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SYMPOSIUM: SPORTS LAW IN THE 21ST CENTURY

GLOBALIZING SPORTS LAW

JAMES A.R. NAFZIGER*

During the summer of 1778, the Fabronis, a noble family living in Tuscany, requested their Community Magistrate to prohibit ball games that had been held “since time immemorial¹ in the public square in front of their house. The Community Magistrate refused to do so.² The ball games, therefore, took place on schedule. In subsequent proceedings,³ the Fabronis requested damages from the responsible team for injury allegedly caused by stray balls that hit their house during the games.⁴ Ultimately, one of the highest courts in Tuscany, the Rota Fiorentina, denied relief to the Fabronis.⁵ The court ruled, in effect, that they had come to the nuisance. Because there was nothing new or unusual about the annual ball games, the court found that any harm the Fabronis might

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1. See Gino Gorla, *A Decision of the Rota Fiorentina of 1780 on Liability for Damages Caused by the “Ball Game,”* 49 TUL. L. REV. 346, 349 (1975).

2. The Community Magistrate was apparently an administrative body that, having denied the Fabronis’ request for an injunction against the ball games, had no jurisdiction to address their request for damages. See *id.* at 350. On the same date, the Community Magistrate, acting on the request of the Auditore Fiscale, one of the highest agents of the Grandduke of Tuscany, determined that the ball game, as usual, could be conveniently played only in the public square in front of the Fabronis’ house. See *id.* at 350-51. The Fabronis filed no appeal of either decision.

3. Before the commencement of the ball games, the Fabronis had filed a second action in the *Vicario*, the ordinary local court. They requested damages for any injury to their property that might result and a *cautio de damno infecto* (a kind of warranty or suretyship to cover estimated damages). When a private citizen provided a personal suretyship (*cautio*) to the Fabronis, the games proceeded as scheduled without prejudice to later consideration of the claim for damages. See *id.* at 351. After the alleged injury to the Fabronis’ property, the *Vicario* ordered partial payment of damages. Both parties appealed this decision to the Magistrato Supremo in Florence. The Magistrato Supremo commissioned the Rota Fiorentina to hear the appeals. See *id.*

4. See Gorla, *supra* note 2, at 351. Anyone who has witnessed a traditional game of *gioco del pallone*, at issue in the Fabronis’ action, or *gioco del calcio*, as played in Florence and Lucca, will appreciate the risk to life and limb, if not the Fabroni’s property. The medieval game of *calcio* I attended in 1997 on the Piazza di Santa Croce in Florence was the longest sustained free-for-all I have ever witnessed. Stray balls seemed far less threatening, however, than stray fists, stranglegolds and kicks administered by the players.

5. See *Marradiensis Praetensae Refectionis Damnozum*, 2 COLLEZIONE COMPLETA DELLE DECISIONI DELL’AUDITORE GIUSEPPE VERNACCINI 279 (1824), cited in Gorla, *supra* note 2, at 347 n.5.

have suffered was merely "natural and intrinsic"⁶ to the games. The legal rationale for this vindication of sports over torts seems to have been that well-established public amusements create a legal servitude on neighboring property.⁷

Granted, this case is not within the mainstream of sports and torts. And what does an eighteenth century decision have to do with "Sports Law in the Twenty-First Century?" After all, the modern Italian Civil Code would probably reach the opposite result and award damages to the Fabronis, on a theory of strict liability.⁸

I. USE AND NON-USE OF FOREIGN AND INTERNATIONAL LEGAL AUTHORITY

What is of interest, however, is that the Tuscan courts relied on foreign legal authority⁹ and the *jus commune* that had evolved as a form of international law for over a thousand years. This body of transnational tort law was derived from the *Lex Aquilia* in the *Justinian's Digest*.¹⁰ For the Tuscan courts, making use of this authority was doing what came naturally. They were simply applying a law that they assumed had more or less universal application, at least in Europe and America. The law of the eighteenth century had roots and the law had branches.

Even today, Italian courts routinely consult foreign and international sources, as do jurists throughout Europe.¹¹ Contrast American sports law today. It is extremely rare to find any judicial recognition of either

6. See Gorla, *supra* note 2, at 355.

7. See *id.* at 356.

8. See C.C.ART. 2050 (1969) of the Italian Code, which is apparently the most specific provision on point, reads as follows:

Liability arising from exercise of dangerous activities. Whoever causes injury to another in the performance of an activity dangerous by its nature or by reason of the instrumentalities employed, is liable for damages, unless he proves that he has taken all suitable measures to avoid the injury.

ITALIAN CIVIL CODE 504 (Mario Beltramo, Giovanni Longo & John Henry Merryman trans., 1969).

