

**WORLD CUP DREAMING:  
SPORTING ACTIVISM AND THE INCREMENTALIST  
ADVANCEMENT OF SEXUAL EQUALITY  
THROUGH ASSOCIATION FOOTBALL**

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## I. INTRODUCTION

International sporting events such as the Olympics and the World Cup of men's association football (soccer) unfold on television screens over the world before billions of viewers. But the governance of international athletics is not so public. Transnational organizations such as the International Olympic Committee (IOC) and the Fédération Internationale de Football Association (FIFA) operate largely behind closed doors and through secret agreements. These non-public entities leverage the world audience for sport to wield enormous power. They bend national governments to their will and they venomously protect their transnational corporate partners from market competition. Both the IOC and FIFA have been named in corruption scandals. Recently, FIFA has been embroiled in a wave of transnational indictments.<sup>1</sup> But their powerful franchises only grow. Behind the scenes of the world's most public events is a cloak-and-dagger world of backroom dealings with the makings of an international spy thriller.<sup>2</sup>

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<sup>1</sup> Indictment, *United States v. Webb*, 15-CR-00252 (RJD)(RML) (E.D.N.Y. May 20, 2015); Press Release, U.S. Dep't of Justice, *Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption* (May 27, 2015), <http://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and>. At the time of this writing, the investigation is ongoing. FIFA President Sepp Blatter has announced his resignation, though effective at some indefinite future time, and "has been keeping a low profile by speaking mostly to Swiss newspapers and appearing at private, FIFA-controlled events in Zurich." Andrew Das, *Sepp Blatter Won't Attend Women's World Cup Final*, N.Y. TIMES (June 30, 2015), <http://www.nytimes.com/2015/07/01/sports/soccer/sepp-blatter-wont-attend-womens-world-cup-final.html>; William K. Rashbaum & Matt Apuzzo, *Bribery Inquiry Drawing Closer to FIFA's President, Sepp Blatter*, N.Y. TIMES (June 1, 2015), <http://www.nytimes.com/2015/06/02/sports/soccer/sepp-blatters-top-fifa-deputy-jerome-valcke-is-said-to-have-transferred-money-central-to-bribery-case.html>; see also Justin Block, *Sepp Blatter, FIFA President, Says "I Did Not Resign,"* HUFFINGTON POST (June 26, 2015, 11:03 AM), [http://www.huffingtonpost.com/2015/06/26/sepp-blatter-resignation\\_n\\_7671084.html](http://www.huffingtonpost.com/2015/06/26/sepp-blatter-resignation_n_7671084.html).

<sup>2</sup> Comparison between FIFA and James Bond villains principally dates in popular culture to FIFA President Sepp Blatter's own satiric comment at the Oxford Union in October 2013:

There are those who will tell you of the supposed sordid secrets that lie deep in our Bond villain headquarters in the hills above Zurich, where we apparently plot to exploit the unfortunate and the weak. They would have you believe that I sit in my office with a sinister grin, gently stroking the chin of an expensive, white Persian cat as my terrible sidekicks scour the earth to force countries to host the World Cup and to hand over all of their money.

Oxford Union, *Sepp Blatter Full Address*, YOUTUBE (Oct. 30, 2013), <https://www.youtube.com/watch?v=7QWAXbkTzsg>, quoted in Edwin Rios, *Watch Sepp Blatter Lash Out Against FIFA's Critics in 2013*, MOTHER JONES (May 28, 2015, 9:54 AM), <http://www.motherjones.com/mixed-media/2015/05/watch-sepp-blatter-lash-out-against-fifas-critics-2013>. Let the record reflect (drafts on file with authors!) that we latched on to the Bond comparison when preparing this Article in summer 2014. More comparisons with the Bond franchise have emerged since the indictments. See, e.g., *FIFA Executives as James Bond Villains*, JSPOrtsBLOGGER (June 15, 2015), <https://jsportsblogger.wordpress.com/2015/06/15/fifa-executives-as-james-bond-villains/>;

Despite the secrecy and many unknowns about how international sport is governed, organizations such as FIFA are rational economic actors. They can be relied on to act in their own commercial interests. That consistency means that interest groups that align with FIFA's commercial interests can take advantage of the organization's power. This study specifically considers the potential to use FIFA and its World Cup soccer tournament to affect the advancement of LGBT rights.

Recognizing the historical interplay of civil rights and international sport, the study begins in Part II with the recent experience of the 2014 Olympics and the anti-LGBT law in Russia, as well as the 2014 World Cup and socioeconomic protests in Brazil. It is in this context that the World Cup plans to unfold in Russia in 2018 and, for the first time in the Arab world, in Qatar in 2022. In Part III, the study offers background on the interconnection between organized international sport and social activism. Particularly, this study considers the governance of international soccer and the role of FIFA as a sporting activist. In Part IV, the study examines the recent work of Professor Jeremiah Ho, who employed contemporary incrementalist theory to describe and predict the gradual social and legal acceptance of marriage equality in the United States.<sup>3</sup> Part V unites these threads. Cognizant of the circumstances in which FIFA recently exerted pressure on World Cup host countries to effectuate desired policy goals, the study in Part V employs Professor Ho's model to propose the advancement of LGBT rights by exploiting FIFA's motives and means to manipulate nations' domestic policies. Part VI concludes, if the World Cup is a public stage on which nations and peoples can dream of victory, then perhaps equality activists can too.

## II. INTERNATIONAL SPORT AND LAWS THAT CONDEMN HOMOSEXUALITY: FROM RUSSIA WITH LOVE<sup>4</sup>

The world's eyes were on Russia for the Sochi Winter Olympics in 2014, but the scrutiny was not all about sport. The Olympics provided a context for global cultural conflict over LGBT rights. In the United States, marriage equality has been advancing gradually, but inexorably, through state courts and legislatures.<sup>5</sup> At the same time, homophobic lobbying in Uganda resulted in the adoption of a life sentence for criminalized homosexuality.<sup>6</sup> Brunei is in the

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Dogfood, *James Bond Vs FIFA (Spectre + United Passions Mashup)*, YOUTUBE (June 3, 2015), <https://www.youtube.com/watch?v=MXbVb2iYm7o>.

<sup>3</sup> Jeremiah A. Ho, *Weather Permitting: Incrementalism, Animus, and the Art of Forecasting Marriage Equality After U.S. v. Windsor*, 62 CLEV. ST. L. REV. 1 (2014).

<sup>4</sup> IAN FLEMING, *FROM RUSSIA WITH LOVE* (1957).

<sup>5</sup> E.g., Ho, *supra* note 3, at 21–25.

<sup>6</sup> Alan Cowell, *Uganda's President Signs Antigay Bill*, N.Y. TIMES (Feb. 24, 2014), <http://www.nytimes.com/2014/02/25/world/africa/ugandan-president-to-sign-antigay-law.html>. A Ugandan court struck down the law on technical grounds, but it may resurface in substance. See

process of adopting Sharia law<sup>7</sup> which, at least as literally read, would impose the death penalty for homosexual intercourse.<sup>8</sup> Olympics watchers focused on Russia's 2013 anti-gay propaganda law, which equated homosexuality with child endangerment and effectively criminalized open expressions of gay identity.

Navigating these divergent trends are the world's transnational sporting organizations. The IOC awarded the 2014 Winter Olympics to Russia, and FIFA awarded the men's World Cup in association football ("the World Cup"<sup>9</sup>) to Russia for 2018. The World Cup is the most widely viewed "single-event sporting competition" in the world,<sup>10</sup> rivaling the Olympics.<sup>11</sup> While organizations such as the IOC and FIFA would prefer to steer clear of

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Jeffrey Gettleman, *Uganda Anti-Gay Law Struck Down by Court*, N.Y. TIMES (Aug. 1, 2014), <http://www.nytimes.com/2014/08/02/world/africa/uganda-anti-gay-law-struck-down-by-court.html>.

<sup>7</sup> E.g., Carol J. Williams, *Sultan of Brunei Imposes Harsh Islamic Criminal Code*, L.A. TIMES (May 1, 2014, 3:35 PM), <http://www.latimes.com/world/asia/la-fg-wn-brunei-sharia-law-20140501-story.html>. International reaction to the law has rippled in international sport. See Norman Hermant & Sam Clark, *AFL Reviews AFL Europe and Royal Brunei Airlines Sponsorship Deal Over Anti-Gay Laws*, AUSTL. ABC (Sept. 10, 2014, 8:01 PM), <http://www.abc.net.au/news/2014-09-10/afl-reviews-brunei-sponsorship-deal-over-anti-gay-laws/5735116> (regarding Australian football).

<sup>8</sup> E.g., Sanaz Alasti, *Comparative Study of Cruel & Unusual Punishment for Engaging in Consensual Homosexual Acts (in International Conventions, the United States and Iran)*, 12 ANN. SURV. INT'L & COMP. L. 149, 159 (2006) (describing Iranian Sharia law against sodomy and observing that punishments prescribed by law are "fixed" beyond judicial discretion).

<sup>9</sup> We are cognizant of the dramatic disparity between world investment in the World Cup in men's soccer and in the World Cup in women's soccer, which FIFA also runs. Cf. *infra* text accompanying note 45. We fully acknowledge the unfortunate irony in a paper about sexual equality. Nevertheless, for practical reasons, we focus this research and adopt the convention of referring to the men's tournament as "the World Cup." We personally are devoted supporters of the women's sport. One of us was lucky enough to cheer on the U.S. side at the Ottawa quarterfinal match of World Cup 2015, and at the time of this writing, we are giddy over the victory of the U.S. Women's National Team in the tournament. If it can build on its international foothold, the women's sport has more potential than the men's to contribute to equality of both gender and sexual-identity. See, e.g., David Beard & Bradley Campbell, *The Most-Watched Soccer Match in US History Prompts Gaze at FIFA's Unequal Payouts*, PRI (July 3, 2015, 2:00 PM), <http://www.pri.org/stories/2015-07-03/who-will-redeem-who-womens-world-cup-match-sunday> (quoting U.S. coach Jill Ellis, "I'm so happy for every little girl who dreams about this"; comparing victory purse of \$2 million with victory purse in men's World Cup of \$35 million; and observing significance, in light of same-sex marriage legalization in United States, of Wambach-Huffman embrace); Lauren Gambino, *Women's World Cup Joy: Abby Wambach and Her Wife Are "Just Another Couple Celebrating"*, THEGUARDIAN (July 6, 2015, 12:07 AM), [http://www.theguardian.com/football/2015/jul/06/womens-world-cup-final-abby-wambach-wife-kiss?CMP=share\\_btn\\_link](http://www.theguardian.com/football/2015/jul/06/womens-world-cup-final-abby-wambach-wife-kiss?CMP=share_btn_link) (featuring photograph by Bob Frid, EPA, of televised post-game embrace and kiss between U.S. star Abby Wambach and her same-sex spouse, Sarah Huffman).

<sup>10</sup> FIFA WORLD CUP, <http://www.fifa.com/aboutfifa/worldcup/> (last visited Oct. 8, 2015).

<sup>11</sup> Zak Burns, *Brazil 2014 Set to Smash TV Records*, CNN MONEY (June 10, 2014, 9:47 AM), <http://money.cnn.com/2014/06/10/news/world-cup-audience/>.

controversy that might alienate consumers, they can be compelled by social, economic, and political pressures to choose sides on issues. Historically, international sport has been inextricable from social and political development, even playing a role in revolutionary advancements in civil rights. Famously, the ban on South Africa from international competitions turned up the heat on Apartheid,<sup>12</sup> and Nelson Mandela later embraced the Springboks, South Africa's national rugby team, to inaugurate the post-Apartheid era.<sup>13</sup> Beginning in 2013 and through the 2014 World Cup in Brazil, with gradually waning ferocity, protestors brought global attention to poverty and wealth disparity.<sup>14</sup> It remains to be seen whether the demonstrations in Brazil will have any long-term impact on those intractable and worsening global problems. But FIFA has been compelled to ramp up its commitment to charitable programs that at least offer the appearance of football as a force for social good.<sup>15</sup>

In 2013 Russia enacted Article 6.21, which criminalizes positive speech about homosexuality.<sup>16</sup> The law punishes expression that

[p]romot[es] non-traditional sexual relations to minors by spreading information aimed at instilling in minors non-traditional sexual arrangements, the attractiveness of non-traditional sexual relations and/or a distorted view that society places an equal value on traditional and non-traditional sexual relations or propagating information on non-traditional sexual relations making them appear interesting, provided that these

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<sup>12</sup> E.g., Rob Nixon, *Apartheid on the Run: The South African Sports Boycott*, TRANSITION, no. 58, 1992, at 68–82, [http://www.english.wisc.edu/rdnixon/files/apartheid\\_run.pdf](http://www.english.wisc.edu/rdnixon/files/apartheid_run.pdf).

<sup>13</sup> JOHN CARLIN, INVICTUS: NELSON MANDELA AND THE GAME THAT MADE A NATION 241–54 (2008).

<sup>14</sup> DAVID GOLDBLATT, FUTEBOL NATION: THE STORY OF BRAZIL THROUGH SOCCER 222–49 (2014) [hereinafter GOLDBLATT, FUTEBOL NATION]; Donna Bowater, *Whatever Happened to Brazil's World Cup Protests?*, AL JAZEERA AM. (July 10, 2014, 3:59 PM), <http://america.aljazeera.com/articles/2014/7/10/brazil-protests-worldcup.html>.

<sup>15</sup> See FIFA, SUSTAINABILITY REPORT: 2014 FIFA WORLD CUP BRAZIL 56–57 (Dec. 2014) [hereinafter FIFA, SUSTAINABILITY REPORT], [http://www.fifa.com/mm/document/afsocial/general/02/50/92/69/sustainabilityreportofthe2014fwf\\_neutral.pdf](http://www.fifa.com/mm/document/afsocial/general/02/50/92/69/sustainabilityreportofthe2014fwf_neutral.pdf) (describing “Football for Hope Forum 2013,” sponsored by FIFA in Belo Horizonte; acknowledging “civil unrest”; and reporting on a program that “explored and debated the origins of the protests, highlighting that football could be used to tackle the social inequalities and injustices underlying the concerns of the Brazilian people”). Street Football World is FIFA’s key partner in its charitable arm, Football for Hope. Football for Hope on the one hand aims to ensure that the World Cup leaves behind a legacy of social development. How serious FIFA is about that legacy is arguable. See Caitlin Moyles, *Football for Hope*, SOCCER POL. BLOG, <http://sites.duke.edu/wcwp/world-cup-2014/fifa-institutional-politics/fifa-institutional-politics/football-for-hope/> (last visited Oct. 8, 2015) (placing FIFA charitable work in financial context).

<sup>16</sup> Article 6.21. *Promoting Non-Traditional Sexual Relations to Minors*, HUM. DIGNITY TR., [http://www.humandignitytrust.org/uploaded/Library/Other\\_Material/2013.06.29\\_unofficial\\_translation\\_Russia\\_Federal\\_bill\\_N\\_135-FZ.pdf](http://www.humandignitytrust.org/uploaded/Library/Other_Material/2013.06.29_unofficial_translation_Russia_Federal_bill_N_135-FZ.pdf) (last visited Oct. 13, 2015).

activities do not involve criminal acts which are punishable under the law[.]<sup>17</sup>

Modest penalties pertain to individuals, who may be fined in the neighborhood of \$120, while penalties for corporate violators range upward of \$27,000 or operating suspension for up to 90 days.<sup>18</sup>

The day the Olympics opened in Sochi, an attorney in Chicago posited a hypothetical scenario: imagine a gold medalist steps down from the Olympic podium after hearing her national anthem, and then, in keeping with popular social custom and in plain view of television audiences, kisses her same-sex spouse.<sup>19</sup> The athlete could be convicted of a crime in Russia because the kiss would portray homosexuality in a favorable light to child viewers. Olympic athletes agree to abide by the laws of the host country.<sup>20</sup> Would Russian authorities prosecute? Would the IOC intervene for the defense? Neither the IOC nor a host nation wants the Olympics clouded by controversy so both tread carefully to avoid conflict. But pretending the issue away makes both parties complicit in the oppression of athletes' civil rights. Moreover, the civil rights of all LGBT persons are neglected as non-heterosexual identity is marginalized and tacitly condemned.

Russia's law survived the heat of the Olympic torch.<sup>21</sup> But the next FIFA World Cup set to open in Russia in 2018 promises to resurrect the conflict.<sup>22</sup> And as LGBT rights continue to gain ground in Western democracies, the conflict promises to present with deeper gulfs and sharper edges. While the Olympics in 2016, 2018, and 2020 will stay on trodden ground in Brazil, South Korea, and Japan, respectively, the FIFA World Cup will move into the Arab world for the first time, locating in culturally

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* The Authors converted currency from Russian rubles to U.S. dollars at xe.com on Sept. 12, 2014.

<sup>19</sup> *Midyear Program Tackles Olympic Games, Russia's Anti-Gay Laws*, AM. BAR ASS'N (Feb. 8, 2014, 3:42 PM), [http://www.americanbar.org/news/abanews/aba-news-archives/2014/02/midyear\\_program\\_tack.html](http://www.americanbar.org/news/abanews/aba-news-archives/2014/02/midyear_program_tack.html) (quoting attorney Stephen J. Thompson); *cf.* Gambino, *supra* note 9.

<sup>20</sup> *See* sources cited *supra* note 19.

<sup>21</sup> *See* Amy K. Nelson, *Sochi Post-Game Analysis*, WOMEN'S MEDIA CTR. (Mar. 6, 2014), <http://www.womensmediacenter.com/feature/entry/sochi-post-game-analysis> (declaring LGBT opposition to the Russian law a failure).

<sup>22</sup> Joseph Patrick McCormick, *Campaigns Demand FIFA Bans Russia from Hosting 2018 World Cup Due to Anti-Gay Law*, PINK NEWS (Mar. 25, 2014, 3:01 PM), <http://www.pinknews.co.uk/2014/03/25/campaigns-demand-fifa-relocates-2018-world-cup-russia-due-anti-gay-law/> (reporting U.S.- and U.K.-originating Change.org petitions citing Russian anti-gay law and military action in Ukraine). *But see* Owen Gibson, *Questions Remain for FIFA as Russia World Cup Becomes Centre of Attention*, THE GUARDIAN (July 15, 2014, 9:58 PM), <http://www.theguardian.com/football/2014/jul/15/fifa-russia-world-cup-sepp-blatter-qatar> (predicting less opposition than in Brazil because of speech-oppressive Putin regime).

conservative Qatar in 2022.<sup>23</sup> Unlike the Russian law, the law in Qatar does not take aim at expression but does criminalize female adultery, male sodomy, and “illegal or immoral actions” by any gender, as well as any “[i]nducing or seducing” that led there.<sup>24</sup> With its mix of civil and Islamic law, Qatar has flogged foreign nationals for alcohol consumption and “illicit sexual relations,” according to Amnesty International, and male homosexuality is punishable by “imprisonment, flogging, deportation and death.”<sup>25</sup> The religious dimension of law in Qatar adds a wrinkle to the problem. FIFA clashed mightily with Brazil over alcohol sales in stadiums there during the 2014 World Cup,<sup>26</sup> and the economic will of FIFA sponsor Budweiser prevailed.<sup>27</sup> But Brazil’s objection was based on social policy, not religious doctrine.<sup>28</sup>

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<sup>23</sup> At the time of this writing, the FIFA indictments, *supra* note 1, have not affected the 2018 and 2022 awards. However, speculation abounds that the awards are in jeopardy. See, e.g., ‘Russia & Qatar May Lose World Cups’—FIFA Official, BBC SPORT (June 7, 2015, 5:34 PM), <http://www.bbc.com/sport/0/football/33041467>.

