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If . . .: Counterfactuals in the Law

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Introduction

Can we know what might have been? Most people probably would say that we cannot. We know facts and universal generalizations derived inductively from our observation of facts: that Thomas Jefferson was the third President of the United States; that Lincoln is the capital of Nebraska; and that water boils at 100 degrees centigrade and freezes at 0 degrees under certain conditions that we can specify.[1] However, when we talk about what might have been but did not happen, we leave the domain of facts. We are talking, instead, about fictions. Whatever status we give to these imaginative creations, we are certain that they differ in kind from facts.[2] Facts are "hard," "solid," and "substantial like physical matter."[3] They possess "definite shape, and [a] clear persistent outline—like bricks," and we may "pile them up" for use.[4] They are verifiable, or amenable to empirical testing. Might-have-beens, on the other hand, are "pure conjecture,"[5] "mere guess and speculation,"[6] "fanc[i]ful suppositions,"[7] "fictional constructs,"[8] or "figments."[9]

1. Knowledge of facts or of generalizations derived from facts is not the only kind of knowledge we may have. We also have "practical knowledge" or knowledge "how." *See* GILBERT RYLE, THE CONCEPT OF MIND 25-61 (1949).

2. "It is simply impossible for a singular statement to be *both* counterfactual and factual at the same time." DAVID H. FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 16 (1970).

3. Carl L. Becker, *What are Historical Facts? in* THE PHILOSOPHY OF HISTORY IN OUR TIME 120 (Hans Meyerhoff ed., 1959).

4. *Id.* at 120-21.

5. New York Cent. R.R. v. Grimstad, 264 F. 334, 335 (2d Cir. 1920).

6. Taylor v. City of Yonkers, 11 N.E. 642, 644 (N.Y. 1887).

7. Reynolds v. Texas & P. Ry., 37 La. Ann. 694, 698 (1885).

8. FISCHER, *supra* note 2, at 16.

They are the antithesis of facts; they are counterfactual. We cannot look them up in an authoritative source, as we can the name of the capital of Nebraska, nor verify them experimentally, as we can our assertions about the boiling point and freezing point of water.[10]

Yet we often talk as if we can know what might have been. One can imagine saying or hearing any of the following:

> If Paul had dropped the crystal on the floor, it would have shattered.
>
> I wish you had come to Phyllis' party. You would have had a wonderful time.
>
> Had it not rained on Saturday, I would have mowed the lawn.

We pepper our thoughts and our discourse with statements about what might have been. Usually, we do not stumble over such statements, or even notice that they may differ in kind from much of what we say or think.[11] That we typically do not think of such statements as unusual or problematic suggests that most of the statements we make about what might have been are uncontroversial and readily accepted by the listener or reader.[12] Perhaps, then, we should revise our intuition about our ability to know what might have been.

In that case, what should we make of the following statements:

> My doctors incorrectly told me that polycystic kidney disease was not hereditary and that the chances of my having a second child afflicted with the disease were practically nil. If they had not misinformed me, I would not have borne another child who suffers from this disease.[13]
>
> My son would not have drowned in defendants' swimming pool if they had stationed a lifeguard there.[14]

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9. Fritz Redlich, *"New" and Traditional Approaches to Economic History and Their Interdependence*, 25 J. ECON. HIST. 480, 484 (1965).

10. *See* NELSON GOODMAN, FACT, FICTION, AND FORECAST 3-27 (4th ed. 1983); *see also* Redlich, *supra* note 9, at 484 (describing counterfactuals as "neither verifiable nor falsifiable").

11. With regard to counterfactuals, we are much like Molière's Monsieur Jourdain who learns that he has been "speaking prose for more than forty years without knowing it." MOLIÉRE, THE SELF-MADE GENTLEMEN (LE BOURGOIS GENTILHOMME) act 2, sc. 4, *in* SIX PROSE COMEDIES OF MOLIÉRE 253 (George Graveley trans., 1956). Douglas Hofstadter writes that counterfactuals "are common currency, they are daily bread, they are the meat and potatoes of communication." DOUGLAS HOFSTADTER, METAMAGICAL THEMAS: QUESTING FOR THE ESSENCE OF MIND AND PATTERN 258 (1985).

12. Of course such statements might be uncontroversial simply because they are about unimportant things, and the listener does not bother to evaluate them. Undoubtedly, listener indifference accounts for the acceptance of some counterfactual statements, but it hardly seems possible that none of these statements ever matter enough to stand the scrutiny of the hearer. Moreover, they usually must at least matter to the speaker. So, unless many of these statements are nonproblematic at least to their makers, we need to explain why we persist in speaking nonsense.

13. *See* Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978).

14. *See* Rovegno v. San Jose Knights of Columbus Hall Ass'n, 291 P. 848 (Cal. Dist. Ct. App. 1930); *cf.* New York Cent. R.R. v. Grimstad, 264 F. 334 (2d Cir. 1920) (failure to equip barge with life preservers or life buoys); Collins v. Riverside Amusement Park

> We would have fired Sam for leaving his keys in the bus and taking unauthorized breaks even if he had not been soliciting his fellow drivers on behalf of the Teamsters Union.[15]
>
> Had testator known that Amherst College would refuse to accept his bequest to establish a trust to provide scholarships for "American born, Protestant, Gentile boys of good moral repute," he would have given the gift without the offending restrictions, rather than give that portion of the estate to his heirs.[16]
>
> Had the employer refrained from engaging in unfair labor practices during the union representation election, the union would have won the election, even though it cannot show that it had obtained majority support prior to the employer's campaign of unfair labor practices.[17]

In law, as in the rest of life, we indulge, indeed, require, many speculations on what might have been. Although such counterfactual thinking often remains disguised or implicit, we encounter it whenever we identify a cause, and quite often when we attempt to fashion a remedy. If this kind of thinking often remains implicit and in the background, it may be that most of these statements are as unproblematic in law as they are in our ordinary discourse.[18] Yet, as the examples above suggest, troublesome might-have-beens abound

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Co., 145 P.2d 853 (Ariz. 1944) (no lifeguard when accident occurred); Haft v. Lone Palm Hotel, 478 P.2d 465 (Cal. 1970) (failure to provide lifeguard, or to post warning sign).

15. *See* NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

16. *See* Howard Sav. Inst. v. Peep, 170 A.2d 39 (N.J. 1961). *See generally* Vanessa Laird, Note, *Phantom Selves: The Search for a General Charitable Intent in the Application of the* Cy Pres *Doctrine,* 40 STAN. L. REV. 973 (1988) (discussing courts' ability to apply *cy pres* doctrine to effectuate testators' charitable intent despite testators' defective gift).

17. *See* Conair Corp. v. NLRB, 721 F.2d 1355 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1241 (1984); United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054 (3d Cir. 1980).

18. But-for causation, and its more sophisticated variants, is an example of a large body of law where the counterfactual usually remains implicit and untroublesome. If we say that the defendant's negligent conduct (or that the negligent aspect of the defendant's conduct) caused the plaintiff's harm, we usually mean that in an imagined world in which the defendant had not conducted himself negligently the harm does not occur. We acknowledge this meaning in our discussion of factual causation, but in the ordinary tort case (or criminal case) we are content to say that *X* caused *Y,* without more. This analysis, admittedly, gets more complicated, and the hard cases are so called with good reason. For a discussion of more sophisticated models of causation, see *infra* notes 81-85 and accompanying text. My point here is simply that in the run-of-the-mill case, courts get along fine with their primitive model of causation, and with the counterfactual left implicit and unexplored.

The relative ease with which courts decide these issues every day should make us cautious about complicating matters. I proceed mindful of the following poem attributed to Mrs. Edward Craster:

> The centipede was happy quite,
> Until a Toad in fun
> Said "Pray which leg goes after which?"
> That worked her mind to such a pitch,
> She lay distracted in the ditch,
> Considering how to run.

BARTELETT'S FAMILIAR QUOTATIONS 1046 (Christopher Morley ed., 12th ed. 1951); *cf.* MAX WEBER, *Critical Studies in the Logic of the Cultural Sciences, in* MAX WEBER ON THE METHODOLOGY OF THE SOCIAL SCIENCES 115 (Edward A. Shils & Henry A. Finch eds. & trans., 1949) (cautioning not to overestimate the significance of methodological studies for the practice of history and noting that methodological study "is no more the precondition of fruitful intellectual work than the knowledge of anatomy is the precondition for 'correct' walking").

in legal disputes. We find ourselves stumbling over them in a variety of situations and responding to them in inconsistent ways ranging from brazen self-confidence to paralysis in the face of the task. When we recognize the exercise for what it is, however, our self-confidence tends to erode, and we become discomforted, perplexed, and skeptical about the whole endeavor.[19]

This Article considers some of the uses of counterfactuals in the law. Counterfactuals are a type of conditional statement.[20] Conditional statements express the idea that something is or will be the case (the consequent), provided that some other situation is realized (the antecedent).[21] Conditionals often take the form "if *p* then *q*"[22] Counterfactuals are conditionals in which the author expresses the knowledge or belief that the antecedent is false.[23]

If we hope to use counterfactuals sensibly in the law, we need to clarify our thinking about them. We must decide when it is appropriate to think counterfactually. Some situations may resist meaningful consideration of what might have been, or render counterfactual thought unnecessary. Some counterfactuals may be plausible but irrelevant because their antecedents lack legal significance. Thus, we must take care in defining the thought experiment

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19. *See, e.g.*, Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 559 (1962) (contending that "what *would have happened* had defendant performed his duty" is a question "that can seldom, if ever, be answered"); John Leubsdorf, *Remedies for Uncertainty*, 61 B.U. L. REV. 132 (1981) (questioning ability of remedies to fit uncertain might-have-beens); Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 64-72 (1956) (discussing role of judge in limiting use of conjecture in jury's assessment of legal liability); E. Wayne Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 TEX. L. REV. 423 (1968) (arguing that use of speculation in determining liability is erroneous and contending that court should focus on what actually happened). Professor Leubsdorf writes, for example:

> How can we talk of a world that never existed and never will exist as if it were real? It does not seem unthinkable to conclude that, had the defendant's explosives not gone off, the plaintiff's building would still be standing. But saying that, had it not been for constitutional violations, a given school would have had 158 white students and 110 black ones is hard to distinguish from writing a treatise on the habits of unicorns.

Leubsdorf, *supra*, at 135.

20. On the relationship between counterfactuals and conditionals, see GOODMAN, *supra* note 10, at 4-5; J.L. MACKIE, TRUTH PROBABILITY AND PARADOX: STUDIES IN PHILOSOPHICAL LOGIC 64-66, 70-71 (1973); R.S. Walters, *Contrary-to-Fact Conditional*, *in* 2 ENCYCLOPEDIA OF PHILOSOPHY 212 (Paul Edwards ed., 1967).

21. A DICTIONARY OF PHILOSOPHY 70 (Anthony Flew ed., 2d ed. 1984).

22. Although conditionals often are expressed as "if" sentences, they need not be written that way. Such statements as: "I will come to the party, provided that I find a ride"; "Had he come, he would have enjoyed himself"; or "One step closer, and I shoot," all express conditionals. *See* MACKIE, *supra* note 20, at 73-74.

23. A statement is no less a counterfactual if the author holds a mistaken belief that the antecedent is false. One can imagine a person waking up on the morning after the presidential election of 1948 and saying: "What a pity Dewey won. If Truman had won, we would have something to celebrate this morning." Our imagined political analyst has spoken counterfactually, even though her antecedent has been realized. *See* MACKIE, *supra* note 20, at 71.

to be expressed by a counterfactual and be mindful of questions of legal relevance in crafting the antecedent. Even when it is appropriate to think counterfactually, how can we distinguish a valid, or plausible counterfactual, from an invalid, implausible, or downright silly one? For every statement that begins "if *p* then . . .," there is an infinite number of possible consequents. If we are unable to evaluate competing counterfactuals using some standard of plausibility, we had best abandon the enterprise. Yet, given the pervasiveness of counterfactuals in our thinking about law, we cannot avoid relying on them, at least under current legal doctrine.

This Article assumes that legal decisionmakers cannot avoid counterfactual questions.[24] Because such questions are necessary, we should think carefully about when and how to pose them, and how to distinguish good answers from poor ones.

Part I of this Article identifies and analyzes some uses of counterfactuals in current legal practice. Taking as an example an action in tort, it first shows how pervasive and essential counterfactual thinking is in our legal decisionmaking. Next, it considers the disturbingly extreme responses of bravado or dread that courts have often adopted when confronted with the demands of counterfactual inquiry. Finally, it broadly maps the ways courts deal with, or attempt to avoid, the question of what might have been. This section's survey is deliberately broad, both to uncover and make coherent the rich range of responses to the problem of counterfactuals in the law, and to show that several seemingly unrelated problems in law can be understood and analyzed fruitfully as instances of that problem.

Among legal scholars there is a widespread sense of the exhaustion of doctrinal analysis and the need to look beyond the boundaries of cases.[25] This mood binds such diverse approaches to law as law and economics, law and literature, legal anthropology, legal history, feminist legal theory, and critical race theory, as well as their predecessor, legal realism. These approaches share the idea that

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24. I do not mean to suggest, however, that counterfactuals are never avoidable. Professor Leubsdorf has suggested a variety of strategies for avoiding counterfactuals and other sources of uncertainty in remedial decisionmaking. Most of his suggestions, however, require a revision of our basic premises regarding remedies. *See* Leubsdorf, *supra* note 19, at 141-72.

25. I am aware that proclamations of the end of particular ideas, ideologies, methods, or theories often prove to be embarrassingly premature. In the late 1950s, Daniel Bell and Seymour Martin Lipset announced the "end of ideology" and the "exhaustion of political ideas." DANIEL BELL, THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES 17, 409 (1988 ed.); SEYMOUR M. LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 403-17 (1960); *see also* JOB DITTBERNER, THE END OF IDEOLOGY AND AMERICAN SOCIAL THOUGHT: 1930-1960, at 147-251 (1976) (discussing Bell's and Lipset's contributions to the end of ideology debate). Events quickly showed their claim to be unprescient, although recently we have heard it echoed in the proclamation of the end of history. *See* Francis Fukuyama, *The End of History?*, 16 NAT'L INTEREST 3 (1989). For a fitting rejoinder to Fukuyama, see Josh Brown, *Osborne at the End of History*, 50 RADICAL HIST. REV. 243 (1991); Josh Brown, *Osborne at the End of History*, 49 RADICAL HIST. REV. 167 (1991).

law has little method of its own and must instead draw on the theories, insights, and methods of other disciplines. Their disagreement is over which discipline to borrow from.

This Article similarly reflects the belief that legal discourse must go beyond the cases, and that we must infuse that discourse with methods and ideas found elsewhere. Because my focus is on how legal factfinders should and do reconstruct the past and construct alternative counterfactual pasts, the most promising discipline to turn to is history.[26] Historians have produced some of our most elaborate examples of counterfactual thinking.[27] Part II examines some of this literature to see what it can tell us about using counterfactuals and standards for evaluating them as plausible or implausible.

Finally, Part III examines how we might better use counterfactuals in legal decisionmaking. Drawing on Parts I and II, it considers how and when we should construct counterfactuals in the law. It then categorizes and analyzes the kinds of arguments that will sustain counterfactuals so that we may better evaluate them when used in the law.

I. Counterfactuals in Law

A. The Pervasiveness of the Counterfactual Inquiry

Counterfactual considerations intrude at many stages in legal factfinding and decisionmaking. Sometimes we acknowledge their presence, but other times we remain unaware of them. Sometimes counterfactuals help focus our inquiry, but other times they lead us astray. Nevertheless, whether express or implicit, helpful or misleading, they are there.

Take, for example, an action in tort. Most obviously, counterfactual considerations loom in the determination of factual causation and remedy. The factual causation, or cause-in-fact, inquiry requires that the factfinder determine whether the defendant's tortious conduct, or defective product, causally contributed to the plaintiff's injury.[28] Traditionally, courts have understood this requirement in terms of causal necessity and have applied a but-for test to determine causation.[29] Under this test, the defendant's conduct or defective product will only be described as a cause of the

26. For a discussion of the limited usefulness of economic modeling for legal decisionmakers faced with the problem of counterfactuals, see *infra* note 164.

