

# Counterfactual Reasoning: An Effective Component of the International Law Methodological Armor?

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### Abstract

The exploration of international legal patterns is an increasingly multifaceted enterprise. As such, it inevitably entails recourse to a progressively broader array of analytical instruments designed to place the process on a firmer scientific, or quasi-scientific, foundation. This expanding set consists predominantly, albeit not exclusively, of qualitative techniques relied upon in seeking generalizations about complex realities that are shrouded in uncertainty. The cluster of tools employed or deemed potentially usable includes, although tentatively, counterfactual thinking. The latter may be regarded as a research vehicle of “last resort,” underpinned by a soft substructure, but it may facilitate the quest for better grasp of phenomena observed in the international law domain and more effective action in that realm.

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## A. Introduction

Academic legal inquiry has traditionally followed a path closely identified with “black-letter-law.” This is an approach whose principal focus is on the tightly delineated legal sphere, within which internal mechanisms operate to entrench a range of principles that may be fathomed by scrutinizing statutes and judicial decisions. The wider environment in which it is embedded is relegated to the periphery. Extracting meaning and purpose from available ordinances and cases, logically connecting them, and erecting a viable conceptual framework on that basis has been the mainstay of this time-honored mode of scholarly investigation.<sup>1</sup>

A convenient term appropriately invoked to capture the essence of the descriptive and evaluative pursuits undertaken in such a fashion is “doctrinal research.”<sup>2</sup> In educational and professional training milieus, doctrinal research involves efforts to provide students with the necessary skills to identify sources of legal authority, gain familiarity with indexes and citators, obtain access to statutes and judicial records, and utilize computer information retrieval systems such as Heinonline, LexisNexis, and Westlaw. Statutes and cases are the core of the empirical set that supports this clearly mapped and well-established endeavor.<sup>3</sup>

A second path, of much more recent origin, and whose boundaries are less unambiguously demarcated, followed by scholars engaged in a methodical examination of issues within and beyond the law domain, and particularly those lying at the interface between the legal and non-legal realms, comes under the rubric of “law in context.”<sup>4</sup> Here, the emphasis is not on the normative underpinnings of the legal system and the institutional machinery reinforcing them but on socially relevant questions that are reliably amenable to valid generalization. From this perspective, the law itself may constitute a source of problems because of the social dislocation it engenders or due to its inadequacies—compared with other, non-legal, policy instruments—as a multi-level remedial mechanism.<sup>5</sup>

The two paths do not smoothly converge. Indeed, researchers who deviate from the traditional blueprint express serious misgivings about the narrow track traveled by those

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<sup>1</sup> See Mike McConville & Wing Hong Chui, *Introduction and Overview*, in *RESEARCH METHODS FOR LAW 1* (MIKE MCCONVILLE & WONG HONG CHUI eds., 2007).

<sup>2</sup> *Id.*, 3.

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

<sup>4</sup> *Id.*, 1.

<sup>5</sup> *Id.*

wedded to the conventional vision. According to them, the latter adopt “intellectually rigid, inflexible, and inward-looking”<sup>6</sup> procedures in their quest to enhance the understanding of the law and the functioning of legal regimes. To better achieve this goal, they argue, a multidisciplinary, or even interdisciplinary, standpoint needs to be embraced, incorporating theoretical insights and empirical techniques from the social sciences and the humanities.<sup>7</sup> In educational and professional environments, especially the former, this is reflected in the tweaking of curriculums away from law as traditionally conceived and toward “socio-legal studies.”<sup>8</sup>

“Generalists” have struggled to accommodate international and comparative law within this two-dimensional framework and have opted to create a separate category for this apparent “outlier.”<sup>9</sup> They have acknowledged the increasingly global character of legal life which ineluctably means that distinctions between systems and sub-systems are becoming more blurred.<sup>10</sup> Yet, generalists have chosen to outline a third path along which international legal scholars and comparativists conduct their analytical expeditions, notwithstanding the explicit recognition of the growing fluidity and outreach seen in the academic space, including its law segment.

This is a rather outdated and somewhat inaccurate portrayal of intellectual trends in the international—and, for that matter, comparative—law space. It is true that international legal inquiry addresses issues that possess certain features not readily and recurrently witnessed elsewhere. This stems from the nature of the agenda—revolving around conflict and cooperation in the global arena, and thus transcending country borders—that shapes its evolution. Nevertheless, if abstracted from their specific context, the questions confronted in international legal inquiry bear a fundamental similarity to those encountered in other (for example, federal) hierarchically configured political settings. Moreover, domestic-international linkages loom large—at both ends of the continuum—on the horizon in today’s globalized community of nations and, to a considerable extent, render the dichotomy partly obsolete.

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<sup>6</sup> *Id.*, 4.

<sup>7</sup> *Id.*, 4–7.

<sup>8</sup> *Id.*, 4–5.

<sup>9</sup> *Id.*, 6–7.

<sup>10</sup> *Id.*, 1.

The fact of the matter is that international legal researchers have not retreated into hermetically closed territory, remaining comfortably oblivious to the centrifugal forces both buffeting and propelling forward their academic neighbors. Rather, they have also pursued a two-track strategy, albeit less unequivocally and with a lag. By far, the most heavily traveled path is that inspired by traditional concerns with the two primary sources of international law, custom and treaties, in a manner displaying a “black-letter-style” or doctrinal orientation—notably in regard to treaties, which may in some respects be likened to statutes.<sup>11</sup> And while the principle of *stare decisis* does not apply in this context, decisions of international—as well as domestic, validating the “linkage” argument—courts and tribunals furnish a basis for drawing inferences pertaining to the content and scope of international norms.<sup>12</sup>

Although still dominant this standard way of grappling with international legal issues is no longer the sole perspective embraced by scholars involved in that activity, however. A parallel approach—overlapping with the “law in context”/ “socio-legal studies” school—has emerged under the expansive label of “law and international relations.”<sup>13</sup> The participants of this type of scholarship emanate from both disciplines, with those possessing social science background—economics, political science, and sociology—perhaps continuing to exhibit greater initiative and to exert stronger influence, qualitatively as well as quantitatively. The persistence of this asymmetric pattern notwithstanding, contributions originating in the legal field have reached a meaningful level.

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<sup>11</sup> See Stephen Hall, *Researching International Law* in McCONVILLE & CHUI, *supra* note 1, 182–92.

<sup>12</sup> See *id.*, 196–98.

<sup>13</sup> See generally THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES (Eyal Benvenisti & Moshe Hirsch eds., 2004); INTERNATIONAL LAW AND ORGANIZATION: CLOSING THE COMPLIANCE GAP (Edward C. Luck & Michael W. Doyle eds., 2004); MARKUS BURGSTALLER, THEORIES OF COMPLIANCE WITH INTERNATIONAL LAW (Martinus Nijhoff 2005); JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (Oxford Univ. Press 2005); INTERNATIONAL LAW AND INTERNATIONAL RELATIONS (Beth A. Simmons & Richard H. Steinberg eds., 2006); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (Oxford Univ. Press 2008); JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW (Harvard Univ. Press 2008); INTERNATIONAL LAW AND POLITICS (Joel P. Trachtman ed., 2008); ADRIANA SINCLAIR, INTERNATIONAL RELATIONS THEORY AND INTERNATIONAL LAW: A CRITICAL APPROACH (Cambridge Univ. Press 2010); SERGE SUR, INTERNATIONAL LAW, POWER, SECURITY, AND JUSTICE: ESSAYS ON INTERNATIONAL LAW AND RELATIONS (Hart Publishing 2010); INTERNATIONAL LAW FOR INTERNATIONAL RELATIONS (Basak Cali ed., 2010); DAVID ARMSTRONG, THEO FARRELL & HELENE LAMBERT, INTERNATIONAL LAW AND INTERNATIONAL RELATIONS (Cambridge Univ. Press 2d ed. 2012); HANDBOOK OF INTERNATIONAL RELATIONS (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2012); INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013); KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, AND RIGHTS (Princeton Univ. Press 2014).

In fact, the catalyst for cross-disciplinary bridge building was not the significant entry by social scientists into the previously detached and convention-bound international law domain but the publication of a seminal book by a prominent international legal researcher in the late 1960s<sup>14</sup> and its republication a decade later.<sup>15</sup> Louis Henkin, the pioneering and far-sighted author, is widely credited for laying a long-lasting, even if inevitably less than comprehensive, foundation for a study of international law that is not constrained by traditional-style intellectual and professional preferences and practices. Notable social science forays into this self-contained realm have followed, rather than preceded, his *tour de force*.

Henkin's point of departure was inspirational or normative, reflecting values and concerns prevalent among scholars favoring a formalistic line of inquiry, uncontaminated by insights from neighboring disciplines. Specifically, he was disheartened by the persistent recourse to force in the global arena and signaled his hope that it would before long yield to diplomacy and ultimately law. Unfortunately, the geo-political circumstances at that juncture failed to conform to this idealistic template and Henkin, without altogether discarding his vision, proceeded to clinically explore the interrelationships between these three determinants of international policy outcomes. In the process, he uncovered substantial gaps in the literature, stemming from an overly narrow focus and virtual absence of cooperation between international relations specialists, professional diplomats and their political "masters," and international legal researchers:

In general, the student of foreign affairs is skeptical about international law, and fulsome claims in its behalf tend to make him cynical . . . . As for the diplomat and the maker of foreign policy, they do not appear to consider international law important . . . . Students of international law, on the other hand, tend to begin with international law, and often they end there; all of it should be observed, and respectable governments observe it; there is also need for more laws and nations should agree to create that law and abide by it.<sup>16</sup>

Whether it has been the effect of this cogently conveyed critical assessment or the result of unprompted adaptation, partly kindled by the growing appreciation that undue parochialism hampers the expansion of knowledge, but also motivated by an inherent proclivity to push back the frontiers of science, the line separating two of these three

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<sup>14</sup> See generally LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (Columbia Univ. Press 2d ed. 1979).

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

<sup>16</sup> *Id.*, 2–3.

spheres of professional pursuit has markedly narrowed. The diplomatic enterprise and the foreign policy making endeavor may have not been fully incorporated into the equation, yet the intellectual distance between international relations and international law has significantly shrunk, even if international legal scholars have largely played a secondary role in the process.

The publication of Henkin's treatise did not galvanize researchers from the two disciplines into immediate action, but an uptrend formed in the 1970s and has steadily gained momentum since, without necessarily experiencing a sharp steepening of its trajectory. Substantial headway has been made during this period in terms of broadening and deepening both theoretically-centered and practically-oriented research agendas. Over time, international law and international relations has evolved into a fertile and idea-rich field of academic inquiry, in which innovative and valuable investigations are undertaken across a spectrum and on a scale wide enough to ensure productive continuity and diversification.

The past four decades or so, however, have primarily been characterized by a quest for conceptual enhancement and rigor. Prevailing analytical frameworks have carefully been scrutinized, challenged, and reformulated. New ones have been proposed and fine-tuned through multi-party exchanges. At the same time, methodological issues have received scant attention. This does not imply that theoretical formulations have emerged in an empirical vacuum. On the contrary, factual support has been sought not merely via recourse to hypothetic-deductive models, notably of the game-theoretic variety, but also to instruments whose application entails heavy dependence on data, albeit predominantly qualitative in nature. The case study technique, in particular, has extensively been resorted to in this domain—indeed, to a point of “crowding out” complementary tools. Yet, cases have often been selected and dissected in a rather unsystematic fashion, giving rise to concerns about reliability and validity of findings.

