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# Commodification and Juridification in Football: Reflections on the Study of Law and Society

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# COMMODIFICATION AND JURIDIFICATION IN FOOTBALL: REFLECTIONS ON THE STUDY OF LAW AND SOCIETY

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*Simon Archer\**

## I. INTRODUCTION

On July 9th, 2014, it took about six minutes for the German side to dispatch, in a most definitive manner, any hope for the host Brazilian side to win the World Cup at home for a second time. Very quickly the football commentariat—at least in the English-speaking media—began to discuss the mental and emotional pressure on the Brazilian side which contributed to the deflation in their effort, and following this, turned to the conflicted social situation in Brazil leading up to the tournament and the potential political implications of the match and the tournament.<sup>1</sup> Would FIFA finally be meaningfully reformed, or would it make off once again with hundreds of millions in profit without real benefits to the host community? Would this lead to another set of congressional hearings on performance in Brazilian football? How would President Dilma Rousseff, who faced a general election in early October, cope with the political fallout of the loss, the suppression of social protest, the barely-completed and sometimes redundant infrastructure and enormous cost?

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1. See, e.g., *Brazil's Protests: The Fallout Spreads*, *ECONOMIST*, July 6, 2014, at 39; Anthony Boadle, *Brazil's Leader Sees No Political Fallout from World Cup Defeat*, *REUTERS* (July 11, 2014, 9:55 PM), <http://www.reuters.com/article/2014/07/12/us-brazil-election-idUSKBN0FH01V20140712>; Laurent Dubois, *What Will We Take from This Tournament?*, *NEW REPUBLIC* (July 11, 2014), <http://www.newrepublic.com/article/118658/2014-world-cup-what-will-we-take-tournament>; John Lyons & Reed Johnson, *World Cup Defeat Brings Host Country to the Ground*, *WALL ST. J.*, <http://online.wsj.com/articles/world-cup-defeat-brings-1404862493> (last updated July 9, 2014, 6:54 AM); Antonio Sampaio, *The Political Hangover from Brazil's World Cup*, *TRANSITIONS* (Jul. 12, 2014, 4:32 AM), <http://transitions.foreignpolicy.com/posts/2014/07/12/the-political-hangover-from-brazil-s-world-cup-defeat>.

Anyone familiar with the game and its place in Brazilian history and society was not surprised by the socio-political dissection of a football match. This issue of the *Southwestern Journal of International Law* follows by exploring some of the legal dimensions of the last World Cup, an exercise which necessarily requires asking what law and football might have to do with each other. The balance of this essay discusses this question, tracing connections, albeit in an impressionistic manner, in the comparative political economy and law of football today.

If this sounds too grandiose a proposition, a brief attempt at justification may assist.<sup>2</sup> We can perhaps do no better than to begin with Ryszard Kapuściński's account of his interlocutor when covering a military conflict "caused" by a football match during the World Cup qualifying round in 1970:

In Latin America, . . . the border between soccer and politics is vague. There is a long list of governments that have fallen or been overthrown after the defeat of the national team. Players on the losing team are denounced in the press as traitors. When Brazil won the World Cup in Mexico, an exiled Brazilian colleague of mine was heartbroken: "The military right wing," he said, "can be assured of at least five more years of peaceful rule." On the way to the title, Brazil beat England. In an article with the headline 'Jesus Defends Brazil,' the Rio de Janeiro paper *Jornal dos Sportes* explained the victory thus: "Whenever the ball flew towards our goal and a score seemed inevitable, Jesus reached his foot out of the clouds and cleared the ball."<sup>3</sup>

There is a certain amount of hyperbole in connecting football to domestic war and peace—Kapuściński, for example, goes on to list the migration and land title reforms that created the conditions for conflict between Honduras and El Salvador in 1969.<sup>4</sup> In October, despite early anxieties, President Rouseff and her party won the national elections.<sup>5</sup> Yet, the connection remains compelling for many commentators, and the final section of this article will explore some reasons

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2. With Arthur Hopcraft's 1968 admonition firmly in mind, it nevertheless seems that an attempt at justification for inquiries into the social impact of football remains necessary in some domains. See ARTHUR HOPCRAFT, *THE FOOTBALL MAN: PEOPLE AND PASSIONS IN SOCCER* (Aurum Press Ltd 2006) (1968).

3. RYSZARD KAPUŚCIŃSKI, *THE SOCCER WAR* 159 (William Brand trans., Vintage Books 1992) (1990).

4. *Id.* at 182-83.

5. *Brazil's Presidential Election: Why Brazil Needs Change*, *ECONOMIST*, Oct. 18, 2014, at 12.

why the connection remains compelling.<sup>6</sup> In Brazil, however, the case for social and political relevance of football has been made many times, perhaps most popularly in English by Alexander Bellos and David Goldblatt.<sup>7</sup> In Goldblatt's assessment of the role of football in Brazil immediately before the 2014 tournament, he concludes that it expired as a unifying social force that "could unite futebol nation[s] the way the seleção (the national team) had done in the past, for they have been bought at the cost of making Brazil's divisions and its injustices starker than ever."<sup>8</sup>

Goldblatt recites a litany of domestic Brazilian social tensions behind his conclusion.<sup>9</sup> We can highlight some of the key trends that his and other literatures on the subject have identified in the development of football and its relationship to social and political events. Perhaps the two most discussed dimensions of the political economy of football today are the professionalization of football and its subse-

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6. One prolific commentator is explicit in equating the two. See generally SIMON KUPER, *SOCCER AGAINST THE ENEMY: HOW THE WORLD'S MOST POPULAR SPORT STARTS AND FUELS REVOLUTIONS AND KEEPS DICTATORS IN POWER* (Nation Books 2010) (1994). Most recently, the UK Labour party has promised a sort of democratizing reform of football club governance permitting "fan" representation on boards of directors and options to purchase share ownership. *Labour Promise More Power for Fans*, INDEPENDENT.IE (Oct. 17, 2014 6:36 AM) (Ir.), <http://www.independent.ie/sport/soccer/labour-promise-more-power-for-fans-30671250.html>.

