toronto and today is a member of the Faculty of Law at the University of Melbourne, where he teaches sports law and torts courses. He is not merely the leading authority on Australian sports law, but an internationally recognized figure in the field—as evidenced, I would think, by his previous selection to be a member of our National Sports Law Institute's Board of Advisors. It would require far more time than would be appropriate in this introductory context for me to purport to recount the extent of Professor Opie's scholarship in the area of sports law, but suffice it to say that it is not merely an impressive list of titles, but also, I understand from Professor Mitten, an impressive corpus of scholarship.

Professor Opie is not merely a teacher and a scholar. He is an active and engaged participant in the practical world of sports law as well. To give you but one or two examples, he conducted an independent inquiry on behalf of Australia's government into the national women's gymnastics program, and he has conducted investigations and hearings into a variety of disputes for Australian sports governing bodies. It is this combination of being a teacher and scholar, on the one hand, and an active participant in the field, on the other hand, that, it seems to me, makes Professor Opie an especially appropriate selection as this year's Boden Lecturer.

Hayden, I will stand down in your favor.

ROBERT F. BODEN LECTURE

Mr. Dean, distinguished guests, ladies and gentlemen, "Good Afternoon," and, Mr. Dean, thank you for your kind words of welcome and of introduction.

May I preface this Eighth Robert F. Boden Lecture by recording both the honour and pleasure I feel at being asked to deliver it. I am the first Australian to do so and this is the first occasion upon which the topic is related to the field of sports law, which I admit is one of my passions. My feelings of honour and pleasure are strengthened because Marquette University Law

2. *Id.* at xv.

School is very well respected in my country as an international centre of learning and leadership in sports law.

May I also express my appreciation of the warm welcome and assistance extended to me by the faculty, staff, and students of the Law School and, more generally, Marquette University and the people of Milwaukee.

Barely a day passes without report of some new controversy concerning performance-enhancing drugs in sport. The topic has a remarkable capacity to engage public interest. When one speaks of performance-enhancing drugs, the reference is commonly to a miscellaneous collection of drugs – many of them ordinary, legitimate medicines – and also various procedures, all of which are claimed to improve athletic performance in a manner regarded as improper. I offer that as a guide rather than an exhaustive or rigorous definition. Included are various stimulants and painkillers, anabolic steroids, testosterone, human growth hormone, treatments and drugs that increase the capacity of the blood to carry oxygen such as EPO, attempts to tamper with the accuracy of test results such as by swapping urine samples and, most recently prohibited, genetic doping.

This lecture is divided into three parts. I will begin by describing some experiences and perspectives from Australia, and then a number of recent important international developments, before concluding by offering suggestions for resolving various dilemmas and problems presented by those international developments.

AUSTRALIAN EXPERIENCES AND PERSPECTIVES

Almost invariably we see the world through the prism of our own experiences and events at home. Let me begin by sharing with you some Australian perspectives and experiences; not so much because they are necessarily special, but because they may bring to mind comparable matters in your own countries and systems, and demonstrate the commonalities and the differences involved in regulating performance-enhancing drugs.

Australians take their sport very seriously. Sport holds an important place in Australian society – some say pride of place – and for a young and geographically remote nation with a small population, sport is a means of formulating and expressing national identity.

Australians also take great objection to the use of performance-enhancing drugs in sport, largely for "ethical" reasons. The news media give prominence to reports of the detection of "drug cheats" at home and abroad and can be strident in their criticism.

The root cause of such an uncompromising stance is almost certainly the widely held belief in Australia that drug use by other nations was responsible for a slump in Australia's international performances in major Olympic sports like swimming and track and field during the 1970s and 1980s.

