

Your Counterfactual Strategy: How You Can Influence Jurors' Thoughts About 'What Might Have Been'

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Jurors do it about ten times per hour – they consider something that is false in order to test whether something is true. They engage in counterfactual thought or argument by asking “what if” and by speculating on “what might have been.”

If the Doctor would have conducted a full examination, she would have discovered the abnormality in time.

If the driver had been following the speed limit, then the injuries would have been far less severe.

Even if the client would have received different advice from his agent, he still would have sold his property .

It is natural to speculate about “what if,” and “what might have been” in order to form conclusions about “what is” or “what was.” That is, it is predictable, and at times necessary to reason using premises we know to be false (e.g., assume the Doctor *did* a complete examination, the driver *followed* the speed limit, the client *received* different advice from his agent) in order to form conclusions about cause and effect (e.g., the doctor was negligent, the driver’s negligence was a proximate cause of injury, but the agent’s advice was not a proximate cause of the seller’s losses). Commonly foreseeable and legally-relevant claims, such as the ones identified above, require jurors to think about what would have happened if the known course of events had been different.

The claims listed above are called “counterfactuals”¹ and understanding counterfactual reasoning can be an important way for attorneys and other communicators to get inside the minds of jurors as they attempt to reason their way toward a verdict. Quite simply, they are called “counterfactuals” because the information presented runs *counter* to the *facts* of the case.

Counterfactual claims have long held interest for logicians and philosophers of language, but more pragmatically, they’ve also held interest for legal

¹ More precisely, counterfactuals can be defined as follows: Counterfactuals assert that if a given antecedent condition were present, then a specific consequent would obtain: “If it were the case that ____, then it would be the case that ____” (Lewis, 1973, p. 2); if I struck that match, it would light; if the defendant would have adhered to the contract, then the plaintiff’s economic losses would have been less severe. “As a first approximation,” Creath (1989) notes, “we might say that a counterfactual is any sentence which says what *would* happen under specified conditions, even though those conditions do not in fact obtain” (p. 95).

communicators. The ever-presence of counterfactual claims belies a certain complexity: “What if” thinking requires the mental generation of a “possible world” – a world which didn’t happen, but could have happened. It is hard to imagine a situation in which the mental generation of possible scenarios carries greater weight than it does in the jury room as participants weigh the fates of those who come before the courts.

This brief essay explores some of the current research on counterfactual thinking with the goal of helping the legal persuader understand and influence this critical element of juror decision-making and advocacy. After first looking at *why* counterfactual thinking matters and *the extent* to which jurors are likely to engage in it, I’ll turn to advising on the ways that counterfactual thinking can be marshaled in support of either a plaintiff or a defense case.

So What’s the Big Deal? Why Does Counterfactual Thinking Matter?

There are three answers to that question: Because this way of thinking and arguing is common, because it is a little tricky, and because it is necessary in nearly all contexts of legal decision-making.

First, Counterfactual Thinking is A Common Juror Activity

When a jury is left to its own devices, one or more of the jurors on that jury will generate and express counterfactual thoughts at a rate of about ten per hour.² This finding, based on our analysis of more than 27 hours of mock juror deliberation and focus group discussion in response to actual civil cases, also showed that the rate of counterfactual expression was constant whether we were looking at unmediated deliberation (a mock trial) or facilitated interview (a focus group). So, about ten times per hour (or once every six minutes) jurors will make suppositions about the false in order to discuss the true. They do this by asking hypothetical questions (“what if...”) or by proposing hypothetical alternatives (“if only...”). The purpose is not to entertain a flight of fancy, but to use the hypothetical as a way of answering an important question – e.g., the Doctor may be seen as negligent if there was an available course of action which would have better served the patient.

This form of hypothetical thinking occurs in other contexts as well. A substantial body of research indicates that counterfactual thinking accurately describes a common way that people reason and reach

² Broda-Bahm (2000).

conclusions, assessing causes and events in an number of different situations in everyday life.³

Second, Counterfactual Thinking is a Little Tricky.

Counterfactuals are trickier than they might seem at first blush. The critical question is whether speculation is a predictable process, or whether it is a process that is wide-open and uncontrolled. Consider a somewhat odd (and decidedly non-legal) example that has become famous in the philosophy literature.