7. See ALEX BELLOS, *FUTÉBOL: THE BRAZILIAN WAY OF LIFE* (2014) (intriguingly translated to Portuguese as *BRASIL: FUTÉBOL AO RITMO DO SAMBA*); DAVID GOLDBLATT, *THE BALL IS ROUND: A GLOBAL HISTORY OF FOOTBALL* (Penguin Books 2008) (2006); DAVID GOLDBLATT, *FUTÉBOL NATION: THE STORY OF BRAZIL THROUGH SOCCER* (2014); accord. José Sergio Leite Lopes, *Class, Ethnicity, and Color in the Making of Brazilian Football*, DAEDALUS, Spring 2000, at 239 (2000).

8. *FUTÉBOL NATION*, *supra* note 7, at 249. The *seleção's* style and quality of play during the tournament echoed this lament. Brazil's play has for some been regarded as the finest in the world (known as *joga bonito*, or the beautiful game) giving rise to a massive export of players in the 1980s and 1990s. However, their style of play during the 2014 World Cup was criticized as violent and lacking in the traditional style. Not only was there a dramatic loss, there was not even a beautiful game. This stood in contrast to the play of some other teams in the tournament and a record number of goals scored (one metric of the freedom of play and enjoyment of the matches).

9. See *id.* The issues are the foreseeable "bread and circuses" problems associated with large sporting-cultural events: over \$1 billion was spent on security forces, and over \$12 billion spent on stadiums, including Brasilia's Mane Garrincha Stadium (\$900 million) and the Arena da Amazonia in Manaus (\$300 million) which has no long-term purpose. See Sam Borden, *Building a World Cup Stadium in the Amazon*, N.Y. TIMES, Sept. 25, 2013, at B10. The popularity and political desirability to host such events appears to be waning, or the cost too high for the benefits involved: most recently, no "developed" nation has bid to host the 2022 Olympic winter games, leaving only two non-democratic states to bid—China (Beijing) and Kazakhstan (Almaty)—following the withdrawal of Norway. John Powers, *IOC Left with Two Choices for 2022 Winter Games*, BOSTON GLOBE (Nov. 7, 2014), <http://www.bostonglobe.com/sports/2014/11/07/ioc-left-with-two-choices-for-winter-games/rf2ECF6a154C2eOPvCuXFJ/story.html>. The last winter Olympic games were hosted by Russia.

quent commodification. A quick review of these twin themes or perspectives give us coordinates by which to navigate legal literatures on the subject.

## II. PROFESSIONALIZATION

Much has been written about the class politics of football, from its origins in British public schools to its adoption by working class groups and what we would later term the globalization of these strata.<sup>10</sup> One long-term trend in the expansion of football as an organized activity was its professionalization, which has undergone several phases or eras of development over the past 100 years with, of course, differing timing and emphases in different countries. Professionalization is, in brief, the process of creating a dedicated, paid pool of players and other stakeholders (teams, coaches, management, referees, sponsorships, and so-forth).<sup>11</sup> This process, which has been in development since about 1870 in football, revolves around the economic relations between the stakeholders. We might note that the United States and Canada remain two of the few jurisdictions to have relatively under- or newly-developed professional football associations despite several attempts to generate permanent professional football. This exceptionalism in itself has generated study.<sup>12</sup>

Professionalization involves a series of questions and issues surrounding the payment of players to play: the development of common rules of play and their development and regulation over time; the relationship of amateur or unpaid football to paid football and the thresholds between the two; the organization and compensation of players, managers, staff, and its relationship to the macroeconomics of football teams themselves; the markets and mobility of players; and the regulation of club and league economic advantages, among others.

Perhaps the most visible issue in the professionalization of football globally has been the size of players' compensation at the top club

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10. See, e.g., BELLOS, *supra* note 7; EDUARDO GALEANO, *SOCCER IN SUN AND SHADOW* (Mark Fried trans., Nation Books 2013) (1998); HOPCRAFT, *supra* note 2; *THE BALL IS ROUND*, *supra* note 7; JAMES WALVIN, *THE PEOPLE'S GAME: A SOCIAL HISTORY OF BRITISH FOOTBALL* (1975).

11. The definition of professionalization has developed over time, also connoting an increase in competence of practice, expertise, and athleticism. For earlier treatments, see Alexander M. Carr-Saunders, *Professionalization in Historical Perspective*, in *PROFESSIONALIZATION 2-6* (H. Vollmer & D. Mills eds., 1966) and MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977).

12. See, e.g., ANDREI S. MARKOVITS & STEVEN L. HELLERMAN, *OFFSIDE: SOCCER AND AMERICAN EXCEPTIONALISM* (Paul J. DiMaggio et al. eds., 2001).

level.<sup>13</sup> Each year, headlines announce new records set in the amount paid by one club to another to purchase the contract of players and the problems of third party ownership of interests in players. These fantastic sums are generated through a political economy of markets for players, where professional football clubs and club ownership bears—to the common lawyer—only a loose relation to classical economic models.