A number of specific problematic practices have been pinpointed in this respect.<sup>17</sup> One involves the overwhelming tendency not to venture beyond a single case, or a handful of cases, and not to extract sufficient information from the empirical material garnered. This frequently reflects inadequate design but may also stem from the paucity of cases. In such circumstances, the problem may be resolved by enlarging the sample, or at least stretching the boundaries of a case, by invoking a rather loosely structured but nevertheless potentially useful method known as “counterfactual reasoning” (CR).<sup>18</sup> The aim of this

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<sup>17</sup> See generally Roda Mushkat, *China's Compliance with International Law: What Has Been Learned and the Gaps Remaining*, 20 *PACIFIC RIM L. & POL'Y J.* 41 (2011); Roda Mushkat, *The Case for the Case Study Method in International Legal Research* (available from the author).

<sup>18</sup> See generally ROBERT W. FOGEL, *RAILROADS AND AMERICAN ECONOMIC GROWTH: ESSAYS IN ECONOMETRIC HISTORY* (Johns Hopkins Univ. Press 1964); DAVID LEWIS, *COUNTERFACTUALS* (Blackwell 1973); James Fearon, *Counterfactuals and*

Article is to outline its essence, roots, and limitations; illustrate how CR has been found helpful by international relations scholars; and demonstrate that their international legal counterparts also may fruitfully avail themselves of this experimental vehicle, in general and in a specific context, without making excessive claims on its behalf. The next four sections follow this roadmap.

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*Hypothesis Testing in Political Science*, 43 *WORLD POL.* 195 (1991); GEOFFREY HAWTHORN, *PLAUSIBLE WORLDS: POSSIBILITY AND UNDERSTANDING IN HISTORY AND THE SOCIAL SCIENCES* (Cambridge Univ. Press 1991); Thomas J. Biersteker, *Constructing Historical Counterfactuals to Assess the Consequences of International Regimes: The Global Debt Regime and the Course of the Debt Crisis of the 1980s* in *REGIME THEORY AND INTERNATIONAL RELATIONS* 315 (Volker Rittberger ed., 1993); NOEL J. ROESE & JAMES M. OLSON, *WHAT MIGHT HAVE BEEN: THE SOCIAL PSYCHOLOGY OF COUNTERFACTUAL THINKING* (Lawrence Erlbaum Associates 1995); *COUNTERFACTUAL THOUGHT EXPERIMENTS IN WORLD POLITICS: LOGICAL, METHODOLOGICAL, AND PSYCHOLOGICAL PERSPECTIVES* (Philip Tetlock & Aaron Belkin eds., 1996); *VIRTUAL HISTORY: ALTERNATIVES AND COUNTERFACTUALS* (Niall Ferguson ed., 1997); Richard N. Lebow, *What's So Different about a Counterfactual?*, 25 *WORLD POL.* 550 (2000); NECESSARY CONDITIONS: THEORY, METHODOLOGY, AND APPLICATIONS (Gary Goertz & Harvey Starr eds., 2003); Jorg G. Hulsmann, *Facts and Counterfactuals in Economic Law*, 17 *J. LIBERTARIAN STUD.* 57 (2003); Gregory Mitchell, *Case Studies, Counterfactuals, and Causal Explanations*, 152 *UNIV. PENN. L. REV.* 1517 (2004); Larry Lohman, *Marketing and Making Carbon Dumps: Commodification, Calculation, and Counterfactuals in Climate Change Mitigation*, 14 *SCI. AS CULTURE* 203 (2005); Jajseet S. Sekhon, *Quality Meets Quantity: Case Studies, Conditional Probability, and Counterfactuals*, 2 *PERSPECTIVES ON POL.* 281 (2004); RUTH J. BYRNE, *THE RATIONAL IMAGINATION: HOW PEOPLE CREATE ALTERNATIVES TO REALITY* (MIT Press 2005); *THE PSYCHOLOGY OF COUNTERFACTUAL THINKING* (David R. Mandel, Dennis J. Hilton, & Patrizia Ctellani eds., 2005); *UNMAKING THE WEST: 'WHAT IF' SCENARIOS THAT REWRITE WORLD HISTORY* (Philip Tetlock, Richard N. Lebow, & Geoffrey Parker eds., 2006); Giovanni Cappocia & R. Daniel Kelman, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, 59 *WORLD POL.* 341 (2007); *EXPLAINING WAR AND PEACE: CASE STUDIES AND NECESSARY CONDITION COUNTERFACTUALS* (Gary Goertz & Jack Levy eds., 2007); STEPHEN L. MORGAN & CHRISTOPHER WINSHIP, *COUNTERFACTUALS AND CAUSAL INFERENCE* (Cambridge Univ. Press 2007); Jack Levy, *Counterfactuals and Case Studies*, in *THE OXFORD HANDBOOK OF POLITICAL Methodology* 627, 627–44 (Janet M. Box-Stoffensmeier, Henry Brady, & David Collier eds., 2008); Kathryn Sikkink, *The Role of Consequences, Comparison and Counterfactuals in Constructivist Ethical Thought*, in *MORAL LIMIT AND POSSIBILITY IN WORLD POLITICS* 83 (Richard M. Price ed., 2008); RICHARD N. LEBOW, *FORBIDDEN FRUIT: COUNTERFACTUALS AND INTERNATIONAL RELATIONS* (Princeton Univ. Press, 2010); JAMES PATTISON, *INTERVENTION AND THE RESPONSIBILITY TO PROTECT: WHO SHOULD INTERVENE?* (Oxford Univ. Press 2010); Steven Wheatley, *A Democratic Rule of International Law*, 22 *EURO. J. INT'L L.* 525 (2011); *UNDERSTANDING COUNTERFACTUALS, UNDERSTANDING CAUSATION: ISSUES IN PHILOSOPHY AND PSYCHOLOGY* (Christoph Hoerl, Teresa McCormack & Sarah Beck eds., 2012); Clemens Mattheis, *A System Theory of Nikolas Luhmann and the Constitutionalisation of World Society*, 4 *GOETTINGEN J. INT'L L.* 625 (2012); INGO ROHLFING, *CASE STUDIES AND CAUSAL INFERENCE: AN INTEGRATIVE FRAMEWORK* (Palgrave Macmillan 2012); LARS THOMANN, *STEPS TO COMPLIANCE WITH INTERNATIONAL LABOUR STANDARDS: THE INTERNATIONAL LABOR ORGANIZATION (ILO) AND THE ABOLITION OF FORCED LABOR* (Springer 2012); RICHARD J. EVANS, *ALTERED PASTS: COUNTERFACTUALS IN HISTORY* (Brandeis Univ. Press 2013); Viktoria H.S.E. Robertson, *A Counterfactual on Information Sharing: The Commission's Horizontal Guidelines 2011 Applied to the Leading Cases*, 36 *WORLD COMPETITION* 459 (2013); RICHARD N. LEBOW, *CONSTRUCTING CAUSE IN INTERNATIONAL RELATIONS* (Cambridge Univ. Press 2014); *PROBABILITIES, HYPOTHETICALS, AND COUNTERFACTUALS IN ANCIENT GREEK THOUGHT* (Victoria Wohl ed., 2014); Cass R. Sunstein, *What if Hypotheticals Never Existed? Studying History with Hypotheticals*, [www.newrepublic.com/article/119357/altered-pasts-reviewed-cass-r-sunstein](http://www.newrepublic.com/article/119357/altered-pasts-reviewed-cass-r-sunstein) (last visited Mar. 31, 2016); Ingo Venzke, *What If? Alternative Realities of International Law*, [www.esil-sedi.eu/node/733](http://www.esil-sedi.eu/node/733) (last visited Mar. 31, 2016).

## B. Panoramic Survey

CR features consistently, although not uniformly, and at times controversially, in a number of academic disciplines which vary in their adherence to principles of scientific discovery. Of these disciplines, psychology is located at the “hard” end of the analytical continuum and history and philosophy are positioned at its “soft” counterpart. International relations, political science, and sociology are situated in the middle, but not precisely because the former leans toward history and the latter toward psychology. Law, if it is appropriate to link it with the other fields of study, given the modest attention systematically accorded to the subject, may be placed in the vicinity of international relations or political science.

While they mostly approach CR in a standardized manner, psychologists still address the process in an elementary way that readily captures its meaning. In the rudimentary versions of their accounts, CR entails thinking “about alternatives to past events, that is, thoughts of what might have been.”<sup>19</sup> Pondering along these lines is extremely common. After all, “[w]ho among us has never wondered what might have been [the outcome] had some past choice been different?”<sup>20</sup> By the same token, “[w]ho among us has never regretted choices made and actions taken?”<sup>21</sup> This is attributable to the fact that “[t]hinking about what might have been, about alternatives to our own pasts, is central to human thinking and emotion.”<sup>22</sup>

In everyday life, a person’s CR frequently assumes the shape of a conditional statement, occasionally with a probability attached to it, such as “[i]f only I had studied, I would have passed the exam.”<sup>23</sup> Here, the inferred result is regarded as a virtual certainty.<sup>24</sup> As this example highlights, CR possesses a salient evaluative dimension, involving an explicit or implicit assessment of the relative merits of alternative and realized outcomes. Superior hypothetical results are identified as “upward counterfactuals” and inferior ones as “downward counterfactuals.”<sup>25</sup> When the former relate to individual choice, the emotion experienced, unsurprisingly, is referred to and conceptualized as “regret.”<sup>26</sup>

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<sup>19</sup> Kai Epstude & Neal J. Roese, *The Functional Theory of Counterfactual Thinking*, 12 PERSONALITY & SOC. PSYCH. REV. 168, 168 (2008).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *See id.*

CR appears to be an ingrained element of people's conscious mental landscape. The ability to engage in the process develops early in life—normally by age two—and may be observed as soon as children acquire the lexical skills to communicate subjunctive notions of “if only.”<sup>27</sup> This phenomenon is not confined to specific places and periods but may be seen across space and time, including in different cultural milieus and national settings, even if the concrete manifestations may vary somewhat.<sup>28</sup> Consequently, it has been suggested that CR may be an innate ingredient of human intelligence.<sup>29</sup>

Psychologists examine the process from a functional perspective, positing that it is triggered to serve a well-defined purpose. The principal objective seems to be the regulation of ongoing personal behavior.<sup>30</sup> The underlying logic is that asking oneself “what might have been” is an effective tool for monitoring performance with a view to bringing about improvement: “Counterfactual thoughts are deeply connected to goals and are a component of regulatory mechanisms that keep behavior on track, particularly within social interactions.”<sup>31</sup> Empirical findings in the field of cognitive neuroscience lend support to this theoretical stance.<sup>32</sup>

The analytical and data-derived insights produced by psychologists are an appropriate starting point in CR-focused introductory surveys because of their broad scope and elaborate nature. They encompass a wide array of individual and group behavioral propensities and cognitive responses.<sup>33</sup> They are also rooted in a rich conceptual tapestry that consists of illuminating accounts of basic CR processes (invoking norm theory,<sup>34</sup>

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<sup>26</sup> See *id.*, 168–69.

<sup>27</sup> *Id.*, 169.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See Neal J. Roese and James M. Olson, *Counterfactual Thinking: A Critical Overview*, in ROESE AND OLSON, *supra* note 18, at 1.