<sup>24</sup> Qatar law states:

Whoever commits the following offences shall be punished with imprisonment for a term of no less than one year and no more than three years: 1- Grooms a female to commit adultery; 2- Instigates, induces, seduces a female in any way to commit adultery or to frequent a brothel in order to commit debauchery whether inside or outside the country; 3- Leading, instigating or seducing a male by in any way to commit sodomy or dissipation; 4- Inducing or seducing a male or a female in any way to commit illegal or immoral actions; 5- Bringing, exposing or accepting a male or a female for the purpose of sexual exploitation.

*Law No. 11 of 2004 Issuing the Penal Code*, AL MEEZAN: QATAR LEGAL PORTAL, <http://www.almeezan.qa/MOJPortal/LawArticles.aspx?LawArticleID=889&LawID=26&language=en> (last visited Oct. 8, 2015) (showing translation of article 296).

<sup>25</sup> Hannah Wilkinson, *Manchester Metropolitan University Under Fire for New Deal to Train Qatari Police Officers*, INDEP. (Apr. 4, 2014), <http://www.independent.co.uk/student/news/manchester-metropolitan-university-under-fire-for-new-deal-to-train-qatari-police-officers-9238432.html>; see also “My Whole Back Felt Like It Was on Fire”: As a British Teacher Faces 40 Lashes, *One Man Speaks Out*, DAILYMAIL.COM (Nov. 28, 2007, 12:29 AM), <http://www.dailymail.co.uk/news/article-496844/My-felt-like-As-British-teacher-faces-40-lashes-man-speaks-out.html>.

<sup>26</sup> *Beer “Must Be Sold” at Brazil World Cup, Says FIFA*, BBC NEWS (Jan. 19, 2012), <http://www.bbc.com/news/world-latin-america-16624823>; see also Katie Sanders, *John Oliver Says FIFA Pressured Brazil into Lifting Its Alcohol Ban at Stadiums for World Cup*, TAMPA BAY TIMES PUNDIT FACT (June 11, 2014, 5:26 PM), <http://www.politifact.com/punditfact/statements/2014/jun/11/john-oliver/john-oliver-says-fifa-pressured-brazil-lifting-its/>.

<sup>27</sup> Alexandre Grosbois, *Biggest World Cup Comeback So Far: Beer*, MEDICALXPRESS (June 14, 2014), <http://medicalxpress.com/news/2014-06-biggest-world-cup-comeback-beer.html>.

<sup>28</sup> *FIFA Official ‘Amazed’ By Fans’ Drunkenness at Brazil World Cup*, HUFFINGTON POST (July 2, 2014, 2:40 PM), [http://www.huffingtonpost.com/2014/07/02/world-cup-alcohol-drunkenness-fifa\\_n\\_5552199.html](http://www.huffingtonpost.com/2014/07/02/world-cup-alcohol-drunkenness-fifa_n_5552199.html).

Will the same result pertain in Qatar?<sup>29</sup> FIFA's own antidiscrimination policy seems to require the deference of cultural relativism to Qatari law—which is to say nothing of LGBT human rights.<sup>30</sup> So far, debate over the 2022 World Cup in Qatar has been dominated by other headlines.<sup>31</sup> Foremost, consternation has surrounded revelations of shocking working conditions for the foreign laborers in Qatar who are building the infrastructure that FIFA demands.<sup>32</sup> Their plight is worsened by the austerity of the desert, which has itself become an issue, causing FIFA to reluctantly embrace a controversial rescheduling of the World Cup from summer to late autumn.<sup>33</sup> Meanwhile the ongoing Swiss investigation into FIFA's corruption is focused on the tournament awards to Russia and Qatar.<sup>34</sup> These swirling controversies have raised serious doubts that the World Cup will happen in Qatar in 2022.<sup>35</sup> One wonders whether FIFA ultimately might point to weather as a politically neutral shield for a decision to rescind the award, thus ducking the potentially explosive problems of social and economic rights.<sup>36</sup>

FIFA purports, under article three of its constitution, to take an absolute stance against discrimination, including discrimination based on race,

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<sup>29</sup> See Mohammad Amin-ul Islam, *Uncertainty Looms over 2022 FIFA World Cup in Qatar*, ECON. TIMES (July 11, 2015, 5:10 AM), <http://blogs.economictimes.indiatimes.com/commentary/uncertainty-looms-over-2022-fifa-world-cup-in-qatar/>.

<sup>30</sup> See *Anti-Discrimination*, FIFA SUSTAINABILITY, <http://www.fifa.com/sustainability/anti-discrimination.html> (last visited Oct. 8, 2015) (encompassing religion and sexual orientation).

<sup>31</sup> Jim Murphy, *Eight Years to the Qatar World Cup—But FIFA Can Act on Forced Labour Now*, THEGUARDIAN (Feb. 13, 2014), <http://www.theguardian.com/commentisfree/2014/feb/13/qatar-world-cup-forced-labour-fifa>.

<sup>32</sup> E.g., Pete Pattison, *Revealed: Qatar's World Cup 'Slaves'*, THEGUARDIAN (Sept. 25, 2013), <http://www.theguardian.com/world/2013/sep/25/revealed-qatars-world-cup-slaves>; see also Vivek Chaudhary, *Qatar Refuses to Let Nepalese Workers Return to Attend Funerals After Quake*, THEGUARDIAN (May 23, 2015, 7:05 PM), <http://www.theguardian.com/world/2015/may/24/qatar-denies-nepalese-world-cup-workers-leave-after-earthquakes>.

<sup>33</sup> Sam Borden, *FIFA Confirms Winter World Cup for 2022*, N.Y. TIMES (Mar. 19, 2015), <http://www.nytimes.com/2015/03/20/sports/soccer/fifa-confirms-winter-world-cup-for-2022.html> (reporting December 18 as the final match date with commercial implications for European football clubs and U.S. broadcasters covering American football).

<sup>34</sup> Michael E. Miller & Fred Barbash, *U.S. Indicts World Soccer Officials in Alleged \$150 Million FIFA Bribery Scandal*, WASH. POST (May 27, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/05/27/top-fifa-officials-arrested-in-international-soccer-corruption-investigation-according-to-reports/>; see also The Associated Press, *FIFA Receives Evidence in Corruption Probe of Qatar Bid*, CBC SPORTS (Sept. 5, 2014, 12:14 PM), <http://www.cbc.ca/sports/soccer/fifa-receives-evidence-in-corruption-probe-of-qatar-bid-1.2756839>.

<sup>35</sup> E.g., Mitchell Epner, *Why Qatar Will Likely Be Stripped of the 2022 World Cup*, CNBC (June 13, 2014, 5:01 PM), <http://www.cnbc.com/id/101758568#>; see also *supra* note 23.

<sup>36</sup> Cf. *FIFA Strips Qatar of Confederations Cup*, CBC SPORTS (Feb. 26, 2015, 11:41 AM), <http://www.cbc.ca/sports/soccer/fifa-strips-qatar-of-confederations-cup-1.2973534> (reporting FIFA rationale of “brutal summer heat in the host country”).

gender, religion, and sexual orientation.<sup>37</sup> Accordingly, FIFA is under both internal and external pressure to be proactive in defense of LGBT rights. After the Russian law was adopted in June 2013, outlawing positive representations of homosexuality, the IOC sought clarification from Russia as to whether and how the law would be executed during the Olympics.<sup>38</sup> The IOC, which also perpetuates its antidiscrimination policy, took heat from activists when it backed down from challenging the Russian law.<sup>39</sup> FIFA will have to negotiate its own course with Russia. Activists have pressed for suspension of anti-gay laws in Russia and Qatar, but FIFA statements in response have been ambiguous.<sup>40</sup> The ambiguity surely is strategic because FIFA has enormous power at its disposal to influence law and social policy in host countries.

### III. INTERNATIONAL SPORTING ORGANIZATION AND ACTIVISM: THE NAME IS FOOTBALL, ASSOCIATION FOOTBALL<sup>41</sup>

Organized international sport and social activism have ties that go to the very origin of the nation-state as a governing system. That relationship manifests today in the governance of international soccer. The following Part III.A sketches the trajectory that drove FIFA from modest origin to political powerhouse and commercial locomotive. Part III.B outlines the relationship between FIFA and tournament host nations, especially the profound power that FIFA wields over its government partners. Finally, Part III.C explores the

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<sup>37</sup> *Anti-Discrimination*, *supra* note 30. Antidiscrimination principles are stated in FIFA Statutes, the FIFA Disciplinary Code, the FIFA Code of Ethics, and the FIFA Code of Conduct. See *How FIFA Works*, FIFA, <http://www.fifa.com/governance/how-fifa-works/index.html> (last visited Oct. 8, 2015). The Statutes, Code of Ethics, and Code of Conduct all explicitly disallow discrimination based on “sexual orientation” or “gender.” The Disciplinary Code lists only “race, colour, language, religion, or origin.” *Id.*

<sup>38</sup> Travis Waldron, *Can FIFA “Suspend” Russian and Qatari Anti-Gay Laws During Their World Cups?*, THINKPROGRESS (June 14, 2013, 3:32 PM), <http://thinkprogress.org/sports/2013/06/14/2161911/fifa-suspend-russia-qatar-gay-laws/#>.

<sup>39</sup> E.g., Kathy Lally, *IOC: No Grounds to Challenge Russian Anti-Gay Law as Sochi Olympic Games Approach*, WASH. POST (Sept. 26, 2013), [https://www.washingtonpost.com/world/europe/ioc-backs-off-on-russian-anti-gay-law/2013/09/26/38b39266-269c-11e3-9372-92606241ae9c\\_story.html](https://www.washingtonpost.com/world/europe/ioc-backs-off-on-russian-anti-gay-law/2013/09/26/38b39266-269c-11e3-9372-92606241ae9c_story.html).

<sup>40</sup> See Joe Morgan, *FIFA May Suspend Anti-Gay Laws in Russia, Qatar During World Cup*, GAY STAR NEWS (June 14, 2013), <http://www.gaystarnews.com/article/fifa-may-suspend-anti-gay-laws-russia-qatar-during-world-cup140613> (reporting statements by FIFA President Sepp Blatter emphasizing safety and inclusivity regardless of sexual orientation, yet suggesting, in 2013, that “gay people should ‘refrain from sexual activity’ when they are visiting Qatar for the World Cup” in 2022); see also Owen Gibson, *FIFA Urged to Pressure Russia and Qatar over Anti-Gay Legislation*, THEGUARDIAN (Sept. 8, 2013, 3:08 PM), <http://www.theguardian.com/football/2013/sep/08/fifa-russia-qatar-anti-gay-legislation> (dating earlier Blatter sentiment to 2011).

<sup>41</sup> See DR. NO (Eon Productions 1962) (“The name is Bond, James Bond.”).

connection between sport and activism in the particular experience of FIFA, considering implications for World Cup 2018 in Russia and 2022 in Qatar.

A. *Governance and Commercialization of the Global Game*

FIFA is the governing body of association football, or soccer. The global organization has 209 affiliate associations at the national level.<sup>42</sup> The FIFA mission statement revolves around three pillars: (1) “[d]eveloping football everywhere and for all,” (2) “[o]rganising inspiring tournaments,” and (3) “[c]aring about society and the environment.”<sup>43</sup>

All three pillars touch on public service at an aspirational level, beyond the pitch and match. Developing the game, in the mission statement, emphasizes the “unifying, educational, cultural and humanitarian values” of soccer, “particularly through youth and development programmes.”<sup>44</sup> The organization of tournaments capitalizes on those values to “unite and inspire the world,” also feeding revenues from lucrative men’s tournaments into development of the sport for women and youth.<sup>45</sup> In the scope of the third pillar, FIFA imposes upon itself “a duty to society that goes beyond football: to improve the lives of young people and their surrounding communities, to reduce the negative impact of our activities and to make the most we can of the positives.”<sup>46</sup> Thus, FIFA’s purported vision of football is much broader than sport and much broader than commercialism. The organization recognizes that organized soccer has negative externalities. But those externalities are outweighed by a vast potential to improve the world,<sup>47</sup> and FIFA asserts its intention to actualize that potential through proper stewardship.

Today a global power capable of bending the will of governments, FIFA has a modest origin story.<sup>48</sup> Though ball play can be traced to ancient history, what we recognize today as soccer was invented by the English and pursued British imperialism throughout the world, especially in the late 19th

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<sup>42</sup> *Associations*, FIFA, <http://www.fifa.com/associations/index.html> (last visited Oct. 8, 2015).

<sup>43</sup> *What We Stand For*, FIFA, [http://www.fifa.com/about-fifa/who-we-are/explore-fifa.html?intcmp=fifacom\\_hp\\_module\\_corporate](http://www.fifa.com/about-fifa/who-we-are/explore-fifa.html?intcmp=fifacom_hp_module_corporate) (last visited Oct. 8, 2015).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Cf. Richard J. Peltz, *The Sportswriter as Development Journalist: Covering African Football*, 31 *ECQUID NOVI: AFR. JOURNALISM STUD.* 149, 149–50 (2010) [hereinafter Peltz, *Sportswriter*] (positing potential furtherance of social and economic development through journalistic writing about international football).

<sup>48</sup> See generally UNITED PASSIONS (Leuviah Films & Thelma Films 2014). Or the better citation signal might be, “See at your own risk.” E.g., Andi Thomas, *Reviewing “United Passions,” FIFA’s Bizarre Propaganda Film*, *SBNATION* (June 8, 2015, 6:46 AM), <http://www.sbnation.com/soccer/2014/10/7/6934967/united-passions-review-fifa-bizarre-propaganda-film> (“FIFA’s past is a hazy and uninterrogated one.”).

and early 20th centuries.<sup>49</sup> In 1904, delegates from seven European countries constituted FIFA as an international governing body for the sport.<sup>50</sup> Early on, sporting associations such as FIFA operated more like social clubs for the upper crust than like international governance organizations.<sup>51</sup> Membership grew internationally and FIFA organized 13 sides in its first (men's) World Cup in Montevideo in 1930, in coincidence with the centennial celebration of the first Uruguayan constitution.<sup>52</sup> The quadrennial tournament persisted, excepting a break for World War II.<sup>53</sup>

In the relative peace of the Cold War and more in the economically prosperous years that followed, FIFA transformed itself from a modest sport bureaucracy into one of the most powerful non-governmental organizations in the world. Key to that transformation was the development of soccer's commercial potential, and a key figure in the transformation was João Havelange, who ascended to the FIFA presidency in 1974.<sup>54</sup> Schooled in the soccer-obsessed social and political culture of Brazil,<sup>55</sup> Havelange intensified the 20th-century commercialization of soccer and made corporate sponsorship a defining feature of the World Cup.<sup>56</sup> As told by British journalist and soccer biographer David Goldblatt, Havelange employed a four-part strategy:

First, only the very largest multinational companies, whose advertising budgets could bear the load and whose global reach matched the TV audience on offer, [would] be approached as sponsors. Second, sponsorship and advertising would be segmented by product type: there could be only one soft drink, one brand of beer, one micro-electronics firm or one financial services company that could be the official World Cup product or supplier . . . . Third, FIFA would have total control over all forms of TV rights, advertising, stadium space, etc. . . . Fourth, FIFA itself would not handle the details of the sponsorship or TV deals. Marketing and TV rights would be

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<sup>49</sup> DAVID GOLDBLATT, *THE BALL IS ROUND: A GLOBAL HISTORY OF SOCCER* 13–15, 112–70 (2006) [hereinafter GOLDBLATT, *THE BALL IS ROUND*].

<sup>50</sup> *Id.* at 233.

<sup>51</sup> *Id.* at 234; *History of FIFA—The First World Cup*, FIFA, <http://www.fifa.com/classicfootball/history/fifa/first-fifa-world-cup.html> (last visited Oct. 8, 2015).

<sup>52</sup> GOLDBLATT, *THE BALL IS ROUND*, *supra* note 49, at 249.

<sup>53</sup> *History of FIFA*, *supra* note 51.

<sup>54</sup> *See* GOLDBLATT, *THE BALL IS ROUND*, *supra* note 49, at 522–27; *see also* GOLDBLATT, *FUTEBOL NATION*, *supra* note 14, at 226 (implicating Havelange in World Cup 1990 media rights kickback scandal).

<sup>55</sup> *See, e.g.*, GOLDBLATT, *FUTEBOL NATION*, *supra* note 14, at 99 (describing Havelange as president of Brazil football association).

<sup>56</sup> GOLDBLATT, *THE BALL IS ROUND*, *supra* note 49, at 514; *see also* John Nadeau, Norm O'Reilly & Louise A. Heslop, *Linking Place, Mega-Event and Sponsorship Evaluations*, 22 *J. PRODUCT & BRAND MGMT.* 129, 129 (2013).

handed over for a guaranteed sum of money to an intermediary who would sell them on.<sup>57</sup>

As a result, some of the world's largest companies, such as Coca-Cola, brought their global brand recognition into alliance with FIFA.<sup>58</sup> The money spigot opened.<sup>59</sup> More money only augmented FIFA's leverage over sporting affiliates and corporate and governmental partners. Under this model, the men's World Cup of soccer became the premier sporting event on the planet.

Meanwhile secrecy clauses in sponsorship contracts forbade any public scrutiny of the deals.<sup>60</sup> In this atmosphere of sport-sponsor complex, it becomes difficult to distinguish FIFA pursuit of commercial growth from the pursuit of the aspirational mission.<sup>61</sup> Recently, accusations of misconduct—not unlike the International Olympic Committee bribery scandal in 1998 that marred the 2002 Salt Lake City games<sup>62</sup>—have raised grave doubts about whether FIFA officials put public health and welfare ahead of commercial advantage, a shadow cast over the award of the 2022 World Cup to Qatar<sup>63</sup> and intensified by the recent indictments of FIFA officials.<sup>64</sup> FIFA officials at least purport to be bound by a strict Code of Ethics,<sup>65</sup> adopted in 2004, which is enforced by a judicial body within FIFA, the Ethics Committee.<sup>66</sup> But dogged by corruption allegations, transparency has not proved to be FIFA's forte. Scottish investigative reporter Andrew Jennings has invested heavily in holding FIFA accountable.<sup>67</sup> And the global non-profit Transparency International has set its

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<sup>57</sup> GOLDBLATT, *THE BALL IS ROUND*, *supra* note 49, at 524–25.

<sup>58</sup> *Id.* at 525; Dale T. McKinley, *FIFA and the Sports Accumulation Complex*, in *SOUTH AFRICA'S WORLD CUP: A LEGACY FOR WHOM?* 13, 19 (2011).

<sup>59</sup> McKinley, *supra* note 58, at 13, 19.

<sup>60</sup> *E.g., id.* at 13, 25.

<sup>61</sup> *See id.* at 17.

<sup>62</sup> *See, e.g.,* Bill Mallon, *The Olympic Bribery Scandal*, 8 *J. OLYMPIC HIST.* 11 (2000), <http://library.la84.org/SportsLibrary/JOH/JOHv8n2/johv8n2f.pdf>.

<sup>63</sup> *See, e.g.,* *FIFA: Time to Change*, TRANSPARENCY INT'L (June 12, 2014), [http://www.transparency.org/news/feature/fifa\\_time\\_to\\_change](http://www.transparency.org/news/feature/fifa_time_to_change).

<sup>64</sup> *See supra* note 1.

<sup>65</sup> *FIFA CODE OF ETHICS* (2012 ed.), <http://www.fifa.com/mm/document/affederation/administration/50/02/82/codeofethics2012e.pdf>.