*If kangaroos had no tails, they would topple over.*⁴

A little bit of thought, some creative visualization, and maybe some knowledge of physics and balance on your part might suggest that this proposition could well be true. But in coming up with a world of tail-less kangaroos, exactly how do you imagine it? Just the same kangaroos, but this time with no tails? Other possibilities certainly exist: kangaroos could have evolved with no tails (and presumptively ended up well-balanced, so to speak). Or, if we are indeed entering the world of fantasy, why not kangaroos that are capable of walking with crutches or capable of defying gravity just enough to stay upright? Absurd? Certainly, but the question is once you begin to imagine alterations to reality, how far do you go? Once the door to speculation is opened, is it really thrown wide open, or are there common and predictable paths that such speculation might take?

Thankfully, the answer is that there are *relatively* common and predictable paths that such speculation tends to take, and common paths that jurors tend to take. But understanding those paths requires a bit of understanding of how people respond to these ‘if only’ claims – a subject which will be explored below.

Third, Counterfactual Thinking is Necessary in Nearly All Contexts of Legal Decision-Making

Kangaroos notwithstanding, the counterfactual thought is not just a psychological quirk or a mental ‘mistake’ that jurors make – often it is key to what the law is asking them to do. Perhaps the kangaroo example convinced you to consider rejecting counterfactual thinking altogether, reasoning that ‘this is why it is best to stick to the facts and not speculate.’ That option however, isn’t available. Counterfactual thinking in law (and most other settings) is unavoidable in the process of forming important conclusions. For example, consider the question, “would plaintiff’s injuries have occurred if the plaintiff had exercised reasonable care?” From a jury’s standpoint, that is not merely a predictable question, but it is a question that is *legally required* if one is to address many necessary

questions, including in this example, the question of comparative negligence.

Many similar circumstances in law, most basically causation, require jurors to consider/imagine what would have happened if some alternate set of conditions had been present. Scholars of legal communication have examined the role of counterfactual statements in assessing causation, forming juror narratives, and influencing juror disposition toward severity, blame, and damages. More specifically, counterfactuals have been evaluated in a variety of legal contexts, including the consideration of negligence,⁵ the assessment of causation,⁶ the evaluation of sympathy with a crime victim,⁷ the appropriateness of fines and punishments,⁸ the evaluation of the seriousness of an incident,⁹ and the legality of police practices, such as drug courier profiles.¹⁰

Counterfactual thinking also plays a role in the development of juror narratives. Building from previous research indicating that jurors use a story structure to understand trial evidence¹¹, researchers have recently looked at the story structures used by real jurors in deliberations in four unique criminal trials recorded in 1996 by CBS in Maricopa County, Arizona.¹² An important finding was that jurors familiarize themselves with trial evidence by “fictionalizing self or imagined other into specific events of the trial scenario”¹³ and that this fictionalization occurred by jurors “engaging in storytelling about what might have happened if one or more events had happened differently” (p. 7). The most frequent type of storytelling observed in these trials involved imagining trial participants in different situations, “e.g., ‘What would have happened if he had called the police first?’ ‘Let’s think about what would have happened when she got to New York’” (p. 12). Such storytelling functions not merely as speculation, but as a means of interrogating the evidence and promoting interaction by triggering responses (including supporting stories and counter-stories) from other jurors. In other words, these scenarios often drive the important conversations that jurors have.

So counterfactual thinking is frequent and tricky, but necessary to legal deliberation. What the legal persuader needs to know, however, is how to influence counterfactual thoughts, or how to direct this

³ Dunning & Parpal, 1989; Hilton & Slugoski, 1986; Markovitz & Vachon, 1989; Wells et.al., 1987.

⁴ This example was first used by David Lewis (1973, p. 1-9).

⁵ Weiner et al., 1994.

⁶ Robinson, 1997; Wells & Gavinski, 1989.

⁷ Macrae, 1992; Weiner et al., 1994.

⁸ Macrae, 1992; Macrae et al, 1993.

⁹ Macrae et al, 1993.

¹⁰ Robbenolt & Sobus, 1997.

¹¹ Bennett & Feldman, 1981.

¹² Sunwolf, 1999.

¹³ Sunwolf, 1999, p. 8.

speculation in the right directions. In order to answer this critical question, the remainder of this essay will pose three maxims: one that is general, one that is mostly for plaintiff, and one that is mostly for defense.

Maxim One: Promote the *reasonable* creation of counterfactuals by trying to *always* alter in the direction of normality

To put it simply, the most reasonable counterfactual alternative to reality is generally the one that is closer to what we think normally would happen than what actually did happen.