27. *See infra* notes 157,162 & 166-67 (citing examples).

28. As Professor Wright shows, a better statement of the factual causation requirement is that the tortious aspect of the defendant's conduct (or product) must be a cause of the injury. Richard W. Wright, *Causation in Tort Law,* 73 CAL. L. REV. 1735, 1759-74 (1985).

29. *See* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 110 (2d ed. 1985); W.

injury if, but for that conduct or product, the injury would not have occurred. The test instructs the factfinder to recreate an imaginative past, in which the factfinder eliminates the tortious act and plays out an alternative (counterfactual) history.

To be sure, there are severe critics of this account of causation. Indeed, much criticism of the but-for test stems from particular instances where resolution of the counterfactual question is difficult, or appears to lead to counterintuitive results.[30] Nevertheless, the but-for test remains the predominant approach to factual causation in tort.[31] Moreover, as I argue below, attempts to replace the but-for test inescapably pose counterfactual questions of their own.[32]

The resort to counterfactual inquiry is less controversial and more explicit in the determination of money damages for the tort plaintiff. At bottom, all determinations of tort damages imply a comparison between the actual world and a counterfactual one in which the defendant had not injured the plaintiff. Often that comparison gives the trier of fact little pause. For example, if the factfinder concludes that the defendant broke the plaintiff's leg, it should have little trouble deciding that the medical costs of mending the leg are attributable to the defendant and should be included in the damage award.[33] Yet often we require the factfinder to engage in much more uncertain inquiries to establish the damage award. For example, in a wrongful death action, the factfinder probably will be asked to determine: the job history that the decedent would have had and the stream of income that she would have generated; the value of the services that she would have rendered and of the goods that she would have produced for her family; the self-maintenance costs that she would have incurred; and her probable life expectancy, all in a counterfactual world in which the accident that took her life had not occurred.[34]

Other elements of a tort action also raise counterfactual questions. In deciding whether a defendant has been negligent, the factfinder must compare the defendant's conduct to some standard of nonnegligent (or reasonable) conduct. Typically, the court instructs the factfinder to measure the defendant's conduct by the reasonable person standard. Although this standard calls for a

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PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 265-66 (5th ed. 1984); Wright, *supra* note 28, at 1775.

30. *See infra* notes 67-74 and accompanying text.

31. 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS 91 (1986) (2d ed.).

32. *See infra* notes 79-85 and accompanying text.

33. It should have little trouble unless the defendant can argue that the plaintiff aggravated the injury by, for instance, needless delay in obtaining medical care. *See infra* note 36 and accompanying text.

34. The factfinder also will be asked to predict the rate of inflation for the additional years that she would have lived. *See generally* STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH & INJURY (3d ed. 1988) (explaining how economic and statistical principles, based on federal government publications and scholarly works by expert economists, are used in appraising gross and net loss earnings).

normative judgment about the community's sense of reasonable behavior, it also asks the factfinder to substitute a hypothetical reasonable person for the defendant in the account of events and to decide whether under the circumstances a reasonable person would have behaved better than the defendant did.[35] Similarly, the doctrine of avoidable consequences, which denies a plaintiff recovery for that portion of her harm that she could have avoided by acting reasonably after the accident had occurred, necessitates counterfactual thinking.[36]

Hidden and unwelcome counterfactual considerations may also play a role in the factfinder's decision in a tort action. In a recent study, two psychologists found that test subjects varied the amount of compensation they would award to accident victims according to the ease with which they could imagine a counterfactual alternative scenario in which the harm did not occur.[37]

Counterfactual questions also abound beyond the law of torts.[38]

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35. RESTATEMENT (SECOND) OF TORTS § 283 (1965); KEETON ET AL., *supra* note 29, at 173-75; *see also* JON ELSTER, LOGIC AND SOCIETY: CONTRADICTIONS AND POSSIBLE WORLDS 180 (1978) (noting the counterfactual nature of reasonable person inquiry).

36. RESTATEMENT (SECOND) OF TORTS § 918 (1965); 4 HARPER ET AL., *supra* note 31, at 511-20. The question of avoidable consequences, which seeks to identify that portion of a plaintiff's injury that is attributable to her post-accident conduct, is, of course, at heart a question of causation. Similar notions underlie the principle of mitigation of damages in cases of contract breach and in claims for recovery of backpay for unlawful discharge in labor and employment discrimination law.

37. Dale T. Miller & Cathy McFarland, *Counterfactual Thinking and Victim Compensation: A Test of Norm Theory*, 12 PERSONALITY & SOC. PSYCHOL. BULL. 513, 515-16 (1986). For example, in one experiment subjects were given one of two variants on a scenario involving the crash of a small plane in a remote area. *Id.* at 516-17. In both variants the victim sustained only minor injuries from the crash itself and decided to walk to the nearest town. In the first variant the victim died of exposure 75 miles from help, but in the second, he died only a quarter mile from help. Subjects responding to the second variant of this scenario made substantially larger awards than did subjects responding to the first. *Id.*

38. Questions of causation and remedy outside of the area of tort similarly raise counterfactual considerations. So too do a number of other legal issues. For example, under the *Erie* doctrine, a federal court sitting in diversity jurisdiction must decide state law issues in terms of the appropriate state law. If there is no state law on the question, and the jurisdiction does not provide for certification of such questions to its courts, the federal court must predict how a court of the particular jurisdiction would decide the question. *See, e.g.*, Alfonso v. Lund, 783 F.2d 958, 964 (10th Cir. 1986) (predicting that New Mexico would not allow recovery for loss of chance malpractice claim). Moreover, as Judge Patricia M. Wald has noted: "Judges of lower courts like mine not only follow Supreme Court precedent as best we can, but rule on the basis of our predictions as to how the Supreme Court will act in a particular situation." Patricia M. Wald, *Government Benefits: A New Look at an Old Gifthorse*, 65 N.Y.U. L. REV. 247, 264 (1990). The *cy pres* doctrine requires the court to determine what the testator would have desired had she known that circumstances would frustrate her bequest. *See supra* note 16 and accompanying text. The Federal Rules of Civil and Criminal Procedure require that courts apply a harmless error standard in determining whether a verdict or judgment should be set aside. FED. R. CIV. P. 61; FED. R. CRIM. P. 52(a); *see also infra* note 54. *See generally* 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2881-2883 (1971) (detailing the history, purpose, and application of the harmless error rule).

They are an inevitable part of our attempt to adjudicate legal disputes.

B. Counterfactual Bravado and Counterfactual Dread

Courts often fail to recognize that they are dealing with counterfactuals. When they do recognize the counterfactual nature of their inquiry, they fail to relate it to other counterfactual inquiries in the law. Lacking a general understanding of counterfactuals and their place in legal decisionmaking, courts' treatment of legal counterfactuals is ad hoc, localized, and inconsistent.

We see this inconsistency in the wide array of responses by legal decisionmakers to the invitation to think counterfactually. At the extremes are their responses of counterfactual bravado and counterfactual dread. Sometimes their bravado is so great that they assume extravagant epistemological possibilities; sometimes their dread is so great that they deny the possibility of any counterfactual inquiry.

Thus, the United States Court of Appeals for the Seventh Circuit has instructed the agency that administers the Black Lung Benefits Act,[39] to determine whether a totally disabled coal miner who suffers from black lung disease would have become totally disabled as a result of his heavy cigarette smoking, or any other cause, even if he had not worked in a coal mine.[40] Indeed, the court further indicated that if an administrative law judge determined that the miner would have become totally disabled as a result of causes other than mining, she still would have to consider whether exposure to coal dust hastened the onset of total disability.[41] Presumably, if she determined that it did, she then would have to decide how much later total disability would have occurred but for the coal dust exposure.

The Seventh Circuit engages in vicarious counterfactual bravado. The court does not claim to know the answer to its counterfactual questions; it just assumes that an administrative law judge will. However, one can easily find instances of equally bold assertions by legal factfinders regarding such uncertain might-have-beens. Some of the boldest examples of counterfactual bravado arise, of necessity, in the realm of remedies. There the factfinder may find itself tracing hypothetical commercial ventures or life histories. The

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The concept of discrimination in labor and employment law entails comparison between how the person subject to discrimination was treated, and how he would have been treated but for the activity or characteristic that marked him for different treatment. *See* BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 13 (2d ed. 1983) (quoting Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)); Julius G. Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice,* 32 U. CHI. L. REV. 735, 737 (1965).

39. *See* 30 U.S.C. §§ 901-945 (1988).

40. Shelton v. Director, Office of Workers' Compensation Programs, 899 F.2d 690, 693 (7th Cir. 1990). It must, in other words, determine that exposure to coal dust was a necessary, although not necessarily sufficient, cause of the miner's total disability.

41. *Id.*

problem is especially perplexing in cases involving young tort victims who have no career history.[42] In one case involving the death of a young woman, for instance, the court as trier of fact took great pains to describe the likely net earnings of the decedent.[43] Among other things, the court found that she would have chosen a career as a legislative analyst in preference to enrolling in law school.[44] It determined what job she would have taken at what entry salary level.[45] It further determined her rate of promotions, when she would have had children, the amount of time she would have taken off from full-time work to care for those children, and, having determined that she would have worked part-time during that period, her earnings until she returned to full-time work.[46]

Sometimes courts disguise their counterfactual bravado as counterfactual dread. In *Reynolds v. Texas and Pacific Railway,*[47] the corpulent[48] Mrs. Reynolds hurried out of a lighted waiting room onto the defendant's unlighted steps, where she made a misstep and fell. The defendant argued that Mrs. Reynolds had not shown that its negligence had caused her accident, which might have occurred "even had it been broad daylight."[49] The court, however, assumed the causal connection because the railroad's negligence was "of a

42. The valuation of children for purposes of tort damages, as well as for other purposes, has long been a source of considerable conceptual difficulty. For a fascinating history of this issue, see generally VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985). For a discussion of how changes in the valuation of children and in the conception of the maternal relationship altered tort law's treatment of bystander claims for injury resulting from witnessing the injury of a loved one, see Martha Chamallas & Linda K. Kerber, *Women, Mothers and the Law of Fright: A History,* 88 MICH. L. REV. 814, 837-41, 851-62 (1990).

43. Feldman v. Allegheny Airlines, Inc., 382 F. Supp. 1271, 1281-88 (D. Conn. 1974), *aff'd in part and rev'd in part,* 524 F.2d 884 (2d Cir. 1975).

44. *Id.* at 1283.

45. *Id.* at 1284.

46. *Id.* at 1281-88. The court was keenly aware of the speculative nature of its inquiry, as it indicated by quoting the following statement of the Connecticut Supreme Court:

> "Suffice it to say that, except for the special expenses allowable under the statute, all of these elements are, of necessity, imponderable and largely speculative. No one can place a definite value upon them, nor can one do more than conjecture as to what the future course of any life, if continued, would have been. At best, the trier must take the evidence and make an intelligent estimate."

Id. at 1282 (quoting Fairbanks v. State, 124 A.2d 893, 897 (Conn. 1956)). The *Feldman* court recognized the difficulty of its task and made a serious attempt at resolving the counterfactual questions through a careful consideration of the available evidence regarding the decedent's likely choices and prospects.

47. 37 La. Ann. 694 (1885).

48. *Id.* at 697. Although I understand the relevance of Mrs. Reynolds' haste, the relevance of her size to her sense of balance is not obvious to me. It is clear, however, that defendant considered this to be a significant fact, as do the torts casebooks that discuss *Reynolds. See, e.g.,* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 369 (5th ed. 1990).

49. *Reynolds,* 37 La. Ann. at 698.

character naturally leading to [the accident's] occurrence."[50] The court, having decided the counterfactual by virtue of attributing causation to the defendant's failure to light its steps, cast the defendant's argument that Mrs. Reynolds' size and haste may have caused the accident as a "mere possibility" and a "fanciful supposition[]," which the court need not indulge.[51] Not surprisingly, there are similar slip and fall cases where the court reaches the opposite conclusion and dismisses a plaintiff's arguments about causation as too speculative and hypothetical.[52]

Not all assertions of counterfactual dread are mere rhetorical stratagems employed to foreclose consideration of all possible resolutions of the counterfactual question other than the one that the court adopts implicitly.[53] In some instances, courts deliberately cast their analyses in a manner intended to avoid difficult counterfactuals.[54]

As with counterfactual bravado, some of the strongest expressions of counterfactual dread appear in discussions of remedies. Thus, courts historically have required proof of contract damages with far greater certainty than proof of tort damages.[55] Furthermore, distrust of their ability to resolve counterfactual questions has

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50. *Id.*

51. *Id.*

52. *See, e.g.*, McInturff v. Chicago Title & Trust Co., 243 N.E.2d 657, 662 (Ill. App. 1968) (holding that "[d]amages cannot be assessed on mere surmise or conjecture as to what probably happened to cause his injury and death" where decedent fell down dangerously steep and worn stairway that had no handrail); Wolf v. Kaufmann, 237 N.Y.S. 550, 551 (N.Y. App. Div. 1929) (stating that in context of unwitnessed fall down unlighted staircase "it would be solely a conjecture for a jury to draw the conclusion that the deceased fell down the stairs because of the absence of light").

53. *See supra* notes 47-52 and accompanying text; *see also* Elsroth v. Johnson & Johnson, 700 F. Supp. 151, 164 (S.D.N.Y. 1988) (rejecting plaintiff's theory that use of gelatin capsules rather than tablets or caplets more impervious to tampering constituted defective design because "plaintiff cannot demonstrate that had the manufacturer eliminated gelatin capsules these criminals (who apparently prefer Tylenol products) would not have poisoned tablets or caplets. Anyone capable of such sophisticated package tampering would have little difficulty in contaminating the product.").

54. Occasionally, substantive law also causes courts' analyses to have the effect of counterfactual dread. One example is the harmless error beyond a reasonable doubt standard for certain types of error in criminal trials. Under that standard, appellate courts will not accept the counterfactual statement that had the trial error not occurred the trial outcome would have been the same, if they can imagine even remotely possible counterfactual scenarios where the trial outcome would have changed. *See* 11 WRIGHT & MILLER, *supra* note 38, § 2883, at 280. The rationale for the harmless error beyond a reasonable doubt standard has more to do with substantive values than with skepticism about our ability to resolve the counterfactuals. There is no reason to be more acutely skeptical regarding our counterfactual resolving skills in these kinds of cases in particular. Rather, we say that because of what is at stake in effectively excusing the trial error, we will not tolerate the same degree of uncertainty, or chance of mistake, that we will in engaging in other counterfactual inquiries.

A similar example of predictive, though not counterfactual, dread is the rule of remote possibilities in applying the rule against perpetuities. THOMAS F. BERGIN & PAUL G. HASKELL, ESTATES IN LAND AND FUTURE INTERESTS 187-90 (2d ed. 1984) ("Probabilities are irrelevant; all that matters is what conceivably can happen, no matter how far-fetched."). Again, it appears that the rationale for such things as the fertile octogenarian rule is something other than our lack of confidence in our ability to predict that she will bear no more children. *See id.* at 179.

55. The tendency in recent years has been to relax the stringent contract damages

sometimes led legal decisionmakers to reject certain types of remedies as too speculative. For example, the National Labor Relations Board will order an employer to bargain with a union as the representative of its employees (a "*Gissel* bargaining order") even though the union has not been chosen by those employees in a representation election, if employer misconduct has undermined the union's strength and destroyed the opportunity for a fair election, and if the union can demonstrate that at some point it held majority support.[56] If the union cannot demonstrate prior majority support, however, the NLRB will not issue a bargaining order, no matter how "outrageous" and "pervasive" the employer's unfair labor practices, and without regard to the union's evidence that it would have won an untainted election.[57] The NLRB's rejection of the bargaining order remedy in these so-called *Gissel I* cases rests largely on its doubt about its ability to make valid counterfactual judgments.[58] Similarly, in cases of employer bad faith refusal to bargain, the NLRB has rejected the argument that employees are entitled to a make-whole remedy for the loss of the benefits of the bargain they would have attained had the employer bargained in good faith.[59]

The academic literature mirrors judicial responses of bravado and dread. Professor Richard Wright optimistically writes:

> [I]n most cases there is little difficulty [in analyzing the counterfactual], for example, when the change is removing the explosive character of a substance or the act of firing a gun. The analysis becomes more complicated when human reactions to the changed situation must be estimated. Again, however, the analysis is usually fairly easy and not too speculative. People's reactions generally will be fairly predictable using causal generalizations in which there is a high degree of confidence.[60]

Professor James Henderson, on the other hand, writes that:

> [C]ourts must try to avoid hypothetical "what would have happened if . . . ?" questions in the course of resolving tort disputes. When such hypotheticals are addressed in adjudication, attention focuses on events that never occurred and circumstances that never existed. If liability rules require answers to such questions, proof gives way to speculation. Of course, to some extent these

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requirements. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 150-57 (1973); E. ALLAN FARNSWORTH, CONTRACTS 881-88 (1982).