<sup>66</sup> *Id.*

<sup>67</sup> *E.g.,* Michael E. Miller, *How a Curmudgeonly Old Reporter Exposed the FIFA Scandal that Toppled Sepp Blatter*, *WASH. POST* (June 3, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/06/03/how-a-curmudgeonly-old-reporter-exposed-the-fifa-scandal-that-toppled-sepp-blatter/>; SI Wire, *Andrew Jennings' 2006 Book on FIFA Is Selling for Crazy Prices*, *SPORTS ILLUSTRATED* (June 3, 2015), <http://www.si.com/extra-mustard/2015/06/03/andrew-jennings-fifa-sepp-blatter-book-amazon> (citing ANDREW JENNINGS, *FOUL!: THE SECRET WORLD OF FIFA: BRIBES, VOTE RIGGING, AND TICKET SCANDALS* (2006)); *cf. supra* notes 37–39.

sights on FIFA, publishing reports<sup>68</sup> and in April 2015 launching a focused initiative on corruption in sport.<sup>69</sup>

### B. FIFA and Its Host Nations

FIFA chooses a country to host the World Cup—as well as other FIFA-sponsored events, such as the women’s cup, youth cups, and beach soccer cup—using a process of competitive bidding.<sup>70</sup> National football associations, which constitute FIFA’s membership, coordinate with their national governments and other in-country stakeholders—including local governments, media, and especially private financial interests—to formulate bids that comply with expectations set out in a FIFA “Bidding Manual.”<sup>71</sup> FIFA hypes the benefits of bidding and hosting its events, including economic activity and investment as well as intangible gains such as “cooperation and goodwill [among] stakeholders,” “civic pride and community empowerment,” opportunity for women and youth, and positive role modeling.<sup>72</sup> But the cost of hosting sporting mega-events, for the World Cup like the Olympics, has skyrocketed “from several hundred million in 1994, when the United States hosted the event, to \$5–\$6 billion in 2010 in South Africa and \$15–\$20 billion in Brazil in 2014.”<sup>73</sup> For Qatar in 2022, a “final price tag” has been estimated as high as “an eye-popping \$200 billion.”<sup>74</sup>

Tournament bidding has been the persistent focus of ethics and corruption investigations.<sup>75</sup> Final decisions are made in secret votes of the FIFA executive committee, so the true motives of the organization renowned for lack of transparency are “impossible to discern” and at best involve “murky

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<sup>68</sup> *Global Corruption Report: Sport*, TRANSPARENCY INT’L, [http://www.transparency.org/research/gcr/gcr\\_sport/0/](http://www.transparency.org/research/gcr/gcr_sport/0/) (last visited Oct. 8, 2015).

<sup>69</sup> *Corruption in Sport Initiative*, TRANSPARENCY INT’L, [http://www.transparency.org/news/feature/sport\\_integrity](http://www.transparency.org/news/feature/sport_integrity) (last visited Oct. 8, 2015).

<sup>70</sup> *Bidding for FIFA’s Other World Cups*, FIFA, <http://www.fifa.com/governance/competition-organisation/introduction.html> (last visited Oct. 8, 2015).

<sup>71</sup> *Id.*

<sup>72</sup> *Benefits of Bidding for and Hosting FIFA’s Other World Cup Events*, FIFA, <http://www.fifa.com/governance/competition-organisation/benefits-of-bidding.html> (last visited Oct. 8, 2015).

<sup>73</sup> ANDREW ZIMBALIST, CIRCUS MAXIMUS: THE ECONOMIC GAMBLE BEHIND HOSTING THE OLYMPICS AND THE WORLD CUP 2 (2015). A recent article placed the price tag for Brazil at \$11.5 billion and also questioned the socioeconomic merits of the spending. Kim Catley, *Fair Play?*, RICHMOND L., Summer 2015, at 9, 10.

<sup>74</sup> ZIMBALIST, *supra* note 73, at 2.

<sup>75</sup> See, e.g., Stephanie Clifford, *Ex-FIFA Official Chuck Blazer Admitted Accepting Bribes for World Cup Votes*, N.Y. TIMES (June 3, 2015), <http://www.nytimes.com/2015/06/04/sports/soccer/soccer-official-chuck-blazer-admitted-accepting-bribes-for-world-cup-votes.html>.

internal . . . politics.”<sup>76</sup> U.S. prosecutors in the recent round of indictments see a link between a \$10 million payment to FIFA in 2008 and the World Cup award to South Africa for 2010, though auditor KPMG stands by its “clean bill of financial health” for FIFA.<sup>77</sup> It was after an inquiry into the 2018 and 2022 World Cup awards substantially exonerated FIFA in 2014 that ethics investigator and former U.S. Attorney Michael J. Garcia resigned his post in vocal protest.<sup>78</sup> *The New York Times* described the bidding processes behind the Russia and Qatar awards as “rife with accusations of bribery and vote trading.”<sup>79</sup>

Meanwhile in plain view, the rising costs have caused economists to cry foul on the supposed calculation that extols hosting, especially in “countries with meager resources and deficient public services.”<sup>80</sup> Professor Andrew Zimbalist explained:

While promoters of the games made lofty claims about the economic benefits to be gained from hosting these sporting extravaganzas, the local populations seemed unimpressed. Not only were there no evident economic gains, there were social dislocations and resource diversions away from meeting basic needs. The games may benefit their wealthy promoters, but those at the middle and bottom of the income ladder appear to be picking up the tab . . . .<sup>81</sup>

That message has been reaching the general public and contributed to the socioeconomic protests during the Brazil World Cup in 2014.<sup>82</sup>

When a bidding nation and its football association win hosting rights to the World Cup, the nation and its host cities sign comprehensive—and usually confidential—agreements with FIFA.<sup>83</sup> Logically, many terms of the

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<sup>76</sup> Jeré Longman, *Russia and Qatar Win World Cup Bids*, N.Y. TIMES (Dec. 2, 2010), <http://www.nytimes.com/2010/12/03/sports/soccer/03worldcup.html>.

<sup>77</sup> Lynnley Browning, *Corruption in FIFA? Its Auditors Saw None*, N.Y. TIMES (June 5, 2015), <http://www.nytimes.com/2015/06/06/sports/soccer/as-fifa-scandal-grows-focus-turns-to-its-auditors.html>.

<sup>78</sup> Jeré Longman, *FIFA Investigator Michael J. Garcia Quits in Dispute over Report*, N.Y. TIMES (Dec. 17, 2014), <http://www.nytimes.com/2014/12/18/sports/soccer/michael-j-garcia-resigns-as-fifa-prosecutor-in-protest.html>.

<sup>79</sup> *Id.*

<sup>80</sup> ZIMBALIST, *supra* note 73, at 2. Even better endowed localities are having second thoughts about hosting sporting mega-events nowadays. *See, e.g., After Boston Drops Olympic Bid, U.S. Committee Scrambles to Find New Choice*, NPR (July 29, 2015, 5:10 PM), <http://www.npr.org/2015/07/29/427464709/after-boston-drops-olympic-bid-u-s-committee-scrambles-to-find-new-choice> (featuring interview with Andrew Zimbalist).

<sup>81</sup> ZIMBALIST, *supra* note 73, at 2.

<sup>82</sup> *Id.*

<sup>83</sup> Andrew Jennings, *The Documents that FIFA Doesn't Want Fans to Read* (Dec. 18, 2010) (on file with author); *see* FIFA, *Bidding Agreement Regarding the Submission of Bids for the*

agreements relate to infrastructure, going directly to the vast technical apparatus of the tournament, from stadium specifications to team and training accommodations to security arrangements.<sup>84</sup> FIFA tailors template agreements to particular tournaments and nations, and it is bold and meticulous in its demands.<sup>85</sup> Some demands are economically motivated, such as “generous tax provisions” for FIFA itself and “ensuring the protection of FIFA sponsors’ brands from ambush marketing and local competition.”<sup>86</sup> Some demands go to averting disruption of the tournament but run roughshod over local policy or culture, such as the beer sales in Brazil, and a ban on musical instruments in the Brazilian stadiums after the vuvuzela debacle in South Africa.<sup>87</sup> Some demands are notional, for example, ensuring compliance with FIFA antidiscrimination policy.<sup>88</sup> Governments bend to FIFA’s will because, they believe, the opportunity to host the world’s premier sporting event reaps billions of dollars

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Right to Host and Stage the 2018 FIFA World Cup or 2022 FIFA World Cup 32, 40 (on file with author) [hereinafter FIFA, Bidding Agreement] (stating terms of confidentiality in bidding and defining “Hosting Agreement” and “Host City Agreement”); FIFA, Host City Agreement (on file with author); *see also* FIFA, Template Government Declaration (on file with author). These documents apparently were leaked in connection with a Netherlands bid. Although unavailable online at the time of this publication, the documents should be reposted in the future on <http://transparencyinsportblog.blogspot.com/>. Email from Andrew Jennings, Investigative Journalist, to Richard J. Peltz-Steele, Professor of Law, Univ. of Mass. Law Sch. (Oct. 1, 2015) (on file with author). We were not able to find a template or copy for the hosting agreement at the national level.

<sup>84</sup> *E.g.*, FIFA, STADIUM AGREEMENT COVER BETWEEN FIFA & LOC & STADIUM AUTHORITY, <http://dockets.sandiego.gov/sirepub/cache/2/kacirr2zopr2ox2wiataxrem/13997710072015033334139.PDF>.

<sup>85</sup> *See, e.g.*, Letter from Jörg Vollmüller, Head of Commercial Legal, FIFA, to Henny Smorenburg, Found. Bid 2018/2022 Holland-Belgium (Sept. 16, 2010) (on file with author) (objecting to Dutch/Belgian changes to bid template such as, *inter alia*, insistence on supremacy of domestic policy and resistance to specific deadline for changes in domestic law).

<sup>86</sup> GOLDBLATT, FUTEBOL NATION, *supra* note 14, at 233. On “ambush marketing,” see generally Monika Piątkowska & Jolanta Żyśko, *Off-Field Competition at Major Sport Events: Case Study of 2010 FIFA World Cup South Africa*, 50 PHYSICAL CULTURE & SPORT: STUD. & RES. 118, 120–24 (2010), <http://www.degruyter.com/view/j/pcsr.2010.50.issue—1/v10141-010-0029-6/v10141-010-0029-6.xml>.

<sup>87</sup> GOLDBLATT, FUTEBOL NATION, *supra* note 14, at 233.

<sup>88</sup> *Anti-Discrimination*, *supra* note 30.

of economic activity<sup>89</sup> and affords the country intangible riches in domestic spoils and international prestige.<sup>90</sup>

Inversely, failure to meet FIFA expectations signals humiliation on the world stage. The World Cup can be taken away from a country that drops the ball and the tournament can be moved elsewhere. Exactly that happened in 1982 when FIFA moved the 1986 tournament to Mexico after Colombia announced that it “lacked the economic capacity” to meet FIFA expectations.<sup>91</sup> Whether or not justifiably so, Brazil’s readiness for the 2014 tournament was the subject of much angst in the media.<sup>92</sup> The FIFA secretary-general gave a “four-week ultimatum” to one Brazilian host city “to accelerate stadium construction or risk being excluded from the tournament.”<sup>93</sup> The investment in sport infrastructure required of Brazil to meet FIFA demands spurred on protestors who wondered at spending on such extravagance rather than spending more directly to alleviate poverty or ameliorate wealth disparity.<sup>94</sup>

Nations that host FIFA tournaments have much to gain but they also put themselves at risk. An event such as the World Cup balances the opportunity for a nation to show its world-class status—in physical infrastructure, public order, business friendliness, and touristic opportunity—against the risk of failure and humiliation. Rightly or wrongly—Brazilian protestors raised the question—national leaders have thought the bargain worth pursuit, affording FIFA enormous leverage in negotiating host agreements.<sup>95</sup>

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<sup>89</sup> E.g., Victor A. Matheson, *Mega-Events: The Effect of the World’s Biggest Sporting Events on Local, Regional, and National Economies* (Coll. of the Holy Cross, Dep’t. of Econ. Faculty Research Series, Working Paper No. 06-10, 2006), [http://college.holycross.edu/RePEc/hcx/Matheson\\_MegaEvents.pdf](http://college.holycross.edu/RePEc/hcx/Matheson_MegaEvents.pdf); see also Clifford J. Shultz, II, *Special Session Summary, Planet Soccer and the World Cup 1998: An Unreality Zone of Media, Marketing and Consumption in a Land of Hysterical Fantasy*, 26 *ADVANCES IN CONSUMER RES.* 238 (1999), <http://www.acrwebsite.org/search/view-conference-proceedings.aspx?Id=7906>.

<sup>90</sup> Scarlett Cornelissen, *Our Struggles Are Bigger than the World Cup: Civic Activism, State-Society Relations and the Socio-Political Legacies of the 2010 FIFA World Cup*, 63 *BRIT. J. SOC.* 328, 334–35 (2012) (describing South African expectations).

<sup>91</sup> *Columbia Won’t Be Cup Host*, *N.Y. TIMES* (Oct. 26, 1982), <http://www.nytimes.com/1982/10/26/sports/colombia-won-t-be-cup-host.html> (citing statement of Colombian President Belisario Betancur).

<sup>92</sup> E.g., Owen Gibson, *World Cup 2014: Brazil Still Facing Issues with 100 Days to Go*, *THEGUARDIAN* (Mar. 3, 2014, 7:03 AM), <http://www.theguardian.com/football/2014/mar/04/world-cup-2014-brazil-stadiums>.

<sup>93</sup> Jonathan Watts, *FIFA Issues Ultimatum to Host City over Brazil World Cup Stadium Delays*, *THEGUARDIAN* (Jan. 22, 2014), <http://www.theguardian.com/football/2014/jan/22/fifa-ultimatum-world-cup-stadium-brazil-curitiba>.

<sup>94</sup> E.g., GOLDBLATT, *FUTEBOL NATION*, *supra* note 14, at 234–35 (calculating Brazilian public expenditure to reach US \$13.5 billion, “enough money to pay the entire country’s annual *Bolsa Familia* [family welfare] bill twice over”). Consternation was aggravated by repeated revelations of “corruption and incompetence” in contracting. *Id.* at 234.

<sup>95</sup> E.g., Stan du Plessis & Cobus Venter, *The Home Team Scores!: A First Assessment of the Economic Impact of World Cup 2010*, in *INTERNATIONALE SPORTEVENTS IM UMBRUCH?*:

Proffered host agreements in fact leave little to negotiation.<sup>96</sup> Moreover, even though FIFA contracts with governments, the agreements contain secrecy clauses,<sup>97</sup> withholding from public scrutiny the terms that bind host governments.<sup>98</sup>

The host nation's contractual pledges to FIFA cover a broad range of logistical issues, including the legal, financial, organizational, and infrastructural foundations for the World Cup.<sup>99</sup> At the same time, the agreements are highly protective of FIFA in both practical and extravagant ways. As reported by Dale McKinley, host nations agree to assume all the infrastructural costs of hosting, to afford FIFA preferential business or tax status, to indemnify FIFA against legal claims, "and to ensure that FIFA leaders are effectively treated as visiting heads of state."<sup>100</sup> The exclusive access to the global market that FIFA affords sponsors<sup>101</sup> is guaranteed by outlawing—even criminalizing, as in South Africa<sup>102</sup>—the advertising of competing products or services.<sup>103</sup>

INSTRUMENTALISIERUNG, DIGITALISIERUNG, TRIVIALISIERUNG 31, 33 (Martin-Peter Büch, Wolfgang Maennig & Hans-Jürgen Schulke eds., 2011) (describing hyperbolic South African expectations for economic benefit from World Cup 2010).

<sup>96</sup> McKinley, *supra* note 58, at 25.

<sup>97</sup> *E.g.*, FIFA, Bidding Agreement, *supra* note 83, § 6.4; FIFA, Host City Agreement, *supra* note 83, § 9.2.

<sup>98</sup> Domestic access laws sometimes win out. *See, e.g.*, Colleen Dardagen, *It's Their Party and We Can Cry if We Want To*, MERCURY (S. AFR.) (May 14, 2010), <http://www.highbeam.com/doc/1G1-226365327.html> (describing access to Durban host city agreement through South African open records law). Different access laws at national, state, and local levels take different positions on access to governmental records concerning economic development. *See generally* RICHARD J. PELTZ-STEELE, *THE LAW OF ACCESS TO GOVERNMENT* (2012) (describing controverted problem of sunshine law application to governmental economic development efforts in context of U.S. state access exemptions for competitive business information).

<sup>99</sup> McKinley, *supra* note 58, at 24.

<sup>100</sup> *Id.* at 25; *see also* Lourdes Garcia-Navarro, *FIFA's Soccer "Embassy" in Paraguay, Complete with Legal Immunity*, NPR (June 5, 2015, 4:59 AM), <http://www.npr.org/sections/parallels/2015/06/05/412177013/fifas-soccer-embassy-in-paraguay-complete-with-legal-immunity> (describing embassy status and legal immunity—"something no other private enterprise has anywhere else in the world"—afforded to the headquarters of the South American Football Confederation (CONMEBOL) in Luque, Paraguay, which has been implicated in FIFA corruption).

<sup>101</sup> Vered Yakovee, *Legal Aspects of Big Sports Event Management, Part II: Sponsorships*, 25 ENT. & SPORTS L. 1 (2007); *see also* Eric MacIntosh et al., *The Role of Mega-Sports Event Interest in Sponsorship and Ambush Marketing Attitudes*, 21 SPORT MARKETING Q. 43 (2012), <http://www.thefreelibrary.com/The%20role%20of%20omega-sports%20event%20interest%20in%20sponsorship%20and%20ambush.%20.%20.-a0323258627>.

<sup>102</sup> *See infra* note 110 and accompanying text.

<sup>103</sup> Piątkowska & Żyśko, *supra* note 86, at 127–29. FIFA also maintains firm control over its intellectual property interests. *E.g.*, Alberto Bellan, *FIFA's Unfair Catenaccio on World Cup's IP*, IPKAT (June 9, 2014, 1:27 AM), <http://ipkitten.blogspot.it/2014/06/fifas-unfair-catenaccio>

A curious and compelling model of host accommodation of FIFA demands can be found in the “World Cup courts” of the 2010 World Cup in South Africa. To host the World Cup and accommodate FIFA, South Africa created 56 courts designed to speed up criminal dispositions.<sup>104</sup> FIFA was worried that the perception of high crime in the host country would alienate tourists and mar the tournament, and even South African locals were receptive to the idea as an alternative to the “glacial pace” of domestic justice.<sup>105</sup> So under specially enacted South African legislation, criminal charges that arose from conduct within World Cup zones were directed into the World Cup courts.<sup>106</sup> The efficacy of the pricey courts—with 1,500 dedicated personnel working nights at public expense<sup>107</sup>—is well arguable. A *Guardian* correspondent reported after the tournament that the “courts were largely empty, attracting headlines only for the severity of the sentences imposed on a sometimes bizarre and pathetic parade of miscreants.”<sup>108</sup> Perhaps the most famous prosecution garnered only negative publicity when two Dutch women were arrested for wearing orange dresses promoting Bavaria beer—not a World Cup sponsor.<sup>109</sup> So-called “ambush marketing” was made criminal by the World Cup South Africa Special Measures Act of 2006, itself a product of the national hosting agreement with FIFA, to protect the exclusive access of FIFA sponsors to World Cup consumers.<sup>110</sup>

Notwithstanding the controversy and questionable efficacy of World Cup courts, it is remarkable that FIFA endeavored to address problems of crime and justice, and negotiated such a solution, because it marks recognition of a social problem clearly related to neither physical infrastructure nor metaphysical norms such as antidiscrimination. Certainly FIFA’s concern for safety and efficient justice can be portrayed in self-interested economic terms, like the Budweiser sales in Brazil. But FIFA—pointing, for example of its commitment to social welfare, to its pervasive “Say No to Racism”

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on-world-cups-ip.html (describing as “psychedelic” and analyzing “FIFA, 2014 FIFA World Cup Brazil™: FIFA Public Guidelines for Use of FIFA’s Official Marks”).