The economics of football has been described by Simon Kuper as “soccernomics,”<sup>14</sup> whereas particular configurations within certain leagues have been addressed by, for example, Tim Parks<sup>15</sup> (in the case of Seria A in Italy), David Goldblatt<sup>16</sup> (Champions League and the relationship to other European leagues), and Alex Bellos<sup>17</sup> (Brazil), among many others.<sup>18</sup> The system, repeated across the “big five” leagues in Europe, is one in which three or four clubs dominate a national league at the top level of play in terms of the size of budget available each season, the caliber of players purchased with that budget, and the results in league standings. The sources of financing vary, but include both sponsorship revenues from teams that have built major brands and the patronage of independently wealthy owners.<sup>19</sup>

In this arrangement, the financial stability of all other clubs in those five leagues becomes much more precarious. The rest of the

13. As of the date of writing, the transfer fee (a fee to buy out his contract) of one of the top players in the world, Cristiano Ronaldo, is reported by the Guardian newspaper to be 1 billion euros. This is an unconfirmed rumor of Ronaldo’s agent, but it gives an example of the sums and subsequent excitement they generate. Mark Ogden, *A Billion Reasons for Cristiano Ronaldo to Stay at Real Madrid*, TELEGRAPH (Sept. 3, 2012, 10:06 PM) (U.K.), <http://www.telegraph.co.uk/sport/football/players/cristiano-ronaldo/9518047/A-billion-reasons-for-Cristiano-Ronaldo-to-stay-at-Real-Madrid.html>.

14. SIMON KUPER & STEFAN SZYMANSKI, *SOCCERNOMICS: WHY ENGLAND LOSES, WHY GERMANY AND BRAZIL WIN, AND WHY THE U.S., JAPAN, AUSTRALIA, TURKEY—AND EVEN IRAQ—ARE DESTINED TO BECOME THE KINGS OF THE WORLD’S MOST POPULAR SPORT* (2012).

15. See TIM PARKS, *A SEASON WITH VERONA* (2002).

16. THE BALL IS ROUND, *supra* note 7.

17. BELLOS, *supra* note 7.

18. Henk Erik Meier, *Solidarity and Market Power in German Soccer: The Regulation of Collective Selling*, 6 FOOTBALL STUD. 22 (2003). For a classical treatment in the economics of football, see DAVID CONN, *THE FOOTBALL BUSINESS: THE MODERN FOOTBALL Classic* (2002) and STEPHEN DOBSON & JOHN GODDARD, *THE ECONOMICS OF FOOTBALL* (2d ed. 2011).

19. By one 2013 count, more than fifty billionaires own football teams in whole or part, including the following top-flight clubs: Chelsea, Real Madrid, AC Milan, AS Monaco, Manchester City, Manchester United (actually publically listed but with large stakes held by George Soros and Malcolm Glazer), Arsenal (privately held by a consortium), FC Shaktar Donetsk, and others. Ricardo Geromel, *Forbes’ Starting Lineup: The 11 Richest Soccer Billionaires*, FORBES (Mar. 12, 2013, 8:53 AM), <http://www.forbes.com/sites/ricardogeromel/2013/03/12/forbes-starting-lineup-the-11-richest-soccer-billionaires>.

leagues' teams often perform the function of identifying and training talent for sale to the top teams in their own attempt to maintain stable balance sheets, and this talent itself is found not only domestically, but increasingly in other leagues and jurisdictions, which themselves become "feeders" to the top leagues and clubs. Perhaps the most notorious component of this system is the Brazilian club system which, even for its most successful top-flight teams, is characterized by the sale of its best players to European leagues by extremely wealthy owners of insolvent clubs that variously refuse to pay players, maintain health and safety standards, and incorporate other business practices that would otherwise result in severe sanctions.<sup>20</sup>

From the players' perspective, the most desirable leagues to play in Europe, where the salaries are the highest and, arguably, the best football is to be found.<sup>21</sup> Thus Brazil—like most of South America, Africa, and latterly South Asia—has for decades exported its top football talent, at times as young as twelve or fourteen years of age, to European clubs in a complex web of agents, recruitment, and training programs. At each stage of intermediation, fees are paid, and one of the key issues that arises in this series of arrangements is the rights of player mobility and the contentious issue of third party "ownership" of individual players by retaining rights of payment for transfer of their contract to play.<sup>22</sup>

It might be expected then that one of the tensions in this system is the tendency to find a large gap in terms of budget and performance between the wealthiest clubs and all others in the leagues. This inequality concerns football's regulatory bodies in its implication for the broader expansion and stability of football markets. Smaller clubs, unable to compete for top players may, in the end, erode the interest in the league as a whole and contract the overall market for football. These conditions engendered a response from the European leagues' regulator of professional football, UEFA, known as the "financial fair play" rules.<sup>23</sup> These rules were introduced in 2009, intending to "level

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20. BELLOS, *supra* note 7. A recent case and anecdote provide a representative illustration. On March 27, 2014, a Brazilian court ordered the Sao Paolo football players union to garnish media revenues of a Brazilian club (Comercial Futebol Clube) to pay players' unpaid wages. TRT-15, Processo No. Arrest-00000522.68.2014.5.15.0042, Juiz: Walney Quadros Costa, 27.3.2014, DIÁRIO ELETRÔNICO DA JUSTIÇA DO TRABALHO [D.e.J.T.], 5.6.2014, 4793 (Braz.).