At the Olympic Games in Munich in 1972, Australian female swimmers won five gold medals and East German female swimmers won none. Four years later at the Olympic Games in Montreal, Australian female swimmers did not win medals of any colour while East German female swimmers won 11 gold medals out of 13 events.[3]

Arguably the world's best female sprint runner of the 1970s was the Australian, Raelene Boyle. She competed at three Olympic Games from 1968 to 1976, but was often beaten narrowly by opponents powered by anabolic steroids. Despite never winning an Olympic gold medal, she maintains an iconic status in Australia. In her recent autobiography, she describes her main East German rival as possessing a curious musky smell[4] and female change rooms at international track and field meets as resembling the set for the movie, "Planet of the Apes."[5]

This lean period for Australia in Olympic sport deflated national pride significantly and in some quarters there is a legacy of bitterness. The sudden emergence of all-conquering Chinese female runners and swimmers in the early 1990s revived concerns. Thus, Australia's strong support for international anti-doping initiatives is traceable to the wish to avoid the repetition of competitive failure born of performance-enhancing drugs.

To a lesser degree, Australian opposition to performance-enhancing drugs in sport is motivated by concern over reports from overseas of deaths and other harmful effects from the abuse of such drugs.

Australia is recognised as a leader in the so-called war on drugs in sport. The catalyst for this role is not so much in the events just mentioned, but something closer to home.

A substantial portion of the credit for Australia's success in Olympic sports over the past decade must go to the work of the Australian Institute of Sport. The AIS (as it is known) is a federal government "sports school" located in the national capital, Canberra. It has a fine sports medicine and

3. DAVID WALLECHINSKY, THE COMPLETE BOOK OF THE OLYMPICS 429-49 (1984). *See also*, Werner Franke & Brigitte Berendonk, *Hormonal Doping and Androgenization of Athletes: A Secret Program of the German Democratic Republic Government*, 43 CLINICAL CHEM. 1262 (1997).

4. RAELENE BOYLE & GARRY LINNELL, RAELENE: SOMETIMES BEATEN, NEVER CONQUERED 132 (2003).

5. *Id.* at 227.

sports science program as well as excellent coaching and training facilities. In 1987, some years after the AIS was established, the nation was rocked by accusations of drug taking in some sports at the AIS. The Australian Senate immediately established a full parliamentary inquiry and its processes were well underway before Ben Johnson was apprehended at the Seoul Olympic Games in 1988 and Justice Dubin subsequently conducted a more famous judicial inquiry in Canada.

The most important outcome of the Australian Senate inquiry was the creation of a new federal agency, the Australian Sports Drug Agency. ASDA became responsible for all drug testing in Australia, including the selection of athletes for in and out-of-competition tests, collection of samples, laboratory analysis, and reporting. Individual sports remained responsible for framing anti-doping rules and conducting disciplinary proceedings. The government's view was that the integrity and uniformity of drug testing would be advanced if the functions assigned to ASDA were in the hands of government and centralised rather than left to disparate sports bodies. In the intervening years, this view has proven correct and ASDA has been the international model and benchmark for similar organisations in other countries, the ultimate manifestation being the World Anti-Doping Agency, or WADA.

Through the 1990s, the anti-doping rules and disciplinary processes which had been left to individual Australian sports were found wanting in many cases. The drafting of rules was not always clear or comprehensive allowing "guilty" athletes to avoid punishment, inconsistent penalties were applied and sometimes athletes who did not deserve punishment found themselves branded as "cheats."

Progressively, improvements were made and, in particular, athletes who needed certain banned drugs for legitimate health reasons were able to obtain dispensations. Mandatory penalties were established according to the class of drugs detected. Overall, the anti-doping regime was extended, considerably tightened, and greatly unified in a process sometimes called "harmonisation."

Nevertheless, there have been recurring dilemmas and problems. The following are selected examples.