56. The United States Supreme Court approved of the NLRB's practice of issuing such bargaining orders in NLRB v. Gissel Packing Co., 395 U.S. 575, 610 (1969).

57. *Id.* at 613-15.

58. *See* Gourmet Foods Inc., 270 N.L.R.B. 578, 586 (1984); *see also id.* at 588 (Member Dennis, concurring) (quoting Conair Corp. v. NLRB, 721 F.2d 1355, 1383 (D.C. Cir. 1983)). For the tripartite categorization of employer election interference, see *Gissel*, 395 U.S. at 613-15. *See also* cases cited *supra* note 17.

59. For a discussion of these decisions, see *infra* text accompanying notes 107-22.

60. Wright, *supra* note 28, at 1806-07.

questions are unavoidable in connection with such issues as proximate cause and damages. But the verifiability constraint requires that liability rules avoid raising such questions whenever possible.[61]

C. *Coping with Counterfactual Questions*

As previously noted, the law's response to counterfactuals is ad hoc and inconsistent. Furthermore, its response to counterfactual questions is generally localized, without regard for what those questions share with similar questions in other kinds of cases or substantive areas of the law. If we step back from a localized view to look more broadly at decisions involving counterfactual questions, however, we can discern certain patterns of responses.

If we hope to better use legal counterfactuals, we must first identify and analyze the law's current repertoire of techniques for responding to them. This Section critically examines the primary techniques that legal decisionmakers use either to avoid or to resolve counterfactual questions.

1. *Techniques of Avoidance*

Most instances of counterfactual avoidance are not really a matter of "technique" because they involve no conscious decision to avoid the counterfactual. In determining causation we usually leave the counterfactual implicit and unnoticed. For instance, in our everyday discourse if we say that Billy got a stomach ache because he ate too many snacks, we do not stop to recognize that implicitly we are saying that, under the circumstances, had he not eaten so many snacks he would not have gotten the stomach ache. We certainly do not play out an imaginative alternative history in which we correct Billy's eating habits and see what happens as a consequence. Usually, the causation question for legal factfinders resembles the case of Billy's stomach ache.[62] If we are called upon, for instance, not to explain a simple stomach ache, but to explain why Billy contracted salmonella, we would try to identify the tainted food, and we could then announce that the food preparer caused Billy's salmonella, much as we had described the cause of his stomach ache in the previous example. In such a case our factfinding proceeds adequately without mention of might-have-beens.

When will the implicit counterfactual emerge as an issue in the

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61. James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 914 (1982) (footnotes omitted); *see also* James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 308 (1990) (stating that "resolution of the causation question in failure-to-warn cases frequently depends on variables that cannot be resolved coherently in the courtroom"); Morris G. Shanker, *A Retreat to Progress: A Proposal to Eliminate Damage Awards for Loss of Business Profits*, 85 COMM. L.J. 83, 87 (1980) ("In trying to figure out the extent of future lost business profits . . . we permit our courts to pretend to know what really is unknowable.").

62. *Cf.* Malone, *supra* note 19, at 67 ("At times this determination [of what would have happened had defendant acted differently] is made so automatically that the cause issue is little more than a bit of formalism in the trial.").

discussion of causation? Typically, it emerges in cases of causal overdetermination or of causal uncertainty. In such cases the defendant is likely to argue that the plaintiff cannot show that she would not have suffered the injury but for defendant's conduct.[63]

a. Avoidance by Reframing the Questions Asked

i. Substantial-factor Causation

As noted above, we typically describe causation in the counterfactual terms of the but-for test.[64] That test works in most instances. The test's assumption of causal necessity conforms to our intuitive notion of causation,[65] and under its guidance courts and juries typically determine factual causation without stumbling.[66]

Nevertheless, this account of causation has severe critics. Courts and commentators have long noted that in certain kinds of cases "there are good reasons both for saying that some given event was caused by some action and also that it would still have happened without this action."[67] In these cases of causal overdetermination there are two or more sets of conditions present, each of which alone would suffice to cause the same harm. The harm in these cases is causally overdetermined either because the causal candidate acts concurrently with a duplicate sufficient cause, as in the cases of two merging fires, either of which singly could have destroyed the plaintiff's property,[68] or because it preempts another sufficient

63. Professor Henderson argues that this issue will be raised by the defendant: "In spite of the fact that theoretically, 'but for' is part of the plaintiff's case, in practice it enters the case as a defense that the defendant must prove." James A. Henderson, Jr., *A Defense of the Use of the Hypothetical Case to Resolve the Causation Issue—The Need for an Expanded, Rather than a Contracted, Analysis,* 47 TEX. L. REV. 183, 200 (1969). *Contra* E. Wayne Thode, *A Reply to the Defense of the Use of the Hypothetical Case to Resolve the Causation Issue,* 47 TEX. L. REV. 1344, 1352-53 (1969) (expressing skepticism of Henderson's assertion as an empirical matter).

64. *See supra* notes 28-30 and accompanying text.

65. *But see* Judith J. Thompson, *Causality and Rights: Some Preliminaries,* 63 CHI.-KENT L. REV. 471, 481-84 (1987) (rejecting necessary condition account of causation and asserting that her position conforms to philosophical mainstream). Many legal economists also reject but-for causation. *See, e.g.,* WILLIAM M. LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 229 (1987) (arguing that notion of causation itself is largely dispensible in an economic analysis of torts); Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.,* 43 U. CHI. L. REV. 69, 85-87 (1975) (questioning importance of but-for test).

66. Malone, *supra* note 19, at 71 & n.25 (quoting LEON GREEN, RATIONALE OF PROXIMATE CAUSE 132 (1927)); Wright, *supra* note 28, at 1775. Cecil A. Wright, a Canadian torts scholar, estimated that fewer than one case in a thousand presents troublesome factual causation questions. Cecil Wright, *The Law of Torts: 1923-1947,* 26 CAN. B. REV. 46, 58 (1948), *cited in* Willard H. Pedrick, *Causation, the "Who Done It" Issue, and Arno Becht,* 1978 WASH. U. L.Q. 645, 646 (1978).

67. HART & HONORÉ, *supra* note 29, at 123.

68. Kingston v. Chicago & N.W. Ry., 211 N.W. 913 (Wis. 1927); Anderson v. Minneapolis, St. P. & S. Ste. M. Ry., 179 N.W. 45 (Minn. 1920), *overruled by* Borsheim v. Great N. Ry., 183 N.W. 519 (Minn. 1921); Cook v. Minneapolis, St. P. & S. Ste. M. Ry., 74

cause that is waiting in the wings to accomplish the same effect, as in the familiar hypothetical of *A* who shoots and kills *B* just as *B* is about to drink tea that has been poisoned by *C*.[69] Because there are at least two sets of sufficient conditions to bring about a harm in these instances of duplicative or preemptive causation, the usual but-for test does not help us identify the cause of the harm.[70] Indeed, strict application of the but-for test would absolve each causal candidate, an intuitively untenable result in most instances.

The problem of counterintuitive results yielded by the counterfactual but-for test in cases of causal overdetermination has led some commentators to advocate its abandonment,[71] and others to advocate substitution of an alternative test in instances of causal overdetermination.[72] Typically, proponents of total or partial abandonment of the but-for test have championed a substantial-factor formula in its place, under which the defendant's conduct is a cause of the harm if it is a substantial factor in producing that harm.[73] They have heralded the substantial-factor approach for its avoidance of counterfactual inquiry. Leon Green, for example, advocated the substantial-factor formula primarily to avoid counterfactual inquiry, which Green believed "take[s] the eye off the ball" by focusing on what would have happened, instead of on what did happen.[74] Of course, to the extent that these advocates of the substantial-factor formula have retained the but-for test for cases that are

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N.W. 561 (Wis. 1898); *cf.* Corey v. Havener, 65 N.E. 69 (Mass. 1902) (involving two noisy motorcycles, either of which alone could have frightened the plaintiff's horse).

69. *E.g.*, Wright, *supra* note 28, at 1775. Preemptive causes can also beat the preempted cause to the punch by overtaking it and neutralizing it. For instance, in a much-discussed variant of the poisoning hypothetical, *A* puts poison in *B*'s canteen before *B* sets out for a trip through the desert. *C*, thinking that the canteen contains pure water, steals it from *B* in the desert. *B* dies of thirst. *E.g.*, *id.* at 1802. The original source of this hypothetical is found in James A. McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 155 n.25 (1925).

70. In describing these as cases of duplicative causation and preemptive causation, I have adopted Professor Wright's terminology in lieu of such other labels as concurrent causes, additional causes, or alternative causes. *See* Wright, *supra* note 28, at 1775-76.

71. *See, e.g.*, LEON GREEN, RATIONALE OF PROXIMATE CAUSE, 137-41 (1927).

72. *See, e.g.*, WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS, § 41, at 239-40 (4th ed. 1971); William L. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 375-79 (1950).

73. *See supra* notes 71-72. Leon Green ultimately became disenchanted with the substantial-factor test, although he was not willing to substitute the but-for test for it. *See* Green, *supra* note 19, at 553-58. The originator of the substantial-factor formula, Jeremiah Smith, intended it as a guide to rationalizing decisions relating to proximate cause. Smith considered the but-for test to be an appropriate test for factual causation except in certain causally overdetermined cases. Jerimiah Smith, *Legal Cause in Actions in Tort*, 25 HARV. L. REV. 103, 108-10 (1911); *see also* Wright, *supra* note 28, at 1781.

The Restatement (Second) of Torts' treatment is particularly muddled. It adopts a substantial-factor formula, but it also requires that an actor's conduct be a necessary cause of the harm to qualify as a substantial factor, except in cases of two active forces operating concurrently where each is sufficient to cause the harm. RESTATEMENT (SECOND) OF TORTS §§ 431-432 (1965). The Restatement also notes that even when the definition of legal cause includes the idea of but-for causation, a but-for cause may be deemed insufficiently substantial, and hence not a legal cause. *Id.* § 431 cmt. a. Moreover, the substantial-factor test, as described by the Restatement, blurs the lines between factual causation and legal or proximate cause. *See id.* § 433.

74. Green, *supra* note 19, at 556, 559-60. For similar criticism of the but-for test, see

not causally overdetermined, they have not eliminated a counterfactual test of causation in most tort cases.[75]

More important, the substantial-factor approach is an inadequate solution to the causal overdetermination problem. First, it smuggles noncausal policy considerations, which normally are confined to the duty or proximate cause analysis, into the analysis of factual causation.[76] Second, the formula is either contentless, or it reintroduces and complicates counterfactual inquiry. It directs the factfinder to measure the significance or substantiality of a particular cause against an unspecified yardstick.[77] To the extent that the determination of substantiality is causal at all, the factfinder must measure substantiality of a cause either relative to an unexpressed (indeed, Deans Prosser and Green tell us an inexpressible) threshold that divides substantial from insubstantial causes, or relative to other causes of the event.

The first possibility suggests a quantitative approach under which we would designate as substantial any cause whose importance quotient exceeded some agreed upon minimum.[78] But, if we cannot articulate the idea of causal substantiality with some specificity, how can we expect to quantify it?

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generally Thode, *supra* note 19; Mark C. Weber, *Beyond* Price Waterhouse v. Hopkins: *A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495 (1990).

75. Indeed, the substantial-factor formula and its close kin, the dominant-motive test, which surface in a variety of settings including intentional interference with contractual relations, malicious prosecution, and retaliatory eviction, do not escape the need for counterfactual analysis. *See infra* note 79 and accompanying text. For a discussion of applications of the two tests, see Weber, *supra* note 74, at 507-13. Obviously, I disagree with Professor Weber's conclusion that under these tests the "court's question [is] purely factual, not counterfactual." *Id.* at 513.

76. The substantial-factor approach authorizes selection or ranking among necessary causes on the basis of noncausal criteria. *See* RESTATEMENT (SECOND) OF TORTS § 433 (1965). The factfinder must determine not only that the conduct in question caused the harm, but also that it "played an *appreciable* part in the result." GREEN, *supra* note 71, at 134. For a critique of Green's approach, see HART & HONORÉ, *supra* note 29, at 293-95; Wright, *supra* note 28, at 1782-84. Wright notes the irony of Green, who argued vigorously for the insulation of the factual causation issue from the policy issues that lurked behind the proximate cause analysis, readmitting noncausal policy considerations into the determination of factual causation by use of the substantial-factor formula. *Id.* at 1782.

77. Indeed, proponents of the substantial-factor formula acknowledge, sometimes even applaud, the formula's irreducibility to more definite terms. Leon Geen argued that the formula "cannot be reduced to any lower terms; it has no multiples." GREEN, *supra* note 71, at 137. Presumably, Green intended "factors" instead of "multiples." William Prosser contended that "[t]he phrase is sufficiently intelligble to any layman to furnish an adequate guide to the jury." Prosser, *supra* note 72, at 379. Green eventually concluded that the value of the substantial factor formula "is slight." Green, *supra* note 19, at 554.

78. Inclusion in or exclusion from the community of substantial causes would operate much like the process of determining whether a child can ride on the go-karts at a carnival. We would, in effect, make a cause stand against the wall to see whether it reached some prescribed size. One might imagine a different, nonquantitative technique based on ideal types of substantial and insubstantial causes. Conceivably, we

The second approach suggests that we can rank contributing causes by importance. Because it is not obvious that there can be degrees of causal necessity, some scholars have argued that any talk of one necessary cause being more important than another is meaningless.[79] Others contend that it is possible to compare causal weight, but only by making counterfactual comparisons. They argue that to show that *A* was a more important cause of *P* than was *B*, we must show that "had *B* not occurred, something would have occurred which more closely approximates *P* than had *A* not occurred."[80] As we multiply the number of causes to be compared, we also increase the complexity of the counterfactual task inhering in the effort to identify substantial causes. Thus, unless the substantial-factor formula is merely a means for using noncausal criteria to select legally responsible causes, it requires greater reliance on counterfactual inquiry than does the but-for test. Consequently, if the substantiality inquiry is to be causal at all, it must be so at the expense of expanding the counterfactual inquiry required by the but-for test.

We are thus thrown back onto a necessity notion of causation. Friends of this approach take either of two tacks in response to the causal overdetermination problem. Some, like the English philosopher J.L. Mackie, attempt to refine, and thereby salvage, the but-for test.[81]

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could compare causal candidates to ideal type substantial and insubstantial causes and determine substantiality by the strength of the analogy between the causal candidates and our ideal types. It is doubtful that factfinders use either technique in determining whether something was a substantial cause.

79. *See, e.g.*, Roy J. Aiken, *Proportioning Comparative Negligence—Problems of Theory and Special Verdict Formulation*, 53 MARQ. L. REV. 293, 296 (1970); John Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419, 449-51 (1979); Mark Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 CHI.-KENT L. REV. 579, 579 (1987).

80. *See, e.g.*, RAYMOND MARTIN, THE PAST WITHIN US: AN EMPIRICAL APPROACH TO PHILOSOPHY OF HISTORY 78 (1989); Michael Hammond, *Weighting Causes in Historical Explanation*, 43 THEORIA 103, 110-27; Andrus Pork, *Assessing Relative Causal Importance in History*, 24 HIST. & THEORY 62, 63-69 (1985).