A simple example will make this clear: assume that following a particularly hard night of drinking, a young law school graduate fails to pass the bar examination.¹⁴ The naturally-occurring counterfactual at this stage is to suppose, “If only the young graduate had not drunk so much.” It naturally seems more reasonable to suppose that the student pursued a more normal course on the night in question. It is less natural to suppose “if only the bar examination was easier” or even “if only the bar examination was given on another day” because both of those options are less normal than what is, we hope, a more average night for the young graduate. This tendency to alter in the direction of what is normal, typical, and predictable not only seems more intuitive, it is supported as well by scientific research indicating that when research subjects are asked to imagine alternatives, the most common alternatives and the ones most likely to stick and be used for subsequent evaluation are those that allow the thinker to pursue a more typical course.¹⁵

The implication of this is that if you are asking jurors to assess one party’s conduct by drawing a comparison to another alternative course of action, you should ground, justify, and support that alternative by aligning it with what we suppose to be closer to normal, closer to what would have happened ‘but for’ the conduct which did occur. For example, let’s say that a product manufacturer you’re defending comes out with a new product, one with greater efficiency, but some hidden dangers. Instead of coming out with this new product, the company *could have* come out with an even better product, just as efficient, with no hidden dangers (the other side’s scenario), or they could have stayed with their current product, just as dangerous, but less efficient (your scenario). In this case, the other side likes their scenario because it effectively foists responsibility on your company. Your scenario, however, is closer to the typical counterfactual patterns of reasoning of the juror. To increase your chances of persuasion, emphasize that advantage by highlighting your scenario as the more *normal* of the two options:

But lets imagine – what would have happened if this company had not come out with this new product? What would they

have done instead? The most realistic scenario, however, is that we would still be here, because Mrs. Johnson would have still injured herself, but this time with a less effective product.

Maxim Two: For the Plaintiff, Use Counterfactual Thinking to Highlight the Tragedy of an Event

The nearly taken alternatives to a tragic event can increase juror’s feelings of blame and anger and can also increase their sense of what a case is worth. Researchers have found, for example, that people’s reactions to unfortunate events depend on the extent to which they are encouraged to imagine more positive alternatives.¹⁶ The more likely an event is to be imagined otherwise, the higher the likelihood of thinking that this unfortunate event was foreseeable, and hence avoidable.

Consider another example: A traveler voluntarily switches flights at the last minute only to be killed as the newly selected airliner crashes. Rationally, of course, the fate of this passenger is just as tragic as that of passengers who had booked the doomed flight months in advance. However, the perception that this particular traveler *need not have boarded the plane* increases the psychological salience of counterfactual alternatives in which he *does not* board the plane, and this fosters a belief that this traveler really *ought not* to be dead and has accordingly suffered a greater tragedy than the other passengers on board the fated air liner. “A misfortune preceded by an action that was unusual or unnecessary (even if it was not foreseeably linked to the misfortune)” the researchers concluded “is especially likely to generate a strong reaction - either of sympathy or blame depending on the particular features of the situation.”¹⁷

This finding persists in legal matters as well: when counterfactual alternatives are available and made especially salient, subjects considered crimes to be more serious, victims to be more harmed, and believe that punishments should be greater, and awards to victims should be larger.¹⁸

For this reason, at the level of showing and reinforcing damages, an important argument in the arsenal of the plaintiff or prosecutor is demonstrating the ‘close alternative’ – what almost happened, but didn’t happen:

¹⁶ Miller and Turnbull, 1990.

¹⁷ Miller and Turnbull, 1990, p. 17.

¹⁸ Gleicher et al, 1992; Landman, 1988; Macrae, 1992; Macrae & Milne, 1992; Miller & McFarland, 1986; Miller & Gunasegarami, 1990; Turley, Sanna & Reiter, 1995; Wells & Gavinski, 1989; Williams et al., 1996.

¹⁴ This is a version of an example used by Roese & Olson, 1995, p. 8.

¹⁵ Kahneman & Tversky, 1982.

- ...and she was just twelve steps away from arriving home safely.
- ...but this contract was just one pen-stroke away from being complete.
- ...and nine times out of ten, maybe even 99 times out of 100, Dr. Smith would have done the procedure at that point... but this time he didn't.

It is important to also note that while an emphasis on nearly taken alternatives can increase the perception of loss or tragedy, they can also increase the sense of responsibility. That is, jurors will view the auto manufacturer that 'almost' increased its roof-strength but didn't as more responsible than the auto-manufacturer that never considered improving roof strength. But on the flip-side, they will also view the plaintiff who 'nearly' bought a safer car as more responsible than the plaintiff who never considered it. In both cases, the key is the ease with which jurors can imagine the alternative.