<sup>104</sup> Marina Hyde, *World Cup 2010: Fans, Robbers and a Marketing Stunt Face Justice, FIFA Style*, *THEGUARDIAN* (June 20, 2010, 3:39 PM), <http://www.theguardian.com/football/2010/jun/20/world-cup-2010-fans-marketing-justice-fifa>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Owen Gibson, *World Cup 2010: South Africa Leaves a World Cup Legacy to Remember*, *THEGUARDIAN* (July 12, 2010, 2:39 PM), <http://www.theguardian.com/football/blog/2010/jul/12/south-africa-world-cup-2010>.

<sup>109</sup> *E.g.*, *Dutch Mini-Dress Women Walk Free from Court over Ambush Marketing Stunt*, *MIRROR* (June 22, 2010, 2:57 PM), <http://www.mirror.co.uk/news/uk-news/dutch-mini-dress-women-walk-free-230688>.

<sup>110</sup> Eric Pfanner, *At World Cup, Publicity Money Can’t Buy*, *N.Y. TIMES* (June 16, 2010), [http://www.nytimes.com/2010/06/17/business/global/17ambush.html?\\_r=0](http://www.nytimes.com/2010/06/17/business/global/17ambush.html?_r=0).

campaign<sup>111</sup>—might prefer to portray World Cup courts as a defense of the human rights to personal safety and to prompt and fair criminal process.

It remains to be seen what accommodations FIFA will demand of Russia and Qatar for the 2018 and 2022 World Cup tournaments—or how much heat FIFA will be willing to sustain for relenting on demands with years for opposition to foment. Should FIFA demands result in accommodations in Russian or Qatari law, FIFA might find itself cast in the role of political activist for LGBT, labor, or other human rights; or, from the opposing perspectives, the role of cultural imperialist and purveyor of depravity. Alternatively, if FIFA backs down from pursuit of its interests, be they commercial or metaphysical, it might find itself cast in the role of cultural relativist or social oppressor.

### C. FIFA the Activist

Sport and activism have ancient ties.<sup>112</sup> Activists use sport because it is imbued with power.<sup>113</sup> One of us has written at greater length previously about the peculiar properties of sport—namely, conservatism, conflict, unification, and identity—that make it appealing to political leaders, whether for democratic or dictatorial purposes.<sup>114</sup> And Goldblatt has described in detail the historic tie between soccer and political power, writing most recently, on the occasion of the 2014 World Cup, about Brazil, where soccer is the “avatar of the nation.”<sup>115</sup> In its conservative property, sport amplifies the status quo, which may promote the establishment sector or demonstrate a need for change.<sup>116</sup> Likewise sport may be used to foster conflict, as in the construction of international rivalry, and also to unify, as in the perpetuation of national

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<sup>111</sup> See, e.g., Henry Winter, *World Cup 2014: FIFA Rips Itself Apart over Strength of Commitment to Anti-Racism Campaign*, TELEGRAPH (July 3, 2014, 8:29 PM), <http://www.telegraph.co.uk/sport/football/world-cup/10944805/World-Cup-2014-Fifa-rips-itself-apart-over-strength-of-commitment-to-anti-racism-campaign.html>.

<sup>112</sup> See, e.g., JUDITH SWADDLING, *THE ANCIENT OLYMPIC GAMES* 94–98 (rev. 2d ed. 2008) (describing interplay of politics, commercialism, and corruption in ancient Olympics, including, for example, legendary oration of Lysias in 388 B.C. to turn Olympic crowds against Dionysius I, the tyrant of Syracuse, who himself had tried to impress the masses by sponsoring a team of horses and displaying wealth); see also Scott Rosner & Deborah Low, *The Efficacy of Olympic Bans and Boycotts on Effectuating International Political and Economic Change*, 11 TEX. REV. ENT. & SPORTS L. 27 (2009) (relating other examples). Padhi traced the coincidence of politics and sport to truce treaties, which afforded sanctuary or immunity to persons traveling to and from the Olympics in the ninth century B.C. Bishnupriya Padhi, *Sports Diplomacy: South Africa and FIFA 2010*, 3 INSIGHTS ON AFR. 55, 55 (2011). However, the entanglement of politics and sport diminished in importance after the ancient Olympics until the 19th century A.D. *Id.*

<sup>113</sup> Peltz, *Sportswriter*, *supra* note 47, at 161.

<sup>114</sup> *Id.*

<sup>115</sup> GOLDBLATT, *FUTEBOL NATION*, *supra* note 14, at xxi.

<sup>116</sup> Peltz, *Sportswriter*, *supra* note 47, at 158.

identity.<sup>117</sup> Political leaders are therefore deeply cognizant of the role of sporting identity as a proxy for national identity, whether to good or evil ends. So Nelson Mandela embraced the Springboks, the United States and China opened a dialog through “Ping Pong” diplomacy,<sup>118</sup> and Adolf Hitler sought to promote Aryan supremacy and German identity in hosting the 1936 Olympics.<sup>119</sup> The “rules and commercial arrangements” of international sport, or “*lex sportiva*,”<sup>120</sup> are creating international law in areas such as intellectual property and human rights.<sup>121</sup> And that is to say nothing of the dubious and perhaps mixed motives of multinational corporations, which are playing an increasing role in the supervision of global development.<sup>122</sup>

FIFA is no stranger to sport as power, nor to using sport in furtherance of a social agenda. During the 2014 World Cup in Brazil, FIFA’s “Say No to Racism” slogan was pervasive in ceremonies, stadiums, and media campaigns.<sup>123</sup> FIFA has a big stick as well as carrots; it has punished national affiliates, sides, and players for discrimination and racism. For example, FIFA banned spectators from a Ukraine-Poland match after a group of Ukraine supporters at an earlier match against San Marino displayed Nazi salutes and neo-Nazi banners and made “monkey noises and gestures.”<sup>124</sup> Like IOC,<sup>125</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> David A. DeVoss, *Ping-Pong Diplomacy*, SMITHSONIAN MAG. (Apr. 2002), <http://www.smithsonianmag.com/history/ping-pong-diplomacy-60307544/?no-ist=>.

<sup>119</sup> *E.g.*, DAVID CLAY LARGE, NAZI GAMES: THE OLYMPICS OF 1936, at 14–15 (2007) (describing revisionist dissociations of Nazism and 1936 Olympics as “abiding misconceptions”).

<sup>120</sup> *E.g.*, Matthew J. Mitten & Hayden Opie, “*Sports Law*”: *Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 TUL. L. REV. 269, 287 & n.80 (2010).

<sup>121</sup> *Id.* at 315–20.

<sup>122</sup> *See, e.g.*, Lyndsay M.C. Hayhurst, *The Corporatization of Sport, Gender and Development: Postcolonial IR Feminisms, Transnational Private Governance and Global Corporate Social Engagement* 1–2 (Oct. 12, 2011) (Munk Sch. of Glob. Affairs Working Paper Series 2009–2010), <http://ssrn.com/abstract=1942740>.

<sup>123</sup> *E.g.*, Dakota Antelman, *FIFA’s Failure to Punish Homophobia and Racism Among Other Things Make Soccer the Harshes of Sports*, SBNATION: OUTSPORTS (June 20, 2014, 6:05 PM), <http://www.outsports.com/2014/6/20/5829190/fifas-failure-to-punish-homophobia-and-racism-among-other-things-make> (criticizing pervasive campaign as “all talk”). Though less controversial anti-racism eclipses sexual-orientation discrimination among FIFA priorities, a FIFA publication touting the Women’s World Cup in Japan in 2011 featured the “Say No to Racism” campaign in an article that also venerated sexual diversity. *See* Alexander Koch, *No Room for Discrimination*, FIFA WORLD, Aug./Sept. 2011, at 40, 41, [http://www.fifa.com/mm/Document/AF-Magazine/FIFAWorld/02/21/84/15/FIFAWorld20110809EN\\_Neutral.pdf](http://www.fifa.com/mm/Document/AF-Magazine/FIFAWorld/02/21/84/15/FIFAWorld20110809EN_Neutral.pdf).

<sup>124</sup> Press Release, FIFA, Sanctions of the FIFA Disciplinary Committee Against Ukraine and Peru (Sept. 27, 2013), <http://www.fifa.com/governance/news/y=2013/m=9/news=sanctions-the-fifa-disciplinary-committee-against-ukraine-and-peru-2182133.html>. The efficacy of a spectator ban is questionable. *See, e.g.*, Jamie Jackson, *Vincent Kompany Questions Why UEFA Banned Manchester City Supporters*, THEGUARDIAN (Oct. 21, 2014, 6:32 PM), <http://www.theguardian.com/football/2014/oct/21/vincent-kompany-manchester-city-cska>.

FIFA threw its weight into the boycott of South Africa during Apartheid. Early on, in fact, FIFA acted when the IOC did not, suspending the Football Association of South Africa in 1961 after black Brazilian players were barred from competing in South Africa.<sup>126</sup>

Once the world majority has staked out a position, sporting activism is attractive to international organizations such as the IOC and FIFA, because front-end investment is low-risk and popular, and potential gains are multiplicative.<sup>127</sup> Whether or not social policy pressure effects change, the organization favorably identifies itself with global public opinion.<sup>128</sup> Plain economic sanctions surely had more to do with the collapse of Apartheid than did sporting bans. But whether or not sanctions succeeded, the IOC and FIFA gained in global currency by joining the bandwagon. By the same token, the award of the 2010 World Cup to South Africa was mutually beneficial to both nation and FIFA.<sup>129</sup> Even more than economic advantage, South Africa sought prestige, diplomatic legitimacy,<sup>130</sup> and affirmation of its membership in the community of peaceful nations.<sup>131</sup> FIFA won big by demonstrating that its tournament had those things to give.

Of course, both host nation and FIFA also follow the dollar. Nations see World Cup hosting as a boon to GDP.<sup>132</sup> Cities see match hosting as an opportunity to revitalize infrastructure, to jump-start economic productivity, and to energize social development.<sup>133</sup> World Cup hosting is an opportunity for international branding and advertising that host nations and cities hope will boost their profiles in important economic sectors such as investment and

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moscow (reporting Manchester City captain's frustration, after draw, that spectator ban for racist conduct by CKSA Moscow supporters punished away team City as much as home team Moscow, and worse because local spectators invited by European soccer's governing body included vociferous Moscow fans despite ban). Full disclosure: one of us is a City supporter, and the unfortunate other who did not write this footnote favors that other Manchester side.

<sup>125</sup> E.g., Rosner & Low, *supra* note 112, at 59.

<sup>126</sup> *Id.* at 64.

<sup>127</sup> Padhi, *supra* note 112, at 55.

<sup>128</sup> *Id.* at 57–58 (describing growing involvement of international sporting organizations from 1930s to 1960s in combatting apartheid in South Africa).

<sup>129</sup> Cornelissen, *supra* note 90, at 334.

<sup>130</sup> James A.R. Nafziger & Andrew Stenk, *The Political Uses and Abuses of Sports*, 10 CONN. L. REV. 259, 269, 273 (1978).

<sup>131</sup> Derek Charles Catsam, *The Death of Doubt? Sport, Race, and Nationalism in the New South Africa*, 11 GEO. J. INT'L AFF. 7, 7 (2010).

<sup>132</sup> Swantje Allmers & Wolfgang Maennig, *Economic Impacts of the FIFA Soccer World Cups in France 1998, Germany 2006, and Outlook for South Africa 2010*, 35 E. ECON. J. 500, 500 (2009).

<sup>133</sup> Tommy D. Andersson, John Armbrrecht & Erik Lundberg, *Impact of Mega-Events on the Economy*, 7 ASIAN BUS. & MGMT. 163, 163 (2008).

tourism.<sup>134</sup> Success in hosting an event such as the World Cup is proven to engender positive impressions of the host nation by foreigners.<sup>135</sup>

Russian President Vladimir Putin exploited the peculiar properties of sport to further a self-aggrandizing agenda consistent with a mythology of Russocentrism and an ambition of post-Soviet renaissance. Putin has driven an agenda designed to show the world that Russia is still a force to be reckoned with.<sup>136</sup> He was unabashed (like the Chinese and other hosts before him) in using the 2014 Olympics as an opportunity to showcase both Russia as nation and Putin as leader.<sup>137</sup> A forthcoming scholarly book on the 2014 Olympics will describe the function of the spectacle within Russian political culture and as an instrument dedicated in particular to further Putin's self-aggrandizement.<sup>138</sup> In arraying Putin's aims, the authors point specifically to "national pride for the masses," "regime stability," and "rent distribution for key elites whose support is crucial for the leadership to maintain the status quo."<sup>139</sup> So, true to form, Putin sought to exploit the conservative, unity, and identity properties of sport to consolidate and perpetuate power. Economic rewards placate the influential, while inspirations of pride mollify the people, thus neutralizing threats to the ruling regime.

Furthermore, Putin exploited the conflict property of sport to the same ends. The anti-gay law was not a singular statement, but one installment in a developing xenophobic agenda.<sup>140</sup> Russia outlawed American adoptions a year before the Olympics, in part in retaliation for U.S. human rights sanctions.<sup>141</sup> The Putin regime moved in fall 2013 to enforce a law requiring social activist

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<sup>134</sup> Ram Herstein & Ron Berger, *Much More than Sports: Sports Events as Stimuli for City Re-branding*, 4 J. BUS. STRATEGY 38, 38 (2013) (citing aims in tourism, residency, business, and export); Cheng-Jong Lee, *Effects of Sport Mega-Events on City Brand Awareness and Image: Using the 2009 World Games in Kaohsiung as an Example*, 48 QUALITY & QUANTITY 1243, 1254-55 (2014).

<sup>135</sup> Jami Fullerton & Derina R. Holtzhausen, *Americans' Attitudes Toward South Africa: A Study of Country Reputation and the 2010 FIFA World Cup*, 8 PLACE BRANDING & PUB. DIPL. 269, 274 (2012).

<sup>136</sup> E.g., C.J. Chivers & Noah Sneider, *Russia's Grip Tightens with Shows of Force at Ukrainian Bases*, N.Y. TIMES (Mar. 10, 2014), <http://www.nytimes.com/2014/03/11/world/europe/ukraine.html?partner=rss&emc=rss>.

<sup>137</sup> See Steven Lee Myers, *Putin's Olympic Fever Dream*, N.Y. TIMES (Jan. 22, 2014), [http://www.nytimes.com/2014/01/26/magazine/putins-olympic-fever-dream.html?\\_r=0](http://www.nytimes.com/2014/01/26/magazine/putins-olympic-fever-dream.html?_r=0).

<sup>138</sup> *Id.* (citing ROBERT W. ORTTUNG & SUFIAN ZHEMUKHOV, *THE 2014 WINTER OLYMPICS AND THE EVOLUTION OF PUTIN'S RUSSIA* (forthcoming June 7, 2016)).

<sup>139</sup> *Id.* (quoting same).

<sup>140</sup> See, e.g., David M. Herszenhorn, *Xenophobic Chill Descends on Moscow*, N.Y. TIMES (Apr. 12, 2014), <http://www.nytimes.com/2014/04/13/world/europe/xenophobic-chill-descends-on-moscow.html>.

<sup>141</sup> *Id.*; e.g., David Crary, *Russian Adoption Ban: One Year Later*, CHRISTIAN SCI. MONITOR (Jan. 18, 2014), <http://www.csmonitor.com/The-Culture/2014/0118/Russian-adoption-ban-One-year-later>.

organizations receiving money from abroad to register as “foreign agents.”<sup>142</sup> Lest the soaring cost of the Sochi Olympics or the largess afforded friends of the regime spark controversy at home after the spotlight waned, pro-Russian protests broke out in Sevastopol on the same day as the closing ceremonies.<sup>143</sup> The invasion of Crimea and ongoing turmoil in eastern Ukraine that followed provided ample “diversion” for the populace,<sup>144</sup> which responded with patriotic expression.<sup>145</sup> Thus the conflict property of sport, reflected best in international competition, fomented Russian nationalism to complement the Putin agenda.

Now Russia will trade hats with Brazil. Brazil looks forward to its role as Olympic host in 2016, and Russia to its role as World Cup host in 2018. Putin is informed by the exposure given to his anti-gay agenda, especially the social activism of Pussy Riot and the negative publicity garnered by two members of the group who undertook a world media tour.<sup>146</sup> He also is informed by the publicity given to protestors in Brazil, before and during the World Cup, and to alarming police action to clear the favelas.<sup>147</sup> At the same time, Putin must also be informed by the generally accepted narrative that both Russia and Brazil were successful in their enterprises; by the positive publicity and economic activity that those enterprises fueled; and by the fact that both countries successfully marginalized protestors. Putin must know that despite ongoing outcries over sexual-identity and preference discrimination in Russia, and despite (because of?) Russian aggression in Ukraine, his popularity at home hit an all-time high in August 2014. And despite the unending revelations of corruption and devastating wealth disparity in Brazil, the protests faded to the background during the World Cup.<sup>148</sup> As after past upheavals,<sup>149</sup> no seismic

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<sup>142</sup> Herszenhorn, *supra* note 140; e.g., *NGO Law Monitor: Russia*, INT’L CTR. FOR NOT-FOR-PROFIT L., <http://www.icnl.org/research/monitor/russia.html> (last updated Feb. 7, 2015).

<sup>143</sup> See Howard Amos, *Ukraine Crisis Fuels Secession Calls in Pro-Russian South*, THEGUARDIAN (Feb. 23, 2014, 2:01 PM), <http://www.theguardian.com/world/2014/feb/23/ukraine-crisis-secession-russian-crimea>; Owen Gibson, *Sochi Closing Ceremony: Games End with Flourish as Protest Fears Melt Away*, THEGUARDIAN (Feb. 23, 2014, 7:04 PM), <http://www.theguardian.com/sport/2014/feb/23/sochi-closing-ceremony-putin-games>.

<sup>144</sup> Kimberly Marten, *Crimea: Putin’s Olympic Diversion*, WASH. POST (Mar. 26, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/03/26/crimea-putins-olympic-diversion/>.

<sup>145</sup> See, e.g., Herszenhorn, *supra* note 140.

<sup>146</sup> E.g., Rick Gladstone, *Pussy Riot Members Take Tour to New York*, N.Y. TIMES (Feb. 5, 2014), <http://www.nytimes.com/2014/02/06/world/europe/pussy-riot-members-say-prison-emboldened-them.html>.

<sup>147</sup> Jonathan Watts, *Brazil to Order Army into Rio Slums as Violence Escalates Before World Cup*, THEGUARDIAN (Mar. 24, 2014, 9:36 AM), <http://www.theguardian.com/world/2014/mar/24/brazil-army-rio-slums-violence-world-cup>.

<sup>148</sup> Dom Phillips, *World Cup 2014: Protests in Brazil Fade to Background*, WASH. POST (June 27, 2014), [http://www.washingtonpost.com/sports/dcunited/world-cup-2014-protests-in-brazil-fade-to-background/2014/06/27/9d2dce1e-fbdf-11e3-b1f4-8e77c632c07b\\_story.html](http://www.washingtonpost.com/sports/dcunited/world-cup-2014-protests-in-brazil-fade-to-background/2014/06/27/9d2dce1e-fbdf-11e3-b1f4-8e77c632c07b_story.html).

policy shifts resulted.<sup>150</sup> Establishment incumbent Dilma Rousseff—Lula “protégé” with left-wing bona fides,<sup>151</sup> but owner of a mixed record on LGBT rights<sup>152</sup>—was reelected in October 2014<sup>153</sup> and has kept a shaky but persistent grip on the helm.<sup>154</sup>

Qatar watches, too. World Cup coverage there already has resulted in reports of migrant-worker abuse.<sup>155</sup> And FIFA’s ethical woes have tainted Qatar with allegations of bribes paid to FIFA officials.<sup>156</sup> Moreover, Qatar is

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<sup>149</sup> See, e.g., Kenneth Rapoza, “Brazilian Spring”? Probably Not., FORBES (June 16, 2013, 9:59 PM), <http://www.forbes.com/sites/kenrapoza/2013/06/16/brazilian-spring-probably-not/>.