<sup>34</sup> *Id.*, 6–8.

motivational considerations,<sup>35</sup> and causal relationships<sup>36</sup>), detailed identification of outcome-connected determinants of counterfactual generation (with special emphasis on expectancy,<sup>37</sup> valence,<sup>38</sup> closeness,<sup>39</sup> and involvement<sup>40</sup>), equally fine pinpointing of antecedent-type determinants of this process (notably, the impact of exceptional versus routine drives,<sup>41</sup> actions versus inactions,<sup>42</sup> controllable versus uncontrollable influences,<sup>43</sup> dynamic versus static elements,<sup>44</sup> and serial position)<sup>45</sup> and consequences of CR (such as affect,<sup>46</sup> judgments of victimization,<sup>47</sup> suspicion,<sup>48</sup> self-inference,<sup>49</sup> and expectancies).<sup>50</sup>

The observations about causality have the greatest cross-disciplinary ramifications. This is because all counterfactual conditionals are causal assertions, even though not all conditionals are causal. The latter may simply state correlations—for example, “[t]he proposition, “[i]f today is Thursday, then tomorrow is Friday,” does not mean that Thursday causes the next day to be Friday.”<sup>51</sup> It is the falsity of their antecedents that

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<sup>35</sup> *Id.*, 8–11.

<sup>36</sup> *Id.*, 11–15.

<sup>37</sup> *Id.*, 17–19.

<sup>38</sup> *Id.*, 19–22.

<sup>39</sup> *Id.*, 22–25.

<sup>40</sup> *Id.*, 25–26.

<sup>41</sup> *Id.*, 28–29.

<sup>42</sup> *Id.*, 29–31.

<sup>43</sup> *Id.*, 31–32.

<sup>44</sup> *Id.*, 32–34.

<sup>45</sup> *Id.*, 34.

<sup>46</sup> *Id.*, 36–38.

<sup>47</sup> *Id.*, 38–40.

<sup>48</sup> *Id.*, 40–42.

<sup>49</sup> *Id.*, 42–43.

<sup>50</sup> *Id.*, 43–44.

<sup>51</sup> *Id.*, 11.

accounts for the causal attributes of counterfactual conditionals. By asserting a false antecedent, the counterfactual establishes an inherent connection to a factual state of affairs—for example, “thinking ‘[i]f only I were taller, then I would be happier,’ is inherently linked to one’s actual height and actual happiness.”<sup>52</sup> Importantly, “[t]his reference of the counterfactual conditional to a specific, relevant factual conditional creates the essential requirements for [John Stuart] Mill’s . . . method of difference, which is, of course, the principal technique by which scientists infer causation.”<sup>53</sup>

The corollary is—and the implications extend beyond psychology—that just as causal inferences may be drawn on the basis of findings produced by means of a true experiment, in which two parallel concrete outcomes are compared with one another, so they too may be obtained from the juxtaposition of an actual result with a counterfactual scenario. To the extent that the two outcomes—assuming that they reflect divergent patterns—merely differ due to the presence of a particular antecedent, this variable may be inferred to be causal.<sup>54</sup> It follows that “running counterfactual simulation in one’s head amounts to a proxy experiment.”<sup>55</sup> Indeed, “in fields in which true experiments cannot be implemented, counterfactual test cases are accepted methods of inferring causation.”<sup>56</sup>

The assertion that all counterfactuals possess causal attributes does not mean that their presence is necessary for a causal inference to be drawn. Not all causal inferences are inevitably mediated by counterfactuals, but this does not detract from their potential value as a mechanism in the quest for causal explanations.<sup>57</sup> Nor does it diminish CR’s possible effectiveness as a tool for addressing the indeterminacy problem, or the lack of sufficient empirical evidence in certain circumstances. CR is capable of serving this function because, as indicated, it entails the addition of hypothetical cases to observed—or, technically speaking, “factual”—ones—a process that involves the manipulation of the latter in accordance with specific guidelines, rather than in an entirely open-ended fashion.<sup>58</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*, 12.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See Lebow, *What’s So Different about a Counterfactual?* *supra* note 18, 577–85; Levy, *supra* note 18, 632–40; Rohlfing, *supra* note 18, at 175–79.

CR is not a pseudo-scientific fad possessing shallow roots. Experimentally-oriented psychologists employing the latest techniques of their craft may have provided it with firm methodological underpinnings, but CR's origins lie far deeper. Its common practice, as well as the tentative exposition of its certain limitations, may readily be traced to Ancient Greece.<sup>59</sup> Thucydides liberally invoked counterfactuals—interestingly, particularly those of the “downward” variety; how the course of the Peloponnesian War might have been worse—in an effort to come to grips with Athens’ painful and seemingly inexplicable defeat.<sup>60</sup> By the same token, Homer’s ruminations, pervading the *Iliad*, abound with “unrealized possibilities.”<sup>61</sup> Philosophers have steadily built a conceptual facade on this foundation.<sup>62</sup>

In a selectively more critical manner, but on an even larger scale, historians too have resorted to CR in their reconstructions of past events—an activity they have termed “virtual history.”<sup>63</sup> Proponents among them have conceded that there might be some intuitive objections to CR. After all, why bother posing counterfactual questions? Or, to express it differently, “[w]hy concern ourselves with what *didn't* happen?”<sup>64</sup> To illustrate, “[j]ust as there is no use crying over spilt milk . . . so there is no use in wondering how the spillage might have been averted ([e]ven more futile to speculate what would have happened if we *had* spilt milk that’s still safe in the bottle).”<sup>65</sup>

These rudimentary misgivings have been discarded on the grounds that they do not accord with reality because “we constantly ask such ‘counterfactual’ questions in our daily life.”<sup>66</sup> Reservations proffered by historians closely identified with materialist determinism and those, directly or indirectly, sympathetic to their arguments—for example, religious historians who regard divine agency as the ultimate determinant of events<sup>67</sup>—have posed

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<sup>59</sup> See generally Wohl, *supra* note 18.

<sup>60</sup> *Id.*, 110.

<sup>61</sup> *Id.*

<sup>62</sup> See generally HOERL, MCCORMACK, & BECK, *supra* note 18.

<sup>63</sup> See generally FERGUSON, *supra* note 18.

<sup>64</sup> Niall Ferguson, *Introduction* in FERGUSON, *supra* note 18, at 2.

<sup>65</sup> *Id.*

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

<sup>67</sup> *Id.*, 3.

a greater challenge. The claim is that historical evolution is governed by distinct, and possibly immutable, laws. Consequently, “[t]o contemplate ‘the things that might have happened’ is not only to subscribe to ‘the Bad King John’ or ‘Cleopatra’s Nose’ of history . . . [i]t is to be a bad loser too.”<sup>68</sup>

CR has survived, albeit not unscathed, the deterministic onslaught partly because of an anti-deterministic backlash. Leaders of the “resistance movement” have contended that “[t]he past—like real-life chess, or indeed any other game—is different; it does not have a pre-determined end.”<sup>69</sup> They have further asserted that “[t]here is no author, divine or otherwise; only characters, and (unlike in a game) a great too many of them.”<sup>70</sup> They have also opined that “[t]here is no plot, no inevitable ‘perfect order’; only endings, since multiple events unfold simultaneously, some last only moments, some extending well beyond an individual’s life.”<sup>71</sup>

In a more clinical fashion, historians spearheading the “defense campaign” have advanced two key arguments in favor of continued reliance on CR in research contexts: First, they argue that “it is a *logical* necessity when asking questions about causation to pose ‘but for’ questions, and to try to imagine what would have happened if our supposed cause had been absent.”<sup>72</sup> Second, “to do this is a *historical* necessity when attempting to understand how the past ‘actually was’ . . . as we must attach equal importance to all the possibilities which contemporaries contemplated before the fact, and greater importance to these than to an outcome which they did not anticipate”<sup>73</sup>—a useful reminder but an unduly restrictive criterion. From the latter perspective, it is noteworthy that “what actually happened was often *not* the outcome which the majority of informed contemporaries saw as the most likely; the counterfactual scenario was in that sense more ‘real’ to decision makers at the critical moment than the actual subsequent events.”<sup>74</sup>

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<sup>68</sup> *Id.*, 2.

<sup>69</sup> *Id.*, 68.

<sup>70</sup> *Id.*

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

<sup>72</sup> *Id.*, 72.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, 73.

Such attempts to shore up the scientific, or quasi-scientific, status of CR have been partly, rather than wholly, successful—and not merely due to the divergence of views about economic, geographical, historical, legal, political, psychological and social change. The lingering sense of unease with using CR, particularly outside historical circles, largely stems from the “soft” features of the process. Other than economic historians, who avail themselves of state-of-the-art statistical tools in this context, and psychologists, who conduct controlled experiments in laboratory-like environments, most scholars do not strictly and transparently adhere to a well-defined set of principles when actively embracing CR. It remains one of the most elastic research vehicles, perhaps even the least structured one—alongside scenario construction—in the qualitative methods space, continuing to give rise to concerns about freewheeling excursions into the past, present, and future.

Any misgivings about CR may be warranted but not to a point of throwing out the proverbial baby with the bathwater. Notwithstanding positivist reservations, qualitative inquiry is broadly recognized as a fertile, solid, and thoroughly tested field of empirical investigative endeavor. Its substantial toolkit contains a wide array of instruments, including the “softest” variants, which may be utilized without violating established standards of reliability and validity. Credible strategies may be pursued in order to place techniques for systematically organizing data, such as CR, on an adequate—as distinct from robust—scientific, or quasi-scientific, footing.<sup>75</sup>

Moreover, as noted, specific guidelines have been formulated to render the process less arbitrary and inconsistent. Five guidelines are particularly important in this regard: The first pertains to the transparency of what constitutes the chosen counterfactual’s state of interest and its consequence. The second and third concern the effectiveness of the manipulation of the cause and delineate the minimum rewriting rule and empirical plausibility of the manipulation. The fourth and fifth refer to the consequences resulting from the manipulation. They lay emphasis on the use of theoretical and empirical knowledge in seeking to substantiate the consequences and on the empirical plausibility of the consequences that are the product of the manipulation. Adherence to these and other criteria deemed germane to the domain is thought to be conducive to the attainment of a satisfactory degree of validity and reliability.<sup>76</sup>

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<sup>75</sup> See generally JEROME KIRK & MARC L. MILLER, *Reliability and Validity in Qualitative Research* (Sage Publications 1986); Martin Healy & Chad Perry, *Comprehensive Criteria to Judge Validity and Reliability of Qualitative Research within the Realism Paradigm*, 3 QUALITATIVE MKT RES.: AN INT’L J. 118 (2000); John M. Morse et al., *Verification Strategies for Establishing Reliability and Validity in Qualitative Research*, 1 INT’L J. QUALITATIVE METHODS 13 (2002); Nahid Golafshani, *Understanding Reliability in Qualitative Research*, 8 QUALITATIVE REP. 597 (2003).

<sup>76</sup> See Lebow, *What’s So Different about a Counterfactual?* *supra* note 18, 577–85; Levy, *supra* note 18, 632–40; Rohlifing, *supra* note 18, at 175–79.

### C. No Dearth of Activity in Adjacent Territory

The gap separating international law and international relations has not vanished altogether; it is a prospect that is neither likely to materialize nor is entirely desirable, but it has been steadily narrowing. The narrowing has been an uneven process, with greater headway witnessed on some fronts than others. CR is a realm where the asymmetries have been decidedly pronounced. International legal scholars—and students of law in general—have displayed scant interest in the subject in any shape, abstract or concrete, while researchers in the field of international relations—as well political scientists examining parallel domestic phenomena—have explored it earnestly and fruitfully. In a manner and on a scale similar in key respects to that of historians, researchers in the field of international relations have demonstrated that this is a method possessing certain empirical merits.