In the mid-1990s, Samantha Riley was the "darling" of Australian swimming. She was attractive, charming, and the holder of the world record in the women's 200m breaststroke. At the world short-course swimming championships in Rio de Janeiro in 1995, she tested positive to the banned painkiller, Digesic, which her coach had given her in a single tablet form to treat a migraine headache. Riley faced a two-year ban, which would have included exclusion from the Atlanta Olympic Games. The Australian public perceived grave potential injustice and was greatly agitated. Those nations

who had borne the brunt of Australian "lecturing" on drugs regarded this as hometown bias. In the end, the world governing body for swimming, Fédération Internationale de Natation (FINA), issued a "strong warning" rather than a two-year ban. The decision involved a discretionary reduction of the penalty in light of the circumstance that the coach had supplied the tablet, and followed "intense lobbying" of FINA by Australian officials.[6] The case also attracted attention because of doubts expressed in medical and scientific circles over whether Digesic should have been among the list of prohibited substances. It was subsequently removed.

At an international meeting in The Netherlands in 1996, Australian national champion 100m sprint runner Dean Capobianco tested positive for an anabolic steroid. The International Amateur Athletic Federation (IAAF) referred the case to the Australian governing body for the sport, Athletics Australia. Its disciplinary tribunal, constituted by a respected former federal court judge and sports arbitrator, the Honourable Robert Ellicott, QC, dismissed the charge because the chain of custody of the sample had not been proven. Amid howls of protest alleging hometown treatment, the IAAF referred the case to its international Arbitration Panel for review. Although the Panel reversed the decision of the Australian tribunal, it acknowledged that the Australian decision had been justified because it was not until the case came before the Panel that the full evidence proving the chain of custody was made available by the IAAF.[7]

Netball, a game having some resemblance to basketball, is Australia's most popular team sport played by women. In 2002, a non-elite player who happened to work for the Australian Sports Commission, a federal government agency in Canberra, tested positive for the male sex hormone testosterone. She explained the presence of the prohibited substance by virtue of having had her drink "spiked" at a Canberra nightclub the evening before the in-competition test. The player claimed to have had a really big night out, had little memory of events and felt unusually ill the next morning compared with previous "big nights," but did not report any sexual interference. The police were able to confirm a spate of incidents of drink spiking in Canberra around the same time, but some experts claimed that testosterone would be an inappropriate choice for "drink-spiking." The sport's governing body applied a mandatory two-year ban and consequently the player was suspended from her

6. *Why This Coach is Crucial*, WEEKEND AUSTRALIAN, Feb. 1996, at 24-25. *See further*, Tara Magdalinski, *Drugs Inside Sport: The Rehabilitation of Samantha Riley*, 17 SPORTING TRADITIONS 17 (2001).

7. LAURI TARASTI, LEGAL SOLUTIONS IN INTERNATIONAL DOPING CASES 147-148 (2000).

employment with the Australian Sports Commission because of that doping conviction. The case has been consigned to the category of "outrageous excuses" such as "too much sex" or "I consumed some wild boar offal." Nevertheless, representatives of the sport's governing bodies expressed unease about the outcome wondering whether in fact the player was innocent. There was no apparent reason for her to take testosterone. Netball players do not earn a living from their sport. The player was a good player but did not have a future at an elite level, there is no record of anabolic steroid or testosterone use in netball (it is not a "high-risk" sport like, say, track and field) and her paid employment was with an organisation that has a prominent anti-doping outlook by virtue of which any anti-doping breach would cost her that employment. The case is decided, but perhaps the file should remain open.