9. See Gorla, *supra* note 2, at 347-48 (mostly French authority).

10. The *Lex Aquilia* was the basic Roman law of obligations. The Roman legal tradition encouraged jurists to make analogies *argumenta a similibus* to provisions in the Digest. The Rota Fiorentina therefore applied the advice about the appropriate rule of Roman law found in DIGEST 9.2, 11, which describes a case in which a stray ball struck the hand of a barber while he was shaving a customer, thereby causing the barber to cut the customer's throat. The *jurisconsult* held that the barber, not the player, was liable for damages to the customer because the barber had willingly conducted his trade where it was customary to play the ball game. See *id.* at 353-54 n.30. One is reminded of the clear and present danger to property owners today of stray golf balls.

11. See, e.g., Eric Stein, *Uses, Misuses-And Nonuses of Comparative Law*, 72 Nw. U. L. REV. 198, 210 (1977).

historical context, other than formal precedent, or international authority for ordinary decisions. Although American courts routinely hear, and typically dismiss, cases that involve international competition, they decide those cases as if all that matters are their own world views. It is the wonderworld of West Reporters more than the real world.

The notorious case of Butch Reynolds¹² speaks volumes on the insularity of American sports law. In that bizarre, three-year circus of federal litigation in Ohio, each judicial performer offered a surprise. Even though the substance of the dispute was centered entirely in Europe, neither the federal district nor appellate courts paid any attention whatsoever to foreign or international law.¹³ Small wonder that the courts never really came to grips with the issue of what binding effect, under treaty law, should be given to a foreign arbitral award that had been rendered abroad against Reynolds.¹⁴ Small wonder that both the parties and the judges overlooked what was essentially a choice-of-law issue masquerading as a jurisdictional issue.¹⁵ Small wonder, then, that the courts simply assumed, without blinking an eye, that the law of Ohio applied.¹⁶ Small wonder that the case careened between a \$27 million

12. *Reynolds v. Int'l Amateur Athletic Fed'n.*, 23 F.3d 1110 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 423 (1994) (*reversing* No. C-2-92-452 slip. op. (S.D. Ohio, Dec. 3, 1992) *as modified*, No. C-2-92-452 slip. op. (S.D. Ohio, July 13, 1993)). *See also* 841 F.Supp. 1444 (S.D. Ohio 1992), *stay of preliminary injunction granted*, 968 F.2d 1216 (6th Cir. 1992) (Table) *application for emergency stay granted*, 112 S. Ct. 2512 (1992); No. C-2-91-003, 1991 WL 179760 (S.D. Ohio, Mar. 19, 1991), *vacated and remanded, sub nom.*, *Reynolds v. Athletics Congress*, 935 F.2d 270 (6th Cir. 1991) (Table). For an analysis of this litigation, *see* James A.R. Nafziger, *International Sports Law as a Process for Resolving Disputes*, 45 INT'L & COMP. L.Q. 130, 134 (1996).

13. *See* Nafziger, *supra* note 12, at 134.

14. This issue involved the enforceability of an arbitral award affecting Reynolds, who had not signed an agreement to have his claim resolved by arbitration between his national governing body, The Athletics Congress of the United States (T.A.C.), and its parent federation, the International Amateur Athletic Federation (I.A.A.F.). Even though Reynolds had not agreed in writing to the arbitration, he and his attorneys did attend and testify in the arbitral proceedings, including examining and cross-examining witnesses. *See id.* at 134. Reynolds thus appears to have waived any objection to the proceeding. The arbitrators ruled against Reynolds, finding there was "no doubt" about his use of a banned substance and upholding a two-year suspension of his eligibility for internationally sanctioned competition. *See id.* Because the United States is a party to the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, it is unclear under these circumstances why the federal court did not enforce the award. Even though Reynolds had not formally signed an agreement to have his claim resolved in this way, the fact remains that Reynolds and his attorneys participated fully in the arbitration. Moreover, he was bound by the rules of the T.A.C. and the I.A.A.F., including their provisions for resolving disputes of this sort.

15. *See id.* at 136-40.

16. *See id.* at 139.

default judgment in favor of the plaintiff¹⁷ and ultimate dismissal of his action.¹⁸ Small wonder that, at the end of the day, the case will go down as little more than a futile exercise in the verbal gymnastics of *International Shoe Co. v. Washington*¹⁹ rather than a useful statement about the enforceability of arbitral awards and the quasi-judicial competence of sports associations to resolve eligibility disputes of this sort. The *Reynolds* saga is not alone in revealing these kinds of problems, but it is certainly a prime example of what can go wrong when the ball is in the wrong court of law or, for that matter, in any court of law.