<sup>150</sup> E.g., Jonathan Watts, *Brazil After the World Cup: Almost Back to Business as Usual*, THEGUARDIAN (Dec. 29, 2014, 7:55 AM), <http://www.theguardian.com/football/blog/2014/dec/29/brazil-after-world-cup>.

<sup>151</sup> *Dilma Rousseff: Brazil’s “Iron Lady,”* BBC (Oct. 27, 2014), <http://www.bbc.com/news/world-latin-america-11446466>.

<sup>152</sup> See, e.g., Geoffrey Ramsey, *Rousseff Ahead, LGBT Rights in Focus in Brazil Election*, PAN-AM. POST (Sept. 30, 2014), <http://www.thepanamericanpost.com/2014/09/rousseff-ahead-lgbt-rights-in-focus-in.html>.

<sup>153</sup> E.g., Reuters, *Brazil’s Rousseff Re-elected by Grateful Working-Class but Country Remains Divided*, NEWSWEEK (Oct. 27, 2014, 7:59 AM), <http://www.newsweek.com/brazils-rousseff-re-elected-grateful-working-class-country-remains-divided-279951>.

<sup>154</sup> Rousseff’s second term has been marred by demands for her resignation. E.g., Lourdes Garcia-Navarro, *Drumbeat Grows Louder for Impeachment of Brazil’s Rousseff*, NPR (Mar. 13, 2015, 5:32 PM), <http://www.npr.org/blogs/parallels/2015/03/13/392771461/drumbeat-grows-louder-for-impeachment-of-brazils-rousseff>. At the time of this writing, she is holding firm despite desperate socioeconomic conditions resulting from severe austerity measures. Reuters, *Brazil’s Rousseff Tells Newspaper She Rejects Opposition Calls to Quit*, VOICE OF AM. (July 7, 2015, 2:16 PM), <http://www.voanews.com/content/brazil-rousseff-rejects-opposition-calls-to-quit/2852350.html>; Lourdes Garcia-Navarro, *As Brazil’s Economy Goes In Reverse, Illusion Of Prosperity Fades With It*, NPR (July 27, 2015, 4:21 PM), <http://www.npr.org/2015/07/27/426842568/as-brazils-economy-goes-in-reverse-illusion-of-prosperity-fades-with-it>.

<sup>155</sup> Jamie Doward, *Qatar World Cup: 400 Nepalese Die on Nation’s Building Sites Since Bid Won*, THEGUARDIAN (Feb. 15, 2014, 6:21 PM), <http://www.theguardian.com/football/2014/feb/16/qatar-world-cup-400-deaths-nepalese>.

<sup>156</sup> Owen Gibson, *Sepp Blatter Coy Over Whether Qatar Could Lose out on 2022 World Cup*, THEGUARDIAN (Mar. 21, 2014, 4:17 PM), <http://www.theguardian.com/football/2014/mar/21/sepp-blatter-qatar-2022-world-cup-fifa-bribery-allegations>; Matt Scott, *Millions Paid in Bribes for Qatar’s 2022 World Cup Votes, Report Claims*, THEGUARDIAN (May 10, 2011, 4:30 PM), <http://www.theguardian.com/football/2011/may/10/millions-bribes-qatar-2022-world-cup-claims>. After much anticipation, FIFA in November 2014 concluded an internal ethics investigation that found no impropriety to warrant reconsideration of the World Cup awards to Russia and Qatar for 2018 and 2022. E.g., Sam Borden, *FIFA Agrees to Release Redacted Ethics Report*, N.Y. TIMES (Dec. 19, 2014), [http://www.nytimes.com/2014/12/20/sports/soccer/fifa-report-world-cup-soccer-bidding.html?\\_r=0](http://www.nytimes.com/2014/12/20/sports/soccer/fifa-report-world-cup-soccer-bidding.html?_r=0). FIFA published a 42-page summary of the report but has cited legal reasons in declining to produce the 430-page whole. Statement of Hans-Joachim Eckert, Chairman of the Adjudicatory Chamber of the FIFA Ethics Committee, on the Report on the Inquiry into the 2018/2022 FIFA World Cup Bidding Process prepared by the Investigatory Chamber of the FIFA Ethics Committee (Nov. 13, 2014),

under considerable pressure and scrutiny as the first World Cup host in the Arab world. Like South Africa when it became the first host on the African continent, Qatar carries on its shoulders the aspirations of the region and the expectations—whether with optimistic aspiration or anticipatory *schadenfreude*—of the world.<sup>157</sup>

Russia and Qatar have struck the World Cup bargain, putting their international reputations on the line in the short term with the expectation of big pay-offs, both tangible and intangible. The experiences of Brazil 2014 and Russia 2014 indicate that hosts can weather criticism of their domestic social policies as long as they pull off the sporting events that the international community expects and placate the demands of sport's governing bodies. But knowing what both countries have at stake, FIFA has substantial leverage to engage in sport activism, if it chooses, in Russia 2018 and Qatar 2022. FIFA may demand more of Russia than the IOC did. It may tackle the cultural relativism through which Qatar might assert the variability of human rights norms. Russia and Qatar know that they can weather protests. But they cannot run from FIFA.

What remains to be seen is whether soccer's governing body—or what remains of it—is as committed to its social values as to its commercial ventures. With global attention unexpectedly affixed to issues such as LGBT civil rights, the upcoming World Cup tournaments in Russia and Qatar are auspiciously located. These tournaments open an avenue for prudent social activists to test FIFA's commitments, and even to turn the organization's peculiar power into a force for social good.

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[http://www.fifa.com/mm/document/affederation/footballgovernance/02/47/41/75/statementchairmanadjcheckert\\_neutral.pdf](http://www.fifa.com/mm/document/affederation/footballgovernance/02/47/41/75/statementchairmanadjcheckert_neutral.pdf); Press Release, FIFA, Eckert: Full Publication of the Garcia Report Not Legally Possible (Oct. 27, 2014), <http://www.fifa.com/aboutfifa/organisation/footballgovernance/news/newsid=2457878/>. Conclusion of the investigation has done little to dampen speculation of wrongdoing, especially since a purported whistleblower alleged threats to her safety and the lead FIFA investigator labeled the summary “erroneous” and “quit his post in disgust.” Owen Gibson, *Michael Garcia Quits FIFA Ethics Committee over Handling of Report*, THEGUARDIAN (Dec. 17, 2014, 10:54 AM), <http://www.theguardian.com/football/2014/dec/17/michael-garcia-resigns-fifa-ethics-committee>; e.g., Owen Gibson, *Whistleblower Phaedra Almajid Hits Back at FIFA's Dismissal of Complaint*, THEGUARDIAN (Dec. 16, 2014, 10:52 AM), <http://www.theguardian.com/football/2014/dec/16/whistleblower-phaedra-almajid-hits-back-fifa-confidentiality-complaint>. See generally HEIDI BLAKE & JONATHAN CALVERT, *THE UGLY GAME: THE QATARI PLOT TO BUY THE WORLD CUP* (2015).

<sup>157</sup> For a sense of what is at stake for Qatar in its relations both within and outside the Arab world, see ALLEN J. FROMHERZ, *QATAR: A MODERN HISTORY* 21–24 (2012) (describing contemporary foreign policy of “strategic tolerance and mediation” and impact of World Cup to “place[] Qatar in a position of prominence, especially in the popular Arab imagination”); see also Aaron Schachter, *Why Does Qatar Even Want to Host the World Cup? Pure Vanity*, PRI (June 12, 2015, 4:15 PM), <http://www.pri.org/stories/2015-06-12/locations-some-international-sporting-events-raise-plenty-questions> (locating Qatar's objectives in familiar territory of global public relations).

IV. INCREMENTALISM AND LGBT RIGHTS: STIRRED, NOT SHAKEN<sup>158</sup>

The notion of incrementalism presents a counterintuitive yet eminently appealing way of understanding how policy changes occur in democratic systems. The following Part IV.A describes the origin of incrementalism as a theory of political and social change and how it counterpoises against the conventional model of abrupt reform a more realistic model of subtle evolution in policy. Part IV.B explains how the incrementalism approach has been adopted into deliberate stratagems for reform in policy and law. Finally, Part IV.C explains how Professor Jeremiah Ho has described the evolution of LGBT marriage equality in the United States according to an incrementalist model, suggesting the appropriateness of the same model for a broader take on global LGBT equality.

A. *Incrementalism and the Triumph of Successive Limited Comparisons*

Incrementalism is “a policy or advocacy of a policy of political or social change by degrees.”<sup>159</sup> Yale economist Charles Edward Lindblom is credited with linking incrementalism and “economic, political science and policy decision-making theory.”<sup>160</sup> Lindblom recognized that policy shifts occur not in sea changes, but more naturally, along a gradual road sometimes marked by fractional setbacks, because human thinking warms to new or foreign ideas through the same process.<sup>161</sup> In other words, big policy shifts tend to occur, and might best be achieved, evolutionarily rather than revolutionarily.<sup>162</sup>

In his seminal article, *The Science of “Muddling Through,”* Lindblom critiqued the literature of his time and explained policymaking according to

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<sup>158</sup> See, e.g., IAN FLEMING, *DIAMONDS ARE FOREVER* 85 (Jonathan Cape reprint 1979) (1956) (“shaken, and not stirred”); see also Gene Moore, *Vodka Martini, Shaken, Not Stirred*, YOUTUBE (Mar. 16, 2008), <https://www.youtube.com/watch?v=OUUq5mRCimo&feature=relate> (video collage from Bond movies). Originating in the 1950s, the Bond phrase dates to the same era as Lindblom, “*Muddling Through*,” *infra* note 163. Preparation of a vodka martini by shaking rather than stirring does cause, as incrementalism inversely posits, the more radical transformation chemically. C.C. Trevithick et al., *Shaken, Not Stirred: Bioanalytical Study of the Antioxidant Activities of Martinis*, 319 BRIT. MED. J. 1600, 1600 (1999), <http://www.bmj.com/content/319/7225/1600> (finding possible favorable health impact in shaking rather than stirring martini because shaking deactivates hydrogen peroxide that otherwise interferes with antioxidant capacity). We prefer “the real thing,” gin. Clarence Petersen, *The Great Gin Vs. Vodka Debate*, CHI. TRIB. (Jan. 11, 1988), [http://articles.chicagotribune.com/1988-01-11/features/8803210572\\_1\\_cajun-martini-vodka-martini-gin](http://articles.chicagotribune.com/1988-01-11/features/8803210572_1_cajun-martini-vodka-martini-gin).

<sup>159</sup> *Incrementalism*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/incrementalism> (last visited Oct. 8, 2015).

<sup>160</sup> Ho, *supra* note 3, at 10–11.

<sup>161</sup> *Id.* at 11.

<sup>162</sup> *Id.* at 6–7.

incrementalism.<sup>163</sup> He posited two decision-making processes, “the rational-comprehensive” (or “root”) and the “successive limited comparisons” (or “branch”), and he championed the latter.<sup>164</sup> The rational-comprehensive process approaches policymaking “through a means-end analysis: First the ends are isolated, then the means to achieve them are sought.”<sup>165</sup> The successive-limited-comparisons process rather prefers a “step-by-step” approach, or change “by small degrees.”<sup>166</sup> Lindblom concluded that the successive-limited-comparisons process offers a more realistic approach to policymaking, because the process accounts for real-world conditions in a way that the rational-comprehensive process does not.<sup>167</sup> For example, the rational-comprehensive process ignores the fact that radical social change is incompatible with a consensus-driven democracy in which parties with different viewpoints must agree to rule.<sup>168</sup>

The practical significance of Lindblom’s insight can be seen throughout the democratic political experience. For a contemporary example, the U.S. debate over universal healthcare, which has dominated U.S. policy discussion during the Obama Administration, demonstrates the triumph of the successive-limited-comparison model.<sup>169</sup> The social problem presented was that the United States was one of the only developed countries in the world whose people lacked universal healthcare.<sup>170</sup> A rational-comprehensive approach to the problem would have looked to European single-payer models and asked simply, how do we get there from here? Even President Obama acknowledged that a single-payer system, such as might be achieved by expanding Medicare to include all Americans,<sup>171</sup> would be the surefire way to achieve the guarantee of coverage that Democratic policymakers were after.<sup>172</sup>

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<sup>163</sup> Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79 (1959); see also Charles E. Lindblom, *Initiating Change: Modes of Social Inquiry*, 40 AM. BEHAV. SCIENTIST 264 (1997) (applying theory directly to social activism).

<sup>164</sup> Lindblom, *Science*, *supra* note 163, at 81.

<sup>165</sup> *Id.* at 81 n.2a, 83.

<sup>166</sup> *Id.* at 81.

<sup>167</sup> *Id.* at 84–85.

<sup>168</sup> *Id.*

<sup>169</sup> We will here stipulate, for sake of argument, that “Obamacare” has proved successful. We mean to make no political or normative statement.

<sup>170</sup> Max Fisher, *Here’s a Map of the Countries that Provide Universal Health Care (America’s Still Not on It)*, ATLANTIC (June 28, 2012), <http://www.theatlantic.com/international/archive/2012/06/heres-a-map-of-the-countries-that-provide-universal-health-care-americas-still-not-on-it/259153/>.

<sup>171</sup> See, e.g., Robert Weissman, *Expanding Medicare System for All Would Eliminate Health Care Rationing*, HUFFINGTON POST (July 30, 2015, 12:59 PM), [http://www.huffingtonpost.com/robert-weissman/happy-50th-birthday-medic\\_b\\_7904588.html](http://www.huffingtonpost.com/robert-weissman/happy-50th-birthday-medic_b_7904588.html).

<sup>172</sup> Amy Chozick, *Obama Touts Single-Payer System for Health Care*, WALL ST. J. (Aug. 19, 2008, 9:30 AM), <http://blogs.wsj.com/washwire/2008/08/19/obama-touts-single-payer-system/>.

But such a “root” approach to radically supersede the private healthcare system with top-down federal bureaucracy was a non-starter in the Obama Administration (as it had been in the Clinton Administration). During the 2008 campaign, Obama said: “Given that a lot of people work for insurance companies, a lot of people work for HMOs. You’ve got a whole *system of institutions* that have been set up.”<sup>173</sup> In other words, the real-world conditions of the marketplace, including services, employment, and insurance, could not tolerate a sudden shift to single-payer. Of course, Democrats well knew too that single-payer healthcare faced fierce political opposition from the same quarters that derailed centerpiece legislation in the Clinton Administration.<sup>174</sup> Not all political opposition was without reason; informed policymakers can debate universal healthcare and single-payer on the merits,<sup>175</sup> charting a circuitous course to democratic consensus. Moreover, as lawsuits over the Affordable Care Act (ACA)<sup>176</sup> demonstrated, there are serious structural impediments in the design of the U.S. government that limit the range of permissible federal approaches to address problems of social policy.<sup>177</sup> All of these conditions rendered single-payer practically unattainable, regardless of its merit as a solution.

In contrast, the Obama Administration saw success through a successive-limited-comparisons approach. Rather than superseding the private healthcare system, the ACA exploits it, albeit in a highly regulated fashion, by facilitating market transactions between private health insurance providers and buyers in need of healthcare. The contentious point of this approach that played out in the first Supreme Court challenge was the individual mandate, which was problematic both from a legal-structural standpoint under Tenth Amendment federalism and from a political-philosophical position in terms of the relationship of government, people, and markets. But when compared with single-payer, the individual mandate was a small market manipulation—the creation of a demand to spur a supply—that was needed to ensure that the new system marked only a modest departure from the old system of purely private transactions. Even the fuss over the unsteady launch of online government

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<sup>173</sup> *Id.* (emphasis added) (quoting candidate Obama at roundtable discussion with voters in Albuquerque, N.M.).

<sup>174</sup> *E.g.*, Jane Mansbridge, *A Healthcare History Lesson for the GOP*, L.A. TIMES (Oct. 15, 2013), <http://articles.latimes.com/2013/oct/15/opinion/la-oe-mansbridge-obamacare-democrats-single-payer-20131015>.

<sup>175</sup> *See, e.g.*, Deane Waldman, *Five Strikes Against Single-Payer Healthcare*, AM. THINKER (Jan. 2, 2015), [http://www.americanthinker.com/articles/2014/12/five\\_strikes\\_against\\_singlepayer\\_healthcare.html](http://www.americanthinker.com/articles/2014/12/five_strikes_against_singlepayer_healthcare.html).

<sup>176</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 111th Cong., 2d Sess., 124 Stat. 119 (Mar. 23, 2010).

<sup>177</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577–80 (2012) (outlining constitutional limits on federal power, though upholding instant exercise).

resources to match insurance buyers and sellers indicates modest change, the interpositioning of government as matchmaker in the private market, rather than the imposition of vast government bureaucracy as overseer of medical services. Viewed on a spectrum running from every person for his or herself to true socialism, the ACA looks much more like an exaggeration of regulatory oversight than a policy substitution at the fundamental level.

Indeed, candidate Obama in 2008, after acknowledging the desirability of single-payer but rejecting it as a course of action, proposed instead: “[L]et’s build up the system we got, let’s make it more efficient, we maybe over time—as we make the system more efficient and everybody’s covered—decide that there are other ways for us to provide care more effectively.”<sup>178</sup> Thus President Obama preferred, on the merits, a radical outcome that a rational-comprehensive approach would have striven for, but probably would have failed to achieve. Instead he settled on a successive-limited-comparisons approach that moved the needle in the direction of single-payer, but did so by modifying the existing system in relatively limited degree. He forecast that that change would whet the democratic appetite for further reforms in pursuit of efficacy. This “branch” approach has proven successful to date at least politically and legally, the ACA having overcome two Supreme Court<sup>179</sup> and legislative<sup>180</sup> challenges, if not having overcome the partisan divide in public opinion.<sup>181</sup>

#### B. Incrementalism Refined with Stratagems in Policy and Law

Incrementalism in policymaking has enjoyed widespread acceptance in political science, though has been refined by authorities since “*Muddling Through*” was published in 1959. Woodhouse and Collingridge acknowledged critiques that incrementalism demands a conservative strategy, lacks vision, and, for its shortcomings, ultimately might fail as well as succeed.<sup>182</sup> In response, Weiss and Woodhouse reframed incrementalism as a muddy and sometimes circular process, rather than a progressive, linear process.<sup>183</sup> They

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<sup>178</sup> Chozik, *supra* note 172 (quoting Obama).

<sup>179</sup> King v. Burwell, 135 S. Ct. 2480 (2015); *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566.

<sup>180</sup> E.g., David Frum, *Republicans Should Reform Obamacare, Not Repeal It*, ATLANTIC (June 29, 2015), <http://www.theatlantic.com/politics/archive/2015/06/republicans-obamacare-mandate-part-time-work/397199/>.

<sup>181</sup> E.g., Seth Motel, *Opinions on Obamacare Remain Divided Along Party Lines as Supreme Court Hears New Challenge*, PEW RES. CTR. (Mar. 4, 2015), <http://www.pewresearch.org/fact-tank/2015/03/04/opinions-on-obamacare-remain-divided-along-party-lines-as-supreme-court-hears-new-challenge/>.