Indeed, from a pure analytical perspective, international “relationists” can be said to have injected additional substance into historical discourse, reworking some of the less than robust assumptions pervading it. Importantly, they have taken exception to the assertion that it is misguided to attribute genuinely significant consequences to seemingly unexceptional, on the face of it trivial, events. After all, “[c]ould anyone seriously doubt that the course of history would have been different if Pharoah’s daughter had not found a child in a basket in the reeds, if the Mongol fleet had not encountered a destructive typhoon en route to Japan, if the Duke of Alba had not fallen sick in 1572, or if Hitler had died in the trenches during World War I or in the near fatal traffic accident he suffered in the summer of 1930.”<sup>77</sup> Such apparently immaterial but actually momentous occurrences/non-occurrences may have prompted Max Weber to observe that “the most plausible counterfactuals [are] those that [make] only ‘minimal rewrites’ of history.”<sup>78</sup>

By the same token, scholars in the field of international relations have cast doubt on the claim that exploring counterfactual scenarios should be confined to those that contemporary actors reflected upon, leaving a trace of their experience deemed by historians as an acceptable source. Clearly, this unduly restrictive criterion “would exclude entire categories of counterfactuals.”<sup>79</sup> In addition, “[i]t would limit counterfactuals to elites who made written records, to self-conscious decisions in which alternatives are likely to be carefully considered, and to political systems in which leaders and other important

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<sup>77</sup> Lebow, *supra* note 18, at 567–68.

<sup>78</sup> *Id.*, 568.

<sup>79</sup> *Id.*, 569.

actors feel secure enough to write down their thoughts or share them with colleagues, journalists, family members, or friends.”<sup>80</sup> Moreover, “[i]t would rule out all counterfactuals that were the result of impulsive behavior (or the lack of it), of human accident, oversight, obtuseness, or unanticipated error, of acts of nature, or of the confluence (or the lack of it), or of independent chain of causation.”<sup>81</sup> Problematically, however, it would also eliminate “all miracle counterfactuals.”<sup>82</sup>

A particularly notable contribution of international relationists has been in the form of historical illustrations convincingly showing that, despite pervasive skepticism on that score, CR is not invariably a speculative activity. For example, speculation was kept to a minimum when a team of counterintelligence officers, established by the U.S. Central Intelligence Agency (CIA), in the wake of the arrest of Aldrich Ames as a Soviet spy, determined how he might have been exposed earlier. The group examined a set of procedures that could have realistically been instituted in order to unmask Ames. It relied in the process on substantial knowledge of his personality traits, underlying motives and behavioral patterns, as well as prevailing practices of Soviet spymasters, and was consequently able to draw some fairly credible and unambiguous conclusions.<sup>83</sup> Interestingly, recourse to quantitative techniques is common in such circumstances.<sup>84</sup>

Nor should the absence of firm and incontestable evidence be seized upon to instinctively relegate CR into speculative territory because, even when that is the case, the difference between counterfactual and “factual” history is frequently immaterial. Contrary to widespread assumptions, “[a]ctors only occasionally leave evidence about their motives, and historians seldom accept such testimony at face value.”<sup>85</sup> The truth of the matter is that “[m]ore often historians infer motives from what they know about actors’ personalities and goals, their past behavior, and the constraints under which they operated.”<sup>86</sup> This is reflected across the entire historical inquiry spectrum, ranging from the ancient end to its modern counterpart.<sup>87</sup> Moreover, as one moves from “the level of

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<sup>80</sup> *Id.*

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

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

<sup>83</sup> *Id.*, 551–52.

<sup>84</sup> *Id.*, 553.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*, 553–54.

analysis of individual actors to small groups, elites, societies, [S]tates, and regional and international systems, the balance between evidence and inference shifts decisively in favor of the latter.”<sup>88</sup>

Whatever the level of investigation, and whatever the gap as conceptually articulated, the differences between factual and counterfactual propositions typically fade away in practice. For instance, to come to grips with the dynamics of the 1962 Cuban Missile Crisis, it is essential to gain insight into both the factual and counterfactual beliefs of relevant actors and readily cross the boundary, if any, between the two. The reason is that during that thirteen-day-long crucial episode, in the absence of solid evidence, perceptions shaped policy views. Specifically, “the beliefs of [American] officials determined the motives they attributed to Khrushchev for deploying Soviet missiles in Cuba, their estimates of the cost calculations and political conflicts they assumed to be taking place in Moscow, and the likely Soviet responses to a blockade, air strike, or invasion.”<sup>89</sup> Significantly, “[s]ome of these beliefs took the form of conditional expectations, and with the passage of time they became historical factials.”<sup>90</sup>

From an enlightened scientific perspective, any rigid distinction between factials and counterfactuals may be said to be devoid of ontological substance. Historians who express misgivings about CR predominantly take this position because they are uncomfortable with the lack of a firm factual foundation. Yet, it is increasingly acknowledged among socio-legal researchers that facts are socially constructed. Physical scientists may be justified in claiming that “fundamental concepts like mass, volume, and temperature are essential to the study of nature and that extra-terrestrial scientists would have to possess the same concepts to understand the universe.”<sup>91</sup> This does not, however, apply to socio-legal concepts, which vary across and within human cultures.<sup>92</sup> There are manifold ways of interpreting and presenting socio-legal phenomena, “and the choice and utility of concepts depend largely on the purpose of the ‘knower.’”<sup>93</sup>

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<sup>88</sup> *Id.*, 554.

<sup>89</sup> *Id.*, 555.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*, 556.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

The earlier reference to “miracle counterfactuals” raises the issue of whether CR should be imbued with a meaningful sense of realism. The emphasis on believability is a salient feature of the process; “[p]lausible-world counterfactuals are intended to impress the reader as realistic; they cannot violate their understanding of what was technologically, culturally, temporally, or otherwise possible.”<sup>94</sup> Believability should not be equated with significance because there is a wide array of “what-if”-style scenarios—“historical near misses”—that might have materialized without tangibly impinging on the outcome in question. Counterfactuals must thus satisfy a second criterion: They should have a reasonable probability of bringing about the result that the reconstruction of events purports to lead to. This entails outlining a logical path between the alternative scenario and the hypothesized effect. Some scholars believe that such historical reconfiguration is the only legitimate form of CR, but “miracle counterfactuals violate our understanding of what is plausible or even possible.”<sup>95</sup>

Nevertheless, researchers in the field of international relations contend that removing this type of events from the equation may detract from the value of the analytical exercise. They illustrate the cogency of this argument by highlighting the challenges involved in evaluating the relative advantages of court-contested versus mediated divorces in terms of the financial implications of each method of settlement for women. To fruitfully pursue this project, a systematic comparison needs to be undertaken in political units. Take many states in America, for example, that encourage or discourage mediation in equivalent samples of divorced couples. Practical difficulties emerge, however, if the objective is to establish whether making divorce less easy to secure is more likely to preserve families intact, as asserted by conservative commentators, because legislation to progressively lift the bar to divorce has been contemplated without being implemented due to formidable obstacles. Genuinely strict divorce laws are wholly unrealistic and ending divorce altogether is even more improbable.<sup>96</sup> Still, these far-fetched, miracle-like, scenarios may play a useful role in the assessment process, as evidenced, *inter alia*, by the unfeasible thought experiments conducted by economists “who raise or lower prices of commodities well beyond any realistic market expectations to test consumer preferences.”<sup>97</sup>

In addition to underscoring the merits of CR as a tool of empirical inquiry, international relationists have also demonstrated that it enhances the information processing and judgmental skills of those who rely on the procedure, borrowing from psychology for this

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<sup>94</sup> *Id.*, 565.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*, 566–67.

<sup>97</sup> *Id.*, 567.

purpose. Notably, they have systematically drawn attention to the well-documented certainty with hindsight bias, which manifests itself when outcome knowledge impedes understanding of the past by hindering recall of what individuals were previously unsure was expected to materialize. Thus, “[e]vents deemed improbable by experts (for example, peace between Egypt and Israel, and end of the Cold War) are often considered ‘overdetermined’ and all but inevitable after they have occurred.”<sup>98</sup> By reconstructing the chain of events that seems to have culminated in a particular outcome, we appear to become less open to contemplating alternative patterns and results. This constitutes a failure to acknowledge the uncertainty that confronted actors and the idea that they could have made different choices that might have produced different outcomes. There is evidence to suggest that CR may prove instrumental in offsetting this ingrained tendency, rendering it a valuable investigative technique:

Counterfactuals can combat the deeply rooted human propensity to see the future as more contingent than the past, reveal contradictions in our belief systems and highlight double standards in our moral judgements. Counterfactuals are an essential ingredient of scholarship. They help determine the research questions we deem important and the answers we find to them. They are also necessary to evaluate the political, economic, and moral benefits of real-world outcomes. These evaluations in turn help drive future research.<sup>99</sup>

International relations literature abounds with illuminating and productive applications of CR. The United States’ involvement in the 1950–53 Korean War is an especially noteworthy illustration of a multifaceted, “what-if”-style of exploration.<sup>100</sup> It is commonly thought that forceful engagement in Korea was the first test of the Truman administration’s policy of “containment,” and, in the invasion of the north by south that ensued in 1950, its first failure.<sup>101</sup> This strategy was not entirely new. Rather, it was an extension of Roosevelt’s grand design to “accommodate post-war American security concerns, open the colonies to American commerce and tutelage, and corral communist and anti-colonial revolution.”<sup>102</sup> Truman’s decision to occupy the southern part of the Korean peninsula in autumn of 1945,

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<sup>98</sup> *Id.*, 559.

<sup>99</sup> *Id.*, 557–58.

<sup>100</sup> See Hawthorn, *supra* note 18, at 81–122.

<sup>101</sup> *Id.*, 83.

<sup>102</sup> *Id.*

and his articulation of a broader posture that subsequently became known as the “Truman doctrine” in 1947, was a logical by-product of this policy stance.<sup>103</sup>

A similar inference might be drawn regarding the unwillingness of the United States to countenance a Soviet proposal to form a provisional government to administer the whole peninsula under a joint trusteeship until Korea was believed to be ready for self-rule. An official at the State Department opined in 1949 that it would be plausible to contend that “without the presence of the Soviet army, and under a four power ‘trusteeship,’ where there would always have been three votes to one, the result might have been as in France and Italy.”<sup>104</sup> The validity of this assessment has been challenged, but some historians have embraced it, arguing that events were not preordained. They postulated that “[t]he United States need not have occupied [S]outh Korea, and [its] occupation need not have led to two opposed [S]tates and war.”<sup>105</sup>

Invoking CR, and coupling it with elaborate data mining, Hawthorn, a scholar in the field of international relations has produced a picture that, while inevitably open to conflicting readings, largely accords with this evaluation.<sup>106</sup> The issue could be stretched to encompass a wide of array of scenarios, but he has realistically opted to confine it to the question outlined above, namely, “whether the United States could have decided not to occupy the southern part of the country in 1945, and once it did, whether it could have acted in such a way as to avoid the eventual division.”<sup>107</sup> His empirically underpinned answer has been that “in August 1945, the United States could have tried to pre-empt an excessive intrusion into the space between itself and the Soviet Union after 1945; that consistently with this, it could have acknowledged that Korea stood to the Soviet Union as Greece, Italy, France, and Japan stood to Britain and the United States; that it could have accepted the advice of its chiefs of staff and the commanders in the Pacific; and that it could have decided not to occupy southern Korea.”<sup>108</sup> By the same token, “[t]he president and the Departments of State and War could have arrived at a less anxious interpretation of Soviet intentions, accepted their military limitations, and concentrated on the exclusive occupation of Japan.”<sup>109</sup> Still, “the United States did enter Korea.”<sup>110</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*, 84.