Fortunately, national courts are reluctant to hear international sports disputes.²⁰ As the federal district court in Oregon wrote in the *Tonya Harding* case,

The courts should rightly hesitate before intervening in disciplinary hearings held by private associations. . . Intervention is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in *serious* and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies. Even then, injunctive relief is limited to correcting the breach of the rules. The court should not intervene in the merits of the underlying dispute.²¹

17. No. C-2-92-452 slip op. (S.D. Ohio 1993).

18. See *Reynolds*, 23 F.3d at 1110.

19. 326 U.S. 310 (1945) ("minimum contacts" test for specific personal jurisdiction). Of particular importance is the "purposeful availment" test fashioned in *Hanson v. Denckla*, 357 U.S. 235 (1958). The district and appellate courts failed to consider the issue of general jurisdiction, according to which the TACBIAAF's systematic and continuous presence in Ohio would have clearly brought the two vested organizations within the court's power to hear the matter.

20. In the United States, for example, federal courts seldom allow private causes of action to proceed against sports bodies or federations. See, e.g., *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522 (1987); *Behagen v. Athletics Congress*, 884 F.2d 524 (10th Cir. 1989); *Martinez v. United States Olympic Comm.*, 802 F.2d 1275, 1281 (10th Cir. 1986); *Oldfield v. Athletic Congress*, 779 F.2d 505 (9th Cir. 1985); *Michels v. United States Olympic Comm.*, 741 F.2d 155 (7th Cir. 1984); *Myricks v. United States Olympic Comm.*, CV 90-2381-WMB (C.D. Cal. June 18, 1990); *Cady & Powell v. Athletics Congress of the U.S.A.*, C 89-1737-SC (N.D. Cal. Oct. 24, 1989); *DeFrantz v. United States Olympic Comm.*, 492 F. Supp. 1181 (D.C. 1980); *Walton-Floyd v. United States Olympic Comm.*, 965 S.W.2d 35 (Tex. App. 1st Dist. 1998). As *Walton-Floyd* notes, 965 S.W. 2d at 38 n.1, courts have been willing to hear such disputes only between organizations (*United States Wrestling Fed'n v. Wrestling Div.*, 545 F. Supp. 1053, 1061 (N.D. Ohio 1982), as provided by federal statutory law, or when the disputes were premised in breach of contract claims (*Harding v. United States Figure Skating Ass'n*, 851 F. Supp. 1476 (D. Or. 1994)); *Reynolds v. Int'l Amateur Athletic Fed'n*, 841 F. Supp. 1444 (S.D. Ohio 1992)). In neither of the latter actions did the plaintiff succeed.

21. 851 F. Supp. 1476. Amendments enacted in 1998 to the Amateur Sports Act of 1978 bar injunctions against the United States Olympic Committee (USOC) within 21 days of the

Two years ago my law school hosted a German scholar who was working on a comparison of German and American methods for resolving sports disputes.²² At the beginning of his semester with us, I took him on a quick tour of such peculiarities of American sports law as the anti-trust exemption for baseball, major league franchising, Title IX, and free agency. Later, he was ready to tackle the state action requirement in due process litigation, which may be even more puzzling to foreigners than it is to us. As time went on, we also discussed rules for allocating broadcast time and revenue, NCAA scholarship rules, and the "death penalty." Just describing the curiosities of American sports law really opened my eyes. Much of what I had taken for granted began to stand out for the first time. My German colleague's observations about European Union and German practices strengthened my understanding, by contrast, of our different approaches to regulating sports activity and what we can learn from each other.

My point then, is not that we should change our ways. We are entitled to do things our way. We are even entitled to legal curiosities. My point is, rather, that we need to take greater account of what is going on in the outside world. We have much to gain from comparative insights.²³ And we need to address the issues within a prescribed framework of international law.²⁴

start of the Olympics, Paralympics, or Pan American Games so long as the USOC provides a sworn statement that it cannot resolve the underlying dispute before the beginning of the games. The Olympic and Amateur Sports Act Amendments of 1998, Pub. L. 105-277, 112 Stat. 2681 (1998) [hereinafter 1998 Amendments to the Amateur Sports Act] (emphasis added).

22. See MARKUS BUCHBERGER, *DIE ÜBERPRÜFBARKEIT SPORTVERBANDSRECHTLICHER ENTSCHEIDUNGEN DURCH DIE ORDENTLICH GERICHTSBARKEIT: EIN VERGLEICH DER RECHTSLAGE IN DER BUNDESREPUBLIK DEUTSCHLAND UND DEN VEREINIGTEN STAATEN VON AMERIKA* (1997) (copy on file at Willamette University with the author) (comparison of German and United States resolution of sports disputes).

23. Comparative sports law is in its infancy. Analysis is largely confined to specific issues, such as justiciability and judicial review of sports disputes, eligibility of athletes for competition, and commercial sponsorships and marketing of athletes and competition. More comprehensive studies have focused largely on the growth of a European regime of sports law. Although national programs in such countries as the former Soviet Union, the former East Germany and Cuba have attracted much public attention, there has been very little comparative scholarship on sports regimes outside the western industrialized countries. See James A.R. Nafziger & Li Wei, *China's Sports Law*, 46 AM. J. COMP. L. 201, 202-03 (1998) (footnotes omitted).