The most famous of Australia's doping cases occurred in February 2003. Shane Warne is one of the world's all-time great spin bowlers in the sport of cricket. While not recognised in the Americas or mainland Europe in any significant way, it may be estimated that his name is known to at least 20% of the world's population. His fame is also propelled by his repeated involvement in incidents that attract the gleeful attentions of the tabloid press. Warne had been sidelined with a shoulder injury that threatened his participation in the Cricket World Cup in March 2003 in South Africa. He was making a promising recovery when he tested positive for a banned diuretic. A possible inference was that he was using anabolic steroids to aid his recovery and was seeking to make it more difficult to detect them in his urine by diluting their concentration with the volume-increasing effect of the diuretic. Warne admitted to taking a diuretic tablet, which he had obtained from his mother, so as to lose weight in advance of some public commitments, and that he thought it was only a "fluid" tablet and did not realise it was banned. He later admitted to taking two tablets. A "media frenzy" ensued which pushed to one side reporting of Australia's impending participation in the war in Iraq. Suggestions were made that Warne would argue he had made an "honest and reasonable mistake" about the diuretic which, if proven, would be a defence under the anti-doping rules applying for cricket in Australia. Some important figures in anti-doping campaigning nationally and internationally ridiculed Warne's explanation and were reported in the news media as saying that the potential defence was a "loophole" and that Warne should receive a mandatory two-year suspension. Questions might be raised as to whether this amounted to an improper attempt to influence the outcome of the disciplinary tribunal's decision in advance of the inquiry. Warne was convicted but the penalty was reduced to one year's disqualification because his explanation for taking the diuretic was accepted and there was nothing to

suggest that he was taking anabolic steroids to aid his recovery. It may be surmised that the tribunal also regarded a two-year suspension for a highly remunerated professional athlete late in his career as disproportionately severe compared with the circumstances of the breach. This outcome was accepted by the majority of Australian public opinion that, if anything, may have considered his treatment a little harsh. The overwhelming view of his fellow elite cricketers from around the world who were reported as expressing an opinion was that Warne was no cheat. These reactions contrast markedly with those anti-doping campaigners who called for a mandatory two-year penalty.

In reviewing these case studies, there are numerous lessons including the following. Some drugs can be inappropriately listed as banned. Allegedly offending athletes can be free of any evil intent and in truth be victims of circumstances not of their making. There is deep suspicion of inconsistent or favourable treatment for hometown or high-profile athletes, sometimes without justification. Fixed or mandatory penalties, although exhibiting a formal equality, may finish up imposing unequal punishments, in terms of their effect, upon athletes who have committed similar breaches. The public and fellow athletes can quickly become disaffected with anti-doping regimes if they are perceived to produce unfair results.

There is one further Australian perspective to mention. Australia is an enthusiastic participant in the Olympic Movement. Australian athletes have competed in every summer Olympic Games and Australia has hosted two of them – the only occasions the Olympic Games have occurred in the southern hemisphere. Notwithstanding the immense following of the Olympic Games every four years, year-in year-out the most popular sports in Australia in terms of participation, media coverage, and commercial scale are non-Olympic sports. Even for sports represented at the Olympic Games such as soccer and tennis, the Games are not the most important event in their calendars. One must go down the rankings some distance to reach sports for which the Olympics are the ultimate event. This is not to seek to denigrate the Olympic Movement; rather it is a circumstance to be recognised when considering the design of anti-doping rules.

THE INTERNATIONAL SCENE

Just as in Australia, the international scene has witnessed over the past decade vigorous efforts aimed at extending, tightening, and unifying the anti-doping regime. Harmonisation is again the catch-cry. The latest phase in that process has come with the establishment of WADA in 1999 by the International Olympic Committee (IOC), and the March 2003 *Copenhagen*

Declaration on Anti-Doping in Sport whereby numerous governments and sports organisations "articulated a political and moral understanding" to recognise and support the work of WADA and the World Anti-Doping Code adopted by WADA (the WADA Code), and to work towards an international anti-doping convention or other obligation by the time of the winter Olympic Games in 2006. These are remarkable legal and political achievements in sport and they have substantial significance in international relations. Also of importance has been the growing role and status of another IOC creation; namely, the Court of Arbitration for Sport in regard to the resolution of contested anti-doping cases.