<sup>182</sup> Edward J. Woodhouse & David Collingridge, *Incrementalism, Intelligent Trial-and-Error, and the Future of Political Decision Theory*, in *A HERETICAL HEIR OF THE ENLIGHTENMENT* (Harry Redner ed., 1993), <http://homepages.rpi.edu/~woodhe/pdfs/redner724.pdf>.

<sup>183</sup> Andrew Weiss & Edward Woodhouse, *Reframing Incrementalism: A Constructive Response to the Critics*, 25 POL’Y SCI. 255, 256 (1992), *cited in* Ho, *supra* note 3, at 17–18.

devised six nonlinear “stratagems” that operate to move society incrementally from an initial policy position to a changed position.<sup>184</sup>

The first stratagem limits the field of possible policy choices to a few, none too far from the status quo, so removing an ultimate sea change from the decision-maker’s frame of reference.<sup>185</sup> The second stratagem further limits the decision-maker’s frame of reference by mixing an empirical policy problem into the canvas of policy goals and values, so as to emphasize solving the problem over broad choices in values.<sup>186</sup> The third stratagem similarly focuses the decision-maker’s attention on remediation of the empirical problem, rather than positivist policy-making.<sup>187</sup> Contemplating process, the fourth stratagem acknowledges that trial, error, and sometimes revision are steps toward solution.<sup>188</sup> The fifth stratagem focuses analysis on some, perhaps shorter-term, policy consequences of the possible options, to the exclusion of greater and longer-term consequences.<sup>189</sup> And the sixth stratagem deliberately fragments the option analysis so that a partisan participant in the policy-making process focuses on the piece of the problem within the participant’s scope of concern, rather than the problem and its policy implications on the whole.<sup>190</sup>

These stratagems again can be seen at work in the contemporary political context of healthcare reform. Indeed, evidence of at least the first five stratagems can be found in almost uncharacteristically ordered fashion in the President’s address to a joint session of Congress, in which he pitched healthcare reform in September 2009.<sup>191</sup> The first stratagem limits the field of possible policy choices to a few, none too far from the status quo, so removing an ultimate sea change from the decision-maker’s frame of reference. Though the 2009 address to Congress was a major news event, the President called for only incremental healthcare reform. As discussed in Part III.A, candidate Obama early on in the 2008 Presidential race (like President Clinton before him) had eliminated single-payer healthcare from his menu of options— notwithstanding its merits—because such a sea change in the short term would have been incompatible with the practical realities of commercial markets, political strategies, and U.S. legal structuralism.

The second stratagem further limits the decision-maker’s frame of reference by mixing an empirical policy problem into the canvas of policy

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<sup>184</sup> Ho, *supra* note 3, at 11 (citing Weiss & Woodhouse, *supra* note 183, at 256).

<sup>185</sup> *Id.* (citing Weiss & Woodhouse, *supra* note 183, at 256).

<sup>186</sup> *Id.* at 13.

<sup>187</sup> *Id.* at 14.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 15.

<sup>190</sup> *Id.* at 16.

<sup>191</sup> President Barack Obama, *Remarks by the President to a Joint Session of Congress on Health Care*, WHITEHOUSE.GOV (Sept. 9, 2009), <https://www.whitehouse.gov/the-press-office/remarks-president-a-joint-session-congress-health-care>.

goals and values, so as to emphasize solving the problem over broad choices in values. The President's opening gambit in 2009 played to empiricism. He described the plight of uninsured Americans, quantifying 14,000 persons who lose coverage daily, and the problem of costs, characterizing \$1,000 annually as the "hidden and growing tax" that each insured person pays to subsidize emergency and charitable care.<sup>192</sup> The President cited specific cases of adverse health consequences to patients in Illinois and Texas as a result of lost coverage.<sup>193</sup> Thus President Obama focused on the empirical policy problem of Americans without healthcare and the consequent, inefficient drain on public resources. He refrained from framing the problem as a broad choice in values, whether concerning the relationship between the federal government and individuals under the structure of U.S. government, or the role of government at any level in manipulating the free market and individual choice to provide for health and welfare.

The third stratagem similarly focuses the decision-maker's attention on remediation of the empirical problem, rather than positivist policy-making, while the fourth stratagem acknowledges that trial, error, and sometimes revision are steps toward solution. The President in his 2009 speech proceeded immediately to focus narrowly on remediation. He set out as strawmen the possibilities of Canadian-style single-payer on the left and unregulated market on the right. "But either one would represent a radical shift that would disrupt the health care most people currently have," Obama said, knocking down the strawmen.<sup>194</sup> Adopting the successive-limited-comparisons approach, he offered instead: "Since health care represents one-sixth of our economy, I believe it makes more sense to build on what works and fix what doesn't, rather than try to build an entirely new system from scratch."<sup>195</sup> With respect to trial, error, and revision, the President's very next move was to describe the efforts of Congress to address the problem. He lauded lawmakers for having reached "80 percent" consensus, generating four bills that represented a degree of advancement toward reform "[t]hat has never happened before."<sup>196</sup> But he condemned Congress too for ultimately succumbing to political gamesmanship and not getting the job done.<sup>197</sup>

The fifth stratagem focuses analysis on some, perhaps shorter-term, policy consequences of the possible options, to the exclusion of greater and longer-term consequences. Thus the President next introduced his own plan to achieve stability for insureds, to afford access to insurance for the uninsured,

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

and to control costs.<sup>198</sup> The President spoke directly to voters listening at home to persuade them that this plan would mean only modest change, telling the working insured: “Nothing in our plan requires you to change what you have. What this plan will do is make the insurance you have work better for you.”<sup>199</sup> He emphasized short-term redress of the empirical problem: “As soon as I sign this bill, it will be against the law for insurance companies to drop your coverage when you get sick.”<sup>200</sup> For the uninsured or potentially uninsured, likewise, “[i]f you lose your job or you change your job, you’ll be able to get coverage.”<sup>201</sup> Then the President debunked opponents’ claims, specifically disavowing long-term negative consequences or sea change. He pledged that “no federal dollars will be used to fund abortions, and federal conscience laws will remain in place,” and he denied that his plan would be “a ‘government takeover’ of the entire health care system.”<sup>202</sup>

Later in the speech, the President did move his call for healthcare reform back onto the level of big-picture advocacy. But he did so in the context of sharing a letter from the late Senator Ted Kennedy, quoting Kennedy’s assertion that “[w]hat we face . . . is above all a moral issue; at stake are not just the details of policy, but fundamental principles of social justice and the character of our country.”<sup>203</sup> The President thereby sidestepped his own stake in the big picture. Kennedy’s critics, President Obama explained, might characterize “his passion for universal health care [as] nothing more than a passion for big government.”<sup>204</sup> But the President distilled Kennedy’s assertion to the individual level, eschewing attribution to “rigid ideology” and instead referencing Kennedy’s own battle with cancer.<sup>205</sup> President Obama then attempted to move Kennedy’s assertion outside partisanship, citing as consonant Kennedy’s work on social legislation with Republican senators.<sup>206</sup> In a stunning semantic turnabout, President Obama reframed those bipartisan accomplishments in individual terms of equity rather than broad terms of public policy. He characterized social safety-net legislation not as manifestation of shared social welfare norms, but as reinforcement of the American “hard work”

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* This pledge later became politically problematic for the Administration. *See, e.g.,* Lena H. Sun & Sandhya Somashekhar, *Obama Accused of Breaking Promise to Consumers as Health Plans Cancel Policies*, WASH. POST (Oct. 29, 2013), [http://www.washingtonpost.com/national/health-science/obama-accused-of-breaking-promise-to-consumers-as-health-plans-cancel-policies/2013/10/29/860bed32-40bf-11e3-a751-f032898f2dbc\\_story.html](http://www.washingtonpost.com/national/health-science/obama-accused-of-breaking-promise-to-consumers-as-health-plans-cancel-policies/2013/10/29/860bed32-40bf-11e3-a751-f032898f2dbc_story.html). But again, see *supra* note 169, our interest here is in the strategy, not merits.

<sup>200</sup> Obama, *supra* note 191.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* (quoting Ted Kennedy).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

ethic and sense of “fair play.”<sup>207</sup> Thus he reduced the broad call for long-term social justice to an appeal to short-term individualist values.

The sixth stratagem fragments the option analysis so that a partisan participant in the policy-making process focuses on the piece of the problem within the participant’s scope of concern, rather than the problem and its policy implications on the whole. This is a more complicated proposition in politics and goes to the subtleties of implementing policymaking strategy, much of it behind closed doors, rather than the plain and public terms of a policy speech. It will take years of objective distance for social scientists to obtain and analyze records of the White House strategy that culminated in the ACA; it is difficult now to assess the role of the sixth stratagem in the healthcare reform initiative of the Obama Administration. It is evident though that by November 2009, about two months after the President’s speech to Congress, the White House had found success through what *The New York Times* described as an “arms-length strategy,” or what one House Democrat called “laissez-faire.”<sup>208</sup> Though the Administration was criticized for this approach—and the true inner machinations remain unknown—the President at least appeared to have left the myriad small-scale issues of developing healthcare legislation to the legislature and its fact-finding apparatus. The President earlier had positioned leaders within their areas of expertise in the executive branch, in anticipation of healthcare reform.<sup>209</sup> The at-least-seeming non-involvement of the President from the top of the executive ladder suggests employment of the sixth stratagem. Decision-makers were left to toil over small-scale problems while the White House retreated from the scene and presumably brooded in obscure quiet over the slow progress toward long-term goals.

### C. Incrementalism and Marriage Equality

Analyzed by Professor Jeremiah Ho in 2014, three researchers—Kees Waaldijk in the Netherlands, and William Eskridge and Yuval Merin in the United States—applied incrementalist thinking to the problem of marriage equality upon the advent of marital and marital-like relationships in national laws.<sup>210</sup> Ho identified a common backbone to the three’s descriptions of the incrementalist path toward a national policy of marriage equality: (1) “the decriminalization of consensual same-sex intimacy”; (2) the impermissibility of

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<sup>207</sup> *Id.*

<sup>208</sup> Robert Pear & Sheryl Gay Stolberg, *Obama Strategy on Health Legislation Appears to Pay Off*, N.Y. TIMES (Nov. 1, 2009), <http://www.nytimes.com/2009/11/02/health/policy/02health.html>.

<sup>209</sup> See, e.g., Kenneth T. Walsh, *Experts Predict an Intense Battle over Obama’s Healthcare Reform*, U.S. NEWS & WORLD REP. (Mar. 9, 2009, 2:57 PM), <http://www.usnews.com/news/obama/articles/2009/03/09/experts-predict-an-intense-battle-over-obamas-healthcare-reform>.

<sup>210</sup> Ho, *supra* note 3, at 7.

discrimination against sexual minorities; and (3) the legal recognition of the relationships of same-sex couples.<sup>211</sup> Ho termed this backbone “the Eskridge-Merin-Waaldijk theory or marriage equality incrementalism.”<sup>212</sup>

Ho then explained how the theory integrates with the six stratagems of incrementalist policy-making. He observed that when Eskridge, Merin, and Waaldijk first explicated their theories, LGBT freedom in the United States still labored under the shadow of *Bowers v. Hardwick*,<sup>213</sup> the U.S. Supreme Court decision approving the criminalization of consensual same-sex intimacy.<sup>214</sup> Ho reasoned that the momentous developments that unfolded in favor of LGBT equality subsequently afforded an opportunity to study the six stratagems in the course of a process of successive limited comparisons.

The first stratagem limits the field of possible policy choices to a few, none too far from the status quo, so removing an ultimate sea change from the decision-maker’s frame of reference. From the perspective of the LGBT advocate, criminalized intimacy presented a target for reform more focused than a sea change in the society toward sexual equality. Already Waaldijk had observed modest efforts in Europe to decriminalize same-sex intimacy, such as by limiting the criminal offense to public displays, rather than wholesale repeal of criminalization.<sup>215</sup> Thus the focus of reform became differentiation between consensual private conduct and criminalization of conduct perceived as wrongful or harmful to society, rather than a crusade for sexual equality.

The second stratagem further limits the decision-maker’s frame of reference by mixing an empirical policy problem into the canvas of policy goals and values, so as to emphasize solving the problem over broad choices in values. And the third stratagem focuses on remediation of the empirical problem, rather than positivist policy-making. Ho pointed out that when the U.S. Supreme Court overturned *Bowers* in *Lawrence v. Texas*<sup>216</sup> in 2003, *Lawrence* itself represented an incrementalist and anti-majoritarian advancement of an evolving concept of personal privacy.<sup>217</sup> That privacy doctrine, deriving from cases such as *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>218</sup> was incompatible with the permissive reach of law

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> 478 U.S. 186 (1986) (upholding Georgia law criminalizing sodomy between consenting adults), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), and *discussed in* Ho, *supra* note 3, at 26–30.

<sup>214</sup> *Id.*

<sup>215</sup> Ho, *supra* note 3, at 12 (citing Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* 441 n.18 (Robert Wintemute & Mads Andenæs eds., 2001)).

<sup>216</sup> 539 U.S. 558 (2003).

<sup>217</sup> Ho, *supra* note 3, at 13.

<sup>218</sup> 505 U.S. 833 (1992).

enforcement into the bedroom that *Bowers* had authorized, sexual orientation notwithstanding. Thus the empirical problem of personal privacy and the scope of criminal law mixed into the canvas of sexual equality. Even *Lawrence* confined itself to the subject of criminal due process and on its face, as a precedent, had nothing to do with marriage.<sup>219</sup>

The fourth stratagem acknowledges that trial, error, and sometimes revision are steps toward solution, while the fifth stratagem focuses analysis on shorter-term policy consequences of the options, to the exclusion of longer-term consequences. Recall that the six stratagems do not necessarily unfold in a linear fashion over time, and this process of trial and error, with cognizance of short-term policy impact and sometimes back-tracking, naturally coincides with third-stratagem remediation efforts. Ho examined this process in the nearly two decades that elapsed between *Bowers* and *Lawrence*.<sup>220</sup> In that time, “de-marginalization” was the watchword for LGBT rights,<sup>221</sup> and law and policy choices gradually moved the fight from negativist, opposing criminalization, to positivist, championing anti-discrimination.<sup>222</sup> At the midpoint on that road, *Romer v. Evans*<sup>223</sup> well conveys this surge and pitch. The U.S. Supreme Court struck down Colorado’s effort to deprive the LGBT community of equality, but would not go so far as to grant equality, affirmatively, under the Equal Protection Clause.<sup>224</sup>

Ho also examined the military’s Don’t-Ask-Don’t-Tell (DADT) policy in this era, another emblematic step between tentative decriminalization and positivist embrace.<sup>225</sup> DADT ultimately proved flawed, as it infringed on service members’ expressive freedom and ironically disproved discriminatory arguments that sexual orientation mattered in military service.<sup>226</sup> So eight years after the limited rationale of *Lawrence*, the 2011 repeal of DADT, in part on anti-discrimination grounds, represented a further incrementalist step toward equality, redressing a short-term problem within military ranks while also setting the Obama Administration on the road toward positivist policy-making.

Ho finally analyzed the U.S. Supreme Court decisions in *United States v. Windsor*<sup>227</sup> and *Obergefell v. Hodges*,<sup>228</sup> the latter the culmination of this incrementalist journey in marriage equality. *Windsor* struck down the federal Defense Of Marriage Act (DOMA) insofar as it refused to recognize same-sex

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<sup>219</sup> Ho, *supra* note 3, at 13.

<sup>220</sup> *Id.* at 15.

<sup>221</sup> *Id.* at 9.

<sup>222</sup> *See id.* at 14.

<sup>223</sup> 517 U.S. 620 (1996).

<sup>224</sup> *See* Ho, *supra* note 3, at 15.

<sup>225</sup> *Id.* at 33–42.

<sup>226</sup> *Id.* at 36–39.

<sup>227</sup> 133 S. Ct. 2675 (2013).

<sup>228</sup> 135 S. Ct. 1039 (2015).

marriages, and *Obergefell* compelled the states to recognize the marriages. *Windsor* itself may be viewed as a fragmented option analysis in the sixth stratagem, in which the U.S. Supreme Court was forced to confront the problem of an animus-based discrimination written into federal law. *Romer* provided an easy precedent for that narrowed frame of reference. Ho moreover perceived the circuit split over marriage equality going into the *Obergefell* appeal as a continuing natural manifestation of trial-and-error selection in the incrementalist process.<sup>229</sup> *Obergefell* at last represented the end of one strand of incrementalist advancement, concerning marriage equality in the United States. But *Obergefell* is at the same time but one more incrementalist step in the ongoing, global struggle for LGBT equality.

V. FIFA AND LGBT RIGHTS: “I DIDN’T RECOGNIZE YOU WITH YOUR CLOTHES ON”<sup>230</sup>

We began this inquiry by considering the recent experience of the 2014 Olympics and the anti-gay law in Russia, as well as the 2014 World Cup and socioeconomic protests in Brazil.<sup>231</sup> We then placed those experiences in the context of historical interconnection between organized international sport and social activism, especially with respect to FIFA.<sup>232</sup> We added to that mix the work of Professor Ho and his predecessors, who collectively employed contemporary incrementalist theory to describe and predict the social and legal acceptance of marriage equality in the United States.<sup>233</sup>

Now we unite these threads. Cognizant of the circumstances in which FIFA has exerted pressure on World Cup host countries in recent years to effectuate desired policy goals, we extrapolate from Professor Ho’s marriage equality model to propose that global LGBT equality can be advanced by exploiting FIFA’s motives and means to manipulate nations’ domestic policies. Part V.A sets the stage with a look at FIFA’s sideline role in Olympic wrangling with Russia over the country’s anti-gay law. Part V.B shows that FIFA strives to bolster its economic interests with causes in the name of social responsibility. Accordingly Part V.C proposes that FIFA’s cautious concern over Russia’s anti-gay law might be amped up by appeal to FIFA’s economic rationalism and to the association’s at least purported agenda of social responsibility. Part V.C furthermore demonstrates how such a provocation accords with the stratagems of incrementalism, aiming then to move host countries and the governance of international sport toward sexual equality

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<sup>229</sup> Ho brings *Obergefell* within the scope of his theory in Jeremiah Ho, *Once We’re Done Honeymooning: Marriage Equality, Incrementalism, and Advances for Sexual Orientation Antidiscrimination*, 104 KY. L.J. (forthcoming 2015) (on file with author).

<sup>230</sup> THE MAN WITH THE GOLDEN GUN (Eon Productions 1974).

<sup>231</sup> See *supra* Part II.

<sup>232</sup> See *supra* Part III.

<sup>233</sup> See *supra* Part IV.

through a transformation of successive limited comparisons, rather than, but not exclusive of, a rational-comprehensive approach.