24. See generally JAMES A.R. NAFZIGER, *INTERNATIONAL SPORTS LAW* (1988); James A.R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 AM. J. INT'L L. 489 (1992).

International sports law is fundamentally a process, not a set of rules. It embraces a variety of institutions, including sports associations, international federations (IFs), national Olympic committees (NOCs), the International Olympic Committee (IOC), arbitral bodies, and national courts.²⁵ The relationship among relevant institutions in a given dispute is often complicated and, from the standpoint of athletes, unfair. Sports lawyers therefore have a big job ahead. Our task is, first, to clarify the relationships among the various institutions in order to avoid unnecessary confusion and transaction costs resulting from the jurisdictional conflicts that bedevil resolution of sports disputes today. A second task will be to establish new institutions to handle issues more effectively. It is time, for example, to establish a single agency independent of sports associations and federations to administer drug tests and provide services to resolve disputes arising out of those tests.

Foreign approaches to jurisdictional problems in the sports arena are instructive. Consider European Court of Justice rulings on the reviewability of inter-club player transfers,²⁶ or German constitutional jurisdiction to protect athletes regardless of state action.²⁷ Consider Chinese mediation techniques to resolve disputes²⁸ or English judicial abstention from reviewing decisions of domestic (private) tribunals.²⁹

A recent Canadian decision is a good example of the kind of guidance foreign law can provide to delineate jurisdiction between private judicial tribunals. In *McCaig v. Canadian Yachting Ass'n & Canadian Olympic Ass'n*,³⁰ the plaintiffs, Murray and Amy McCaig, sought a declaration that the respondent, the Canadian Yachting Association (CYA), had ignored an agreement between them that provided for two regattas in order to select the Canadian team for the Mistral class of sailboarding

25. See Nafziger, *supra* note 12, at 133.

26. See *Union Royale Belge des Societes de Football Association ASBL & Ors. v. Bosman*, Case C-415/93 [1995] IEC 38.

27. See Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247 (1989).

28. See Nafziger & Wei, *supra* note 24, at 218-19, 226. China's new sports law provides that "[a]ny disputes arising in competitive sports shall be subject to mediation and arbitration by a sports arbitration body (emphasis added)." See *id.*

29. See *Law v. National Greyhound Racing Club Ltd.*, 1 W.L.R. 1302, 1307 (1983); *McInnes v. Onslow Fane*, 3 All E.R. at 211, 223 (1978) (Eng.) ("This is so even where those bodies are concerned with the means of livelihood of those who take part in those activities."); *accord*, *R. v. Criminal Injuries Compensation Bd., Ex parte Lain*, 2 Q.B. 864, 882 (1967). See generally Edward Grayson, *Reviewing Sporting Bodies*, 141 NEW L.J. 1113 (1991).

30. *McCaig & McCaig v. Canadian Yachting Ass'n*, Case #90-01-96624 (Q.B. Winnipeg Centre 1996). The author is grateful to Richard Pound for sending him a copy of this opinion.

competition in the 1996 Olympic Games.³¹ In fact, only one regatta was held because of poor wind conditions that precluded the scheduling of a second regatta and the CYA refused to reschedule it.³² The McCaigs therefore sought an order directing the CYA to conduct a second regatta to complete the criteria for team selection.³³

The court concluded, however, that the plaintiffs had already had their day in court, and that court was the CYA.³⁴ A decision by the CYA appeals body was final. The court's decision rested on an interpretation of the agreement between the McCaigs and the CYA.³⁵ In the absence of a provision for an alternative if two regattas could not be held, without fault by either party, the court deferred to what it described as a reasonable construction of the McCaig's agreement by the CYA.³⁶ According to the court, "[t]he bodies which heard the appeals were experienced and knowledgeable in the sport of sailing, and fully aware of the selection process. The appeals bodies determined that the selection criteria had been met."³⁷ Significantly, the deciding judge wrote as follows: "[a]s persons knowledgeable in the sport and the contractual language, I would be reluctant to substitute my opinion for those who know the sport and knew the nature of the problem."³⁸ He expressed "profound regret that the parties have ended up in court when one realizes that all are genuinely concerned about encouraging our best athletes to achieve their highest level of skills for themselves and their country."³⁹

II. THE PERILS OF LITIGATION AND THE PROMISE OF THE COURT OF ARBITRATION FOR SPORT

Litigation is rarely the best means for resolving international sports disputes.⁴⁰ Only in extraordinary circumstances does due process justify litigation of the kinds of disputes that have come before courts. Usually, there are better alternatives. National governing bodies and international federations are beginning to find the funds and gain the experience to do a better job of counseling athletes, handling issues as they

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.*

35. *See* McCaig, #90-01-96624

36. *See id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *See supra* note 21.

arise, and resolving disputes on their own. An independent drug-test administering agency is needed, however, in order to relieve these organizations of the suspicions, tensions and serious disputes that often accompany drug testing.