21. See SPORTING INTELLIGENCE, GLOBAL SPORTS SALARIES SURVEY 2014, at 17 (2014).

22. One of the most-discussed rulings in player mobility is the "Bosman ruling" of the European Court of Justice, which held that contractual terms limiting the mobility of players at the end of their contracts with a club were void. Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, 1995 E.C.R. I-4921.

23. UEFA CLUB LICENSING AND FIN. FAIR PLAY REGULATIONS (2010).

the playing field,” the primary effect of which appears to be that a club must spend no more than it earns in a year, which to date have had limited success in implementation.<sup>24</sup>

### III. COMMODIFICATION

The second of the coordinate themes is a phenomenon that emerges from the first but rapidly eclipses it: commodification in and of football. The brief political economy of professional football just described provides examples of commodification and its effects.

We have already mentioned methods of third party “ownership” of players and the restrictions on one’s ability to play and work. These have developed in phases over time in different leagues, the general tension being between owners who attempt to restrict player mobility (or facilitate it for a fee) and player collective action, court rulings, or rule changes that seek to enhance mobility (such as the *Bosman*<sup>25</sup> ruling in Europe). Players in this perspective are commodities, little bundles of talent or potential talent, to be traded among clubs in accordance with or despite the prevailing rules on transfer.

These players quickly become a series of ratios whose common denominator is their salary, each varying with performance statistics in some quite sophisticated method of evaluation, and if you listen to any football match analysis or read the reporting in the Monday papers, you will find this form of commentary and evaluation: so-and-so is under-valued at such-and-such a transfer fee.<sup>26</sup>

While discussion of players-as-commodities may begin with the spectacular transfer fees and compensation of top players, the perhaps more representative case studies are the mid-tier journeyman players without tenure or security or the young players from low-income circumstances aspiring to play in professional leagues—each of whom are exploited in a myriad of ways, from unpaid salaries to poor health and safety to unscrupulous agents, often from young ages and unsophisticated backgrounds. These players, although they may be feted for individual stylistic merits, have brief periods of “value” for their clubs, owners, or agents; they are simply treated as commodities flowing in the international market of players.

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24. *Id.* art. 52.

25. Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, 1995 E.C.R. I-4921.

26. The very detailed treatment of Lionel Messi, for example, can be seen in Benjamin Morris, *Lionel Messi is Impossible*, FIFTYTHREE EIGHT SPORTS (July 1, 2014, 6:00 AM), <http://fivethirtyeight.com/features/lionel-messi-is-impossible>.



A second form or dimension to commodification is the commercialization of players and in particular of clubs themselves: the transformation of what were once hyper-local identities entwined with local working class culture and iconography into global brands despite the complete erosion of the original culture. Again, this process has been discussed in literature on professional sport and football in particular, which traces the transformation of local cultural, political, and football identities (often generated in the class oppositions described above) into brands marketed and consumed globally.<sup>27</sup> There may be more Manchester United fans in London than in Manchester, and certainly more in the rest of the world than in Britain—but a visit to Manchester or its suburbs makes plain the fate of the working class that once created the local identity—the “brand.”<sup>28</sup> This same process is extended to national “brands” during global competitions, and it is Brazil’s “brand” that has been perhaps the most successful in the world, resulting in part from the extraordinary export of Brazilian players over the last twenty-five years.<sup>29</sup>

Theories of commodification in the sociological or Marxian traditions suggest that they result in a form of commodity fetishism, in which the exchange values of relationships become the focus of analysis and discourse, and the human labor or conditions underlying these exchanges become lost or subsumed in an economic and alienating, dehumanizing discourse. This proposal appears to be vindicated by works like Michael Lewis’ *Moneyball* and variants in the football world, such as Simon Kuper’s *Soccernomics*.<sup>30</sup> Among thoughtful football aficionados and commentators like Hopcraft, Galeano, Goldblatt, or Bellos, it is common to find a lament at this aspect of commercialization or commodification of football on the grounds that it has squeezed out of the sport something that made it so attractive in the first place, as if shades of the factory from which players and supporters escaped in ludic joy had closed over them again. We will return to this lament in the final section of this essay.

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27. See Richard Giulianotti & Roland Robertson, *The Globalization of Football: A Study in the Glocalization of the ‘Serious Life’*, 55 BRIT. J. SOC. 545, 546-47 (2004).

28. See *id.* at 551.

29. BELLOS, *supra* note 7.

30. MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003); see KUPER & SZYMANSKI, *supra* note 14.

#### IV. LEGAL DIMENSIONS

What is the role and rule of law in all this, and what can the last World Cup suggest for those interested in law and society? Since Eduardo Galeano lamented the lack of a comprehensive history of football,<sup>31</sup> a healthy literature on football has developed in economic, cultural, and sociological journals, but somewhat less so in legal journals or on legal economic or socio-legal dimensions, at least in English. For heuristic purposes, we can group the legal academic work on football into four groupings. One discusses the perhaps doctrinal issues of law in the market for players, such as the contracts for players; their collective and mobility rights; other terms and conditions of work; doping; civil liability issues within play, including consent and injury; relationship to agents; and the status of arbitral procedures.<sup>32</sup> These issues raise primarily “private law” questions, which, like so much private law, have become increasingly globalized in reach, leading to speculations of a global *lex sportiva*.<sup>33</sup>

A second grouping examines the economics and politics of clubs and ownership, as well as the problems arising in that domain, such as the need for and effects of fair play rules and mitigating the effects of the (current) oligopolistic tendency in football markets.<sup>34</sup> This grouping’s work revolves around the political economy of football in general; mediating “growing pains” through self-regulatory regimes; developing and preserving football markets (particularly the importance and role of television broadcasting); critiquing politico-econom-

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31. Due to his disdain, Galeano wrote his book, *Soccer in Sun and Shadow*, to which Goldblatt elaborated on in his piece, *The Ball is Round*.