81. Mackie explains, in the case of causal preemption, that although neither the preemptive nor the preempted cause may be said to be a but-for cause of the result "described in some broad way," the preemptive cause is a necessary cause of the result "*as it came about.*" J.L. MACKIE, THE CEMENT OF THE UNIVERSE: A STUDY OF CAUSATION 46 (1974); *see also* ROLLINS M. PERKINS, CRIMINAL LAW 689 (2d ed. 1969). Thus, to use the example of *A* who shoots and kills *B* just as *B* is about to drink poisoned tea, Mackie would have us look for a completed causal story to determine the cause of *B*'s death. We can complete the causal story that includes the shooting of *B* using conditions that actually occurred—a bullet entering *B*'s body and his subsequent death. We cannot similarly trace the causal story that includes the poisoning of *B*'s tea to its completion using conditions that actually occurred. Therefore, Mackie would conclude that *A*'s act, but not the poisoner *C*'s, was a but-for cause of *B*'s death as it came about. MACKIE, *supra*, at 46.

Mackie must adopt a different strategy to deal with duplicative causes. In such cases, because "even a detailed causal story fails to discriminate between the rival candidates for the role of cause, we cannot say that one rather than the other was necessary in the circumstances even for the effect *as it came about.*" *Id.* at 47. Instead, Mackie concludes that neither causal candidate singly was a cause of the event, but that the conjunction of the duplicative causes was a but-for cause. *Id.* For a similar treatment of causal overdetermination, see C. BEHAN MCCULLAGH, JUSTIFYING HISTORICAL DESCRIPTIONS 178-81 (1984).

Alternatively, some have salvaged the notion of causal necessity by subordinating it to the requirement of causal sufficiency. Professor Richard Wright has articulated this approach most fully and clearly.[82] Following the suggestion of Hart and Honoré, he adopts a "necessary element of a sufficient set" (NESS) test of causation.[83] Under this approach a condition is a cause of some outcome "*if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence.*"[84]

To examine these attempts by proponents of the substantial-factor test to avoid counterfactual questions, we need not decide between Mackie's and Wright's accounts of causation. The important points are that the substantial-factor test fails to avoid counterfactual questions and that both Mackie's and Wright's accounts describe causation in terms of causal necessity and therefore, as each recognizes, in terms of counterfactual inquiry.[85]

ii. Informed Consent

Another attempt at counterfactual avoidance by reframing a legal question appears in medical informed consent cases. An element of a plaintiff's medical informed consent case is the causal connection between the physician's nondisclosure of medical risks and the plaintiff's harm. The patient must prove not only that the procedure consented to caused the harm, but also that had the physician

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82. *See* Wright, *supra* note 28.

83. *See id.* at 1788; *see also* Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1019 (1988). Professor Wright credits H.L.A. Hart and Tony Honoré as the originators of the necessary element of a sufficient set (NESS) test of factual causation. HART & HONORÉ, *supra* note 29, at 111-17, 122-25, 128-29. J.L. Mackie subsequently formulated a similar test, the insufficient but necessary element of an unnecessary but sufficient set (INUS) test. MACKIE, *supra* note 81, at 60-63. As described above, however, Mackie's approach actually is to apply a revised version of the but-for test to solve the problem of causal overdetermination. *See supra* note 81 and accompanying text.

84. Wright, *supra* note 28, at 1790. The NESS test resolves the problem of causal preemption by requiring that the causal candidate be a member of a set of *actual* antecedent conditions that was sufficient for the injury. For example, in the case of *A* who shoots and kills *B* just as *B* is about to drink tea poisoned by *C*, *A*'s act was a necessary element of a set of actual antecedent conditions that was sufficient to cause *B*'s death. *C*'s poisoning of the tea, however, was not a necessary element of a sufficient set of actual antecedent conditions because *B* did not drink the tea; it was not an *actual* condition. *Id.* at 1794-95. *C*'s poisoning of the tea was not necessary for the sufficiency of the set of conditions that included *A*'s shooting of *B*.

The NESS test resolves the duplicative causation cases by requiring only that a cause be a necessary element of a sufficient set of actual antecedent conditions. It recognizes that there may be more than one such set of actual antecedent conditions that is sufficient to cause the consequence, and thus more than one cause that satisfies the NESS test. *Id.* at 1791-94.

85. Our counterfactual questions will look different, however, depending on whose account of causation we adopt.

disclosed the risk, he would have declined to undergo the procedure.[86] This second (counterfactual) element of proof has been termed "decision causation."[87] Most courts facing this question of decision causation have decided that it should be determined under an objective standard—whether a prudent person in the patient's position would have submitted to the procedure if he had been informed adequately.[88] They have cast the question in these objective terms rather than in terms of the decision that the patient would have made because of the belief that the latter question requires the factfinder to decide whether to credit the plaintiff's "speculative answer to a hypothetical question."[89] These courts recognize that the plaintiff's resolution of the counterfactual question will be tinged with regret that the undisclosed hazard has materialized, and with self-interest in the result of the litigation.[90] Consequently, these courts fear that the factfinder will be unable to evaluate the question of causation posed in subjective terms.[91] Of course, the shift from a subjective to an objective standard alters, but does not eliminate, the counterfactual.[92]

b. Avoidance by Burden Shifting

In cases of causal uncertainty[93] it is difficult, and sometimes impossible, to decide which among two or more rival causal candidates actually caused the harm.[94] Courts sometimes resolve the causal uncertainty dilemma by shifting the burden of proof to the defendant to negate a presumption of causation. Sometimes courts shift

86. Canterbury v. Spence, 464 F.2d 772, 790 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 502 P.2d 1, 11-12 (Cal. 1972).

87. Alan Meisel & Lisa D. Kabnick, *Informed Consent to Medical Treatment: An Analysis of Recent Legislation*, 41 U. PITT. L. REV. 407, 438-39 (1980); Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL. L. REV. 607, 617.

88. *See, e.g., Canterbury*, 464 F.2d at 787.

89. *Id.* at 791.

90. *See, e.g., id.* at 790-91; *Cobbs*, 502 P.2d at 11-12. Most courts that have faced the issue have adopted an objective test. Twerksi & Cohen, *supra* note 87, at 614 n.28 & 615 n.31. *But see* Scott v. Bradford, 606 P.2d 554, 559 (Okla. 1979).

91. *Cobbs*, 502 P.2d at 11.

92. The subjective and the objective tests are both "but-for" tests. Meisel & Kabnick, *supra* note 87, at 440. Thus, the move from a subjective to an objective test recasts the counterfactual, but does not avoid it. Professors Twerski and Cohen propose another avoidance strategy. They would reframe the informed choice action from one centering on personal injury to one focusing on the deprivation of the right to participate in the decisionmaking process. Twerski & Cohen, *supra* note 87, at 648-65; *cf.* Gouse v. Cassel, 561 A.2d 797 (Pa. Super. Ct. 1989), (holding that physician's failure to obtain informed consent constitutes a battery requiring no proof that patient would not have consented had he been informed of the risks), *petition to appeal granted*, 569 A.2d 1367 (1990).

93. Although causal overdetermination creates uncertainty as to the actual cause of an event, I intend the phrase "causal uncertainty" to describe instances where it is difficult to determine which causal candidate caused the harm, but where there is no reason to suspect causal overdetermination. Cases of causal overdetermination, as we have seen above, involve either duplicative causes or causal preemption. *See supra* notes 67-69 and accompanying text.

94. We experience causal uncertainty when it is as likely as not that the causal candidate advanced in litigation was not a cause of the harm even if we cannot describe its causal rival beyond denominating it "cause unknown."

the burden of proof to undo the normal consequences of the plaintiff's inability to identify the cause of his harm. In a second line of cases, however, courts shift the burden of proof to avoid an individualized counterfactual inquiry by substituting in its stead a generalized solution to the counterfactual.

A classic example of the first kind of burden shifting is *Summers v. Tice.*[95] There, two hunters, both using the same gauge shotgun and same size shot, both negligently fired in the direction of the plaintiff. A shotgun pellet, fired by one of the hunters, lodged in the plaintiff's eye.[96] The trial judge, sitting without a jury, found that both defendants were negligent and, unable to determine whose shot hit the plaintiff, awarded judgment against both of them.[97] The California Supreme Court, holding that under the circumstances the burden of proof properly shifted to the defendants to disprove causation, affirmed the judgment.[98]

Informed choice claims grounded in the defendant's nondisclosure of a material fact and misrepresentation claims often share with cases like *Summers* this characteristic of causal uncertainty. In such cases, the factfinder must select between two (or sometimes more) rival explanations for the harm: the defendant's nondisclosure (or misrepresentation) and the plaintiff's desire to undergo the procedure (or to buy Florida swampland, or whatever), a desire that would not have been deterred by an adequate and accurate disclosure by the defendant.

In some of these cases courts will impose a burden-shifting presumption of causation. For example, in products liability failure to warn cases, but not in medical informed consent cases, many courts will apply a rebuttable presumption "that the consumer would have read any warning provided by the manufacturer, and acted so as to minimize the risks."[99] In effect, by assuming causation the court

95. 199 P.2d 1 (Cal. 1948).
96. *Id.* at 1-2.
97. *See id.* at 2-3.
98. *Id.* at 4; *see also* Sindell v. Abbott Lab., 607 P.2d 924 (Cal.), *cert. denied,* 449 U.S. 912 (1980); Haft v. Lone Palm Hotel, 478 P.2d 465 (Cal. 1970); Malone, *supra* note 19, at 71. In *Summers,* the California Supreme Court did not try to resolve the counterfactual, but rather tried to undo the consequences of the inability to determine causation.
99. Reyes v. Wyeth Lab., 498 F.2d 1264, 1281 (5th Cir.) (applying Texas law), *cert. denied,* 419 U.S. 1096 (1974); *see also* Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d 541, 555 & n.12 (Ind. Ct. App. 1979); Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820, 826-27 (Ind. Ct. App. 1975), *rev'd on other grounds,* 358 N.E.2d 974 (1976); Wolfe v. Ford Motor Co., 376 N.E.2d 143, 147 (Mass. App. Ct. 1978); Butz v. Werner, 438 N.W.2d 509, 516-17 (N.D. 1989); Technical Chem. Co. v. Jacobs, 480 S.W.2d 602, 606 (Tex. 1972); Menard v. Newhall, 373 A.2d 505, 506 (Utah 1977). *But see* Sheehan v. Pima County, 660 P.2d 486, 489 (Ariz. Ct. App. 1982) (refusing to apply presumption in polio vaccine context because of remote chance of harmful effects and fact that vaccine had approval of federal government and National Academy of Pediatrics); Potthoff v. Alms, 583 P.2d 309, 311 (Colo. Ct. App. 1978) (holding plaintiff not entitled to presumption, at least in case where dangerousness of product, an

avoids, at least in the first instance, the need to make a particularized counterfactual inquiry. Instead, particularly in the products liability failure to warn cases, the court imposes a generalized finding on a class basis of how things would turn out in a counterfactual world. Of course, the presumption is rebuttable: particularized evidence showing that it should not apply in an individual case will restore the particularized counterfactual inquiry. For instance, evidence in warning cases that the plaintiff knew of the danger and nonetheless willingly encountered it will suffice to rebut the presumption against the defendant on the issue of causation.[100]

Courts only sometimes resort to burden shifting. For every instance where the court shifts the burden of proof regarding causation there are many instances where they let it remain with the plaintiff. Attempts to rationalize this decisional law are unpersuasive.[101]

c. Avoidance by Burying the Question: Jury Questions and Multifactor Analyses

Courts often evade the counterfactual question by leaving it to the jury.[102] That strategy fails to avoid the counterfactual inquiry or to resolve the question of how to answer it. Instead, it merely hands the problem to the jury, which, as a "black box" decisionmaker, presents its judgment with little accountability for its analysis of the counterfactual.[103] Similarly, Professor Thode, an opponent of the but-for analysis of factual causation in tort, advocated that courts

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earth scraper, was obvious). For criticism of the read and heed presumption, see Henderson & Twerski, *supra* note 61, at 278-79, 303-10, 325-26; Twerski & Cohen, *supra* note 87, at 624-26. For further discussion, see *infra* notes 149-50 and accompanying text.

100. *E.g.*, Thomas v. Baltimore & O.R.R., 310 A.2d 186 (Md. Ct. Spec. App. 1973) (finding presumption rebutted by evidence of plaintiff's knowledge of danger even in absence of warning signs). Similarly, evidence that plaintiff did not read the labels or materials that should have contained an adequate warning or instruction will suffice to rebut the presumption. *E.g.*, Bloxom v. Bloxom, 512 So. 2d 839, 850-51 (La. 1987) (denying recovery to plaintiff who had not read automobile owner's manual, despite inadequate warning contained therein).

101. In his classic discussion of factual causation, Professor Malone argued that courts base their decisions to lower or shift the burden of proof on causation on the policies underlying the substantive claims of the litigants. Malone, *supra* note 19, at 71-88. Professor Wright shows that Malone's attempt to rationalize the cases in terms of underlying substantive law policies is unpersuasive. Instead, he argues that the courts in these cases typically are applying principles that underlie the actual causation requirement, rather than those underlying the substantive law in question. Wright *supra* note 28, at 1809-13.

102. *E.g.*, Cipollone v. Ligget Group, Inc., 683 F. Supp. 1487, 1496 (D.N.J. 1988) (Stating that whether habitual smoker who had heard, but discounted, information about the dangers of smoking would have altered her behavior had cigarette manufacturer warned of risks of smoking before 1966 was question for jury), *aff'd in part and rev'd in part*, 883 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386, *restored to calender for reargument*, 116 L. Ed. 2d 276 (1991).

103. A. Leon Higginbotham, Jr., *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1051 (1991) (describing jury decisions as a "collective hunch" and obscured from public view as "black box decisions"); *cf.* RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 106 (1980) ("Judicial deference to the jury does not solve the proof problems lurking in the causation issue [in failure to warn cases]; it only removes them from public view.").

consider the counterfactual question as part of a multifactor analysis of whether defendant owed a duty to plaintiff.[104] Thode's solution, like that of delegating responsibility to the jury, fails as an avoidance technique and offers no guidance regarding how to evaluate the counterfactual. It merely "allow[s] the dilemma to slip unseen and unnoticed into the great sea of 'duty,' " by making the but-for inquiry one of many factors for the judge to weigh in deciding whether the defendant owed the plaintiff a duty.[105]

d. Avoidance by Denying "Speculative" Remedies

Finally, legal decisionmakers sometimes recast substantive law to avoid counterfactual inquiries. Courts and other legal decisionmakers deny certain remedies to avoid what they consider to be speculative valuation of the harms suffered. Traditionally, courts have been reluctant to remedy contract claims for expected losses that are uncertain or speculative.[106]

A similar lack of confidence underlies the NLRB's refusal to grant make-whole remedies to compensate employees for employer bad-faith bargaining in violation of the National Labor Relations Act of 1935 (NLRA).[107] The NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."[108] When the NLRB determines that an employer has refused to engage in good-faith bargaining, its conventional remedy is prospective—an order to bargain in good faith in the future. The Board's remedial approach leaves employees without redress for forgone bargaining gains, enriches the employer by her postponement of bargaining, and weakens the process of collective bargaining.[109] It encourages employer violation of the NLRA to

104. Thode, *supra* note 19, at 429-30.

105. Henderson, *supra* note 63, at 196-97 & n.30.

106. *See supra* note 55 and accompanying text.

107. 29 U.S.C. §§ 151-169 (1988). Counterfactual avoidance is not the only theme in the Board's decisions denying the availability of a make-whole remedy. The Board also believes that its decision is compelled by the logic of H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970), in which the United States Supreme Court held that the Board cannot compel an employer to agree to a particular bargaining agreement clause as part of its remedy for the employer's bad-faith bargaining. Ex-Cell-O Corp., 185 N.L.R.B. 107, 109-10 (1970).

108. 29 U.S.C. § 158(a)(5) (1988).