In the process of international sports law, the Court of Arbitration for Sport (CAS)⁴¹ is gradually assuming a central position in resolving disputes.⁴² As a result, the CAS is generating special law (*lex specialis*) to guide other institutions, including national courts.⁴³ The establishment of on-site CAS panels at the Olympic Games in Atlanta, Nagano and Sydney and the establishment of CAS courts in Sydney and Denver have confirmed this trend in dispute resolution.⁴⁴

So far, the CAS has decided over 200 cases, resulting in more than fifty arbitral awards, ten advisory opinions, and "many amicable settlements."⁴⁵ Of ten recent CAS cases, six involved charges of coping against athletes, two involved non-doping issues of eligibility for competition, one related to an endorsement contract between two private companies, and one concerned violence between two national teams in international competition.⁴⁶

Although it is still too early to identify any clear jurisprudential trends among CAS awards, a summary of them is instructive. First, despite a general rule among IFs of strict liability for doping, several of the

41. The CAS is governed by a Code of Sports-Related Arbitration, Procedural Rules, and Rules for Resolution of Disputes Arising During the Olympic Games. Court of Arbitration for Sport, CODE OF SPORTS-RELATED ARBITRATION (1995). For descriptions of the CAS and its work, see Luigi Fumagalli, *Il Tribunale Arbitrale dello Sport: Bilancio dell'Attività e Prospettive Future*, 47 RIVISTA DI DIRITTO SPORTIVO 715 (1995); Nafziger, *supra* note 24; Matthieu Reeb, *The Court of Arbitration for Sport (CAS): An Institution for Settling Sports-Related Disputes by Arbitration*, in SPORTS & EUROPEAN COMMUNITY LAW 199 (D. Panagiotopoulos ed. 1998); Jean-Philippe Rochat, *The Court of Arbitration for Sport*, 26 OLYMPIC REV., 73 (1997).

42. The CAS resolves:

disputes of a *private* nature arising out of the practice or development of sport, and in a general way, *all* activities pertaining to sport and whose settlement is *not otherwise* provided for in the Olympic Charter. Such disputes may bear on questions of principle relating to sport or on pecuniary or other interests. . . .

Art. 4, Statute of the Court of Arbitration for Sport (emphasis added).

43. See Reeb, *supra* note 41, at 199; Rochat, *supra* note 41, at 73.

44. See Reeb, *supra* note 41, at 205.

45. See *id.* at 200; Remarks of Matthieu Reeb, the Hague's 750th Anniversary International Law Conference, July 3, 1998.

46. See Nagano (NAG) 4 & 5 (1998); NAG 2 (1998); Tribunal Arbitral du Sport (TAS) 96-157 (1997); TAS 96/156 (1997); TAS 96/149 (1997); TAS 96/153 (1996); TAS 95/150 (1996); TAS 95/141 (1996); TAX 94/129 (1995); TAS Award of March 30, 1994.

awards disclose CAS efforts to avoid unnecessarily harsh results.⁴⁷ Principles of equity seem to play a role.

Second, in determining the validity of anti-doping sanctions against athletes, the CAS has insisted on high and clearly expressed standards and strict compliance with formal requirements. It has relied on the IOCs Medical Code and Drug Formulary Guides, rather than its own interpretations of doping. In a celebrated case at the Nagano Games,⁴⁸ Canadian Ross Rebagliati briefly lost his gold medal in the snowboarding giant slalom when he tested positive for marijuana. The CAS found, under the Medical Code, that the IOC had no competency to disqualify Rebagliati in the absence of the requisite agreement between the IOC and the International Skiing Federation (FIS) to provide for marijuana testing. The CAS further found that marijuana was not listed as a banned substance in the IOCs Drug Formulary Guide that had been published for athletes participating in the Nagano games.

Third, an important advisory opinion of the CAS helped resolve jurisdictional issues in doping cases by establishing the priority of IFs over NOCs.⁴⁹ Finally, the CAS has not hesitated to reprimand NOCs for violating rules of fair play. In one case at the Nagano Games the CAS reprimanded the Czech NOC for contesting the eligibility of a United States naturalized hockey player who had played for the Swedish team. Despite its conclusion that the player had been ineligible to compete in matches already concluded in Nagano, the CAS refused to order forfeiture of the disputed matches involving the Swedish team. Forfeiture would have accrued in the standings to the advantage of the Czech team.⁵⁰

III. AN AGENDA FOR GLOBALIZATION

The growing importance of the CAS in resolving disputes highlights a trend toward collaboration rather than confrontation off the playing field. Unfortunately, the dominant issue of steroids and other doping agents seems to be litigation-prone. The argument is that doping issues cannot be resolved by negotiation or mediation because they require the evidentiary rules and binding, up-or-down solutions that the courts are best equipped to provide. I would suggest, however, that we need to

47. See Aaron N. Wise, *Sports Governing Bodies' Strict Liability Drug Rule Standards*, 14 *SPORTS LAW.*, Sept.-Oct. 1996, at 14.