<sup>106</sup> *Id.*, 81–122.

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

<sup>108</sup> *Id.*, 112–13.

<sup>109</sup> *Id.*, 113.

This leaves unresolved the issue of subsequent choices and their ramifications. Interestingly, in this respect, the researcher has displayed greater ambiguity than otherwise, suggesting that, once in Korea, the Americans room for maneuver was materially circumscribed. Specifically, they could have not pursued a different course of action unless they had been willing to reconsider their rationale for being in Korea in the first place. This would have entailed willingness and ability to radically rethink “their conception of what they were and why more generally they were doing what they were doing in the world.”<sup>111</sup> The reason is that, at this crucial historical juncture, “they had created a set of circumstances from which they, as they had come to define themselves, could not retreat.”<sup>112</sup> The reconstruction of events does not end here because “the question of what the Americans could have done does lead naturally to the question of whether they were right in what they did.”<sup>113</sup> And, ineluctably, “this also is a matter of counterfactual analysis.”<sup>114</sup>

#### **D. Potential Pathway to Methodologically Richer International Legal Inquiry**

Despite its acceptable conceptual underpinnings and proliferation of relevant case studies in a number of neighboring disciplines demonstrating its effectiveness as a tool for seeking theoretical and policy illumination, unlike international relationists, scholars in the field of law, and particularly those concerned with its international dimension, have exhibited virtually no favorable disposition toward and no active interest in CR. With few notable exceptions, this remains virgin territory, possibly ripe for systematic and sustained exploration. It would be inappropriate to imply, however, that in a domain characterized by a distinct lack of methodological awareness and momentum, CR ought emphatically to be singled out and should determinately be promoted as a top-priority area.

To date, merely one comprehensive article (Mitchell, 2004) has been published on the useful role that CR might play in general legal research. The impetus for Mitchell’s article emanated from the 2001 collapse of the Enron Corporation. The author was struck by the

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*, 121.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*, 121–22.

<sup>114</sup> *Id.*, 121.

outpouring of scholarship on the subject, its scope and diversity and, at the same time, its rather inconclusive nature. A myriad of explanations have liberally been offered for Enron's abrupt demise, without being clear or compelling,<sup>115</sup> which prompted the following observation: "[W]e may ask . . . whether these Enron autopsies truly help us understand when business and regulatory failures are likely to occur and how we might be able to prevent them in the future."<sup>116</sup>

Dissatisfied with the ongoing stress on quantity rather than quality, and the analytical and policy consequences of this misdirected and unfruitful effort, Mitchell suggested that it might be desirable to shift tack and, instead of furnishing additional views on the legal lessons of Enron, focus on the process of learning those lessons.<sup>117</sup> This involves taking concrete steps to fathom how causal stories are fashioned to account for pivotal events such as Enron's unraveling and how those stories are relied upon to produce policy recommendations. In stories of that type, equivalent to single-observation case studies, the teller depicts a pattern showing why an event has occurred and then employs this explicit or implicit causal model to formulate prescriptions for law reform.<sup>118</sup>

Proceeding along that line of explanation is not without attractions, not least of which are adherence to tradition, clarity, and communication in a manner harmonious with readers' cognitive maps. Those are valuable features in an enterprise where successful implementation hinges on delivering the right form, as well as high-quality substance.<sup>119</sup> Nevertheless, "the methodological problems associated with the story telling approach are so severe that many social scientists avoid this approach if at all possible."<sup>120</sup> Social scientists assert that causal stories provide, at best, "innocently misleading portraits of the causes of behavior and, at worst, unavoidably partial stories biased by the writer's pre-existing beliefs and values."<sup>121</sup>

The story telling explanatory mode, as observed in the Enron case, possesses diverse ramifications that extend well beyond this particular episode, including deep into the

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<sup>115</sup> See Mitchell, *supra* note 18, at 1519–520.

<sup>116</sup> *Id.*

<sup>117</sup> See *id.*, 1521.

<sup>118</sup> See *id.*

<sup>119</sup> See *id.*, 1521–522.

<sup>120</sup> *Id.*, 1522.

<sup>121</sup> *Id.*

policy sphere. Insofar as policy is concerned, it is noteworthy that, in the manifold accounts of this flagrant corporate self-destruction, the teller virtually always converts her specific explanation for the isolated occurrence into an explanation for a broad set of potential events, which then assumes the form of a prediction for future corporate and regulatory failures. In other words, the teller shifts from a singular to a general causal account, with possibly considerable strategic consequences—one that merits close attention on the part of high-level actors in the policy arena.<sup>122</sup> This practice leaves much to be desired because in the process:

[T]he specific explanation becomes endowed with law-like properties, and the causal relation posited for the Enron matter is presumed to hold in other corporate settings as well. This occurs with little or no demonstration of the applicability of this explanation for other events occurring under different circumstances. Although many scholars widely apply the conclusions they draw from Enron, they do so with little more than bald assertions or limited anecdotal evidence to support their generalizations. For the scholar inclined to make policy recommendations, this inductive leap must occur because, while singular causal stories about specific events are of great interest to trial judges, juries and the parties involved in a particular lawsuit, they are of little interest to the lawmaker, who enact laws with behavioral implications beyond the specific case in mind. Unless the causal explanation extends beyond Enron to provide a more general explanation of how certain behaviors and corporate and regulatory failures are related, then specific explanations for Enron provide little insight for lawmakers. Stated differently, if Enron is an aberration or the product of unique forces unlikely to be seen again, then why bother with “sweeping legal reforms.” The focus should instead be placed on criminal punishment, civil liability, and reparations for the players in the Enron case alone.<sup>123</sup>

As these methodological “malpractices” illustrate, the story tellers engaged in corporate failure post-mortems, such the one in that particular instance, that commonly follow a two-track approach: First, a singular causal story is told to account for the specific factors responsible for the collapse of a certain corporate entity. Second, a more general causal story about market distortions, inappropriate company actions, regulatory oversight, or professional wrongdoing is derived from the first story. By hastily progressing from the

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<sup>122</sup> *Id.*, 1538–539.

<sup>123</sup> *Id.*, 1540–542.

specific to the general level, however, the story tellers typically overlook alternative credible explanations of corporate demise—scarcely ever systematically resorting to CR—and thus expose their stories to criticism on grounds of internal validity. Moreover, to the extent that their projections beyond the circumstances surrounding the unraveling of one firm rest on shaky foundations, the external validity of their inferences may be in doubt.<sup>124</sup> A key step in the process of developing strategies to minimize threats to internal and external validity, particularly the latter, is to abandon the single-observation case studies in favor of multiple-observation ones.<sup>125</sup> Yet, this clearly is not a practical course to pursue in all circumstances. In the international law context, for instance, the option seldom presents itself. The second step thus entails the adoption of adequate criteria to enhance the robustness of CR. Interestingly, those proposed by a domestically-oriented legal researcher, predominantly concerned with business regulation, are essentially borrowed from the international relations literature. These criteria include transparency,<sup>126</sup> counterfactuality of the proposed antecedent,<sup>127</sup> consideration of competing hypotheses,<sup>128</sup> theoretical and statistical reasonableness of the proposed causal chain,<sup>129</sup> co-tenability and counterfactual minimalism,<sup>130</sup> and projectibility.<sup>131</sup>

A second notable input into CR discourse in the general law space, or rather in the law and economics segment thereof, is primarily theoretical nature, with no salient methodological components and offering no visible demonstration effects.<sup>132</sup> On balance, Hulsmann's contribution to economics may have been greater than to law, but it is worth briefly highlighting because the responses to it may have had cross-disciplinary ramifications. The basic proposition has been that most economic laws are counterfactual in nature and do not have to be qualified by invoking the *ceteris paribus* or an "all other things being equal" condition.<sup>133</sup> This claim, amounting to an ambitious attempt to redefine economic science,

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<sup>124</sup> *Id.*, 1542–543.

<sup>125</sup> *Id.*, 1543–587.

<sup>126</sup> *Id.*, 1589–591.

<sup>127</sup> *Id.*, 1591–592.

<sup>128</sup> *Id.*, 1592–593.

<sup>129</sup> *Id.*, 1593–595.

<sup>130</sup> *Id.*, 1595–600.

<sup>131</sup> *Id.*, 1600–601.

<sup>132</sup> See generally Hulsmann, *supra* note 18.

<sup>133</sup> *Id.*

has elicited illuminating reactions, the potentially most constructive being that *ceteris paribus* elements may fruitfully be incorporated into CR.<sup>134</sup>

The third, and thus far last, significant addition to the general law literature featuring CR stands out for its policy relevance rather than methodological refinement.<sup>135</sup> Robertson has systematically addressed the European Commission's 2001 guidelines regarding the applicability of article 101 of the Treaty on the Functioning of the European Union (EU) to horizontal co-operation agreements (Guidelines), designed to serve as a framework for assessing "pure" information exchanges between competitors—that is, those that do not underpin other forms of anti-competitive behavior, such as the type seen in cartel-like settings. Besides codifying the Court of Justice of the EU's (CJEU) case law, the Guidelines also introduce a more subtle—and grounded in economic logic—element into the evaluation of information sharing agreements.<sup>136</sup>

The key purpose of the Guidelines is to encourage variants of information sharing that bolster efficiency—by resolving information asymmetries, facilitating benchmarking, enabling faster delivery of perishable products, countering unstable demand, and reducing consumers' search costs as well as augmenting their choices—while at the same time discouraging firms from resorting to information exchanges that erode competition. Consistent with the Commission's overall strategy of pursuing an increasingly economics-based approach in dealing with competitive forces, or lack thereof, the Guidelines limit competitive restriction by object to very specific cases, with the preponderance of information exchanges judged in terms of their effects.<sup>137</sup>

The careful and thorough, exclusively CR-inspired, dissection of the Guidelines and the CJEU's leading cases on information exchanges has shed ample light on crucial policy issues, such as the degree to which the Guidelines purely restate the case law, the soundness of the underlying economic logic, and the likely evolution of information exchanges under the regulatory regime embodied in the Guidelines.<sup>138</sup> While this is a governance milieu characterized by intellectual experimentation and innovation, when

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<sup>134</sup> See generally Mateusz Machaj, *In Counterfactuals We Are All Dead*, 15 Q. J. AUSTRIAN ECON. 443 (2012).

<sup>135</sup> See generally Robertson, *supra* note 18.

<sup>136</sup> *Id.*, 459–60.

<sup>137</sup> *Id.*, 460–61.

<sup>138</sup> *Id.*, 485–88.

coupled with sequential learning and steady accumulation of knowledge, it is not devoid of complexity and uncertainty. The fact that CR has proved a highly valuable—indeed, as indicated, the sole—analytical vehicle in such intricate and fluid circumstances attests to its utility as an instrument for generating action-oriented strategic, tactical, and operational insights.