Maxim Three: For the Defense, Use Counterfactual Thinking to Combat the 'inevitability' of hindsight bias

Counterfactual thinking has a cousin in hindsight bias,¹⁹ to the extent that hindsight bias can be seen as a particular (and for the defense, unfortunate) use of counterfactuals: "If I had been in his shoes, I *never* would have bought that house." While counterfactuals relate to the ability of jurors to entertain alternatives to reality, hindsight bias relates to the tendency to overestimate the probability of events after the events occur such that past events appear to have been inevitable. This 'creeping determinism'²⁰ makes people feel greater certainty that they would have been able to predict the outcome of a given event. At this level, hindsight bias shares a similarity because at the projection stage it includes a counterfactual step: 'if I had been in the position to predict this event....'

Such thinking, of course, is a classic bane for a defense attorney (and sometimes for a plaintiff as well) in many types of cases. Jurors' present knowledge of a bad outcome reinforces their belief that it could have been and *should* have been predicted and avoided at an earlier stage. Apart from telling jurors about hindsight bias, however, attorneys are frequently at a loss over how to prevent it. In this case, however, *encouraging* counterfactual thinking can actually play a practical role in reducing determinism, perceived inevitability, and a resulting hindsight bias.

The reason that counterfactual thinking can combat hindsight is that it can increase jurors' awareness that a given event which actually occurred was only one of a number of events which could have occurred:

Then Dr. Reese looked at the test results, and a world of possible choices presented themselves to him. How might he have responded? He could have directed the results to the specialist across town. He could have changed the method of dialysis. He could have monitored her condition for another 6 hours. He could have taken the most aggressive stance possible and operated immediately. Or he could have gradually increased medication to determine if that would have been effective – as he did do. His choice was one among many, and the best he could make without the benefit of 20/20 hindsight.

The practical effect of this multiplication of was tested by researchers who focused on mock juror reactions to a case focusing on drug courier profiles, or law enforcement assumptions about who is likely to be smuggling drugs. These researchers found that when the circumstances surrounding a drug search were presented as very unusual, the scenario would prompt a greater number of counterfactualizations, because it would suggest a greater range of "more normal" alternatives. This multiplication of alternative outcomes, in turn tended to moderate the influence of hindsight. That is, jurors' knowledge of the outcome of the drug search was found to have had less effect.²¹ Other researchers have emphasized the need for witnesses to help jurors flesh out the number of possible outcomes to any given event. For example, one study in finding that expert testimony was generally ineffective in reducing hindsight bias, encouraged efforts "to strengthen the expert witness testimony such that subjects better understand the need to 'imagine' other alternative outcomes to the events in question"²² So one implication for the preparation of expert witnesses is to encourage them to present ideas as counterfactuals (... "what ended up occurring is only one of a number of possible outcomes, including..."). In this way, the witness can help to encourage jurors to keep the frame of possibility open and avoid the creeping determinism that is characteristic of hindsight bias.

Conclusion: Getting Inside the Black Box²³

If the preceding discussion is unusual or difficult, then the cause for that, aside from the discussion of kangaroos, may be that we are used to thinking of jurors and legal persuasion generally in terms of inputs and outcomes: e.g., *this* kind of message causes *that* kind of response from jurors. We are less used to thinking about the *process* that jurors use in transforming that persuasive input into a decision or action output. But treating juror decision-making process as a sort of

¹⁹ Hindsight bias can be defined as "a projection of new knowledge into the past accompanied by a denial that the outcome information has influenced judgment" (Hawkins & Hastie, 1990, p. 311).

²⁰ Fischhoff, 1975.

²¹ Robbenolt and Sobus, 1997.

²² Worthington and Stallard, 1999, p. 15.

²³ MacCoun, 1994

“black box” that can’t be understood doesn’t move us toward the goal of more informed legal persuasion.

An emphasis on counterfactual thinking emphasizes this process, and importantly also addresses jurors as *arguers* and not just as recipients of arguments. That is, one of the most interesting findings regarding counterfactuals is that jurors use them commonly in order to reconstruct, explain, and test events when they are *talking* to each other in deliberation. For that reason alone, it is critical to think about the counterfactuals that jurors are likely to develop, and the ways in which your messages will encourage, discourage, or shape the jurors’ vision and articulation of ‘what might have been.’

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