A. *IOC, FIFA, and Anti-Gay Law*

Following up the Sochi Olympics, Professor Derek Van Rheenan recognized the rationality in “key stakeholders—host countries, international organizations and corporate sponsors—seek[ing] to leverage positive outcomes while mitigating negative consequences.”<sup>234</sup> He therefore conceptualized international mega-sporting events as inherently “political and ideological struggle[s].”<sup>235</sup> Accordingly, Van Rheenen described norms of “social sustainability,” comprising “equity, ethics, and human rights,” which the international community may impose on the nations that host these events, and he described efforts to bring such pressure to bear vis-à-vis Russia’s anti-gay law.<sup>236</sup> Though acknowledging that little measurable progress resulted in Russia from Sochi protests, Van Rheenen concluded that Sochi might nonetheless have been “a watershed moment” for having—we note, in incrementalist fashion—triggered an international conversation about LGBT rights and set a precedent for international sport to invite diplomatic pressure in support of sexual equality.<sup>237</sup>

IOC inquiry into the scope and potential application of the Russian anti-gay law<sup>238</sup> in the run-up to the Sochi Olympics<sup>239</sup> strikes a chord with the first stage of Eskridge-Merin-Waaldijk theory,<sup>240</sup> in consonance with the six incrementalist stratagems.<sup>241</sup> Purporting to be child protection legislation, the Russian law, which would punish public expressions of same-sex affection, implicates a range of concerns different from the perceived threat that anti-sodomy law purports to address. But the First Amendment, or free expression, implications of the Russian law are well analogous to the Fourth Amendment, or personal privacy, implications of criminalized intimacy. Both controls smack of the Orwellian authority of a police state. And in response, libertarian-minded decriminalization proffers an easy solution—notwithstanding the incremental

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<sup>234</sup> Derek Van Rheenen, *A Skunk at the Garden Party: The Sochi Olympics, State-Sponsored Homophobia and Prospects for Human Rights Through Mega Sporting Events*, J. SPORT & TOURISM, Aug. 21, 2014, at 1, 2, <https://derek-vanrheenen.squarespace.com/s/Derek-Skunk-article.pdf>.

<sup>235</sup> *Id.* at 3.

<sup>236</sup> *Id.* at 4.

<sup>237</sup> *Id.* at 12.

<sup>238</sup> *See supra* notes 16–17 and accompanying text.

<sup>239</sup> *See supra* note 38 and accompanying text.

<sup>240</sup> *See supra* notes 210–212 and accompanying text.

<sup>241</sup> *See supra* notes 185–190 and accompanying text; *cf. supra* notes 214 and accompanying text.

step that decriminalization might take toward ultimate global recognition of sexual freedom and equality.

It stands to reason, then, that FIFA inquiry into the operation of anti-gay laws in Russia and Qatar, which criminalize conduct regarded as protected by human rights norms of expression and privacy, would represent an incremental movement in the direction of LGBT rights. If IOC pressure at least stalled the application of the Russian law during the Sochi Olympics, then FIFA pressure could have the same impact in Russia and Qatar, despite the wariness each has of Western culture. In turn, then, as LGBT advocates pressured the IOC to exert pressure on Russia, so LGBT advocates should pressure FIFA to exert pressure on Russia and Qatar. Even modest incremental movement toward the recognition of LGBT rights in those states might ultimately be the most productive path, if not the only path, to freedom and equality there.

Citing the anti-discrimination principle in FIFA statutes, the association joined the IOC in 2013 in asking Russia for “clarification and more details” about the Russian anti-gay law.<sup>242</sup> Informal response from the CEO of the Russia World Cup Committee was not wholly satisfying. Alexey Sorokin defended Russia with World Football Insider by distinguishing criminalization of homosexuality from criminalization of “propaganda,” asking rhetorically, “Would you like a World Cup where naked people are running around displaying their homosexuality?”<sup>243</sup> Any salience in Sorokin’s distinction was diminished by the prospect of Qatar as 2022 host, prompting further inquiry of FIFA President Sepp Blatter. Blatter then took his turn at regrettable comment by suggesting that gay fans and players might simply “refrain from sexual activity” while in Qatar.<sup>244</sup>

The Sochi Olympics went on without a confrontation between the IOC and Russia, but the Olympic non-discrimination principle was never satisfactorily reconciled with the Russian law. Russian officials said that Olympic athletes, fans, and media in Sochi would not be subject to arrest.<sup>245</sup> The IOC reported itself “fully satisfied”<sup>246</sup> and retreated behind a culturally relativistic insistence on respect for domestic sovereignty and inability to alter

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<sup>242</sup> Press Release, FIFA, Statement on Russia (Aug. 14, 2013), <http://www.fifa.com/worldcup/russia2018/news/newsid=2152163/>.

<sup>243</sup> Mark Bisson, *Exclusive: Russia World Cup Chief Defends Anti-Gay Law*, WORLD FOOTBALL INSIDER (Aug. 13, 2013), <http://worldfootballinsider.com/Story.aspx?id=36065>.

<sup>244</sup> Gibson, *supra* note 40 (quoting Blatter).

<sup>245</sup> E.g., Travis Waldron, *Olympic Committee “Fully Satisfied” by Russia’s Assurance About Anti-Gay Law*, THINKPROGRESS (Sept. 26, 2013, 9:54 AM), <http://thinkprogress.org/sports/2013/09/26/2683441/olympic-committee-fully-satisfied-by-russias-assurances-about-anti-gay-law/>.

<sup>246</sup> *Id.*

Russian national law.<sup>247</sup> “We are not a supra-national parliament or government,” IOC President Thomas Bach wrote to the activist group All Out.<sup>248</sup> At the same time, Russia maintained that its law remained in effect during the Olympics,<sup>249</sup> and LGBT protestors were arrested before and during the Olympics,<sup>250</sup> if under more general protest prohibitions and not the anti-gay law in particular.<sup>251</sup>

FIFA had naught to say about the Russian assurances, even as a famed retired German footballer came out as gay only weeks before the Olympics.<sup>252</sup> A FIFA task force had highlighted human rights issues in connection with Russia and Qatar before the Olympics and met with FIFA President Blatter.<sup>253</sup> Since the Olympics, sundry petitions and criticisms have targeted FIFA over LGBT rights and the upcoming World Cup,<sup>254</sup> notably hard-hitting words from Robbie Rogers in U.S. Major League Soccer.<sup>255</sup> Meanwhile preparations for Russia have proceeded apace without official FIFA mention of the issue.<sup>256</sup>

<sup>247</sup> Chris Geidner, *IOC Responds to Gay Rights Group, Noting Russian “Assurances” About Nondiscrimination*, BUZZFEED (Oct. 7, 2013, 4:26 PM), <http://www.buzzfeed.com/chrisgeidner/ioc-responds-to-gay-rights-group-noting-russian-assurances-a#.alValxDna>.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *E.g.*, *Gay Protestor Arrested for Waving Rainbow Flag During Olympic Torch Relay in Russia*, DAILY NEWS (N.Y.) (Jan. 19, 2014, 10:23 AM), <http://www.nydailynews.com/news/world/russia-arrests-gay-protester-olympic-torch-relay-article-1.1584514>; *Russia Arrests 4 Gay Rights Activists on Opening Day of Winter Olympics Opening Ceremony*, CBS NEWS (Feb. 7, 2014, 10:52 AM), <http://www.cbsnews.com/news/russia-arrests-4-gay-rights-activists-on-opening-day-2014-sochi-winter-olympics-opening-ceremony/>.

<sup>251</sup> *See, e.g.*, Paul Sonne, *Putin Bans Protests at Games*, WALL ST. J. (Aug. 23, 2013, 12:43 PM), <http://www.wsj.com/articles/SB10001424127887323980604579030882235090174>.

<sup>252</sup> *E.g.*, AFP, *Gay Hitzlsperger Calls for Sochi Pressure*, BANGKOK POST (Jan. 8, 2014, 8:49 PM), <http://www.bangkokpost.com/news/sports/388604/german-footballer-hitzlsperger-comes-out-as-gay>. FIFA did highlight Hitzlsperger’s coming out in its online News Centre. *See The Week in Quotes*, FIFA NEWS CENTRE (Jan. 11, 2014), <http://www.fifa.com/news/y=2014/m=1/news=the-week-quotes-2259385.html> (quoting Hitzlsperger in favorable context).

<sup>253</sup> Antoinette Muller, *FIFA to Act on Russia and Qatar’s Anti-Gay Legislation*, DAILY MAVERICK (Sept. 20, 2013, 1:23 AM), <http://www.dailymaverick.co.za/article/2013-09-10-fifa-to-act-on-russia-and-qatars-anti-gay-legislation/#.VMKqZi6Bt6M>.

<sup>254</sup> *E.g.*, Raymond Johnston, *Putin Says Russia Is Ready to Host 2018 World Cup*, PRAGUE POST (July 15, 2014), <http://www.praguepost.com/world-news/40153-putin-says-he-is-ready-to-host-2018-world-cup> (citing Joseph Patrick McCormick, *Campaigns Demand FIFA Bans Russia from Hosting 2018 World Cup Due to Anti-Gay Law*, PINK NEWS (Mar. 25, 2014, 3:01 PM), <http://www.pinknews.co.uk/2014/03/25/campaigns-demand-fifa-relocates-2018-world-cup-russia-due-anti-gay-law/>).

<sup>255</sup> Robbie Rogers, *Robbie Rogers: FIFA Fails to Support Gays*, USA TODAY (Jan. 20, 2015, 2:41 PM), <http://www.usatoday.com/story/opinion/2015/01/20/soccer-gay-fifa-robbie-rogers/22054045/> (“If actions speak louder than words, then the message FIFA sends to gay athletes is painfully clear. Not only don’t they have our backs, our lives don’t matter.”). Rogers came out in February 2013. Joe Morgan, *Robbie Rogers: Other Gay Footballers Are Too*

It remains to be seen then whether FIFA will exert any greater pressure on Russia or Qatar than the IOC exerted on Russia. The extent to which the IOC might influence a host nation's domestic law is not the focus of this study. But given that the IOC is a parent association to sporting entities including FIFA, Bach's language of necessary deference and disavowal of influence over domestic law ring hollow.

The Brazil World Cup for a time focused world attention on social and economic issues,<sup>257</sup> and the media lens has focused occasionally on labor woes in Qatar.<sup>258</sup> Desert heat and FIFA ethics have more lately taken center stage.<sup>259</sup> But the strident debate over LGBT rights that was precipitated by the Sochi Olympics is sure to recur as the 2018 World Cup approaches and the prospect of criminal enforcement looms larger. Ongoing Russian involvement in the war in Ukraine has only exacerbated east-west differences and stoked the passions of cultural identity in Europe and Russia. Making the connection between international conflict and sport, two U.S. senators pressured FIFA in 2014 to expel Russia from the Brazil World Cup and to retract the 2018 award.<sup>260</sup> It is worthwhile to consider, then, the prospect in this context of leveraging through FIFA the further incremental advancement of LGBT equality.

#### B. *FIFA Economic Rationalism and Social Responsibility*

Since Havelange aligned FIFA with powerful corporate sponsors,<sup>261</sup> the association has been motivated by "the almighty dollar."<sup>262</sup> Whatever its commitment to higher values in campaigns such as Say No to Racism and Football for Hope, public disclosures about FIFA site selection and hosting agreements have shown time and again that money commands top priority. Whatever the truth behind the ethics debacle over the Qatar award, FIFA financial priorities at least inadvertently seem to have run ahead of human welfare with respect to the treatment of laborers in the preparations and the lack of planning for desert climate during the tournament. Informed commentators such as David Goldblatt had little trouble concluding that Brazil's vast

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*Terrified to Come Out*, GAY STAR NEWS (Dec. 19, 2013), <http://www.gaystarnews.com/article/robbie-rogers-other-gay-footballers-are-too-terrified-come-out191213>.

<sup>256</sup> See *2018 FIFA World Cup Russia News*, FIFA, <http://www.fifa.com/worldcup/russia2018/news/index.html> (last visited Oct. 8, 2015).

<sup>257</sup> See *supra* notes 14–16 and accompanying text.

<sup>258</sup> See *supra* note 32 and accompanying text.

<sup>259</sup> See *supra* notes 33–34 and accompanying text.

<sup>260</sup> Martin Pengelly, *Republican Senators Tell FIFA Russia Must Be Kicked Out of 2014 World Cup*, THE GUARDIAN (Mar. 7, 2014, 1:32 PM), <http://www.theguardian.com/world/2014/mar/07/republican-senators-fifa-russia-2014-world-cup>.

<sup>261</sup> See *supra* notes 54–59 and accompanying text.

<sup>262</sup> Washington Irving, *The Creole Village: A Sketch from a Steamboat*, in THE CRAYON PAPERS 189, 191 (1886).

investment in World Cup infrastructure prioritized money over social welfare in the Rousseff administration. With all that is publicly known about FIFA demands for the commercial protection of sponsors and the creature comforts of officials, and looking back at the extraordinary mechanism of the World Cup courts in South Africa, the hand of FIFA looms large over the resource allocations in Brazil. It strains credulity to imagine FIFA as a powerless bystander dependent upon the good will of a host nation to accomplish a successful tournament.

To be clear, notwithstanding any normative analysis of the impact of FIFA policy choices, we do not condemn economic actors for making rational decisions. But we recognize that economic activity has collateral consequences, economic and non-economic. Even in a libertarian model, it is the role of democratic government to construct and maintain a regulatory baseline when market competition, in its merciless nature, would undermine a superior common good, such as consumer protection, environmental integrity, or human rights. Market outcomes are neither good nor bad; legislatures supervise the market with allocative justice informed by normative priorities.

With this understanding, a program such as Football for Hope in Brazil is not condemnable as a rational economic response to a public relations problem. And the program merits praise nonetheless if it accomplishes social and economic good. Likewise, the World Cup courts in South Africa might have been created to forestall embarrassing legal entanglements even to ensure economic protectionism, but their normative assessment should derive from outcomes rather than motives: whether the laudable facilitation of access to justice or the dubious utility of prosecuting beer promotion.

Moreover, the corporate social responsibility (“CSR”) movement demonstrates that even economic actors can make choices that satisfy both commercial and public interests at the same time. Lately all the rage in the private sector, “[CSR] is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.”<sup>263</sup> Arguably CSR is motivated by commercial interests, especially in our current economic climate with its abounding resentment toward Wall Street<sup>264</sup> and hardly-a-recovery for Main Street.<sup>265</sup> CSR also might

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<sup>263</sup> RICHARD HOLME & PHIL WATTS, CORPORATE SOCIAL RESPONSIBILITY: MAKING GOOD BUSINESS SENSE 8 (2000), <http://www.wbcd.org/web/publications/csr2000.pdf>.

<sup>264</sup> Lindsay A. Owens, *Confidence in Banks, Financial Institutions and Wall Street, 1971-2011*, 76:1 PUB. OPINION Q. 142, 142 (2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1931908](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1931908).

<sup>265</sup> E.g., Ben Leubsdorf, *Fed: Gap Between Rich, Poor Americans Widened During Recovery*, WALL ST. J. (Sept. 4, 2014, 2:00 PM), <http://online.wsj.com/articles/fed-gap-between-rich-poor-americans-widened-during-recovery-1409853628>; see also JESSE BRICKER ET AL., FED. RES., CHANGES IN U.S. FAMILY FINANCES FROM 2010 TO 2013: EVIDENCE FROM THE SURVEY OF CONSUMER FINANCES, FED. RES. BULL., SEPT. 2014, at 1, <http://www.federalreserve.gov/pubs/bulletin/2014/pdf/scf14.pdf>.

be a function of a changing culture, the impact of recent generations—“13ers” and “Millennials,”<sup>266</sup> or Generations “X”<sup>267</sup> and “Y”<sup>268</sup>—doubting the drudgery of workaday capitalism. Probably CSR owes its appeal to a confluence of circumstances.<sup>269</sup> Regardless of motivation, CSR can move the ball forward with desirable outcomes in social and economic development.<sup>270</sup>

FIFA itself at least purports to take social responsibility seriously;<sup>271</sup> the organization has a “head of CSR.”<sup>272</sup> FIFA and the local organizing committee (“LOC”) of the Brazil World Cup produced a “sustainability” report,<sup>273</sup> and already in July 2015, FIFA and the LOC for Russia 2018 published a “sustainability strategy.”<sup>274</sup> The report prioritized stakeholder social responsibility, consumer protection, fair labor practices, human rights, environmental protection, and community involvement and development.<sup>275</sup> The report touted achievements including anti-discrimination policy, match access for disabled fans and low-income Brazilians, carbon offsets and recycling, community projects such as Football for Hope, and funding for football development and the promotion of public health.<sup>276</sup> The strategy for Russia lays out similar priorities, articulating a three-pronged focus on social development, economic development, and environmental protection.<sup>277</sup> Of salience to this research, the social development objectives promise to

<sup>266</sup> WILLIAM STRAUSS & NEIL HOWE, GENERATIONS: THE HISTORY OF AMERICA’S FUTURE, 1584 TO 2069, at 317, 335 (1991); *see also* NEIL HOWE & WILLIAM STRAUSS, MILLENNIALS RISING: THE NEXT GREAT GENERATION (2000); NEIL HOWE & BILL STRAUSS, 13TH GEN: ABORT, RETRY, IGNORE, FAIL? (1993).

<sup>267</sup> DOUGLAS COUPLAND, GENERATION X: TALES FOR AN ACCELERATED CULTURE (1991).

<sup>268</sup> *Generation Y*, ADVERTISING AGE, Aug. 30, 1993, at 16.

<sup>269</sup> Draw your own conclusions. *See, e.g.*, Devin Thorpe, *Why CSR? The Benefits of Corporate Social Responsibility Will Move You to Act*, FORBES (May 18, 2013), <http://www.forbes.com/sites/devinthorpe/2013/05/18/why-csr-the-benefits-of-corporate-social-responsibility-will-move-you-to-act/>.

<sup>270</sup> Stephanie A. Montañó, *Corporate Social Responsibility—A Critical Risk Mitigation Tool for Businesses Operating in an Interconnected World*, ABA TORT TRIAL & INS. PRAC. SEC. INT’L L. COMMITTEE NEWSL., Spring 2015, at 5, 5, [https://www.slideshare.net/slideshow/embed\\_code/48717390](https://www.slideshare.net/slideshow/embed_code/48717390) (“As the legal framework protecting human rights and the environment continues to grow, businesses are dealing with greater legal, reputational, and financial costs if they fail to address these issues in their business models.”).

<sup>271</sup> *See* FIFA, *Sustainability Strategy of the 2018 FIFA World Cup*, <http://www.fifa.com/sustainability/strategy.html> (last visited Oct. 8, 2015).

<sup>272</sup> FIFA, SUSTAINABILITY REPORT, *supra* note 15, at 16.

<sup>273</sup> *Id.*

<sup>274</sup> FIFA, SUSTAINABILITY STRATEGY: 2018 FIFA WORLD CUP (July 2015) [hereinafter FIFA, SUSTAINABILITY STRATEGY], [http://resources.fifa.com/mm/document/tournament/competition/02/66/69/50/sustainabilitystrategyforfifaworldcup2018\\_neutral.pdf](http://resources.fifa.com/mm/document/tournament/competition/02/66/69/50/sustainabilitystrategyforfifaworldcup2018_neutral.pdf).

<sup>275</sup> FIFA, SUSTAINABILITY REPORT, *supra* note 15, at 12–13.

<sup>276</sup> *Id.*

<sup>277</sup> FIFA, SUSTAINABILITY STRATEGY, *supra* note 274, at 9.

“[e]nsure a discrimination-free environment at FWC [FIFA World Cup] sites and events.”<sup>278</sup> Economic development objectives include both “compl[iance] with FIFA and LOC standards on fair marketing practices and ethics” and “[p]romot[ion of] FWC regions as tourism destinations.”<sup>279</sup>

So we grant that FIFA’s commitment to anti-discrimination is more than mere rhetoric. At the same time, we maintain that money orders FIFA priorities. At worst, FIFA prizes money above all else, and at best, FIFA’s heart beats fastest when commercial and social priorities align. That alignment holds the promise of sporting activism: to unleash FIFA economic power as a force for social good.