48. See CAS award in NAG 2 (1998).

49. See TAS 94/128 (1995).

50. See award in NAG 4 & 5 (1998).

refocus our attention. We need to put more emphasis on education, global standardization of drug-testing, more extensive and reliable testing, protection of confidential testing information, proper supervision of lab procedures, and clear rules of evidence in resolving disputes about alleged doping. If we do better along these lines, I think we can largely ensure athletes of due process or natural justice and thereby avoid litigation except in rare cases.

Sadly, of course, drug-popping is rampant,⁵¹ enforcement of controls is spotty at best, testing procedures are too often controversial, standards vary wildly among national sports bodies and IFs, and administrative review of doping issues is often deficient.⁵² But the regulatory regime of the IOC and the IFs is improving.⁵³ Gradually, the CAS is developing an interpretive jurisprudence to strengthen this regime.⁵⁴ It is often two steps forward and one step backward, but the responsible institutions are making progress.

As the process of collaboration develops into a principal means for avoiding and resolving issues in the international sports arena, athletes and sports bodies will all have to abide by an ethic of fair play. For example, the United States and British NOCs unsuccessfully requested a rewriting of Olympic history to take account of systematic doping of medal-winning East Germans years ago.⁵⁵ Totally aside from the feasibility of rewriting history, strictly as a matter of fair play, the USOC

51. See, e.g., David Walsh, *Drugs Push Sport*, SUNDAY TIMES (London), Aug. 2, 1998, at 8; *Tour de France Hit by Drugs Admission*, July 26, 1998, FINANCIAL TIMES, July 25-26, 1998, at 3.

52. See, e.g., Doriane Lambelet Coleman & James E. Coleman, Jr., *To Fight Drugs, I.O.C. Needs Outside Help: Summit Must Do More Than Redefine Doping*, N.Y. TIMES, Aug. 16, 1998, at 11; Ira Berkow, *Suspect Samples, but FINA's Testing Is Marred, Too*, N.Y. TIMES, Aug. 9, 1998, at 4.

53. See, e.g., Prince Alexandre de Merode, *Doping: Seeking the Causes*, 26 OLYMPIC REV., Oct.-Nov. 1998, at 5; *The World Conference on Doping in Sport*, 26 OLYMPIC REV., Oct.-Nov. 1998, at 9; *Doping: The Historic Agreement*, OLYMPIC REV., Jan.-Feb. 1994, at 15; *Building a Peaceful and Better World Through Sport and the Olympic Ideal*, U.N. Doc. A/50/L.15, U.N. General Assembly, 49th Sess. (1994). But see, *IOC Bid to Tackle "Complex Problem" Bound to Fall Short*, USA TODAY, Jan. 7, 1999, at 4E. IOC efforts are based on the International Olympic Charter Against Doping in Sport, reproduced in 26 OLYMPIC REV., Aug.-Sept. 1998, at 7.

54. See Matthieu Reeb, *General Principles of CAS Case Law in Doping Issues*, 26 OLYMPIC REV., Feb.-March 1998, at 67.

55. See Christopher Clarey, *British Swimmer Is Aiming for Justice*, N.Y. TIMES, Nov. 13, 1998, at D4; Jere Longman, *U.S. Seeks Redress for 1976 Doping in Olympics*, N.Y. TIMES, Oct. 25, 1998, at 1. The IOC declined, however, to implement these requests. Christopher Clarey, *East Germans Will Keep Medals From '76 Olympics*, N.Y. TIMES, Dec. 13, 1998, at 10 (concluding that there were too many variables and no legal basis in withdrawing and reawarding medals).

could not have expected to be successful in this effort because of the incidence of doping among its own athletes. To cite another example, as baseball players take their place in the Olympic pantheon,⁵⁶ how can the USOC turn a blind eye to professional baseball's tolerance of doping?⁵⁷ How fair is it to have allowed Mark McGwire to use androstenedione, a performance-enhancing supplement, on his way to becoming an American hero⁵⁸ while shot put gold medalist Randy Barnes, after a similar practice, was banned for life from sanctioned competition in his sport?⁵⁹ A foolish consistency may be the hobgoblin of *little* minds, but a wise consistency in combating doping and resolving other issues throughout the sports world will take *big* minds in the twenty-first century.