International legal scholars have lagged behind their general law counterparts, especially those in the administrative realm, in evincing awareness of the possibilities furnished by CR as a tool of empirical inquiry. Importantly, they have underscored that international legal ratiocination is rife with CR, notably when it is related to causation, responsibility, and damages. This is an inevitable reflection of the distinct logic brought to bear on situational complexity and ambiguity in problem solving contexts. The corollary is that “counterfactuals play important roles in assessing the effectiveness of international law, of its institutions, and concrete decisions—would Nigeria have ceded Bakassi to Cameroon had it not been for the judgement of the ICJ?”<sup>139</sup>

The proposition may be extended further and rendered more specific. International legal researchers have pinpointed three advantages that may be gained from the incorporation of CR into the international law investigative agenda: First, considering how the overall legal direction and particular actions could have been different “frees the mind from the spell of necessity.”<sup>140</sup> Second, CR may underpin causal statements and assessments pertaining to the significance of certain factors. This is achieved in a manner that ensures greater historical authenticity than is attained by invoking grand theories organized around systematic variables.<sup>141</sup> Third, CR may serve as a lubricant for human creativity and fulfill a crucial function in the process because, “[w]hile there are so many thinks blatantly amiss in international society, [it is] remarkably difficult to imagine alternative reality.”<sup>142</sup>

Besides such broad-based reassertions of the substantial overlap between CR and structure of international legal arguments, and restatement of the general benefits of engaging in the former, virtually no attempts have been made to firmly place CR in the international law conceptual and empirical space. Relevant and effective studies have been conducted in the fields of international humanitarian law—in relation to the responsibility to protect<sup>143</sup>—and international labor law—with reference to international labor

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<sup>139</sup> Venzke, *supra* note 18, at 1 (emphasis added).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *See id.*; *see also* Mattheis, *supra* note 18, at 632–35.

<sup>143</sup> *See generally* Pattison, *supra* note 18.

standards.<sup>144</sup> They have been carried out, however, respectively, by an international relationist or political scientist and an applied social researcher rather than by international legal scholars. Nor can they be said to constitute forays into international law territory in the pure sense of the term, which is understandable given the professional background and analytical disposition of the authors.

Well-delineated and problem-focused international legal inquiry is not altogether devoid of CR elements. A wide-ranging exploration of the democratic deficit that stems from the deficiencies of global governance through international law in the wake of the partial collapse of the Westphalian political settlement is a case in point. Wheatley has elegantly recycled the notion that the legal norms regulating economic, political, and social activities are no longer the sole prerogative of domestic, democratically anchored processes because international governance regimes increasingly claim the right to shape the normative circumstances of citizens of democratic States, apparently without any meaningful linkage to the idea of democratic legitimacy.<sup>145</sup>

He has further elaborated that no meta-narratives have surfaced to properly account for the adjusted allocation of political authority, or to provide a compelling justification for the resulting deficit in the practice of domestic democracy. This has prompted him to examine three concrete strategic options: (1) jettisoning the project of democracy beyond the state; (2) finding other legitimacy pillars—for example, delegation of “sovereign powers,” welfare promoting impacts of global governance “for the people,” and high-quality governance by experts/those “who know better”; and (3) democratizing global governance by embracing democratic principles and institutional mechanisms—such as the introduction of *ex ante* popular controls such as referendums prior to the imposition of significant international legal obligations or allowing the *ex post facto* rejection of international law norms in conformity with the expressed will of the people.<sup>146</sup>

After outlining the three overarching scenarios—a fourth one is derived from the three—the writer has proceeded to devote the core of his article to a consideration of the applicability of the idea of deliberative (“democratic”) legitimacy in this intricate and multifaceted context. That notion emanates from the belief that, in the absence of “objective truths” that inevitably pave the way for the “right policy,” “political truths

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<sup>144</sup> See generally Thomann, *supra* note 18.

<sup>145</sup> See generally Wheatley, *supra* note 18.

<sup>146</sup> See *id.*, 526.

([specifically] contingent, contestable positions) can be established only through acts of communicative reason in which all those subject to a regulatory regime (or their representatives) agree, through reasoned discussions, the scope and content of regulatory norms.<sup>147</sup> This framework, tentatively designed for various communities within the state, has loosely been extended to the inter-state level, to encompass processes that “lead to the adoption of international law norms (a form of ‘deliberative diplomacy’) and to the ‘legislative’ activities of non-[s]tate (‘non-sovereign’) actors.”<sup>148</sup>

Clearly, this type of expansive intellectual journey, entailing the juxtaposition of present configurations with a broad array of alternative futures, requires recourse to non-mainstream investigative vehicles such as CR and scenario construction. Even in this ambitious and open-ended scholarly international legal project, however, CR is mostly employed implicitly rather than explicitly, and is relegated to the periphery. Instead, it should be propelled into the foreground, where it belongs, given the nature of the subject and its methodological ramifications. CR and the thinking pervading international law may share common characteristics, but this is yet to be convincingly shown in practice.

#### **E. Source of Ample Demonstration Effects**

One international legal issue—with salient economic, political, and social dimensions—that figuratively cries for a CR-style treatment concerns the implementation of the Sino-British Joint Declaration Regarding the Future of Hong Kong—formally known as the “Joint Declaration of the Government of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong” and informally referred to as the Joint Declaration. The territory has never exercised sovereign powers and, since decolonization in 1997, has functioned as a Special Administrative Region (HKSAR) of the PRC. Its population is estimated to be slightly in excess of seven million; at mid-2014 Hong Kong’s population consisted of 7.24 million residents, of whom 7.03 million were classified as Usual Residents and 0.22 million as Mobile Residents.<sup>149</sup> The sub-national status and moderate population size, coupled with its near-static nature, may suggest that the fate of the Joint Declaration is not a matter of great international importance.

This would not be an appropriate inference to draw. The aspirations and well-being of seven million people are by no means a trivial question. Otherwise, thousands of local

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*, 527.

<sup>149</sup> See Hong Kong: The Facts, [www.gov.hk/en/about/abouthk/factsheets/docs/population.pdf](http://www.gov.hk/en/about/abouthk/factsheets/docs/population.pdf) (last visited Mar. 31, 2016).

residents would not have taken to the streets, embarked on intense protest, and paralyzed key parts of a normally business-driven and orderly conurbation, for a period extending from late September 2014 to mid-December 2014. Residents rose to action because of the perception that they were being denied political rights enshrined in the Joint Declaration<sup>150</sup> and the Basic Law,<sup>151</sup> the mini constitution, or domestic legal instrument, embodying its vision and principles in more elaborate and specific form.<sup>152</sup> While the physical manifestations of large-scale dissent have subsided, the underlying causes that triggered them and the profound sense of alienation that they have mirrored continue to prevail, raising the prospect of further massive eruption and system-wide instability.

Moreover, Hong Kong should not be looked at in isolation. The territory has always been embedded in an extensive network, performing economic functions akin to those of a bridge and a transmission belt. Over time, this role has expanded enormously, both quantitatively and qualitatively. This growth trajectory markedly steepened during and after the Korean War, but Hong Kong had displayed a pronounced outward orientation serving as a vibrant international linking pin, on one scale or another, with ineluctable pauses engendered by armed conflict, from the establishment of British colonial rule until it entered the phase of accelerated industrialization in the 1950s. Throughout that period, it had operated as a China-centered *entrepot*, predominantly sustained by foreign trade activities.<sup>153</sup>

Rather paradoxically, the outbreak of Korean War and the dislocation that had ensued, expected to sever Hong Kong's external links, instead solidified them by setting the stage for one of its most remarkable structural transformations. The United Nations embargo imposed on the PRC, which had sided with the Communist North, had indeed deprived Hong Kong of its time-honored role as the Mainland's *entrepot*. Its exports foundered at a time when it confronted the enormous challenge of meeting the needs of a population whose size nearly quadrupled, from 600,000 in 1945 to 2.3 million in 1950, as a result of the massive influx of refugees escaping the wave of chaos unleashed by the Chinese

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<sup>150</sup> See generally RODA MUSHKAT, *ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG* (Hong Kong Univ. Press 1997).

<sup>151</sup> See generally YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW* (Hong Kong Univ. Press 2d ed. 1999).

<sup>152</sup> See generally Michael Davis, *Hong Kong's Umbrella Movement: Beijing's Broken Promises*, 26 J. DEMOCRACY 101 (2015); Victoria T.B. Hui, *Hong Kong's Umbrella Movement: The Protests and Beyond*, 26 J. DEMOCRACY 111 (2015).

<sup>153</sup> See ALEXANDER J. YOUNGSON, *HONG KONG: ECONOMIC GROWTH AND POLICY* 3–4 (Oxford Univ. Press 1982); KUI-WAI LI, *THE HONG KONG ECONOMY: RECOVERY AND RESTRUCTURING* 1–4 (McGraw Hill Educ. 2006).

Communist Party (CCP), which had prevailed in 1949 over its Kuomintang (KMT)/Nationalist foe in a civil war that waged intermittently from 1927 to 1937, lost its intensity following the 1937 Japanese invasion, and then vigorously resumed in 1946.<sup>154</sup>

Notwithstanding the dire outlook, Hong Kong's response to the threat had been to ingeniously turn it into an opportunity. Specifically, the territory had nimbly proceeded to relinquish its *entrepot* status and to swiftly reinvent itself as an international center for labor-intensive manufacturing. In the process, it had creatively mobilized the vast inflow of flight capital from the Mainland, the fast expanding pool of labor—containing a substantial number of businesspeople/entrepreneurs, professionals, intellectuals, and unskilled but highly motivated workers from Guangdong Province and Shanghai—and the web of external economic relations/relationship capital furnished by Hong Kong's trading houses with their elaborate contacts throughout the globe. The prospect of a severe slump had thus been supplanted by a pattern evincing astounding growth stretching over two decades, and even greater global exposure than previously.<sup>155</sup>

The next phase of structurally induced further international entrenchment, equally dramatic and fast-paced, yet less trying because it has been precipitated by opportunity rather than threat, has materialized in the wake of the opening up of the Chinese economy in the late 1970s. That event enabled Hong Kong to move its increasingly costly manufacturing base across the border, where key factors of production, notably labor and land, have been far more competitively priced. The shift of labor-intensive manufacturing processes and lower value-added activities to mainland China has given rise to far-reaching and rapid deindustrialization, without, however, leading to a hollowing out of the entire economic structure. This is because high value-added producer services continued to take place in Hong Kong.<sup>156</sup>

This sweeping structural realignment fundamentally repositioned Hong Kong in the Greater China space, which also encompasses Taiwan, albeit controversially from a political perspective. Specifically, the territory has been transformed in the course of the geographical and sectoral readjustment into a vital pivot of the so-called "China Circle." This informal but tightly interconnected economic entity consists of three concentric layers: Greater Hong Kong—or the Hong Kong-Guangdong Province domain—constitutes the nucleus of this expanding spatial configuration. Greater Southeast China (GSC)—which stretches over Hong Kong, Taiwan, and the southeast coastal provinces of the Mainland

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<sup>154</sup>See Zhigang Tao & Y.C. Richard Wong, *Hong Kong: From Entrepot to Manufacturing and then Producer Services*, in *URBAN TRANSFORMATION IN CHINA* 236 (Aimin Chen, Gordon G. Liu & Kevin H. Zhang eds., 2004).

<sup>155</sup> *Id.*, 235–39.