32. See, e.g., INTERNATIONAL SPORTS LAW AND JURISPRUDENCE OF THE CAS—4TH CAS & SAV/FSA CONFERENCE LAUSANNE 2012 (Michele Bernasconi ed., 2014); Jeffrey A. Citron & Mark Ableman, *Civil Liability in the Arena of Professional Sports*, U. BRIT. COLUM. L. REV. 193 (2003); Blair Downey, *The Bosman Ruling: European Soccer—Above the Law?*, 1 ASPER REV. INT’L BUS. & TRADE L. 187 (2001) (Can.); Adriano Pacifici, *Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond*, 3 BERKELEY J. ENT. & SPORTS L. 93 (2014); Ayelet Shachar & Ran Hirschl, *Recruiting “Super Talent”: The New World of Selective Migration Regimes*, 20 IND. J. GLOBAL LEGAL STUD. 71 (2013).

33. See generally Alfonso Valero, *In Search of a Working Notion of Lex Sportiva*, 14 INT’L SPORTS L. J. 3 (2014).

34. See, e.g., Adam Brown, *European Football and the European Commission*, 1 SOCCER & SOCIETY 129 (2000); Stratis Camatsos, *European Sports, the Transfer System and Competition Law: Will They Ever Find a Competitive Balance?*, 12 SPORTS L. J. 155 (2005); Simon Gardiner & Roger Welsh, *The Contractual Dynamics of Team Stability Versus Player Mobility: Who Rules the ‘Beautiful Game’?*, 5 ENT. & SPORTS L. J. 1 (2007); Randy Height, *Alleging an Anticompetitive Impact on a Discernible Market: Changing the Antitrust Landscape for Collegiate Athletics*, 21 JEFFERY S. MOORAD SPORTS L. J. 19 (2014); Harald Dolles & Sten Söderman, *Globalization of Sports—The Case of Professional Football and its International Management Challenges* (Deutsches Institut Für Japanstudien, Working Paper No. 05/1, 2005).

ics behind regional and national football associations; and analyzing clubs and other stakeholders that variously cooperate, compete, or remain ignored. A new literature is devoted to the governance and problems of clubs, firms, and associations—particularly FIFA—most recently focused on corruption and FIFA’s interaction with state actors.<sup>35</sup>

A third grouping engages in social and cultural analysis, variously examining the history of rule development in football, the cultural specificities of game development in different places, professionalization, commodification, juridification, and globalization theories. This grouping also engages with supporter and consumer perspectives and social questions such as hooliganism and racism in football, sexism, and gender politics.<sup>36</sup> Finally, a fourth grouping—a much smaller

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35. FIFA has made some efforts to acknowledge widespread dissatisfaction with its governance. In August 2010 (after Qatar was selected to host the 2018 World Cup), Mark Pieth, the Chair of the OECD Working Group on Bribery, was asked to make recommendations for reforming FIFA’s governance structure. Following his report, Sepp Blatter appointed an “Independent Governance Committee” chaired by Pieth to “oversee the creation and implementation of a framework of good governance and controls for FIFA to ensure the organization’s integrity with the ultimate goal of restoring confidence amongst FIFA stakeholders, including fans and the wider public.” Many have suggested this process will not have substantive effect. For other proposals, see R. Pielke Jr., *How Can FIFA Be Held Accountable?*, 16 *SPORT MGMT. REV.* 255, 261 (2013). For related governance issues in regional bodies, see Manese Kudzai Chiweshe, *The Problem With African Football: Corruption and the (Under)Development of the Game on the Continent*, *AFR. SPORTS L. & BUS. BULL.* (2014), [http://www.africansportslawjournal.com/Bulletin\\_2\\_2014.pdf](http://www.africansportslawjournal.com/Bulletin_2_2014.pdf). Often compared is the IOC and the Olympic process. See Ankur Shingal, *The Olympic Curse: Protecting the Olympic Dream for Host Cities and Their Inhabitants*, 1 *INDON. J. INT’L & COMP. L.* 572 (2014).

36. For two dated but full-length treatments from the British perspective, see DAVID MCARDLE, *FROM BOOT MONEY TO Bosman: Football, Society and the Law* (2000) and STEVEN GREENFIELD & GUY OSBORN, *REGULATING FOOTBALL: COMMODIFICATION, CONSUMPTION AND THE LAW* (2001). For additional British perspectives, see FRANKLIN FOER, *HOW SOCCER EXPLAINS THE WORLD: AN UNLIKELY THEORY OF GLOBALIZATION* (Harper Perennial, 2010) (2004); Adrian J. Walsh & Richard Giulianotti, *This Sporting Mammon: A Normative Critique of the Commodification of Sport*, 28 *J. PHIL. SPORT* 53 (2001). The same analysis has been conducted in other national contexts. See generally Bo Carlsson, *Insolvency and the Domestic Juridification of Football in Sweden*, 10 *SOCCER & SOCIETY* 477 (2009); Ramón Llopis-Goig, *From ‘Socios’ to ‘Hyper-Consumers’: An Empirical Examination of the Impact of Commodification on Spanish Football Fans*, 13 *SOCCER & SOCIETY* 392 (2012). The Osborn and Greenfield book calls for a democratization of football clubs in the UK to enhance accountability to its primary consumers—fans—which is echoed in the Labour Party’s recent pre-election platform. *Labour Promise More Power for Fans*, *supra* note 6. Calls for democratization of ownership and governance harken back to the “high age of industrial football,” as Goldblatt puts it, seeking to more robustly reconnect clubs to local working class identities. This proposal echoes, in some ways, debates about the fate and prospects of working class identity and political expression more generally following an era of deindustrialization and globalization.