IV. THE ROLE OF LEGAL EDUCATION

In twenty-five years we may wonder what became of anti-trust, labor law, and civil rights issues as the dominant themes of sports law. Quite likely, these kinds of issues will remain important but will no longer be dominant. Instead, issues of international eligibility, contracting, marketing, intellectual property rights, and dispute resolution will loom much larger. Sports activity across a full range of remuneration and commercialization is less and less constrained by national boundaries. The globalization of the sports arena is inevitable.

In training tomorrow's lawyers and sports professionals, legal education therefore has a responsibility to broaden the horizons of law students and non-law students alike to include the international dimensions of sports law. Legal educators can play four important roles to prepare students for the future: we can globalize otherwise strictly domestic courses in sports law, supplement courses in international law, offer seminars focused on international sports law, and add a new dimension to courses in exercise science and sports management.

56. Baseball was played for the first time as an official Olympic sport at the 1992 Games in Barcelona. 26 OLYMPIC REV., Oct. 1992, at 498. The International Baseball Association is the sport's governing body. Bob Rybarczyk, *Baseball, A User's Guide*, OLYMPIC REV., July/Aug. 1992, at 374.

57. See generally, *Baseball, Studying Use of Androstenedione*, STATESMAN-JOURNAL (Salem, Or.), Dec. 9, 1998, at 5B (pointing out that the baseball players' association will not agree to random testing of athletes and that the steroid androstenedione, which is banned in other sports and in most international competition, has not been banned in professional baseball).

58. See Joe Drape, *McGwire Admits Taking Controversial Substance*, N.Y. TIMES, Aug. 22, 1998, at C3.

59. See *id.*; *Year of Drugs: From Baseball to Swimming*, USA TODAY, Jan. 7, 1999, at 4E. Barnes incurred the lifetime ban rather than a lesser sanction (but nevertheless a sanction) because the underlying offense was his second.

In basic courses in sports law, the teacher's job is getting easier because the leading text books have introduced materials on Olympic sports.⁶⁰ This is a welcome, if not overdue, development. Related notes and questions in the standard texts are particularly illuminating. More needs to be done, however, to give students a sense of the full scope of international sports law and particularly the significant relationships among pertinent decision-making bodies. This is a tall order, given the complexity of decision-making affecting international sports activity and athletes. The process is confusing even just within the Olympic Movement and related open competition, not to mention in non-Olympic sports and in the professional arena. The *Foschi* case,⁶¹ involving the issue of strict liability for the presence of drugs during routine testing, offers a superb glimpse of the problem of jurisdictional complexity and alternative solutions.

It is very much to the credit of sports law scholars that the principal teaching materials, unlike those for basic courses in international and comparative law, highlight such fundamental issues of international athletic competition as eligibility, gender issues, international politics, jurisdiction to regulate, and so on. It is high time that international and comparative scholars follow the lead of sports law scholars.

In professional research and in the development of teaching materials in sports law, however, we need to get beyond the handful of appellate court opinions that have attracted repeated attention. Most of these have simply confirmed an extension into the international arena of the *Tarkanian*⁶² state action principle so as to deny judicial standing to athletes. Relying on the notorious *Reynolds* litigation⁶³ to establish useful

60. See, e.g., PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW: TEXT, CASES, PROBLEMS* (2d ed. 1998); RAY YASSER ET AL., *SPORTS LAW: CASES AND MATERIALS* (3d ed. 1997).

61. *Foschi v. Fédération Internationale de Natation Amateure (FINA)*, TAS 96/156 (1997); In the Matter of Arbitration Between Jessica K. Foschi & United States Swimming, Inc., American Arbitration Association, Case #77-190-0036-96 (1996). See *N.Y. TIMES*, June 19, 1997, at B-16; John Jeansonne, *Swim Ban is Overturned*, *NEWSDAY*, June 18, 1997, at A61; 73 *WORLD PRESS REV.*, July 1, 1996, at 51; David A. Botwinik & Diane Rapisarda, *Under the Amateur Sports Act, All Disputes Between American Athletes and the U.S. Olympic Committee Must be Submitted to Arbitration for Resolution*, *NAT'L L.J.*, July 22, 1996, at B5, B6.