In developing anti-doping rules, the reasons for banning drugs in sport must never be overlooked and actions should always be taken in a manner consistent with those reasons. The most often identified reasons are about unfair advantage and safety. Performance-enhancing drugs give those who use them a head start over their opponents and are inconsistent with a pure contest of natural ability and skill. Put simply, the user is regarded as a cheater. If abused, drugs can endanger the health of athletes. Recently, the WADA Code has introduced a controversially vague third criterion of "violating the spirit of sport"[8] such that a substance meeting any two of the three criteria may be banned.[9]

In keeping with the progressive tightening of anti-doping rules over the past decade, the WADA Code has adopted an approach of absolute liability for prohibited drugs. Article 2.1.1 stipulates:

> It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance . . . found to be present in their bodily Specimens. Accordingly, it is *not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated* in order to establish an anti-doping violation. . .[emphasis added].

Unqualified, this rule offends universal notions of fairness, justice, and personal responsibility. There is a seemingly endless list of real-life cases where athletes will contravene this rule, but not the reasons for and the underlying morality of anti-doping. For example, prescription, manufacturing, dispensing, and labeling errors in the supply of ordinary medicines and food supplements are a frequent source of breach. Occasionally people have

8. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE art. 4.3.1.3 (2003) [hereinafter "WADA Code"].

9. There is also controversy among commentators about the merits of the war on drugs, but I do not propose to traverse that ground here.

disorders or illnesses that can cause them to test positive without any drugs being used. Food and drinks can be spiked. And so the list goes on. Whatever may be the practical good sense of being careful about what one consumes, it is simply unconscionable to twist the morality of the anti-doping cause into a governing principle of taking absolute responsibility for whatever turns up in one's bodily fluids.

The WADA Code does, however, allow for the creation of an exception where an illness or disorder is responsible for the presence of the prohibited substance via an endogenous process,[10] and also allows for athletes to be able to use certain prohibited substances for good medical reasons under a scheme of therapeutic use exemptions that will involve individual assessment.[11] However, there are other significant issues.

Last year the Court of Arbitration for Sport (the CAS), in accordance with similar absolute liability rules, had no alternative other than to deprive a United Kingdom athlete, Alain Baxter, of a bronze medal won at the Salt Lake City Olympic Games. The CAS did so notwithstanding that it was well and truly satisfied that the athlete was a "sincere and honest man who did not intend to obtain a competitive advantage"[12] and that it was, on the evidence of all of the experts, "very unlikely"[13] that the stimulant to which he had tested positive had delivered any performance advantage at all. (The athlete used the USA version of a Vicks nasal inhaler, which contained a very mild form of a prohibited stimulant that the UK version lacked.) This is not consistent with the notion of fair play and such outcomes present a threat to the moral authority of the anti-doping cause.

To some extent problems of this kind have not gone unrecognised in the WADA Code. Where an athlete can prove on a balance of probabilities[14] that he or she bears NO fault or negligence in regard to the rule violation, the mandatory period of ineligibility must be eliminated, *but not the disqualification from the event in regard to which the violation occurred.*[15] If the athlete proves on a balance of probabilities that he or she bears *no significant* fault or negligence in regard to the rule violation, the mandatory period of ineligibility may be reduced by up to one half.[16]

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10. WADA Code, at art. 2.1.3.
11. *Id.* art. 4.4.
12. Baxter v. Int'l Olympic Comm., CAS 2002/A/376 para. 3.33 (Lausanne, Oct. 15, 2002).
13. *Id.* at para. 3.16.
14. WADA Code art. 3.1.
15. *Id.* art. 10.5.1.
16. *Id.* art. 10.5.2.

It must be questioned whether these responses solve all of the major problems.

First, is it appropriate that an athlete whose fault or negligence was *insignificant* in the violation should at best receive a reduction in penalty of one half of what are quite long periods of disqualification?