one—seeks to theorize and analogize law and football as forms of play, games, and performativity.<sup>37</sup>

## V. AFTER THE WORLD CUP

Perhaps the most immediate reaction to the World Cup is the place of Brazil's players and its style of play—if that is not too abstract—on world and particularly European markets for Brazilian football. The seleção's performance was often critiqued (or merely criticized) as lacking in the traditional Brazilian characteristics, the ritmo do samba, particularly in comparison to other South American players and teams.<sup>38</sup> If reports of the domestic dialogue prior to the World Cup are credible, with its suppressed social conflict and early exit, does this represent an inflection point in the domestic relationship of football to Brazilian politics and social cohesion? Is it the end of football's unique binding effect, as Goldblatt feared? More widely, will it have a similar effect on the export of football talent? The optimistic expectation in hosting these global sporting events is that they create domestic engagement and international profile, but it is simply too soon to determine and will depend on many more factors besides the World Cup. Like most market changes, we will only know if this was an inflection point in hindsight. More broadly, if other global sporting events are any indication (e.g., the 2022 Winter Olympics), we may indeed have crossed a rubicon behind which domestic popula-

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37. E.g., ALLAN C. HUTCHINSON, *IT'S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF ADJUDICATION* (2000); Allan C. Hutchinson, *If Derrida Had Played Football*, 6 GERMAN L. J. 53 (2005). A different theoretical engagement is found in Pierre Bordieu, *The State, Economics and Sport*, 1 CULTURE, SPORT, SOCIETY, no. 2, 1998, at 15.

38. Can Brazil still claim to be the home and best producer of beautiful football, and all that has entailed for at least the past twenty-five years? This line of thought sometimes leads to a discussion of the evolution of the physical elements of the game, which in turn appear to be driven by intensified pressures of professional play. While the overall trend is to better training, diets, and health regimens contributing to better overall athleticism, this is also combined with playing more games per season and greater risks of injury. The physical elements of play are sometimes set up as a dynamic between, on one hand, physical and tactical methods of play that create results as measured by metrics, such as wins and goals per minute played or dollar spent, and on the other hand, visually enjoyable and entertaining football, or beautiful football, which may be measured, in part, by the amount of goals scored. The same questions arise from time to time: they were posed after the 1986 World Cup when Brazil was eliminated earlier than expected, and as early as the mid-1970s players like Pele were advocating reducing the number of players on the field and other changes (e.g., offside rules, tackling rules) to compensate for the advances in athleticism and the resulting lack of freer play and as a result goals scored. Rule changes have occurred following World Cups several times since then and will be a factor in determining tactics and player styles in the next decade. For a very useful summary of the evolution of tactics and influences driving them, see JONATHAN WILSON, *INVERTING THE PYRAMID—THE HISTORY OF SOCCER TACTICS* (2013).

tions have become sufficiently intolerant of the negative social implications, leading to a decline in the number of events produced in this model. These questions lead quickly to Brazil's engagement with FIFA.

There is already considerable discussion on the status and power of FIFA as it interacts with potential host states, effectively able to impose its own conditions and displace the domestic rule of law.<sup>39</sup> FIFA itself is an example of a relatively unaccountable, transnational, self-regulatory organization composed of member state representatives that appears to conduct many of its affairs in an opaque, leading to frequent accusations of corruption.<sup>40</sup> Although presented as enhancing the development of football—in the twin senses of football-as-game-culture but also football-as-business—in new, near-Eastern venues, the most recent contentious issue is the selection of Qatar as the host of the 2022 World Cup, a country with almost no tradition of football, extraordinarily adverse climatic conditions, a record of human rights abuses in stadium construction, and limited access for average supporters to attend. The 2022 World Cup appears to be selected for either private gain within FIFA or within the host nation—an extension of previous allegations to new lengths. The decision has engendered resistance within FIFA and outside it, but proposals for FIFA's reform from within remain elusive. Instead, as many have noted, resistance and opposition has developed through the self-interest of some regional components of FIFA—in particular UEFA.<sup>41</sup> Methods for reforming and holding transnational supra-state bodies accountable (including the question: accountable to whom?) is a much-discussed question in international and transnational law that has perhaps paid too little attention to FIFA and its component federations.

If we wish to make FIFA more consistently a subject of sustained legal study, we could begin by characterizing it as the non-state or supra-state transnational regulatory space in which the tendencies of oligopolistic markets are mediated in sometimes contradictory efforts to create, define, and preserve a “market.” This market appears to be in direct conflict with pervasive internal agency problems and outright conflicts of interest, hindered by opacity created by conditions of oligopoly and lack of democratic accountability to wider groups of stake-

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39. See Pielke Jr., *supra* note 35; THE BALL IS ROUND, *supra* note 7.

40. See, e.g., Borden, *supra* note 9; Andrew Das, *Cup Report to Stay Private*, N.Y. TIMES, September 27, 2014, at D2.

41. See Pielke Jr., *supra* note 35, at 257-59.

holders. There appears to be few countervailing powers or, to borrow the old sociologists' term, elective affinities between the objectives of the wider stakeholders and the core actors in the system, which continues to be characterized by a disparity in wealth and results that, at least to some, threatens the long-term viability of the "football market" altogether.<sup>42</sup> This particular configuration of market actors and regulatory bodies is familiar to legal academics—it has analogues in transnational law, corporate law, labor law, and for law-and-economics approaches and favored subjects of analysis.