109. *See* International Union of Elec., Radio and Mach. Workers v. NLRB, 426 F.2d 1243, 1249 (D.C. Cir.) [hereinafter *Tiidee Prods.*] (recognizing that the NLRB's prospective order to bargain allows an employer to benefit from the initial avoidance of collective bargaining), *cert. denied*, 400 U.S. 950 (1970); Stephen I. Schlossberg & John Silard, *The Need for a Compensatory Remedy in Refusal-to-Bargain Cases*, 14 WAYNE L. REV. 1059, 1063-67 (1968) (arguing that the NLRB's denial of compensation for damages causes real financial injury to the worker, rewards the employer for violating the NLRA, and invites other employers to commit similar violations); Theodore J. St. Antoine, *A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039, 1042 (1968) (arguing that the

capture the value of postponed bargaining concessions and to dissipate employee resolve and support for the union as their bargaining representative.[110]

In a series of decisions in the late 1960s and early 1970s, NLRB trial examiners, the Board, and the United States Court of Appeals for the District of Columbia Circuit confronted the questions of whether a make-whole remedy was appropriate and, if so, how it might be valued.[111] The trial examiners in two decisions concluded that a make-whole remedy was appropriate and calculable,[112] as did the D.C. Circuit under the limited circumstances presented in *Tiidee Products.*[113]

The Board, however, refused to order make-whole relief in these and similar cases in part because it believed that such relief called for an overly speculative inquiry into the bargain that the union and the employer would have made. The Board explained its position in *Ex-Cell-O,* stating:

> Who is to say in a specific case how much an employer is prepared to give and how much a union is willing to take? Who is to say that a favorable contract would, in any event, result from the negotiations? . . . To answer these questions the Board would be required to engage in the most general, if not entirely speculative, inferences to reach the conclusion that employees were deprived of specific benefits as a consequence of their employer's refusal to bargain.[114]

NLRA should grant employees reimbursements for lost wages and benefits that would have been obtained by collective bargaining).

110. *Tiidee Prods.*, 426 F.2d at 1249. Professor Paul Weiler estimates that unions forced to rely on a court order to compel bargaining by the employer will obtain a first contract less than twenty percent of the time. Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation,* 98 HARV. L. REV. 361 n.31 (1984). Professor Weiler further notes that many unions that do obtain a first contract will fail to obtain any significant gains for all of their efforts to compel good faith bargaining. Such unions may have won a contract, but will have lost the hearts and minds of their members, and they will face a difficult task mustering the necessary support for the next round of bargaining. *Id.* at 361.

111. Herman Wilson Lumber Co., 185 N.L.R.B. 914 (1970); Zinke's Foods, Inc., 185 N.L.R.B. 901 (1970); Rasco Olympia, Inc., 185 N.L.R.B. 894 (1970); Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970), *enforced,* 449 F.2d 1058 (D.C. Cir. 1971); Tiidee Prods., Inc., 174 N.L.R.B. 705 (1969), *enforced and remanded sub nom.* International Union of Elec., Radio and Mach. Workers v. NLRB, 426 F.2d 1243 (D.C. Cir.), *cert. denied,* 400 U.S. 950 (1970).

112. *Zinke's,* 185 N.L.R.B. at 909-11; *Ex-Cell-O,* 185 N.L.R.B. at 124-29. The trial examiners in both cases ruled that the amount of damages should be determined in a supplemental hearing before the Board. *Zinke's,* 185 N.L.R.B. at 911-12; *Ex-Cell-O,* 185 N.L.R.B. at 126-29.

113. 426 F.2d at 1253. The court described Tiidee Products' refusal to bargain as "a clear and flagrant violation of the law," and its objections to the election in which its employees had selected the union as their bargaining representative as "patently frivolous." *Id.* at 1248. By contrast, the court, in sustaining the Board's refusal to grant a monetary remedy in *Ex-Cell-O,* described the employer's objections to certification of the union as "fairly debatable," rather than "frivolous" or in "bad faith." Ex-Cell-O Corp. v. NLRB, 449 F.2d 1058, 1065 (D.C. Cir. 1971).

114. *Ex-Cell-O,* 185 N.L.R.B. at 110; *see also Tiidee Prods.,* 194 N.L.R.B. at 1235 ("We know of no way by which the Board could ascertain with even approximate accuracy . . . what the parties '*would* have agreed to' if they had bargained in good faith.").

By casting the substantive law of remedies this way, the Board avoided counterfactual inquiry.

e. The "Problem of Relevant Conditions"[115]

Opponents of make-whole relief also question its proponents' factual assumptions about the counterfactual world in which the employer bargained with the union. The good-faith bargaining requirement does not entail a statutory obligation to agree to any proposed term or to reach agreement at all.[116] Thus, given employer hostility toward the union and collective bargaining, they question the assumption that the employer, had it complied with the statutory duty to bargain, would have made any bargaining concessions. In his *Tiidee Products* dissent, Judge MacKinnon wrote that "the history of this case seems to make it clear that the most realistic prediction would be that the parties would not have agreed to anything. Any other conclusion is difficult to reach in light of the Company president's 'antiunion animus' and the 'patently frivolous' objections to the election."[117]

Judge MacKinnon's dissent raises the problem of relevant conditions—the question of what facts may we accept as true about a counterfactual world. Seldom does the counterfactual's consequent follow from the antecedent alone as a matter of logical implication. Instead, in the counterfactual world, the antecedent implies the consequent only in conjunction with other attendant circumstances. Thus, we evaluate counterfactuals in terms of whether the antecedent, coupled with our other true premises, leads by way of a valid argument to the consequent.[118] Yet a false antecedent will require other changes in our counterfactual world. Certain facts about the actual world cannot be asserted once we introduce the counterfactual antecedent. They are not, to use Nelson Goodman's term, "cotenable" with the antecedent.[119]

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115. The phrase "the problem of relevant conditions" is Nelson Goodman's. GOODMAN, *supra* note 10, at 9-17, 36-37 & n.5.

116. H.K. Porter Co. v. NLRB, 397 U.S. 99, 106-08 (1970).

117. *Tiidee Prods.*, 426 F.2d at 1256 (MacKinnon, J., dissenting).

118. GOODMAN, *supra* note 10, at 36-37; DAVID K. LEWIS, COUNTERFACTUALS 63, 68-69 (1973).

119. GOODMAN, *supra* note 10, at 14-17. David Lewis notes that if we consider the counterfactual "if kangaroos had no tails they would topple over":

> We might think it best to confine our attention to worlds where kangaroos have no tails and *everything* else is as it actually is; but there are no such worlds. Are we to suppose that kangaroos have no tails but that their tracks in the sand are as they actually are? Then we shall have to suppose that these tracks are produced in a way quite different from the actual way. Are we to suppose that kangaroos have no tails but that their genetic makeup is as it is? Then we shall have to suppose that genes control growth in a way quite different from the actual way (or else that there is something, unlike anything there actually is, that removes the tails). And so it goes; respects of

Counterfactuals perplex us partly because of the problem of relevant conditions, of deciding which background facts should be part of the counterfactual world. Unlike the proponents of make-whole relief, Judge MacKinnon would not assume away the employer's unwillingness to reach agreement with the union on terms acceptable to it or its members under counterfactual good-faith bargaining. Instead, Judge MacKinnon concluded that the likeliest outcome in such a counterfactual world would be no contract, and hence no loss to make whole. A more optimistic prediction of what Tiidee Products "would have agreed to"[120] could not be sustained by the conjunction of the counterfactual antecedent and the background facts of the case, and must instead reflect a normative judgment of what the employer "*should* have agreed to."[121] But such a judgment is clearly an impermissible basis for a remedy under *H.K. Porter.*[122]

2. *Attempts to Resolve the Counterfactual Question*

Legal decisionmakers attempt to avoid only some counterfactual questions, and as described above,[123] they sometimes simply substitute one counterfactual question for another. Can we draw on the cases in which courts squarely confront counterfactual questions to analyze and criticize what courts do with them?

Obviously, if counterfactuals (at least implicit ones) are as pervasive in legal decisions as I contend, there ought to be a wealth of decisions to draw upon. And there are cases that we might fruitfully analyze to sharpen our sense of how legal decisionmakers try to resolve counterfactual questions. Yet, the nature of the legal records that we typically study and of counterfactuals themselves limit our ability to generate a Restatement of Counterfactuals.

There is at once too little and too much out there. To begin, the most readily available records of legal decisionmaking are appellate opinions. Although the task of resolving legal counterfactuals typically falls to the legal factfinder, rules of appellate review discourage exhaustive scrutiny of the factual findings.[124] Furthermore, if

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similarity and difference trade off. If we try too hard for exact similarity to the actual world in one respect, we will get excessive differences in some other respect.

LEWIS, *supra* note 118, at 9.

120. *Tiidee Prods.*, 426 F.2d at 1256 (MacKinnon, J., dissenting).

121. *Id.*

122. *See id.* Although Judge MacKinnon writes specifically of the circumstances of Tiidee Products, presumably he would reach the same conclusion about any employer that met the conditions of *Tiidee Products*, i.e., where the employers resistance to bargaining was based on "patently frivolous" objections to certification and constituted "a clear and flagrant violation of the law." *Id.* at 1248.

123. *See supra* notes 73 & 80 and accompanying text.

124. FED. R. CIV. P. 52(a) ("Findings of fact [by a trial court] . . . shall not be set aside unless clearly erroneous."); *see also* 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2585, at 729 (1991) (stating that trial court's findings of fact must be treated as "presumptively correct"). Often, where the reviewing court confronts the counterfactual question, the trial court has granted a summary judgment motion or a motion to dismiss, and the factual context has not been developed by a full-fledged trial. In other instances, the court's decision may address the nature of the counterfactual question dictated by the substantive law, but not the question of how to

counterfactuals are condensed arguments, as J.L. Mackie argues,[125] then there are as many plausible or implausible, successful or unsuccessful resolutions of counterfactuals as there are plausible or implausible and successful or unsuccessful kinds of arguments. There are, in other words, too many legal counterfactuals out there to catalogue by genus and species. Nevertheless, it is possible to glean something more modest than a restatement from some cases involving counterfactuals.

a. Counterfactuals Implicating Scientific Knowledge

We typically demonstrate our greatest confidence in our ability to resolve counterfactuals when they may be answered with reference to laws of nature. We are apt to credit expert testimony that applies scientific knowledge to counterfactual questions without concern about the uncertainty of hypothetical events. We will credit, for example, expert testimony that an alternative design of a car frame would have prevented a fixed pole from a penetrating plaintiff's car more than 9.9 inches, thereby preventing serious injury,[126] or that a defendants' eighteen-hour delay in procuring medical attention for plaintiff's decedent probably caused his pneumonia and eventual death.[127]

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determine which of two competing accounts of the counterfactual ought to be believed. For example, in informed consent cases there are several decisions dealing with whether a subjective or objective standard applies in determining decision causation. *See, e.g.*, *supra* notes 86 & 90. Those cases, in other words, decide whether part of the plaintiff's case is a showing that if the physician had adequately informed her of a particular material risk she would have foregone the treatment that resulted in her injury, or a showing that a reasonable person under like circumstances would, if adequately informed, have foregone the treatment. There are almost no published cases that review a factfinder's resolution of either form of the informed consent decision causation counterfactual. *But see* Shetter v. Rochelle, 409 P.2d 74, 83 (Ariz. 1965) (overturning award of damages for informed consent claim growing out of cataract surgery where after initial medical mishap the plaintiff consented to cataract operation on the other eye with another surgeon); Smith v. Auckland Hosp. 1965 N.Z.L.R. 191 (1964) (finding on appeal that plaintiff would not have consented to operation had he been informed of risk of loss of leg). In one of the leading informed consent cases, Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972), the plaintiff alleged, among other things, that he had not given informed consent for his operation, a laminectomy. *Id.* at 778. Canterbury lost on retrial after the defendants showed that he had submitted to a subsequent laminectomy, despite the bad consequences of his first one. *See* LAW, SCIENCE AND MEDICINE 383 (Judith Areen et al. eds., 1984).

125. MACKIE, *supra* note 81, at 53-54; MACKIE, *supra* note 20, at 86-89.

126. Dawson v. Chrysler Corp., 630 F.2d 950, 958 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

127. Dunham v. Village of Canisteo, 104 N.E.2d 872, 876 (N.Y. 1952); *cf.* Barnett v. Chelsea & Kennington Hosp. 1 All E.R. 1068 (Q.B. 1967) (determining that doctor's negligent failure to admit patient was not cause of death by arsenic poisoning because poison would have killed patient before diagnosis and treatment could have occurred); *see also* Harley-Davidson, Inc. v. Toomey, 521 So. 2d 971, 972-74 (Ala. 1988) (finding relevant expert testimony that alternative design of a motorcycle helmet face shield would not have clouded with condensation and obscured plaintiff's vision); Jackson v.

Of course, circumstances may undermine our confidence in expert medical or scientific testimony. The expert's conclusions may rest on questionable or unspecified factual assumptions,[128] or on statistical evidence relating to broad classes of events rather than on the specific circumstances underlying the case at hand.[129] Opposing experts may dispute the conclusions,[130] or the conclusions simply may be highly speculative with little grounding in fact.[131] Nevertheless, we often credit counterfactuals that rest on applications of laws of science.

Why are we more receptive to counterfactuals relating to laws of nature than to ones concerning human reactions and behavior? After all, few of us are scientists, and scientific explanations are often complex and beyond the ken of the layperson—hence the need for expert testimony (and translation). Moreover, each day we make many predictions drawn from our generalizations about human behavior, ranging from expectations about how other drivers will behave to predictions about what our bosses, coworkers, neighbors, spouse, or children will say or do in particular situations.[132] Although we may make certain scientific predictions—we look to the East to see the sun rise, to the West to see it set—we doubtless feel more confident about our overall ability to generalize about and predict human behavior.

Perhaps their inaccessibility is part of the appeal of counterfactuals that rely on scientific principles. If we must engage in this precarious business of resolving counterfactuals, why not delegate the task, and the responsibility for error, to someone else (the expert), something we cannot do when we all have access to the knowledge

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Ray Kruse Constr. Co., 708 S.W.2d 664, 666 (Mo. 1986) (en banc) (finding relevant expert testimony that had landlord provided speed bump in its apartment building driveway, bicycle that hit plaintiff would have been traveling at a quantifiably slower speed at moment of impact); Herskovits v. Group Health Coop., 664 P.2d 474, 475 (Wash. 1983) (en banc) (involving expert testimony that had defendant diagnosed plaintiff's husband's lung cancer six months sooner he would have had a 39% change of a five-year survival, instead of the 25% chance that he had when he was diagnosed).

128. *See Herskovits*, 664 P.2d at 480 (Pearson, J., concurring) ("Dr. Ostrow testified that if the tumor was at Stage 1 in December 1974, the chance of survival was reduced from 39 percent to 25 percent. He did not, however, indicate the likelihood of the tumor's being at Stage 1 in December 1974, either in terms of certainty, probability, or statistical chance."); *see also Ray Kruse Constr. Co.*, 708 S.W.2d at 666 & n.1, 667-78 (describing uncertain basis for assumptions relied upon by expert in calculating minimum speed of bicycle that struck plaintiff).

129. *See, e.g., Herskovits*, 664 P.2d at 475 (concerning testimony based on five-year survival rates for lung cancer patients with "stage 1" and "stage 2" tumors).

130. *See, e.g., id.* (noting conflicting testimony of defendant physician).

131. *See, e.g., Dunham*, 104 N.E.2d at 876 (involving expert testimony that 18-hour delay before providing medical examination contributed to decedent's death of pneumonia seven days later).