Second, athletes will still lose their medals and records and the right to participate in higher rounds. The Code justifies this stand by reference to the interests of other athletes who might be presumed disadvantaged by the performance-enhancing drug found in the disqualified athlete. Yet what of a case like Mr. Baxter's where no performance advantage is demonstrated? There needs to be a greater appreciation of the consequences of disqualification in circumstances akin to Baxter's. Athletes are unwillingly forced to deal with the instant notoriety and opprobrium of being a drug cheat. No subsequent elimination or reduction of a period of disqualification can repair that damage. Furthermore, the level of self-sacrifice and risk of crippling injury that many athletes endure in the hope of some form of international success should not be treated as for nothing, without very good reason.

One possible solution to a case like Mr. Baxter's is greater rigour in determining what is banned. In this regard, it is appropriate to note that yesterday WADA announced the lifting from January 1, 2004 of the ban on the stimulants pseudoephedrine and caffeine,[17] which has been the source of so many controversial cases, not the least being 16 year old Romanian gymnast Andrea Raducan's loss of the all-round gold medal at the Sydney Olympic Games because of pseudoephedrine contained in a cold medicine administered to her by the team doctor. However, whatever may be done in regard to reviewing the list of banned substances, these problem cases keep on coming. The system requires greater flexibility.

Another area of controversy concerns the WADA Code's uniform, mandatory penalties. Uniformity is supported as desirable because it imposes identical disqualifications on people from different sports and different countries for the same offence and in the process removes scope for favouritism. However, it ignores the impact of the punishment and in the name of equality delivers unequal treatment. Account is not taken of whether the athlete is professional or amateur, participates in a sport where careers are normally short or long or whether skills can be maintained through solitary

17. *Executive Committee Defines WADA Key Priorities*, WADA LATEST NEWS (Sept. 23, 2003), *at* http://www.wada-ama.org/en/t3.asp?p=29627&x=1&a=75183.

training during disqualification or require on-going participation in team activities.

In Australia, non-Olympic sports had little input into the government's approach to the development of the WADA Code. In the aftermath of the Warne case, the associations of professional players have become gravely concerned at the possible impact of the combination of absolute liability and mandatory, lengthy penalties. They were neither consulted nor participated in the development of the WADA Code and see the Code as driven by Olympic objectives and the history of Olympic sports drug-taking, which they do not respectively fully embrace or regard as relevant. There will be a need for the Australian government to convince the mainstream sports and their player associations to accept the principles of the WADA Code or some compromise.

It is easy to understand how the very forceful and stringent legal approach to anti-doping embedded in the WADA Code has come about. When there have been cases of hometown treatment and favouritism or "soft" decisions, the response of the higher authorities has been to close down the gaps and insist upon firmer measures. However, a good number of disciplinary decisions of national, and even international, tribunals that appeared "soft" can be explained by the genuine reluctance of those bodies to visit severe penalties upon athletes who did not display evil intent but were the victims of circumstances. Perhaps no better example is to be found than in the case of the revered Latvian bobsleigh competitor, Sandis Prusis, who tested positive to the anabolic steroid nandrolone that appears to have contaminated a food supplement approved for him by a doctor. In apparent breach of its own rules, the relevant international federation imposed a three-month rather than a two-year disqualification that enabled Prusis to participate at the Salt Lake Winter Olympic Games. It is likely that this incident will see higher authorities acting to further tighten the rules to ensure that there is no repetition. However, there must be care not to fall into the trap which catches occupying powers whereby each act of defiance is greeted with an act of repression only to trigger bitter resentment and sometimes active resistance.

POSSIBLE SOLUTIONS

It is my opinion that the solutions to these dilemmas and problems are to be found in introducing greater flexibility into the anti-doping rules by, among other things, conferring more authority upon disciplinary tribunals to do justice.

In many legal systems, mandatory penalties are rarely employed, at least in the case of serious offences. The preferred approach is to confer discretion

upon courts to determine punishments. The lawmaker may set limits on the court's discretion in terms of maximum and minimum penalties and the factors to be taken into account in exercising sentencing discretion. These usually include the effect of the proposed punishment upon the accused.