Reforming FIFA might do something for the broader community of stakeholders in football (i.e., holding the next World Cup under conditions more accessible to average people), but it does not normally get equated with addressing the long-term trends of professionalization and commodification. These trends—which so far have resulted in concentrations of wealth for a few elite clubs—cause deep unease for the supporters, commentators, amateur players, smaller clubs, and a host of other excluded stakeholders. It is tempting to analogize it to other social and economic inequalities, or to view this problem as an example of larger trends.

The "thicker" analyses of the third grouping described above have been the primary domains exploring the two coordinate themes. There is a developed literature in the sociology of sport and culture, some of which examines the relationship between "law" and "non-law" in the production of institutions, rules, and cultures. This literature traces the impact of economic, social, and cultural conditions on tactics; rulemaking; the regulation of the game and industry; the development of players; the rise and decline of entire systems of play; and unresolved debates on the relative importance of each of these features. That is to say that non-lawyers or at least non-legal-academics have undertaken the project of developing a rich vein of the socio-legal dimensions of football from an amateur, upper-class pastime intended to instill late Victorian views of civic virtue in a ruling class, to a hyper-commodified global industry in sport (and its eternal companion, gambling) and to a transnational regulatory body only rivaled in size by the United Nations. This article has in some respects located itself within the larger, "non-legal" literature and suggest they meet more often.

One branch of this line of thought discusses transnational football phenomena through the lens of globalization theory, with emphasis on

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42. *See id.* at 261.

the “glocalisms” of football within the larger framework of private, transnational actors that trade in cultural products.<sup>43</sup> Transnational legal theorists may be interested in such cultural, transnational “glocal” corporations, owned or controlled by elites, operating within an oligopolistic market, and through their collectivities (football associations) able to impose conditions on domestic governments.

A second branch traces the intensified commodification of football and the corresponding “eventification”<sup>44</sup> of its social practice.<sup>45</sup> In that application the focus is on performativity of legal actors and institutions—typically as embodied in an object, event, or person—seeking to understand normative power and, at a systemic level, conflicting rationalities. These speculations perhaps belong more properly to the final grouping identified above—legal theory.

## VI. JUXTAPOSING THE PLAY-ELEMENT OF SPORT WITH LAW AND POLITICS

Recall the anxiety that expresses itself from time to time: the relationship between a social performance that is “merely a game,” a non-serious pastime, a form of entertainment not thought to be properly connected to more “serious” problems in politics, culture, and economics. This anxiety suggests the connection between football and something else—law, politics, economics—but these things retreat from the analogy or create a strained, complete identification between the two. On one hand, Kapuściński calls his book *The Soccer War*<sup>46</sup> but cannot quite say that it is or is not a war over football. On the other hand, there is a genre of books about sports-that-explain-everything that attempt to root cultural identities, economic arrangements, and political institutions and contingencies as either causally related or usefully analogized to features of football.<sup>47</sup> Is the Dutch landscape and culture an explanation of *totaalvoetball*? David Winner proposed something like that.<sup>48</sup> But these accounts can have a gimmicky feel to them despite the attraction of a neat organizing metaphor. Similarly,

43. See, e.g., Giulianotti & Robertson, *supra* note 27, at 549-50.

44. For an introduction to the terms “eventify,” “eventified,” and “eventification,” see Temple Hauptfleisch, *Eventification: Utilizing the Theatrical System to Frame the Event*, in *THEATRICAL EVENTS: BORDERS DYNAMICS FRAMES* (Vicky Ann Cremona et al. eds., 2004). The analysis of theatre and festivals appears to be amenable to football events like the World Cup.

45. Bo Carlsson, *The Re(con)fusion of Law and Sport in Light of ‘Seriousness’ and ‘Trivialization,’* 17 *SPORT SOC’Y: CULTURES, COM., MEDIA, POL.* 1317, 1321 (2014).

46. KAPUŚCIŃSKI, *supra* note 3.

47. E.g., FOER, *supra* note 36.

48. DAVID WINNER, *BRIGHT ORANGE: THE NEUROTIC GENIUS OF DUTCH FOOTBALL* (Overlook Press 2011) (2000).



there is legal theory that relies heavily on a central metaphor of game-playing and emphasizes inter-disciplinarity in method, performativity and contingency in the critical-legal traditions, and, it is submitted, sometimes expresses an anxiety about whether or not it is “taken seriously.”

An early theorist of the “play-element” in society was Johan Huizinga, who distinguished conditions of mass sport from truly free and voluntary play-elements in social practice in a manner that captures the tensions we observe in football literature. He is worth quoting:

First and foremost, then, all play is a voluntary activity. Play to order is no longer play: it could at best be but a forcible imitation of it. By this quality of freedom alone, play marks itself off from the course of the natural process. . . . A second characteristic is closely connected with this, namely, that play is not “ordinary” or “real” life. It is rather a stepping out of “real” life into a temporary sphere of activity with a disposition all of its own.<sup>49</sup>

Play, Huizinga claims, creates its own sense of order and rules that bound it. Huizinga then illustrates his concept in several social practices, including law, wherein he emphasizes the performativity of legal ritual and positions particularly as they imbue authority and create sets of rules or orders that become accepted by its players.<sup>50</sup>

The result, for Huizinga, is perhaps as astonishing as it is hopeful: “real civilization cannot exist in the absence of a certain play-element, for civilization presupposes limitation and master of the self, the ability not to confuse its own tendencies with the ultimate and highest goal, but to understand that it is enclosed within certain bounds freely accepted.”<sup>51</sup>

Huizinga places special emphasis on the free and voluntary elements of self-imposed order and suggests that civil order, if not civilization, rests upon these conditions being met.<sup>52</sup> Free, voluntary, and self-imposed: here we have some interesting criteria by which to evaluate the observations about professionalization and commodification surveyed above, and the promulgation and legitimacy of orders generated within football. We might immediately acknowledge that these criteria are sufficiently flexible in meaning as to be difficult boundaries to police—as Carlsson suggests in the case of juridified football

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49. JOHAN HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE* 7-8 (1955).