132. On prediction in everyday life, see J.H. HEXTER, THE HISTORY PRIMER 36-46, 94-95 (1971). Others have commented similarly on the ability of participants in the legal process to predict the outcome of concrete cases. *See* HUGH STRETTON, THE POLITICAL SCIENCES 216-20 (1969); Charles M. Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 CARDOZO L. REV. 917, 918-19 & n.6 (1985).

necessary to wrestle with the counterfactual question?[133]

Certainly, however, more than the instinct for evasion is at work here. The difference in our attitude stems largely from our belief that laws of nature, unlike other background facts, are not contingent, and therefore escape the problem of relevant conditions or cotenability.[134] We assume that laws of nature are unchanging and that they will operate in the usual way in a counterfactual world except in those rare instances where the antecedent negates a law of nature.[135] Consequently, many philosophers give a special place to laws of nature in their accounts of counterfactuals.[136] They argue that what distinguishes laws from "accidental" generalizations of fact is our willingness to accept the former as true not only for instances where the law has been checked, but also for unverified instances, including those instances where we apply the law to a counterfactual supposition. Thus, they argue, " 'accidental' universal propositions do not sustain counterfactuals in the way that causal laws do."[137]

Surely, however, the universe of causal laws is not restricted to laws of nature. We can make some lawlike statements about human conduct and behavior, at least if we frame them probabilistically. Yet we seem less willing to ground our counterfactuals in those

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133. On the modern tendency to abdicate decisionmaking responsibility, see generally JETHRO K. LIEBERMAN, THE TYRANNY OF THE EXPERTS: HOW PROFESSIONALS ARE CLOSING THE OPEN SOCIETY (1970).

134. *See supra* notes 115-22 and accompanying text.

135. "If pigs could fly . . ." requires some revisions of our thinking about biology, for instance. Legal counterfactuals do not involve antecedents that negate laws of nature.

136. *E.g.*, GOODMAN, *supra* note 10, at 19-20, 37-38; MACKIE, *supra* note 20, at 114-19; J.L. Mackie, *Counterfactuals and Causal Laws, in* ANALYTICAL PHILOSOPHY 66-80 (R. J. Butler ed., 1962); Chisolm, *Law Statements and Counterfactual Inference, in* CAUSATION AND CONDITIONALS 145-55 (Ernest R. Sosa ed., 1975); Mackie, *supra* note 81, at 196-203. *But see* Lewis, *supra* note 118, at 72-77 (arguing that under possible worlds approach to counterfactuals we will typically consider worlds with the same laws as those of an actual world i to be closer or more similar to i than are worlds in which i's laws are violated because of the considerable importance we place on laws, but arguing, further, that in some instances worlds in which i's laws are violated occasionally may be closest possible worlds to i).

137. MACKIE, *supra* note 136, at 66. We know accidental generalizations of fact, such as "all the coins in my pocket are silver," to be true only by testing all existing cases, and when we entertain a counterfactual supposition that alters the extension of the generalization, we undermine the evidence for believing the generalization. *Id.* at 70-74; *see also* GOODMAN, *supra* note 10, at 19-22, 37-38. Goodman gives the following example:

> It is true that every person now in this room is safe from freezing. It is also true that every person now in this room is English-speaking. Now consider a certain Eskimo who is at this moment nearly frozen to death somewhere in the Arctic. If he were now in this room he would be safe from freezing, but he would not be English-speaking. What makes the difference? We may say that the generalization about safety from freezing expresses a causal relationship or follows from a *law*, while the generalization about knowledge of English is only contingently or accidentally true . . . .

GOODMAN, *supra* note 10, at 37-38.

terms, and less confident about them when we do. This dissimilar treatment results from more than an exaggerated faith in the physical sciences.[138] It reflects our hesitance to relegate human actions to the deterministic realm of causal laws. Our flight from the equation of physical laws and laws of human behavior sometimes leads to an overconfidence in our ability to resolve legal counterfactuals involving scientific questions and a corresponding underconfidence in our ability to resolve those concerning human responses to altered circumstances.[139] Inevitably, however, we must plunge into the task of imaginatively exploring human responses to an altered past to help us decide cases.

b. Predictions About Human Behavior: Safety Device and Warning Cases

Cases posing counterfactual questions regarding human responses to changed circumstances abound in many corners of the law. Cases involving the failure to provide safety devices or to give adequate warnings are a useful model.

i. Demonstrating an Alternative Cause

In some instances the factfinder resolves the counterfactual by identifying an alternative to the causal candidate proposed by the plaintiff as the cause of her harm. The defendant persuasively responds to the plaintiff's assertion that "if the defendant had acted reasonably (by providing the safety device, or whatever) I would not have sustained an injury," with its negation that "even if I [defendant] had acted the way you say I should have, you would have sustained the same injury."[140]

For example, in *Thomas v. Baltimore & Ohio Railroad,*[141] the plaintiff's decedent was killed by an oncoming train after driving onto a railroad crossing where the defendant had failed to post a statutorily

138. For the debate on the claims of scientific knowledge and scientific explanation, see generally THOMAS S. KUHN, THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION & CHANGE (1977); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962); CRITICISM AND THE GROWTH OF KNOWLEDGE (Imre Lakatos & Alan Musgrave eds., 1970); Ian Hackling, 18 HIST & THEORY 223 (1979) (reviewing THOMAS S. KUHN, THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION & CHANGE (1977)).

139. For examples of courts' overconfidence in our ability to resolve counterfactuals involving scientific questions, see cases discussed *supra* notes 128-31 and *infra* note 322. For a discussion of the problems of "junk science" and of the availability of scientific experts willing to testify to its claims, see Peter Huber, *Junk Science and the Jury,* 1990 U. CHI. LEGAL F. 273. By his choice of examples, Huber suggests that plaintiffs alone deploy junk science. For a useful corrective, see PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 53, 225-31 (1985) (describing questionable medical testimony on behalf of defendants in asbestos cases); *see also* Robert Blomquist, *Science, Toxic Tort Law, and Expert Evidence: A Reaction to Peter Huber,* 44 ARK. L. REV. 629 (1991).

140. Nelson Goodman describes such negations of the counterfactual as semifactuals. GOODMAN, *supra* note 10, at 5-6.

141. 310 A.2d 186 (Md. Ct. Spec. App. 1973).

mandated warning sign.[142] The plaintiff argued that: (A) the defendant's failure to warn; (B) caused the decedent's continuing lack of awareness of the possible danger of the crossing; (C) which caused him to venture onto the tracks without looking for a train; (D) which caused the collision and his death, or $A > B > C > D$. To test this hypothesis, the court had to consider the counterfactual statement that if defendant had posted the required sign, decedent would have stopped, looked, and listened, and seeing the oncoming train, would not have proceeded onto the tracks. Causation would be shown by showing that $\bar{A}$ (not A) $> \bar{B} > \bar{C} > \bar{D}$.

Thomas lost because he could not overcome the evidence that implied B—that the decedent, who had crossed the tracks at that crossing on several other occasions, including once ten to fifteen minutes before the accident, was aware of the danger—as the events actually unfolded.[143] By establishing B, the defendant broke the supposed causal chain between the failure to post the sign and the accident, and showed that even if it had posted the sign, the accident would have occurred. It did so by substituting an alternative causal explanation, the decedent's own carelessness and inattention, for the accident.[144]

ii. Counterfactuals Based on Proof of Habit

Workplace accident claims often allege that the employer failed to provide the injured worker with necessary safety equipment or protective clothing. These claims raise the often easy causal question of whether the called-for device would have prevented the accident. They also raise an often more difficult question of decision causation: would the worker have used the safety device if it had been available?

In these cases, evidence of the victim's habits, as well as evidence of the customs of the trade, help to resolve the counterfactual question. For example, in *McWilliams v. Sir William Arrol & Co.*,[145] a steel erector fell to his death from a steel structure in a Glasgow ship yard. The employer had not supplied safety belts on the day of the accident, although it had done so sometimes in the past. The House

142. *Id.* at 187-88.
143. *See id.* at 189.
144. The cases in which a hotel or boarding house failed to provide adequate fire escapes or fire extinguishers, but the victim did not attempt to make use of such safety devices or could not have done so, suggest a similar analysis. *See, e.g.*, Weeks v. McNulty, 48 S.W. 809 (Tenn. 1898); *cf.* Matthews v. Hyster Co., 854 F.2d 1166, 1168 (9th Cir. 1988) (upholding directed verdict for defendant where plaintiff alleged that defendant's forklift's braking system was defective, but where evidence showed that plaintiff did not attempt to brake). *See generally* Malone, *supra* note 19, at 77-79 (discussing fire escape cases).
145. [1962] 1 W.L.R. 295 (H.L.).

of Lords rejected the plaintiff's argument that it would be impossible for her to prove what her husband would have done in a particular unrealized hypothetical situation. Instead, in affirming the lower courts' dismissal of her claim, the Lords concluded that the evidence established with a high degree of probability that the decedent would not have worn a safety belt if one had been available. In reaching this conclusion they relied on evidence that the decedent had not worn safety belts in the past when performing this sort of work, and that the decedent's past practice conformed to that of most steel erectors to reserve the use of safety belts for more dangerous jobs than that in which the decedent was engaged.[146]

iii. Class-based Predictions, or Presumptions

As noted above,[147] many jurisdictions apply a read and heed presumption in products liability cases in which the asserted defect is an inadequate warning or the failure to warn at all.[148] In effect, by presuming causation in such cases, the courts impose a class-wide counterfactual determination of how the plaintiff probably would have acted had the product carried an adequate warning. Relying on a premise that most consumers read and follow adequate warnings—a premise that also underlies the Restatement's position that a product that bears adequate directions for use is not defective[149]—these courts conclude that, subject to particularized rebuttal evidence, the probabilities favor a finding of causation.[150]

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146. *Id.* at 299-300 (Viscount Kilmuir); *id.* at 302 (Viscount Simonds); *id.* at 304-05 (Lord Reid); *see also* Wigley v. British Vinegars, Ltd., [1964] A.C. 307, 322-23, 325-26 (Viscount Kilmuir) (no causation shown where past practice of decedent window washer and industry custom indicate that window washer would not have used safety belt when cleaning window from ladder even if defendant had supplied hooks or bars to which belt could be attached); *cf.* Bux v. Slough Metals, Ltd., [1974] 1 All E.R. 262 (affirming judgment for foundry worker partially blinded by molten metal on theory that employer should have insisted that employees use goggles provided by employer and rejected by employees because of tendency to fog quickly and accepting trial judge's finding that plaintiff "was not the type of man who would have disregarded instructions if they were given personally and in a reasonable and firm manner and were followed up by supervision").

147. *See supra* note 99 and accompanying text.

148. For purposes of this Article, it is not necessary to distinguish between those jurisdictions that hold that the failure to warn gives rise to a read and heed presumption and those that hold that the plaintiff is entitled only to an inference of causation. *See, e.g.*, Raney v. Owens-Illinois, Inc., 897 F.2d 94, 96 (2d Cir. 1990) (plaintiff not entitled to causation presumption, but permitted to get to jury with an inference of causation).

149. RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965) ("Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.").

150. *See* cases cited *supra* note 99. Professors Henderson and Twerski criticize as grounded in a "seriously flawed" logic the view that the plaintiff's read and heed presumption ought to be allowed as the "mirror image" of the presumption enjoyed by defendants under comment j to § 402A. Henderson & Twerski, *supra* note 61, at 278-79. They argue that "[c]omment j never addresses the causation issue, as such, nor does it create any presumption of individualized causation benefiting defendants." *Id.* at 279.

Their argument's logic is elusive. To be sure, comment j does not address causation. It is, however, based on the premise that where a risk is not patent to a substantial number of consumers of a product, and where properly informed of the risk a consumer may use the product safely, the defendant owes a duty to provide adequate warnings,

Similarly, modern rules of intestate succession are intended to effectuate the distribution preferences that the intestate decedent would have expressed had she written a will.[151] Obviously, these rules cannot predict the distribution preference of any individual decedent, but they are meant to reflect the preferences of the average intestate decedent. To the extent that they succeed, these rules should give a reasonably good answer in most cases to the counterfactual question about the decedent's preferences.[152]

3. Summary

The approach of legal decisionmakers towards counterfactual questions is typically ad hoc and often unreflective. Inconsistency abounds. Attempts to avoid counterfactual thinking often mask the

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and having done so has discharged its duty because "the seller may reasonably assume that [a warning] will be read and heeded." RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965). In other words, comment j assumes the premise that most consumers of a product read and act on adequate warnings. If that premise is correct, it is no less correct when asserted by a plaintiff to show causation.

What about their second point, that comment j proves nothing regarding the individual case? Is this less true of any other presumption? When we invoke res ipsa loquitur to give rise to a presumption or inference of negligence, for example, we are not certain that there was negligence in the individual case, only that the type of accident involved usually occurs due to somebody's negligence. *See, e.g.*, KEETON ET AL., *supra* note 29, at 244. If we had conclusive individualized proof, we would have no need for presumptions, but where our premise is that warnings usually will be read and heeded, can we not say, absent contrary evidence, that the individual plaintiff has demonstrated causation by a balance of the probabilities?

Professors Henderson and Twerski's ultimate conclusion about the read and heed presumption might, nonetheless, be right. Although the courts are on firm logical ground in speaking of comment j and the read and heed presumption in one breath, they may be on shakier factual ground. The read and heed presumption and the comment j no defect rule rest equally on a questionable and untested assumption that consumers usually read and act on adequate warnings. There is no indication in the Restatement or in the Reporter's notes to § 402A of the basis for this premise. Nor does the comment draw any distinction by product type, although intuitively it seems likely that consumer sensitivity to instructions for use or warnings might vary with product type. In this regard, it is noteworthy that the comment j language first appeared in the first tentative draft of § 402A (then in comment f), which applied only to the sellers of food, and that the committee of advisers retained the original language virtually unchanged ("carrying such a warning" became "bearing such a warning" and "unreasonable dangerous," no doubt a typographical error, became "unreasonably dangerous") through subsequent drafts. *Compare* RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965) *with* RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (Tent. Draft No. 6, 1961). Of course, one could also decide, as a matter of policy, not to apply strict liability in cases where an adequate warning is given, rather than rely on the assumption that most consumers will read and heed.

151. *See* JOHN RITCHIE ET AL., CASES AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 85-86 (7th ed. 1988); Mary L. Fellows et al., *Public Attitudes about Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 323-24.

152. For a criticism of the method used to discern intestate preferences, see Fellows et al., *supra* note 151.

imposition of unexamined counterfactual judgments under the illusion of avoiding speculation. At other times we avoid such questions by fiat, declaring that the task is too conjectural and uncertain, without taking measure of either the real nature of the counterfactual inquiry or the price we pay in restricting the law's remedial powers. Our attempts to resolve counterfactual questions posed by law are sometimes equally unreflective. We hastily take refuge in our reliance on scientific experts or in uncritically assumed rules of thumb.

Our intuitions may be good ones most of the time, despite all of our shortcomings in dealing with counterfactual questions. Yet, surely we can do better if we pay closer attention to what we ask of ourselves when encountering legal counterfactuals and to what we do when attempting to resolve (or avoid) them. One way to develop a better sense of what it means to talk counterfactually, and how we might do it well, is to examine other examples of their use. With that purpose, it will be helpful to consider how some historians have used counterfactuals in their work.

II. Counterfactuals in History

A. The Relevance of Historiographic Examples

Legal factfinders must describe and evaluate past events. They must reconstruct the past to assess causal responsibility, and they must construct alternative pasts to measure historical, present, and future consequences of past acts.

Predictably, many commentators have noted resemblances between the work of historians and of legal factfinders.[153] Without falling prey to superficial analogies, one may say that historians and legal factfinders both attempt to recapture the past and to give an accurate and meaningful account of its unfolding.[154] In so doing, both often consider issues of causation in similar ways. Both often

153. Numerous commentators have noted a relationship between historical and legal thought. *See, e.g.*, R.G. COLLINGWOOD, THE IDEA OF HISTORY 259, 268 (1946 paperback ed. 1956); ROBERT W. FOGEL & G.R. ELTON, WHICH ROAD TO THE PAST? TWO VIEWS OF HISTORY 13-15 (1983); HART & HONORÉ, *supra* note 29, at 9-10, 62-64; DONALD R. KELLEY, FOUNDATIONS OF MODERN HISTORICAL SCHOLARSHIP: LANGUAGE, LAW, AND HISTORY IN THE FRENCH RENAISSANCE (1970); WEBER, *supra* note 18, at 168; JOHN H. WIGMORE, THE SCIENCE OF JUDICIAL PROOF 980-93 (3d ed. 1937); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1388-90 (1985); Nicholas Rescher & Carey B. Joynt, *Evidence in History and in the Law*, 56 J. PHIL. 561 (1959).