It is curious that in regard to cases where the anti-doping violation involves *no significant* fault or negligence on the part of the athlete, the WADA Code gives the disciplinary tribunal discretion to reduce the period of disqualification by up to one half. However, suspicion of discretionary powers is given as a reason for otherwise setting mandatory penalties.

There would seem no objection in principle to a disciplinary tribunal being granted the discretion to consider the impact of the punishment upon an offender when deciding the period of disqualification.

Similarly, a commitment to flexibility would enable a tribunal to resolve cases such as Mr. Baxter's by permitting a finding of no violation where innocent intent and no performance-enhancing effect *could be proven by the athlete.*

A significant impediment to greater flexibility is distrust of "other people's tribunals." One solution is to improve understanding among the public and news media because, as has been demonstrated by the Australian experience, so-called "soft" decisions may have a sound basis. There needs to be in the WADA Code a greater recognition of the diversity of sport. "Smart" and "targeted" approaches based on that diversity will result in fairer and more effective anti-doping measures than by treating sports as a non-descript mass. Improved standards, knowledge and experience in tribunals and shared tribunal systems for smaller sports offer attractive options.

At an appellate level in international sports, the WADA Code as the body with jurisdiction nominates the CAS. In recent years the CAS has taken great strides in the scope of its role and performed significant work in developing and enforcing legal rules in Olympic sports. Despite its title, it is not a court, but a private arbitral tribunal originally established by the IOC as a mechanism for the purposes of keeping international sports disputes out of domestic courts and delivering the usual claimed advantages of private arbitration.

The CAS continues to be plagued by allegations and concerns that it is insufficiently independent of the IOC, and the international sports federations aligned with the IOC, in order to provide a system of international sports justice worthy of the highest standards of excellence. A recent decision of the Swiss Federal Tribunal to the effect that the CAS is independent enough to

hear a case where one of the parties is the IOC[18] will, I suspect, prove insufficient to alter these adverse perceptions to any significant degree.

It would be an inspiring outcome if the CAS, through the widespread and immense popularity of sport, could become a powerful vehicle for demonstrating worldwide the value of the rule of law and the role of competent, independent and trusted judicial and quasi-judicial bodies. Even the most ardent supporters of the CAS will recognise that there is much to be done before that outcome is achieved. Commentators most frequently point to the relative absence of female arbitrators, the narrow scope of the arbitrators' socio-ethnic backgrounds, the variable standards of skill and expertise in SPORTS LAW, the need for a clear demarcation between those who sit as arbitrators and those who appear as counsel and a much improved system for reporting and publicising decisions of the CAS. In many respects, the need is for a true sports court rather than an arbitration body.

CONCLUSION

These are profoundly interesting and important times for those involved in sports law as it relates to anti-doping. A new international system is coming into place. Its implications are considerable. I believe that it is not without its flaws, and I wonder whether the steady stream of controversial cases may sap public and athlete support and thereby divert WADA from the stated objective of overcoming doping in sport.

In drawing attention to perceived weaknesses in the new anti-doping arrangements, I recognise that some of the solutions and arguments identified in this lecture have been noticed and passed over in the debates for the adoption of the Code. However, the WADA Code is in its infancy and it is to be hoped that over time it will become a more sophisticated and just legal instrument. There is a pressing need for informed debate in academic and other intellectual forums. An important role therefore exists for the National Sports Law Institute and other bodies to foster that debate and, in that respect; the Institute is to be congratulated for its work in hosting the forthcoming sports law conference.

May I conclude with these thoughts? Fairness born of wisely exercised discretion is the key to retaining moral authority. Many diverse groups and sports may still act in harmony notwithstanding their differences and without being forced into the same mould. There must be an uncompromising pursuit

18. A v. IOC, Swiss Federal Tribunal, 1st Civil Chamber (May 27, 2003).

of excellence in the form and processes of the disciplinary rules and bodies because international elite sports warrant nothing less.

Thank you for your attention.