50. For an etymological and historical comparison between legal rituals and play, see *id.* at 78-89.

51. *Id.* at 211.

52. *See id.*



and the “eventification” of social practice within it.<sup>53</sup> Huizinga also quickly acknowledges that the play-element he describes is (often or immediately) appropriated for presumably uncivil objectives. According to him,

[C]ertain play-forms may be used consciously or unconsciously to cover up some social or political design. In this case we are not dealing with the eternal play-element that has been the theme of this book, but with false play. . . . Modern social life is being dominated to an ever-increasing extent by a quality that has something in common with play, and yield the illusion of a strongly-developed play-factor. This quality I have ventured to call by the name of Puerilism, as being the most appropriate appellation for that blend of adolescence and barbarity which has been rampant all over the world for the last two or three decades.<sup>54</sup>

The choice of terms might be considered chauvinistic,<sup>55</sup> but following Huizinga’s definition, Puerilism is conduct

of the lowest order: yells or other signs of greeting, the wearing of badges and sundry items of political haberdashery, walking in marching order or at a special pace and the whole rigmarole of collective voodoo and mumbo-jumbo. Closely akin to this, if at a slightly deeper psychological level, is the insatiable thirst for trivial recreation and crude sensationalism, the delight in mass-meetings, mass-demonstrations, parades, etc. The club is a very ancient institution, but it is a disaster when whole nations turn into clubs, for these, besides promoting precious qualities of friendship and loyalty, are also hotbeds of sectarianism, intolerance, suspicion, superciliousness and quick to defend any illusion that flatters self-love or group-consciousness.<sup>56</sup>

None of this is strange to the football we have just described above, and Huizinga would not consider much of (professional) football a play-element of society, and as such a bulwark of, rather than a hindrance to, a more perfect world. And yet these are the conditions we are faced with theorizing. As we have noted, the Huizinga’s concepts may be over-worked, and Puerilism is not a theory of the aspects of modern sport or social practice. American legal theorists have already tackled, in their own way, any legal theory’s reliance on a concept of freedom and voluntariness. But what Huizinga’s scheme does suggest is an opposition between those elements of social practice (football) that seek to redress and preserve both whatever was free and volun-

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53. See Carlsson, *supra* note 36, at 481-83.

54. HUIZINGA, *supra* note 49, at 205.

55. The original work is in Dutch, so the term may suffer in translation.

56. HUIZINGA, *supra* note 49, at 205.

tary about it through some normative exercise, which we might wish to explore.

Following Huizinga's lead, we might view this free and voluntary self-imposition of an ordered play-element with an emphasis on performance and (legitimate) authority as an operative concept, and one we might consider in light of the anxieties just described and the uses of football analogy in legal theory: the serious and the trivial views of the subject-matter, the opacity of the regulatory authority, the constant negotiation over rules, and the presence of bi- or poly-systemia. At least one commentator has observed similar phenomena in popular culture and lamented or warned that a trend toward the "trivialization" of law in this context erodes its authority, a conclusion perhaps unsurprising given the conservative nature of the discipline itself.<sup>57</sup>

But this juxtaposition also suggests other possibilities. Play-elements—or performativity, we might venture—in Huizinga's conceptualization implies a social practice within a voluntary and self-defined social space that permits the hinging or perhaps hybridization of perspectives and rationalities in productive conflict. Within this hinging of rationalities, the practice of law and the performativity of law have a mediating and potentially emancipatory role. Or, at least, we might propose this characterization in legal theory and the role for law in context.

The juxtaposition of free, voluntary, self-ordered play-elements within the "serious" fields, such as law or politics, captures some of that anxiety expressed in the football literature, whether it is Kapuściński not quite able to believe that football and war could be causally related but organizing his work around it, or Eduardo Galeano lamenting the late capitalist professionalization and commodification of football but unable to turn away from its persistent ability to surprise and delight us. It is perhaps fitting to end such an impressionistic review of these possibilities with an articulation of this juxtaposition from Sócrates<sup>58</sup> himself:

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57. RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2000). A tangential, difficult, but perhaps related observation about the effects on our conception of "human rights" when they are systemically ignored or limited by a permanent state of exception is contained in GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., University of Chicago Press 2005) (2003).

58. Sócrates Brasileiro Sampaio de Souza Vieira de Oliveira, MD was a Brazilian midfielder. According to a former teammate, "He was a very dynamic player with a sublime foot but, most of all, great intelligence." *Brazil Football Legend Socrates Dies at 57*, BBC (Dec. 4, 2011), <http://www.bbc.com/sport/0/football/16017071>.

I'm struggling for freedom, for respect for human beings, for equality, for ample and unrestricted discussions, for a professional democratization of unforeseen limits, and all of this as a soccer player, preserving the ludic, and the joyous and the pleasurable nature of this activity.<sup>59</sup>

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59. THE BALL IS ROUND, *supra* note 7, at 633.