154. G.R. Elton has warned against overdrawn analogies between legal method and historical method. *See* FOGEL & ELTON, *supra* note 153, at 90-95 (discussing OSCAR HANDLIN ET AL., HARVARD GUIDE TO AMERICAN HISTORY (1954)). Nicholas Rescher and Carey Joynt focus primarily on historical and legal approaches to evidence. Although they note the obvious similarities between the use of evidence in history and law, their primary purpose is to explore and explain the limits of the analogy. They note, in particular, the differences in standards of proof, and the restrictions on admissibility of evidence in law that are unparalleled in historical inquiry. Rescher & Joynt, *supra* note 153, at 566-77.

attempt to assign causal responsibility and to trace the consequences of particular acts.[155] Inevitably, both also encounter counterfactual questions. Perhaps, then, lawyers can learn something from the historians' experience with counterfactuals.

Speculations about unrealized possibilities are hardly a new feature of historical writing. We see them in Tacitus.[156] More recently, some historians, particularly, but not exclusively, economic historians, have considered elaborate counterfactuals in their explorations of the past.[157] Concomitantly, they have sparked an intense debate about the historian's use of counterfactuals.[158]

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155. *See* HART & HONORÉ, *supra* note 29, at 63; WEBER, *supra* note 18, at 168. Both historians and lawyers tend to find the scientific model of explanation inapplicable to their work. *See* HART & HONORÉ, *supra* note 29, at 9.

156. Tacitus wrote of the death of Germanicus Caesar: " 'Had he been the sole arbiter of events, had he held the powers and the title of King, he would have outstripped Alexander in military fame as far as he surpassed him in gentleness, in self-command, and in all other noble qualities.' " THE ANNALS OF TACITUS, BOOKS I-VI, at 172 (G.G. Ramsay trans., 1904), *quoted in* J.D. Gould, *Hypothetical History*, 22 ECON. HIST. REV. 195, 195 (2d Ser. 1969). Germanicus, the adopted son of Tiberius and the father of Caligula, died, allegedly by poison, before succeeding his father to the throne.

157. In addition to those discussed below, other examples of historical work that use counterfactual analysis include: PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981); ALBERT FISHLOW, AMERICAN RAILROADS AND THE TRANSFORMATION OF THE ANTE-BELLUM ECONOMY (1965); ROBERT W. FOGEL, RAILROADS AND ECONOMIC GROWTH: ESSAYS IN ECONOMETRIC HISTORY (1964); BARRINGTON MOORE, JR., INJUSTICE: THE SOCIAL BASES OF OBEDIENCE AND REVOLT 376-97 (1978); James Axtell, *Colonial America Without the Indians: Counterfactual Reflections*, 73 J. AM. HIST. 981 (1987); ALFRED H. CONRAD & JOHN R. MEYER, *The Economics of Slavery in the Antebellum South*, *in* THE ECONOMICS OF SLAVERY AND OTHER STUDIES IN ECONOMETRIC HISTORY 43 (1964) [hereinafter ECONOMICS OF SLAVERY]; JOHN R. MEYER, *An Input-Output Approach to Evaluating British Industrial Production in the Late Nineteenth Century*, *in* ECONOMICS OF SLAVERY, *supra*, at 183 (1964); Hugh Neuberger & Houston H. Stokes, *The Anglo-German Trade Rivalry, 1897-1913: A Counterfactual Outcome and Its Implications*, 3 SOC. SCI. HIST. 187 (1979); Robert P. Thomas, *A Quantitative Approach to the Study of the Effects of British Imperial Policy upon Colonial Welfare*, 25 J. ECON. HIST. 615 (1965); C. VANN WOODWARD, *Reconstruction: A Counterfactual Playback*, *in* THE FUTURE OF THE PAST (1989).

158. "Some economic historians have embraced counterfactual tests with a display of open arms, others with arms openly displayed." David J. Loschky, *Counterfactuals in Logically Formed Economic Analysis*, 2 J. EUR. ECON. HIST. 421, 423 (1973). I will not rehearse the debate here.

In addition to works cited elsewhere in this Article, important discussions of historians' use of counterfactuals include: SIDNEY HOOK, THE HERO IN HISTORY: A STUDY IN LIMITATIONS AND POSSIBILITY 119-50, 184-228 (1943); PETER D. MCCLELLAND, CAUSAL EXPLANATION AND MODEL BUILDING IN HISTORY, ECONOMICS, AND THE NEW ECONOMIC HISTORY 146-68 (1975); T.A. Climo & P.G.A. Howells, *Possible Worlds in Historical Explanation*, 15 HIST. & THEORY 1 (1976) [hereinafter *Possible Worlds*]; T.A. Climo & P.G.A. Howells, *Cause and Counterfactuals*, 27 ECON. HIST. REV. 461 (1974); Alfred H. Conrad & John M. Meyer, *Economic Theory, Statistical Inference, and Economic History*, *in* ECONOMICS OF SLAVERY, *supra* note 157, at 3; Stanley L. Engerman, *Counterfactuals and the New Economic History*, 23 INQUIRY 157 (1980); Stefano Fenoaltea, *The Discipline and They: Notes on Counterfactual Methodology and the "New" Economic History*, 2 J. EUR. ECON. HIST. 729 (1973); R.W. Fogel, *The New Economic History: Its Findings and Methods*, 19 ECON. HIST. REV. 655 (1965); David J. Loschky, *Are Counterfactuals Necessary to "The Discipline and They"?*, 4 J. EUR. ECON. HIST. 481 (1975); Hugh R. Trevor-Roper, *History and Imagination*,

No matter the discomfort counterfactuals may cause, historical explanations—statements that attempt to describe the causes of an historical event—imply counterfactual statements.[159] Historical explanations imply counterfactuals in the same manner that any causal explanation does.[160] Take, for instance, Max Weber's rather homely example of the temperamental mother who slaps her misbehaving child and who, upon reflection, explains that she would have used milder discipline had she not already been upset by an argument with the cook.[161] The mother has offered an explanation for hitting the child: "I hit him, rather than reprimanding him, because I was already agitated by the cook." To give this explanation, she must imaginatively remove the antecedent, her argument with the cook, and infer that she would have acted differently without it. In Weber's example she does this expressly. However, whether or not the historian makes the negation of the antecedent express, her statement that *p* caused *q* necessarily warrants the companion statement that had *p* not occurred, neither would have *q*.[162]

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in HISTORY AND IMAGINATION: ESSAYS IN HONOUR OF H.R. TREVOR-ROPER 356 (Hugh Lloyd-Sones et al. eds., 1981).

Historians' counterfactuals have also prompted parody. *See* JAMES THURBER, *If Grant Had Been Drinking at Appomattox, in* THE MIDDLE-AGED MAN ON THE FLYING TRAPEZE 132 (1935) (Grant surrenders). Some years ago the television program Saturday Night Live ran a series of skits in which an "expert" considered such historical counterfactuals as: what would have happened if Eleanor Roosevelt could fly. Best I can recall, she would have played a major role in the allied victory in the European Theatre.

159. Historians do much more, of course, than explain the past. Allan Megill has argued that history has four intertwined aims: interpretation, description, explanation and argument, and justification, and that "every work of history embodies these aims . . . . in differing degrees." Allan Megill, *Recounting the Past: "Description," Explanation, and Narrative in Historiography,* 94 AM. HIST. REV. 627, 627 (1989). Nevertheless, as Megill acknowledges, explanation has held a privileged status in historical writing. *Id.* at 628. Megill recognizes but criticizes the privileging of explanation in academic culture. *See also* EDWARD H. CARR, WHAT IS HISTORY? 113 (1964) ("The study of history is a study of causes."); Climo & Howells, *Possible Worlds, supra* note 158, at 1 ("Most historians would acknowledge causal statements to be indispensable to their work."); Jarle Simensen, *Counterfactual Arguments in Historical Analysis: From the Debate on the Partition of Africa and the Effect of Colonial Rule,* 5 HIST. AFR. 169, 169 (1978) ("Historical analysis is preoccupied with causes . . . ."). It would be an exceptional historical work that does not contain causal explanations, if such a work exists at all. *See* FISCHER, *supra* note 2, at 166 ("There are, of course, many modes of historical explanation which are noncausal in nature. But I have never read an extended historical interpretation which does not include causal statements, or cryptocausal statements, in at least a peripheral way.").

160. *See supra* notes 64-85 and accompanying text; Anthony Flew, *History: Fact and Contrary-to-Fact,* 56 PHIL. 578, 578-79 (1981). As Barrington Moore notes, "any explanation of what actually took place connotes an explanation of why something else failed to occur." MOORE, *supra* note 157, at 377.

161. WEBER, *supra* note 18, at 177-78; *see also* RAYMOND ARON, GERMAN SOCIOLOGY 80 (Mary Bottomore & Thomas Bottomore trans., 1957) (discussing Weber's example).

162. WILLIAM DRAY, LAWS AND EXPLANATION IN HISTORY 104 (1957); ELSTER, *supra* note 35, at 175-76; WILLIAM TODD, HISTORY AS APPLIED SCIENCE: A PHILOSOPHICAL STUDY 11, 156 (1972); WEBER, *supra* note 18, at 164, 184; Flew, *supra* note 160, at 578-79. As John Murrin has written, "To explain his data, [the historian] must ask whether it could have fallen together in some combination other than what actually occurred. Only by posing this question can he decide which of his verifiable 'facts' were decisive and which were peripheral in generating the larger 'events' he hopes to reconstruct." John Murrin, *The French and Indian War, The American Revolution, and the Counterfactual Hypothesis: Reflections on Lawrence Henry Gipson and John Shy,* 1 REVIEWS AM. HIST. 307, 308 (1973).

In addition to offering causal explanations, historians often evaluate particular decisions or courses of conduct in light of available alternatives. Such evaluative judgments also necessitate counterfactual thinking because one cannot say that a particular policy was mistaken without believing that a plausible alternative policy would have worked out better.[163]

If all historians' counterfactuals remained implicit in their work they would be of little interest to us here. Some historians, however, have made their counterfactual suppositions explicit. I propose to examine the following three examples[164] of such work to see what lessons they might hold for legal decisionmakers: John Murrin's consideration of the thesis ascribing causal primacy for the American Revolution to the British victory in the French and Indian War;[165] Murrin's discussion of the possible causal relationships between the Revolution and the rash of evangelical religious excitement and revivals known as the Great Awakening that swept

163. Robert W. Fogel, *Historiography and Retrospective Econometrics*, 9 HIST. & THEORY 245, 256 (1970) (noting that banishing counterfactuals from historical writing would entail prohibiting historians from writing such statements as: " 'Woodrow Wilson miscalculated the consequences of his failure to appoint a prominent Republican to the delegation that represented America at the Paris peace conference' or 'Andrew Johnson played into the hands of his enemies by suspending Stanton and making Grant *ad interim* Secretary of War' "); Murrin, *supra* note 162, at 307 ("Every time a historian evaluates a particular decision or policy option in terms of contemporary alternatives, he is thinking counterfactually because he has to, unless he is prepared to assert that real choices did not exist in the past or that, if they did, historians should ignore them.").

164. My selection of these particular examples from among numerous counterfactual histories necessarily slights other thoughtful works, but my choices are not merely an arbitrary exercise of personal preference. My choices are partly pragmatic. Examples drawn from American history are more accessible to me and, I assume, to most of my audience. So too are traditionally written counterfactual histories (admittedly something of an oxymoron), as compared to the highly quantitative economic modeling of such cliometricians as Robert Fogel, Albert Fishlow, or John Meyer. *See supra* note 157.

Moreover, the constructions of actual and alternative pasts required by legal factfinding typically resemble conventional histories more closely than they do the cliometrician's mathematized model building, making Murrin's and McKitrick's works more germane to a legal audience than the cliometricians'. There are, however, certain kinds of cases, such as United States antidumping law, where legal decisionmakers must draw on models of market behavior, and where the modeling methods of the cliometricians may be especially apt. *See* An Economic Analysis of Dumping, USITC Office of Economics Memorandum, EC-J-457 (Dec. 2, 1986), *cited in* Michael S. Knoll, *United States Antidumping Law: The Case for Reconsideration*, 22 TEX. INT'L L.J. 265, 286 n.115 (1987).

Finally, the Murrin and McKitrick examples are especially useful for several reasons. They limit our focus to two moments in American history, the Revolution and Reconstruction. They are well-argued, and in Murrin's case expressly attuned to theoretical as well as empirical issues. They demonstrate a variety of counterfactual questions, and they use a variety of arguments to sustain their counterfactual assertions ranging from Murrin's use of historical analogies to McKitrick's reliance on dispositional statements.

165. Murrin, *supra* note 162.

through the colonies in the 1740s;[166] and Eric McKitrick's comparison between Andrew Johnson's theory of reconstruction and the approach toward reconstruction that Abraham Lincoln might have adopted had he not been assassinated.[167] This examination will show that we can divide historians' counterfactuals into two categories—those that test causal assertions and those that explore unrealized alternative outcomes—and that their treatment will depend on the category they belong to.[168] It will also identify the ways historians craft counterfactuals and the kinds of argument that they marshal to challenge or support counterfactual assertions.

B. John Murrin and the Causes of the American Revolution

In a pair of counterfactual inquiries, John Murrin has examined two explanations of the American Revolution that find its causes beneath the surface of the imperial crisis that began with colonial resistance to the Stamp Act in 1765. By examining the counterfactuals suggested by these explanations, Murrin seeks to demonstrate the limits of their explanatory force.

In *The French and Indian War, The American Revolution, and the Counterfactual Hypothesis: Reflections on Lawrence Henry Gipson and John Shy,*[169] Murrin examines Gipson's thesis that the Revolution resulted from British success in the French and Indian War.[170] After that war, Great Britain faced the task and expense of administering vast new North American territories ceded by France and Spain in the Peace of Paris, while Americans no longer faced the threat of a hostile French Canada along their borders. Thus, Britain had to ask the Americans to share the burdens of an expanded Empire precisely when their dependence on Britain for protection had largely disappeared. These changes, Gipson argued, caused Americans to reconsider imperial relations, and eventually led to independence.[171] Gipson recognized the counterfactual implications of his

166. John M. Murrin, *No Awakening, No Revolution? More Counterfactual Speculations,* 11 REVIEWS AM. HIST. 161 (1983).

167. ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 101-10 (1960).

168. These categories parallel the principal types of legal counterfactuals: causation-testers and alternative histories that measure remedial needs. *See supra* notes 28-34 and accompanying text.

169. Murrin, *supra* note 162, at 307.

170. Although Murrin rightfully ascribes the argument to Gipson, he also notes that Gipson did not originate the idea. It "antedated the Revolution itself by at least one generation." *Id.* at 309. In American Revolution historiography, "the Canada cession has emerged as a major cause of the Revolution across the entire interpretive spectrum." *Id.* Noteworthy examples include CHARLES M. ANDREWS, THE COLONIAL BACKGROUND OF THE AMERICAN REVOLUTION 124-25 (rev. ed. 1931); GEORGE L. BEER, BRITISH COLONIAL POLICY, 1754-1765, at 172-73 (1907). For a very different analysis of the causal link between the French and Indian War and the Revolution, see Jack P. Greene, *The Seven Years' War and the American Revolution: The Causal Relationship Reconsidered, in* THE BRITISH ATLANTIC EMPIRE BEFORE THE AMERICAN REVOLUTION 85-105 (Peter Marshall & Glyn Williams eds., 1980). For another explicitly counterfactual treatment of the Canada cession, see MORTON BORDEN & OTIS L. GRAHAM, JR., SPECULATIONS ON AMERICAN HISTORY 3-15 (1977).

171. LAWRENCE H. GIPSON, THE COMING OF THE REVOLUTION xi (1962). The Peace of Paris also brought additions to the Empire outside of North America. *Id.* at 1.

thesis. "Had Canada remained French after 1763, he asked, 'would not Americans have continued to feel the need as in the past to rely for their safety and welfare upon British sea power and British land power, as well as upon British resources generally?' "[172] Murrin tests Gipson's thesis by examining this counterfactual.