62. See *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988).

63. See *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110 (6th Cir. 1994), cert. denied, 115 S. Ct. 423 (1994) (rev'g No. C-2-92-452 slip. op. (S.D. Ohio, Dec. 3, 1992), as modified, No. C-2-92-452 Slip. op. (S.D. Ohio, July 13, 1993)). See also prior proceedings in 1992 U.S. Dist. LEXIS 8625, at *1, stay of preliminary injunction granted, 968 F.2d 1216 (6th Cir. 1992) (Table), application for emergency stay granted, 112 S. Ct. 2512 (1992); No. C-2-91-003, 1991 WL 179760 (S.D. Ohio, Mar. 19, 1991), vacated and remanded, sub nom. *Reynolds v. Athletics Congress*, 935 F.2d 270 (6th Cir. 1991) (Table).

rules and principles of international sports law is a little like relying exclusively on *Dred Scott*⁶⁴ to teach a course in constitutional law. The best materials would include several sources in addition to appellate decisions and commentary: national legislation, international practice, the emerging special law of the Court of Arbitration for Sport, and scholarly commentary.⁶⁵

In the classroom, I have gotten good mileage out of current events. Major competition such as the Olympics provides a high-visibility context for productive discussion, but issues and developments can pop up at any time to spark the students' interest. One example involved the allegations of payoffs to secure IOC approval of Salt Lake City to host the Winter Games.⁶⁶ The surrounding issues are a matter not only of sports law but of local government law, professional ethics, conflict of laws, and business organizations, for example. Current developments in the sports arena can therefore help teach a broad range of courses. Indeed, teaching international sports law is a particular opportunity and challenge because it straddles so many fields in the academic curriculum. How many students of disabilities law know, for example, that the Amateur Sports Act⁶⁷ now covers Paralympic games and how many students of administrative law know about the ombudsman for athletes?⁶⁸

As an authoritative process of decision and legal discipline, international sports law is as much a matter of international law as sports law. In a basic course in international law, sports competition therefore is a superb theme with which to engage students and to highlight a variety of issues about the sources of international law, the reality of the transnational legal process, the siren song of sovereign politics, and the problems and opportunities of concurrent jurisdiction. The Olympic Movement provides a fascinating example of the role of non-governmental organizations in the international legal process. I have therefore regularly lectured on that topic during a basic course in International

64. See *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

65. An excellent introduction to this approach may be found in the chapter on international sports found in WALTER T. CHAMPION, JR., *SPORTS LAW* (1993). For a list of published scholarship, see generally JOHN HLADCZUK ET AL., *SPORTS LAW AND LEGISLATION: AN ANNOTATED BIBLIOGRAPHY* 115-23 (1991).

66. See Mike Dodd, *Let the Cleanup Begin*, USA TODAY, Jan. 7, 1999, at § 1E (Spec. Supp.) (summarizing investigation by the U.S. Department of Justice, IOC, USOC, and Salt Lake Organizing Committee); Jere Longman, *Purity vs. Reality: Scandal Points Out Pressure in Quest for the Olympics*, N.Y. TIMES, Dec. 20, 1998, at 1; Jere Longman, *More Reports of IOC Favors Emerge in Utah.*, N.Y. TIMES, Dec. 18, 1998, at D1.

67. See 36 U.S.C. §§ 371-96 (1994).

68. See 1998 Amendments to the Amateur Sports Act, 112 Stat. 2681

Law and Dispute Resolution. Beginning in the 1980's, I have also taught international sports law as a focus of an advanced seminar in international legal problems. A seminar in international sports law of this sort is instructive for future international lawyers and sports lawyers alike. As to comparative law, my own research and published writing has been limited to British and Chinese sports law. Although I have not figured out a way to bring together the disparate strands of foreign sports law into a tight mesh, I have found that individual insights derived from foreign law can raise important points and help provoke discussion in the classroom.

Finally, legal educators can serve a broader function on campus by helping non-law students in exercise science and sports management to gain an understanding of the basic legal issues and institutional framework arising out of international competition. In lecturing to undergraduates, my own approach has been to use a single, highly visible problem, such as drug testing, to explore the practical implications of legal doctrine and institutional alternative. Two hours is normally sufficient to cover the basic issues.

V. CONCLUSION

As we approach a new millennium, the agenda for globalizing sports law is daunting. Moving forward in a spirit of collaboration, we certainly do not have to revert to the Roman law of the last millennium; only in Rome are we supposed to do as the Romans do. But when in London or Monaco we may sometimes have to do as Londoners or Monacs do. What is more, we may sometimes *want* to do as they do in London or Monaco. And we will need to broaden our horizons and those of others in sports management and the legal profession.

The American sports arena is located right on a global commons where more and more competition takes place. Like the Fabronis of two hundred years ago in Tuscany, we will have to put up with stray balls from near and far. We will all have to learn the rules of a global game. We will all have to learn more about foreign law and more about the process of international sports law. And we will have to train professionals to expect globalization of the sports arena.⁶⁹

69. The field is young but growing fast. The first textbook on international sports law, NAFZIGER, *supra* note 24, was published in 1988. In just ten years since publication of that text, the disciplinary focus has shifted substantially from its focus on international politics and the amateur-professional distinction to marketing, drug testing, and the complex framework of dispute resolution.