### C. Incrementalist Activism Through FIFA

The most strident activists, including the U.S. senators who sought to retaliate against Russia for the Crimea invasion, succumb to the deceptive appeal of rational-comprehensive policy-making. They see a threat to world peace in Russian military interventionism, and, rationally, they seek to reestablish world peace through a public shaming in the community of nations. Furthermore rationally, they have identified the mighty hammer of world soccer’s governing body, specifically its prerogative to site (or de-site) one of the world’s top sporting mega-events. This rational-comprehensive approach has normative merit and is not necessarily misguided strategically. Consider that the alienation in sport of South Africa during Apartheid was effective, but took its slow toll over three decades. But this rational approach, an appeal for righteousness, has gotten no traction with FIFA as a rational economic actor motivated by the bottom line. FIFA’s constituency comprises not nations, nor politicians, nor soccer supporters; rather, the constituent of the post-Havelange FIFA is the corporate sponsor. Thus, however rational and comprehensive, petitions to FIFA to impel change in Russia and Qatar fall flat when petitioners resort only to the association’s avowed principles of anti-discrimination.

Instead we look to a happy marriage of commercial incentive and social responsibility.<sup>280</sup> No one needs to know which partner is taking the lead. But when they align in their aims, the corporate sponsors of sporting mega-events will become instruments of incrementalist activism, moving the ball forward through a process of successive-limited comparisons. Activists who demand that FIFA raise Thor’s Hammer against repressive regimes are asking the wrong actor for the wrong remedy. The rational-comprehensive end is

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<sup>278</sup> *Id.* at 15.

<sup>279</sup> *Id.* at 17.

<sup>280</sup> Roger Levermore, *Sport-for-Development and the 2010 Football World Cup*, 5 GEOGRAPHY COMPASS 886, 887, 891 (2011) (examining and challenging merits of CSR efforts purporting to promote social and economic development); *see also* Roger Levermore, *CSR for Development Through Sport: Examining Its Potential and Limitations*, 31 THIRD WORLD Q. 223 (2010) (same).

LGBT equality. But the means should employ the stratagems of an incrementalist process. And the first agent of motion in this process, the first domino in a line, is FIFA's corporate constituent.

### 1. Incrementalism and the Six Stratagems

In an incrementalist approach, the first two stratagems limit the field of possible policy choices to a few, none too far from the status quo, and define the policy choice within the bounds of an empirical problem, rather than an ultimate sea change. The problem confronting international sport is not framed as human rights, and the range of responses is not framed as the enforcement of global legal norms. Instead, we follow the money. The empirical problem is how to make more of it, that is, simple success. Profits and gains, including intangibles such as branding, make corporate sponsors happy. Happy corporate sponsors make for happy international sporting associations. In South Africa, FIFA became sufficiently concerned about the impact of crime and a dysfunctional criminal justice system on soccer consumerism that the association demanded and attained remarkable accommodations in domestic law and policy in the World Cup courts. Whether those courts inured to South Africans' social advantage is doubtful, but the salient point remains that FIFA's commercial ambitions spurred accommodation by the domestic legal system.

Thus the LGBT community must impress soccer's corporate sponsors with the potential adverse impact of a legal and social climate in Russia and Qatar that is hostile and threatening to soccer fandom and tourism. Consumer defection from a brand that identifies with that hostility magnifies the sponsor's risk. The range of policy choices available to the sponsor is framed by consumer apprehension as the sponsor considers how to gain from mega-event exposure without alienating the purchasing public. The typical corporate sponsor has feeble capacity to effect changes in the domestic law and policy of a sovereign nation, and radical—comprehensive—demands anyway would as likely engender prideful resistance as friendly adherence. But the sponsor, aggregating its voice with other sponsors, can communicate its reluctance to FIFA, the would-be recipient of corporate largesse. And FIFA, through the economic leverage of its siting prerogative as effected in hosting agreements at the national and local levels, does have the power to demand domestic accommodation.

The third stratagem focuses the decision-maker's attention on remediation of the empirical problem, rather than positivist policy-making. Thus the LGBT advocate does not seek from the corporate sponsor a declaration of its commitment to pursue equality. Rather, the advocate wishes to consume: to wear an Adidas tracksuit; on an Emirates flight to Russia; where she can eat at McDonald's; and buy a Coke; with her Visa card. Or at least to wear her Adidas gear at home and drive the Hyundai to the McDonald's to buy the Coke with the Visa without allying herself with an anti-gay agenda. The consumer does not demand to kiss her same-sex spouse before a stunned staff

at a Moscow McDonald's, nor that Coca-Cola commit itself to anti-discrimination, nor even that Coca-Cola agree with the consumer's position on gay rights, any more than with the consumer's position on goal-line technology. For the corporate sponsor to win, so for FIFA to win, buying the Coke must be free of unpleasant social implications. So the activist's message to the corporate sponsor is simply a desire to consume with a clear conscience. Attaining even that much effects a demarginalization of the LGBT community.

The fourth stratagem acknowledges that trial, error, and sometimes revision are steps toward solution, while the fifth stratagem focuses analysis on the most immediate consequences of those steps, to the exclusion of long-term potentialities. Our advocate wants to consume, and our corporation wants to sell. FIFA therefore seeks to shield the consumer from legal ramifications and social policy implications. It is not necessary to change Russian thinking on gay "propaganda" and youth, nor to convert Qatar to a secular society, any more than it was necessary to eradicate crime in South Africa or to fix its criminal justice system. The World Cup courts, notwithstanding their efficacy or wisdom, modeled for FIFA a practical and limited solution to shield tournament participants from domestic dysfunction. FIFA host agreements furthermore stipulate adequate security precautions to shield tournament participants from crime. The immediate consequences of such steps are happy consumers, which means happy sponsors, happy FIFA.

Despite its sustainability initiatives, FIFA has suffered bitter criticism for its failure, after closing up shop on the World Cup in South Africa and in Brazil, to leave behind lasting policy reforms that improve social and economic conditions for host nationals. But it is unrealistic to think that FIFA, as an economic actor, frets over such critiques. Short-term solutions to facilitate LGBT consumerism may include the sought-after assurances of host nations that domestic anti-gay laws will be suspended temporarily vis-à-vis foreign nationals—here a conclusion arrived at circuitously, not through advocates' direct demands. Or World Cup courts, after the example of South Africa, could be formed with special instructions to uphold European legal norms—the Russian Federation is a signatory to the European Human Rights Convention—in criminal prosecutions of foreign nationals, who might not be familiar with Russian law. Such oblique accommodations might allow Russia to save face while declining its own controversial enforcements.

The sixth stratagem deliberately fragments the option analysis so that a partisan participant in the policy-making process focuses on the piece of the problem within the participant's scope of concern, rather than the problem and its policy implications on the whole. In this context, the sixth stratagem calls for a diffused approach to soccer's corporate sponsors. Some advocates may focus their commercial alarm on soccer tourism, to create corporate worry over attendance at the World Cup. Some may focus on brand value, perpetuating the impression that FIFA sponsorship equates to the unpredictable and menacing legal norms of unfamiliar foreign countries. Some advocates might seek to exploit the CSR policies of corporate sponsors, threatening exposure for

hypocrisy should they come to be regarded as allied against human rights. Each angle of approach prompts a different segment of analysis and response within the corporate entity: sales, marketing, and CSR compliance. Each will strive to nullify the threat to its mission, its trees, blissfully unmindful of the forest of human rights agenda-setting.

Of course we are not the only advocates who have suggested targeting FIFA's bottom line to spur reform. In January 2015, even before the May indictments,<sup>281</sup> a U.K. politician marshalled a coalition at a kick-off summit in Brussels to found New FIFA Now.<sup>282</sup> The organization proposes reclaiming the international governance of soccer from FIFA's secretive and insular grip through a proposed series of democratic reforms.<sup>283</sup> The organization's methods include a public petition,<sup>284</sup> a letter-writing campaign directed at national football associations,<sup>285</sup> and, of most salience to this study, a letter-writing campaign directed at FIFA sponsors.<sup>286</sup> The New FIFA Now website provides the Twitter handles and CEO email addresses for eight FIFA sponsors—Adidas, Coca-Cola, McDonald's, Visa, Hyundai, Budweiser, Gazprom, and Kia—along with an example letter to each authored in May by Jaimie Fuller, chairman of Australian sportswear manufacturer SKINS.<sup>287</sup> New FIFA Now was slow to get started but picked up steam after the indictments in May.<sup>288</sup> Responding to the worker abuse stories coming out of Qatar, the International Trade Union Confederation joined SKINS to pressure FIFA sponsors.<sup>289</sup> By July, the corporate-sponsor angle gained serious traction, as

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<sup>281</sup> See *supra* note 1.

<sup>282</sup> Owen Gibson, *New FIFA Now Talks a Good Game but Sepp Blatter Will Not Be Quaking*, THEGUARDIAN (Jan. 21, 2015, 2:34 PM) [hereinafter Gibson, *New FIFA Now*], <http://www.theguardian.com/football/blog/2015/jan/21/new-fifa-now-sepp-blatter-brussels>; *Campaign for a New FIFA Now*, NEWFIFANOW.ORG (Jan. 8, 2015), <http://www.newfifanow.org/january-8-2015.html>.

<sup>283</sup> *Guiding Principles for FIFA Reform*, NEWFIFANOW.ORG, <http://www.newfifanow.org/guiding-principles.html> (last visited Oct. 8, 2015); see also *Charter for FIFA Reform*, NEWFIFANOW.ORG, <http://www.newfifanow.org/charter-for-fifa-reform.html> (last visited Oct. 8, 2015).

<sup>284</sup> *Sign the #NewFIFANow Petition for FIFA Reform*, NEWFIFANOW.ORG, <https://confirmsubscription.com/h/j/A4D18D38221A297A> (last visited Oct. 8, 2015).

<sup>285</sup> *What to Do*, NEWFIFANOW.ORG, <http://www.newfifanow.org/write-to-fas.html> (last visited Oct. 8, 2015).

<sup>286</sup> *Write to FIFA's Sponsors*, NEWFIFANOW.ORG, <http://www.newfifanow.org/write-to-sponsors.html> (last visited Oct. 8, 2015).

<sup>287</sup> *Find the Sponsors*, NEWFIFANOW.ORG, <http://www.newfifanow.org/find-the-sponsors.html> (last visited Oct. 8, 2015).

<sup>288</sup> Gibson, *New FIFA Now*, *supra* note 282.

<sup>289</sup> *Workers' Union Joins FIFA Reform Group Adding Pressure on World Cup Sponsors*, PLAY THE GAME (May 20, 2015), [http://www.playthegame.org/news/news-articles/2015/0038\\_workers-union-joins-fifa-reform-group-adding-pressure-on-world-cup-sponsors/](http://www.playthegame.org/news/news-articles/2015/0038_workers-union-joins-fifa-reform-group-adding-pressure-on-world-cup-sponsors/). SKINS also sponsored some persuasive videos posted to YouTube. See SKINS, *The Hypocrisy World Cup*,

Coca-Cola, McDonald's, and Visa all signed on to the reform agenda.<sup>290</sup> With FIFA and Blatter the targets of global scorn and criminal investigation, it was not hard for these sponsors to see the writing on the wall and choose a side. Nevertheless, the governance reform movement demonstrates that pressure on sponsors can appeal to the higher angels of economic rationalists.

Some incrementalist advocacy might focus on intermediaries with megaphones; advocates need not eschew intermediaries with accordant social aims. For example, Walt Disney World, apparently acting on its own anti-discrimination principle, cut funding to the Boy Scouts of America, which ultimately eased on its anti-gay platform.<sup>291</sup> Expressions of concern by gay professional soccer players—eight active or retired players were out according to a January 2014 report,<sup>292</sup> and the aforementioned testimony of Robbie Rogers in January 2015, amplified by social media, was biting<sup>293</sup>—that gay players could face criminal prosecution in Russia or Qatar might rattle team sponsors, if not FIFA itself, by threatening the viability of the World Cup. Though the efforts had little impact, teams in Brazil before the 2014 World Cup protested economic conditions by refusing to play in the first minute of some matches.<sup>294</sup> A disruption on the pitch at the World Cup would be impossible for FIFA to conceal from the world and would undermine the World Cup brand with consumers and sponsors.

So rather than characterizing the end-game in terms of human rights, policy choices in the context of Russia or Qatar are properly focused on piecemeal adjustments to domestic law and policy that will facilitate a successful World Cup—meaning a World Cup that is profitable to its owners and free of controversy. In accordance with incrementalism, the

YOUTUBE (May 18, 2015), <https://www.youtube.com/watch?v=JVOC3-t1sCU>; SKINS, *Qatar Labour Camp*, YOUTUBE (May 18, 2015), <https://www.youtube.com/watch?v=qSuajKyAEwQ>.

<sup>290</sup> Simon Evans, *Soccer-FIFA Sponsor McDonald's Backs Independent Reform Body-Group*, REUTERS (Aug. 6, 2015, 5:42 AM), <http://www.reuters.com/article/2015/08/06/soccer-fifa-mcdonalds-idUSL3N10H38U20150806>; Owen Gibson, *FIFA Urged by Coca-Cola to Undergo Immediate Independent Reform*, THEGUARDIAN (July 17, 2015, 1:31 PM), <http://www.theguardian.com/football/2015/jul/17/fifa-coca-cola-independent-reform> (Coca-Cola and McDonald's); Lucy McCalmont, *Visa Joins Coca-Cola in Call for Independent FIFA Reform Panel*, HUFFINGTON POST (July 24, 2015, 8:40 AM), [http://www.huffingtonpost.com/entry/visa-fifa-coca-cola\\_55b23011e4b0074ba5a42479](http://www.huffingtonpost.com/entry/visa-fifa-coca-cola_55b23011e4b0074ba5a42479). Also in July, global transparency advocate Transparency International, see *supra* notes 68–69 and accompanying text, used its substantial media reach to echo the reform campaign with its publication, *Give Back the Game: How to Fix FIFA* (July 15, 2015), [http://files.transparency.org/content/download/1914/12666/file/2015\\_Fix\\_Fifa\\_EN.pdf](http://files.transparency.org/content/download/1914/12666/file/2015_Fix_Fifa_EN.pdf).

<sup>291</sup> Dana Liebelson, *Disney World Cuts Off Boy Scouts Funding, Allegedly over Anti-Gay Policies*, MOTHER JONES (Feb. 28, 2014, 11:43 AM), <http://www.motherjones.com/mojo/2014/02/disney-stops-giving-money-boy-scouts-over-anti-gay-policies>.

<sup>292</sup> *The 8 Men Who Have Come Out as Gay in Football*, GAY STAR NEWS (Aug. 1, 2014), <http://www.gaystarnews.com/article/7-men-who-have-come-out-gay-football080114>.

<sup>293</sup> See *supra* note 255. No reference to Luis Suárez is intended.

<sup>294</sup> GOLDBLATT, FUTEBOL NATION, *supra* note 14, at 245–46.

accommodations that FIFA might seek in response to modest but cumulative pressures passed through corporate constituents need not be momentous, nor lasting. Suspension of the enforcement of controversial laws, i.e., the temporary decriminalization in World Cup zones of homosexual expression and conduct, fits within this framework as a realistic remedy, but a remedy achieved by incrementalist advocacy rather than radical political demonstration. Nations already have demonstrated willingness to endure grotesque contortions in domestic law and policy to appease the mega-sport Goliath. And if there were any doubt, leaked correspondence shows FIFA boldly willing to overrule domestic legal process to effect commercial advantages in domestic law.<sup>295</sup> Brazil ultimately bent to FIFA's will on sponsor-Budweiser beer sales in stadiums, despite a previously unyielding prohibition in the name of public safety.<sup>296</sup> Thus the employment of incrementalist stratagems, effected through corporate sponsors, can set in motion favorable social policy reforms on LGBT rights in even the most unlikely places, with international sport a willing accomplice.

## 2. Incrementalism as a Non-Exclusive Solution

Like incrementalism in policy-making itself, this approach to LGBT rights is ripe for criticism. Allegations that incrementalism is insufficiently ambitious and too conservative, and risks losing the wider war for the short-term concession, feel painfully meritorious when the approach is incremental. The incrementalist victory is to be found here in the suspension of human right-aborrent laws for only a privileged class of people, in a zone limited by time and geography, at the same time apparently allowing a repressive regime to claim global glory and walk away with its policies intact, seemingly vindicated, to the detriment of a host population left behind. We admit: incrementalism requires galling restraint on the front end and a leap of faith in the long run. The theory goes that because once, for a time however short and a space however small, the expression of rights was permitted, that demonstration of freedom, and under a sky that did not fall, will seed change, making reform inexorable. Right will prevail if given an inroad.

We do not contend that an incrementalist approach must be employed to the exclusion of rational-comprehension approaches; we contend only that incrementalist approaches should be employed and might work. At least our adaptation of incrementalism to the distorted reality of transnational organizational influence over national government merits consideration. At first blush, it might seem strange to suggest, as in essence we do, that sexual equality be pursued through one's determination to watch a soccer match with a

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<sup>295</sup> See, e.g., Letter from Vollmüller, *supra* note 85 (highlighting and rejecting Netherlands refusal to guarantee changes in domestic law on FIFA timetable for 2018 World Cup). Presumably, Russia met FIFA's demands.

<sup>296</sup> See *supra* note 27 and accompanying text.

Budweiser in hand. But powerful transnational organizations want everyone to be able to watch a soccer match with a Budweiser in hand. And advocates for LGBT rights want everyone, regardless of sexual orientation, to be able to watch a soccer match with a Budweiser in hand. The commonality is the Budweiser and the soccer. So that's the starting point. If making that commonality possible compels the decriminalization of sexual orientation, however temporarily, then incrementalism posits at least a possible start toward the ultimate goal.

#### VI. CONCLUSION: "THE WORLD IS NOT ENOUGH"<sup>297</sup>

With the Brazil World Cup still a fresh memory of success, and corruption at center stage in the present news cycle, FIFA has hardly yet turned its full attention to Russia 2018, with Qatar 2022 on the horizon. But hosting agreements for 2018 and 2022 are already in place. Corporate sponsorships are in the works, and infrastructure is under construction. The terms of the hosting agreements are secret. We do not know what latitude FIFA preserves for itself to seek further assurances from host nations, but we can surmise that it is ample.

Questions are percolating already regarding social and economic conditions in Russia and Qatar. The protests in Brazil, whatever they accomplished or failed to accomplish to better conditions there, make those questions inevitable for World Cup tournaments to come. And the Sochi Olympics, in tandem with rational-comprehensive activists such as Pussy Riot and the blockbuster legal developments such as same-sex marriage legalization in the United States, ensure that the criminalization of homosexual expression and conduct will be among the social conditions that remain in the public mind.

The decriminalization of same-sex intimacy, especially if only temporary, is a modest objective for LGBT activism. But we have endeavored to demonstrate that incrementalist stratagems, focused on the commercial consequences of human rights abrogation, rather than directly on positivistic human rights advancement, have the potential to move the enormous machinery of international sport's top mega-events to accomplish such a modest objective, if not more. Incrementalist stratagems may be employed to press even such a famously economic-rationalist entity as international soccer's governing body to advance the cause of sexual equality in small steps. Critically, incrementalist theory posits that those small steps represent not merely reactionary regulation and limited advancement, but a natural and essential course toward the positivist promise of global equality.

Such momentous change seems a fantastic dream. But the beautiful game has always been about dreams.<sup>298</sup>

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<sup>297</sup> IAN FLEMING, *ON HER MAJESTY'S SECRET SERVICE* 66 (New Am. Library 2d prtg. 1969); *see also* *THE WORLD IS NOT ENOUGH* (Danjaq 1999).

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<sup>298</sup> *E.g.*, TAMIR BAR-ON, *THE WORLD THROUGH SOCCER: THE CULTURAL IMPACT OF A GLOBAL SPORT* 184 (2014) (“Seen from a Freudian perspective, soccer is ultimately a series of dreams and attempts to fulfill dreams. . . . It is the magic of dreams in childhood that gives soccer both its tragedy and ultimately its beauty.”).