<sup>156</sup> *Id.*, 239–48.

(Guangdong, Fujian, Jiangsu, Shanghai, and Zhejiang)—is deemed to be the inner layer. Greater China, or the Chinese Economic Area, is regarded as the outer layer.<sup>157</sup>

This prominence in the Greater China space is a form of decisive regionalization, without, however, fully reflecting the extent of Hong Kong's internationalization as a large-scale center for cross-border intermediation and provider of producer services. The Chinese connection stands out and is readily quantifiable, but the territory has evolved in the past three-and-a-half decades or so into one of the world's few all-inclusive "capitals of capital,"<sup>158</sup> leveraging its position as both the gateway to China and the heart of the Chinese diaspora.<sup>159</sup> Problematic divergences from the letter and spirit of the Joint Declaration, as well as the Basic Law, may thus reverberate beyond Hong Kong, generating negative network externalities<sup>160</sup> costly for a host of regional and international players.

Exploration of such divergences leads to the realm of compliance, defined as "a state of conformity or identity between an actor's behavior and a specified rule."<sup>161</sup> It does not entail an examination of the underlying motives, which may be instrumental rather than normatively shaped, because compliance "is agnostic about causality."<sup>162</sup> Nor does it need to be confined to the strictly legal sphere because adherence to standards is a multifaceted issue.<sup>163</sup> By the same token, the impact of law is not limited to compliance as "legal rules may change [s]tate behavior even when [s]tates fail to comply."<sup>164</sup> Still, "most theories of

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<sup>157</sup> See YU-WING SUNG, *HONG KONG AND SOUTH CHINA: THE ECONOMIC SYNERGY 1–2* (City Univ. Hong Kong Press 1991); YU-WING SUNG, *THE EMERGENCE OF GREATER CHINA: THE ECONOMIC INTEGRATION OF MAINLAND CHINA, TAIWAN, AND HONG KONG* (Palgrave Macmillan 2005) 9–10. See also Y.Y. KUEH, *PAX SINICA: GEOPOLITICS AND ECONOMICS OF CHINA'S ASCENDANCE* (Hong Kong Univ. Press 2012).

<sup>158</sup> See generally YOUSSEF CASSIS, *CAPITALS OF CAPITAL: THE RISE AND FALL OF INTERNATIONAL CENTERS, 1780–2009* (Cambridge Univ. Press, 2d ed. 2010).

<sup>159</sup> See generally DAVID R. MEYER, *HONG KONG AS A GLOBAL METROPOLIS* (Cambridge Univ. Press 2000); STEPHEN CHIU AND TAI-LOK LUI, *HONG KONG: BECOMING A CHINESE GLOBAL CITY* (Routledge 2009).

<sup>160</sup> See generally PAUL OMEROD, *POSITIVE LINKING: HOW NETWORKS CAN REVOLUTIONIZE THE WORLD* (Faber & Faber 2012).

<sup>161</sup> Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 539 (Walter Carlsneas, Thomas Risse & Beth A. Simmons eds., 2009).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

compliance with international law are at bottom theories of the behavioral influence of legal rules.”<sup>165</sup>

A fine distinction is commonly drawn, in this context, between conformity to international law and its implementation and effectiveness. The former of these two supplementary concepts is equated with “the process of putting international commitments into practice: the passage of legislation, creation of institutions (both domestic and international), and enforcement of rules.”<sup>166</sup> It is viewed as a crucial step toward compliance, but not as an inevitable one, because adherence to international law may occur whether or not it takes place, without any concrete initiative by a government or other relevant authorities.<sup>167</sup> In contrast, effectiveness refers to the impact of a rule on international legal behavior, with judgment exercised in light of the standards that it sets.<sup>168</sup> Again, the linkage between compliance and effectiveness is not watertight. Rules may conceivably be inherently effective yet fail to elicit conformity. Similarly, assiduous compliance may be indicative of overly lax standards.<sup>169</sup> Such nuanced distinctions are analytically valuable, but this Article observes international law as liberally identified with constructive implementation, geared toward maximizing positive impact, because otherwise compliance may be given an excessively mechanistic interpretation.

Seeking notional clarity is a fruitful pursuit, even if little is to be gained from excessive differentiation, but it is not always an entirely productive one. By contrast, the static nature of most international legal theories concerned with rule-following in the global arena may be regarded as analytically inadequate. The shortcoming stems from the tendency to scrutinize compliance at a point in time, overlooking progress, or lack thereof, over time. There are modest exceptions to the norm, such as constructivism, which loosely traces the development of state identity and its behavioral consequences,<sup>170</sup> and

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<sup>165</sup> *Id.*

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

<sup>167</sup> *Id.*

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

<sup>169</sup> *Id.*

<sup>170</sup> See generally JUTTA BRUNNEE & STEPHEN J. TOOPE, *Constructivism and International Law* in Dunoff and Pollack, *supra* note 13; Benedict Kingsbury, *Indigenous Peoples in International Law: A Constructivist Approach to the Asia Controversy*, 92 AM. J. INT’L L. 414 (1998); Jutta Brunnee & Stephen Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUMBIA J. TRANSNAT’L L. 19 (2000); Jutta Brunnee, *Enforcement Mechanisms in International Law and International Environmental Law*, in ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS: A DIALOGUE BETWEEN PRACTITIONERS AND ACADEMIA 1 (Ulrich Beyerlin, Peter-Tobias Stoll, & Rudiger Wolfrum eds., 2006); Asher Alkoby, *Theories of Compliance with International Law and the Challenge of Cultural Difference*, 4 J. INT’L L. & INT’L REL. 151 (2008); Harlan G. Cohen, *Can International Law Work?*

transnational legal process theory (TLPT), which broadly focuses on the (favorable) implications for compliance of State participation in international governance regimes.<sup>171</sup> Such dynamic conceptualizations, however, are few and far between, and those available may be said to lack sufficient coherence and precision.<sup>172</sup> It remains an open question whether they provide a thoroughly viable framework for multiyear tracking of Chinese adherence to the letter and spirit of the Joint Declaration and the Basic Law.

Interestingly, China has served as fertile ground for the application of the selectively time-sensitive paradigms. Constructivists have thus highlighted the crystallization during the post-1978 reform era of Chinese identity as a “responsible power” and the positive ramifications this process has had for compliance on the trade, arms control, environmental protection, and human rights fronts.<sup>173</sup> By the same token, proponents of TLPT have marshalled partial evidence in support of the proposition that involvement in international governance regimes in similar domains has been a beneficial—from a Western perspective—experience because it has entailed socialization-induced normative learning that, for all intents and purposes, has helped to turn China into a *status quo*-oriented nation from a “rogue”-like one.<sup>174</sup> This should bode well for Chinese conformity with the letter and spirit of the Joint Declaration and the Basic Law, in addition to serving as a theoretical benchmark for systematically monitoring relevant conditions and trends.

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*A Constructivist Expansion*, 27 BERKELEY J. INT'L L. 636 (2009); GERRY NAGTZAAMI, *THE MAKING OF INTERNATIONAL ENVIRONMENTAL TREATIES: NEOLIBERAL AND CONSTRUCTIVIST ANALYSES OF NORMATIVE EVOLUTION* (Edward Elgar ed., 2009); JUTTA BRUNNEE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* (Cambridge Univ. Press, 2010); ADRIANA SINCLAIR, *INTERNATIONAL RELATIONS THEORY AND INTERNATIONAL LAW: A CRITICAL APPROACH* (Cambridge Univ. Press, 2010); RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (Oxford Univ. Press, 2013).

<sup>171</sup> See generally Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold H. Koh, *Why Do Nations Obey International Law?* 106 YALE L. J. 2599 (1997); Harold H. Koh, *How Is International Law Enforced?* 74 IND. J. L. 1397 (1999); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (Princeton Univ. Press, 2004).

<sup>172</sup> See generally Roda Mushkat, *Conceptions of Identity and Identity Economics: A Chinese-Based Explorations*, 4 INT'L J. PUB. L. & POL'Y 245 (2014).

<sup>173</sup> See generally GERALD CHAN, *CHINA'S COMPLIANCE IN GLOBAL AFFAIRS: TRADE, ARMS CONTROL, ENVIRONMENTAL PROTECTION, HUMAN RIGHTS* (World Scientific Publishing 2006).

<sup>174</sup> See generally ANN E. KENT, *CHINA, THE UNITED NATIONS AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE* (Univ. Penn. Press 1999); ANNE E. KENT, *BEYOND COMPLIANCE: CHINA, INTERNATIONAL ORGANIZATIONS, AND GLOBAL SECURITY* (Stanford Univ. Press, 2007); ALASTAIR I. JOHNSTON, *SOCIAL STATES: CHINA IN INTERNATIONAL INSTITUTIONS* (Princeton Univ. Press 2008); Chen Dingding, *China's Participation in the International Human Rights Regime: A State Identity Perspective*, 2 CHINESE J. INT'L POL. 399 (2009).

Yet, in the two decades since decolonization, international legal researchers have found virtually no scope for invoking, in that context, constructivist and TLPT-style explanations, as well as offering corresponding prognostic insights and prescriptions. This in all likelihood stems from the fact that States have multiple identities that may not be readily reconciled, may not be firmly established, may not be meaningfully delineated, and may not withstand extraneous—specifically, non-identity-related—pressures.<sup>175</sup> Similarly, the explanatory power of TLPT appears to be rather limited when it is brought to bear on China's attitudes, including the behavioral component, toward international law.<sup>176</sup> Notably, instrumental learning is prevalent and so is non-learning, non-linear learning, uneven learning and, particularly, incremental, or slow-paced learning, that may prove dysfunctional—if it leads to policy outcomes out of sync with economic, social, and political realities.<sup>177</sup>

In a recent empirically rich and rigorous study of Chinese legal compliance in the trade and human rights realms, the author has demonstrated that the process may vary from one issue-area to another—in particular, trade and human rights may display different patterns—because of its contingent nature and, crucially, that State learning may be far from comprehensive in nature—that is, assume the shape of “selective adaptation”—due to a host of deep-rooted and situation-specific influences. The appropriate inference to draw seems to be that the dissection of China's adherence to the letter and spirit of the Joint Declaration and the Basic Law should not exclusively center on a single event, but instead be an ongoing process. This process should occur without being rigidly guided by any preconceptions—constructivist, those of the TLPT variety, or any others—derived from unidirectional paradigmatic sources.

Hong Kong and the Mainland have historically moved along structurally and functionally different paths and, while the gap has been narrowing, it continues to be sizeable. The former has traditionally operated as a heavily “marketized” entity, governed by the rule of law, inching toward democracy in one form or another, and providing sound channels for

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<sup>175</sup> See generally Mushkat, *supra* note 172.

<sup>176</sup> See generally Roda Mushkat, *Economic Development, Environmental Preservation, and International Policy Learning in China: Venturing beyond Transnational Legal Process Theory*, in *RETHINKING LAW AND DEVELOPMENT: THE CHINESE EXPERIENCE* 187 (Gunaghua Yu ed., 2013); Roda Mushkat, *Non-Democratic State Learning of Universal Human Rights: Reconfiguring Chinese Patterns*, 27 *TEMPLE INT'L & COMP. L. J.* 63 (2013); Miron Mushkat & Roda Mushkat, *The Political Economy of Constitutional Incrementalism in Hong Kong*, 9 *NORTHWESTERN INTERDISC. L. REV.* (forthcoming in 2017).

<sup>177</sup> See generally PITMAN B. POTTER, *ASSESSING TREATY PERFORMANCE IN CHINA: TRADE AND HUMAN RIGHTS* (UBC Press 2014).

the expression of a wide range of voices.<sup>178</sup> The latter, by contrast, has persistently subscribed to state capitalism (socialism during the 1949–78 revolutionary era), rule by law (previously rule of man), one-party dominance, and tight control over socio-political activity.<sup>179</sup> The architects of the Joint Declaration and the Basic Law have constructed a legal façade to minimize intrusions from the centralized, top-down driven system into the decentralized, steered in a bottom-up manner one by introducing mechanisms to preserve and enhance—through progressive democratic reform—Hong Kong’s pre-1997 institutional environment, as well as expand and boost its capacity for self-government.<sup>180</sup>

The commendable and pragmatic vision, embodied in the seemingly ingenious but potentially unworkable “one country, two systems” formula, is asymmetrically configured at the international level because the signatories do not have the same rights and obligations.<sup>181</sup> Moreover, there are no procedures for adjudication and enforcement,<sup>182</sup> although this objective may presumably be achieved indirectly, at the domestic level, via the Basic Law.<sup>183</sup> To complicate matters, the Joint Declaration and the Basic Law are inevitably open to conflicting interpretations. Be that it may, this does not preclude the possibility of fruitfully engaging in serious discourse regarding compliance, both in relation to specific acts and the implementation—as indicated, broadly defined—process as a whole.

In both respects, there is a basis for arguing that the vision, both abstract and concrete, codified in international legal and constitutional documents designed to ensure Hong Kong’s prosperity and stability, the twin goals that it purports to mirror, has not fully been realized, particularly insofar as civil and political rights are concerned. For instance, dubious attempts have been made by the local government, acting at the behest of its central counterpart in Beijing—a “principal” whom serves as an “agent” to introduce draconian

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<sup>178</sup> See generally NORMAN J. MINERS, *The Government and Politics of Hong Kong* (Oxford Univ. Press, 5th ed. 1998); MA NGOK, *POLITICAL DEVELOPMENT IN HONG KONG: STATE, POLITICAL SOCIETY AND CIVIL SOCIETY* (Hong Kong Univ. Press 2007).

<sup>179</sup> See generally KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* (W.W. Norton, 2d ed. 2004); TONY SAICH, *GOVERNANCE AND POLITICS OF CHINA* (Palgrave Macmillan, 3d ed. 2011).

<sup>180</sup> See generally Mushkat, *supra* note 150; Ghai, *supra* note 151.

<sup>181</sup> See generally C.L. Lim, *Britain’s “Treaty Rights” in Hong Kong*, 151 Q. L. REV. 348 (2015).

<sup>182</sup> See generally Mushkat, *supra* note 150.

<sup>183</sup> See generally Mushkat, *supra* note 151.

national security legislation<sup>184</sup> and “patriotic” education in the territory.<sup>185</sup> More importantly, the breadth, depth, and pace of democratization have consistently fallen short of legitimate expectations.<sup>186</sup>

This has coincided with a sustained pursuit of multifaceted strategies to “mainlandize” the Hong Kong governance regime. There is evidence to suggest that these efforts have met with considerable, albeit not necessarily unqualified, success, as reflected in symptoms of “political decay” in the territory. To state it more precisely, the “HKSAR is [currently] characterized by a more personal style of governance; a chaotic implementation of public policies; an increasingly politicized judiciary whose decisions have been . . . challenged by Beijing and its supporters in Hong Kong; endangered civil liberties including academic freedom; an amalgamation of political labeling and mobilization; a failure of political institutions to absorb public pressure and demands; and a governmental insensitivity to public opinion.”<sup>187</sup>

The halting progress toward full-fledged democracy—in all probability due to CCP’s desire to maximize political leverage in Hong Kong and its penchant for tinkering, rather than tackling problems head-on, in order to minimize risks and facilitate error-correction<sup>188</sup>—has left the HKSAR with a fragmented and malfunctioning governance regime. The chief executive (CE), at the epicenter of the system, and the primary political lever relied upon by the CCP in the territory, continues to be nominated by a committee whose composition is heavily shaped by the powers that be in Beijing.<sup>189</sup> The officeholder is alienated from the

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<sup>184</sup> See generally Miron Mushkat & Roda Mushkat, *The Political Economy of the Constitutional Conflict in Hong Kong*, 11 *TILBURG FOREIGN L. REV.* 756 (2004); NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG’S ARTICLE 23 UNDER SCRUTINY (Fu Hualing, Carole J. Petersen, & Simon N.M Young eds., 2005); Roda Mushkat, *The Intricacies of Implementing International Law: a Juxtaposition of Theories with the Actualities of the Sino-British Declaration Regarding the Future of Hong Kong*, 31 *CHINESE (TAIWAN) Y.B. OF INT’L L. & AFF.* 1 (2014).

<sup>185</sup> See generally Mushkat; GREGORY FAIRBROTHER, *TOWARD CRITICAL PATRIOTISM: STUDENT RESISTANCE TO POLITICAL EDUCATION IN HONG KONG AND CHINA* (Hong Kong Univ. Press 2003); Chitat Chan, *Young Activists and the Anti-Patriotic Education Movement in Hong Kong; Some Insights from Twitter*, 12 *J. CITIZENSHIP, SOC. & ECON. EDUC.* 148 (2013); Tracy Lau, *State Formation and Education in Hong Kong: Pro-Beijing Schools and National Education*, 53 *ASIAN SURV.* 728 (2013).

<sup>186</sup> See generally Davis, *supra* note 150; Hui, *supra* note 150.

<sup>187</sup> See SONNY S.H. LO, *GOVERNING HONG KONG: LEGITIMACY, COMMUNICATION, AND POLITICAL DECAY* 13 (Nova Science 2002). See also SONNY S.H. LO, *THE DYNAMICS OF BEIJING-HONG RELATIONS: A MODEL FOR TAIWAN?* (Hong Kong Univ. Press, 2008); Peter T.Y. Cheung, *Who Is Influencing Whom? Exploring the Influence of Hong Kong on Politics and Governance in China*, 51 *ASIAN SURV.* 713 (2011).

<sup>188</sup> See generally Mushkat & Mushkat, *supra* note 176.

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

community-at-large and enjoys no legitimacy at the grassroots level. Functional constituencies, arbitrarily and haphazardly constructed, and acting as another source of selective political leverage for the CCP in Hong Kong, represent special interests in the seriously fractured Legislative Council (LEGCO), alongside directly-elected members. The two segments do not cooperate harmoniously. The CE dominates LEGCO in theory but is severely handicapped in practice. Recurring policy paralysis and widespread disaffection are the upshot.<sup>190</sup>

A proposal was put forward a decade ago,<sup>191</sup> and refined recently,<sup>192</sup> to overhaul the political edifice in line with the spirit and letter of the Joint Declaration and Basic Law. It is consistent with Hong Kong's status as a global metropolis and expectations on the demand side—specifically, those of the public. It should not provoke an adverse CCP reaction and thus can be said to meet the criterion of “political viability.”<sup>193</sup> The scheme is forward-looking, but it should not disrupt historical continuity. It has several attractive features and implementation should not pose an undue challenge—satisfying pertinent criteria such as “technical feasibility,” “economic and financial possibility,” and “administrative operability.”<sup>194</sup>

The crux of the proposal is to embrace bicameralism, with a directly-elected lower house, and an upper house consisting of functional constituency representatives elected in an equitable and transparent fashion.<sup>195</sup> The allocation of responsibilities to each body should be grounded in sound logic, but be skewed in favor of the lower house. LEGCO members should nominate candidates for the CE position, subject to proper threshold requirements, which should be extended to the proliferating political parties, in order to reduce legislative disarray. Internal functional constituency and political party structures and decision-making procedures should be democratized.<sup>196</sup> As may be inferred, the scheme constitutes an

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

<sup>191</sup> See generally Miron Mushkat & Roda Mushkat, *Conversationalism, Constitutional Economics, and Bicameralism: Strategies for Political Reform in Hong Kong*, 1 *ASIAN J. POL. SCI.* 23 (2005).

<sup>192</sup> See generally Mushkat and Mushkat, *supra* note 174.

<sup>193</sup> See CARL V. PATTON & DAVID S. SAWICKI, *BASIC METHODS OF POLICY ANALYSIS AND PLANNING* 214–18 (Prentice-Hall, 2d ed. 1993).

<sup>194</sup> *Id.*, 208–10, 210–14, 218–19.

<sup>195</sup> See generally Mushkat & Mushkat, *supra* note 176.

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

attempt to recapture the apparently lost spirit of the Joint Declaration and the Basic Law, and at the same time build a cohesive governance regime that is capable of garnering the support of all key stakeholders, whose perceptions of institutional effectiveness and fairness currently are poles apart.

The fine details of the proposal are of less interest here than the fact that the authors have liberally employed CR, in conjunction with scenario construction, in an effort to demonstrate that the scheme, if adopted, would have tangibly contributed to Hong Kong's prosperity and stability, helping to avert the late 2014 breakdown of public order. The contention is not merely founded on compelling reasoning but is sustained by a rich set of theoretical models and empirical findings.<sup>197</sup> The exercise could productively be repeated with respect to virtually every significant policy step, or a series of steps, carrying international and constitutional ramifications that might have been taken in Hong Kong in the past two decades or so. This lends further substance to the argument in this Article that, despite being mostly overlooked by students of international law, CR merits a place on their modest methodological agenda.<sup>198</sup>

## F. Conclusion

The narrowing of the gap between the international legal and international relations scholarly foci and practical pursuits has spawned a sizeable literature at the intersection of the two neighboring academic disciplines. Ample insights have been generated regarding processes, such as compliance and enforcement, whose adequate understanding requires access to tools that have been the preserve of social scientists. This has, however, predominantly been a conceptually-driven evolution. The methodological side of the picture has thus far been accorded little systematic attention. Some potentially useful analytical vehicles such as CR have been, for all intents and purposes, simply disregarded.

Elsewhere, a more constructive posture has been observed. Psychologists and historians, the former quantitatively and the latter qualitatively, have been particularly inclined to resort to CR in their quest for unraveling the complexities of human behavior and political evolution. Researchers in the field of international relations have displayed a similar disposition. Indeed, they have led as well as have followed. Perhaps their most notable input in this regard has been in the form of a cluster of criteria that need to be satisfied in order to place CR on a satisfactory scientific, or quasi-scientific, footing. That qualifies as a

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

<sup>198</sup> Another apt and detailed illustration may be found in Vinod K. Aggarwal and Jonathan T. Chow, *The Perils of Consensus: How ASEAN's Meta-Regime Undermines Economic and Environmental Cooperation*, 17 REV. INT'L POL. ECON. 262 (2010).

meaningful methodological contribution, readily embraced by scholars across the disciplinary spectrum.

Legal inquiry has not been completely oblivious to the possibilities that CR offers, both theoretically and as a research technique. They have been acknowledged in general, as well as in specific areas such as administrative law or regulatory policy. The recognition has been coupled with fruitful applications, albeit on a modest scale. In comparison, the international law proverbial methodological chest is empty or nearly so, notwithstanding the fact that international legal reasoning bears close parallels to CR. There is sufficient evidence, including that extracted from a noteworthy and sensitive Greater China source, to suggest that this state of affairs leaves much to be desired. Palpable gains may be realized if the oversight is rectified.