Murrin approaches the problem in a number of ways. First, he notes that Gipson assumes that the French threat discouraged colonial resistance to Britain and that its elimination would stimulate colonial resistance.[173] He tests these causal assertions by examining various instances of British-colonial relations prior to the French and Indian War in which sometimes the French threat was manifest and sometimes it was absent.[174] Although he acknowledges that the earlier political behavior sometimes corresponds to the Gipson thesis, he also shows that that history is rich with local examples of political crises and unstable imperial relations when the French threat was strong, and of colonial quiescence in its absence.[175]

We can express symbolically a modified version of the Gipson counterfactual quoted above as:

> If P in situation S then Q, where:
>
> P = presence of French threat;
>
> Q = colonial loyalty to the British Empire;
>
> and
>
> S = the actual circumstances surrounding the relationship between Britain and the colonies modified only as necessary to permit the supposition of the counterfact P.[176]

Murrin draws two sorts of comparisons that he intends singly and jointly to undermine Gipson's explanation. First, he shows instances of: P in situations $S_1 \ldots S_7$ and not Q.[177] This showing

172. Murrin, *supra* note 162, at 308 (quoting Lawrence H. Gipson, *The American Revolution as an Aftermath of the Great War for the Empire, 1754-1763*, 65 POL. SCI. Q. 65, 103-04 (1950)).

173. *Id.* at 310.

174. *Cf.* Pork, *supra* note 80, at 66 (stating that "confronted with the problem of justification of the counterfactual statement, historians usually intuitively try to find for a comparison some other *real* situation . . . which in some important respect is similar to the possible situation reflected in the counterfactual claim").

175. Murrin, *supra* note 162, at 310.

176. This formula is a modified statement of the Gipson counterfactual because it conflates two causal steps in Gipson's analysis. Gipson argued that elimination of the French threat diminished colonial military dependence on Great Britain. Diminished military dependence in turn caused American disloyalty to the Empire. Murrin's comparison to earlier British-Colonial relations looks only to the ultimate conclusion: were imperial relations strained?

177. $S_1 \ldots S_7$ do not refer to variations on S. They are instead the actual circumstances surrounding imperial relations at the time and place of each of Murrin's counterexamples.

demonstrates that elimination of the French threat was not a necessary cause of strained imperial relations because these strains occurred when the French threat was quite real. This showing alone, however, is not fatal to Gipson's thesis because Gipson makes no claims about necessary causes.[178] Murrin's counterexamples, however, cumulatively weaken our faith in Gipson's explanation by showing several instances where an immediate and obvious French threat did not check colonial political crises. The counterexamples provoke us to seek alternative causal candidates that better explain imperial instability and colonial disloyalty than does removal of the French threat.

Of course, the strength of our resultant skepticism depends on our agreement that Murrin has described his counterexamples accurately (both as to the presence of the French threat in each instance and as to a concurrent breakdown in Imperial relations) and on our willingness to accept his counterexamples as apt analogies. In other words, is S sufficiently similar to $S_1 \ldots S_7$ not only to cause us to disbelieve that removal of the French was a necessary cause of colonial crisis, but also to disbelieve that it was a necessary cause of such crisis under the circumstances presenting themselves after 1763?

Murrin further challenges Gipson's thesis by offering a counterexample[179] of stable imperial relations in Virginia between 1720 and 1753, a period when that colony perceived no threat at its borders and had no overriding need for British military protection.[180] Although his first set of counterexamples attacked Gipson's thesis indirectly, by challenging the counterfactual that thesis implies, this counterexample takes on Gipson's explanation frontally. Murrin's

178. Historians seldom do. Typically, a historian's statement that X caused Y does not purport to state that only if X then Y. Rather, the historian means that in the particular situation that I have chosen to discuss, if you removed X and left everything else the same, then no Y. William Dray writes that:

> Whether or not the historian concludes that the suggested cause was a necessary condition of what he wishes to explain, his argument for the conclusion he in fact reaches need not raise the question whether the condition in question was a *generally* necessary one for the events of the type to be explained; for the historian's explanatory problem is not to represent a particular causal connexion as an instance of a recurring one. He does not ask himself, 'What causes *Y*'s?'; he asks, 'What is the cause of this *Y*?'—and he asks this about a *Y* in a determinate situation. . . . It is true that the historian must be *certain* that without *X*, *Y* could not have happened, if he is to say without qualification that *X* was the cause of *Y*. But there is no need to assume that the only way he could arrive at such certainty is by knowing a law of the 'only if' form.

DRAY, *supra* note 162, at 103-04; *see also* K. Marc-Wogau, *On Historical Explanation*, 28 THEORIA 215, 226 (1962) (describing historical explanation in terms of identifying " 'necessary condition[s] *post factum*' "); C. Behan McCullagh, Book Review, 12 HIST. & THEORY 435, 439 (1973) (reviewing WILLIAM TODD, HISTORY AS APPLIED SCIENCE: A PHILOSOPHICAL STUDY (1972)).

179. Here, but not in the preceding paragraph, my use of the term "counterexample" follows Raymond Martin's discussion of "historical counterexamples." RAYMOND MARTIN, THE PAST WITHIN US 127-40 (1989). Martin contends that an important form of historical argument is the historical counterexample. Historians use these "to show that the causal explanations they *oppose*, or seek to supplement, express *insufficient* causes of what they explain." *Id.* at 129.

180. Murrin, *supra* note 162, at 310.

counterexample shows that the absence or removal of the French threat alone was not a sufficient cause of the Revolution.[181]

As is evident above, Murrin's critique of Gipson's thesis does not depend wholly on an examination of its counterfactual implications. In addition to the arguments described above, he analyzes the evidentiary basis for the thesis.[182] Finally, Murrin challenges Gipson's contention that the elimination of France from North America made the Americans secure enough to contemplate independence.[183]

Whether or not Murrin delivers a knockout blow to the Gipson thesis, he at least casts strong doubt on it. In so doing, he reorients our perceptions of the Stamp Act crisis and other crises of British-colonial relations that preceded the Revolution.[184]

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181. Just as they seldom make claims to have identified universally (rather than contingently) necessary causes, historians seldom make claims to have identified sufficient causes. *See* MCCULLAGH, *supra* note 81, at 176-78.

Again, the strength of Murrin's argument is dependent on the accuracy of his description of Virginia's isolation from hostile threats from without its borders and of his characterization of the colony's relations with Britain as harmonious, as well as on the closeness of the analogy to the colonial situation after the Peace of Paris.

182. One of the appeals of the Gipson thesis, Murrin writes, is the availability of highly quotable contemporary authorities who anticipated the destabilizing effect elimination of the French from North America would have, or who attributed such causal responsibility in retrospect. Murrin, *supra* note 162, at 309. Murrin counterposes to these sources other contemporaries who denied that elimination of the French would or did undermine colonial loyalty, thereby showing that eighteenth-century voices did not constitute a single chorus prospectively endorsing the Gipson thesis. *Id.* at 310; *see also* ROBERT W. TUCKER & DAVID C. HENDERICKSON, THE FALL OF THE FIRST BRITISH EMPIRE: ORIGINS OF THE WAR OF AMERICAN INDEPENDENCE 45 (1982) ("The leaders of the colonial revolt denied with virtually one voice that the removal of the French from Canada had in the slightest degree affected their loyalty to the empire . . . ."). Murrin notes that various British and colonial spokesmen saw a different connection between imperial discord and the French threat. "Thus while Gipson and his sources contend that elimination of the Gallic Peril had to generate an imperial crisis, these other writers perceived an opposite connection." Murrin, *supra* note 162, at 311.

183. Murrin notes that although France was no longer a presence on the continent, the French Canadians were. Americans saw the Canadians as a threat and consequently wanted stable imperial relations and a British military presence on the continent. Ultimately, "the Revolution erupted *despite* general recognition that it would almost certainly produce another Canadian War." Murrin, *supra* note 162, at 311.

Murrin argues that the Revolution rekindled fears of France with a twist. Following James Hutson, he writes that the Continental Congress hurried to declare independence on July 2, 1776, because its members feared (incorrectly) that, unless the Americans quickly declared independence, Great Britain would enter into a treaty with France and Spain offering partition of North America in return for their military assistance against the rebellion. *Id.* at 311-12 (citing James H. Hutson, *The Partition Treaty and the Declaration of American Independence*, 58 J. AM. HIST. 877 (1972)).

184. "Instead of pretexts for the manifestation of a selfish American nationalism, as Gipson saw them, these particular crises again emerge as causes of the Revolution. Without them there would have been no revolution and no American nation, at least not in the immediate future." *Id.* at 312.

With the substitution of one causal explanation for another, Murrin necessarily also substitutes one constellation of implied counterfactuals and counterfactual questions for those implied by the Gipson thesis. Murrin recognizes this, and he asks one of the more interesting counterfactual questions suggested by his analysis: could Britain have pursued a colonial policy that would have avoided the Revolution? In what amounts to a

Ten years later, Murrin took another look at the causes of the Revolution in an essay entitled *No Awakening, No Revolution? More Counterfactual Speculations.*[185] In that essay he attempts to clarify the causal role of the Great Awakening. Murrin notes that the terms of the debate had been set by Alan Heimert's book, *Religion and the American Mind.*[186] Heimert argued that after the Awakening, American Protestantism split in two. On one side were the friends of the revival, the evangelicals, or Calvinists. On the other side were its opponents, the antievangelicals, or liberals. Although Heimert disclaimed an intent to diagnose the causes of the Revolution or to show that any event resulted from the Awakening, he linked Calvinism and the evangelicals to the Revolution.[187] By contrast, liberals supported the political and social status quo, and, in Murrin's paraphrase of Heimert, they "either resisted the Revolution or embraced it awkwardly and with reservations."[188]

Murrin adopts the strategy of "obliterat[ing] the Awakening [to] then try to discover what remains in its absence."[189] After eliminating the Awakening he asks three questions:

> 1) Would colonial resistance to British measures after 1763 have reached the point of armed rebellion by 1775? 2) If it had, would the Revolution have turned out differently with no Awakening to draw upon? 3) With no Awakening, would the republic of 1800 have been significantly different from the one we now love and study?[190]

The first question, which he answers affirmatively, need not detain

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mere "sketch of counterfactual possibilities," and of an argument for their plausibility, he suggests that Britain may have squandered the opportunity to capitalize on the good will that it had won in the war and to avert an imperial crisis because it failed to learn from the lessons of successful colonial relations during the years 1758-62. Instead, after the war, Britain reverted to older assumptions about imperial relations that proved to be inadequate to the Empire's post-war needs. *Id.* at 312-16.

Murrin reaches the opposite conclusions from those of John Shy, who poses similar questions in an essay considering the range of politically acceptable policy options open to Great Britain before the Revolution. John Shy, *Thomas Pownall, Henry Ellis, and the Spectrum of Possibilities, 1763-1775, in* ANGLO-AMERICAN POLITICAL RELATIONS, 1675-1775 (Alison G. Olson & Richard M. Brown eds., 1970). Shy concludes pessimistically that "the range of historical possibilities was very narrow," *id.* at 181, and that "[t]he impulse that swept the British Empire toward civil war . . . did not admit of any real choice," *id.* at 186.

185. Murrin, *supra* note 166.

186. ALAN E. HEIMERT, RELIGION AND THE AMERICAN MIND: FROM THE GREAT AWAKENING TO THE REVOLUTION (1966).

187. *Id.* at 21.

188. Murrin, *supra* note 166, at 161.

189. *Id.* at 162. Murrin accomplishes the goal of suppressing the Awakening by eliminating from the scene the three men most responsible for it, George Whitefield, Jonathan Edwards, and Gilbert Tennent, before certain critical moments in their lives. *Id.* at 162-63. He also temporarily neutralizes John Wesley to remove his influence on the Awakening. *Id.* at 163. In so doing, he may reveal an ulterior motive for his essay: "As should already be obvious, one of the forbidden delights that such counterfactual musings can provide to any suitably degenerate mind is the invention of proper circumstances for dispatching the . . . three men." *Id.*

190. *Id.* at 163-64.

us.[191] Murrin approaches his second question—"would the Revolution have turned out differently with no Awakening to draw upon?"—by asking two subsidiary questions: first, whether the colonies would have been able to agree upon independence by July 1776, thereby thwarting the last remote chances of a negotiated peace; and second, whether they could have won the war.[192] His primary strategy is to ask whether evangelicals were situated where their support for the Revolution might be decisive. For the most part he concludes that they were not.[193] But here, at last, Murrin finds some evangelicals who seem to be strategically located to make an historical difference.

Regarding the decision for independence, Murrin finds his potentially critical band of evangelicals in New Jersey. He concludes that New Jersey poses "a fairly unequivocal case of [evangelical] New Lights dragging their fellows into independence and a bracing republican vision of the future."[194] But what does this correlation suggest about counterfactual possibilities? One might conclude, he suggests, that without the Awakening, New Jersey's continued opposition to independence would have hardened resistance to independence in other Middle Atlantic colonies, and thus postponed or even prevented the Continental Congress' declaration of independence. He concludes, however, that elimination of the Awakening almost certainly would not have had this effect.[195]

How does he argue for his conclusion? His argument is terse (two sentences) and somewhat obscure, but he seems to take two tacks in making his case. First, he asserts that by the Summer of 1776 the course of events had attained such force that independence was virtually inevitable; "the logic for independence would almost certainly have prevailed eventually."[196] In other words, he proposes an alternate causal candidate to Heimert's, or asserts, at the very least, that the decision to declare independence was causally overdetermined

191. If evangelicals were more likely to resist imperial policy and to be more militant in their resistance than liberals, we should see a strong correlation between the geographical intensity of the Awakening and the centers of patriot resistance. Murrin finds no such correlation; indeed in some instances he finds a negative correlation. Having found no evidence of a causal connection between the Awakening and the Revolution, he need not explore further the counterfactual possibilities suggested by such an explanation of the Revolution. *Id.* at 164-65.

192. *Id.* at 165.

193. *Id.* at 165-67.

194. *Id.* at 166. In a colony where over one-third of the population were active loyalists, patriot leadership was comprised largely of New Side Presbyterians from the Princeton area, home of the collegiate center of the Awakening. *Id.* at 165.

195. *Id.* at 166.

196. *Id.; cf.* PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776, at 266-70 (1972) (contending that colonists' growing disillusionment with and disaffection from the English people led to act of declaring independence).

and would have occurred without the Awakening. Second, he bolsters his point by analogy to New York.[197] On July 2, 1776, when the Continental Congress voted on Richard Henry Lee's resolutions calling for independence, the New York delegation abstained under instruction from the cautious and moderate New York Third Provincial Congress. One week later, New York's Fourth Congress met for the first time and immediately declared independence.[198] Here, Murrin argues by positive analogy rather than negative analogy as he did when considering the causal force of the French and Indian War.[199] Murrin suggests that a New Jersey without an Awakening would have been enough like New York that the logic of independence would have overcome the resistance of New Jersey conservatives much as it did their New York counterparts.

As to his second subsidiary question, Murrin concludes that we do not know enough to say conclusively whether the war would have ended differently without the Awakening. Once again, Murrin's primary approach is to look for concentrations of evangelicals in situations where they would have made a difference.[200] He does not find them performing this role in the Continental Army, but he raises the possibility that evangelicals served disproportionately in the militia and thereby played a critical role in the military struggle.[201] Here he discovers a question that requires more research, and hence he concludes that the counterfactual must remain open.[202] But the counterfactual question helps to identify what we do not know and to set an agenda for future research.

Murrin disposes of his third question quickly. Nineteenth century America would have been dramatically different without the Awakening, he argues. Indeed, it would be so different that

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197. Murrin, *supra* note 166, at 166.

198. For discussions of the path to independence in New York, see CARL L. BECKER, THE HISTORY OF POLITICAL PARTIES IN THE PROVINCE OF NEW YORK, 1760-1776, at 253-76 (2d prtg. 1960); BERNARD MASON, THE ROAD TO INDEPENDENCE: THE REVOLUTIONARY MOVEMENT IN NEW YORK, 1773-1777 (1966).

199. *See supra* text accompanying notes 174-81.

200. Murrin, *supra* note 166, at 167. The war, he notes, was "extremely brutal and draining." *Id.* Might the evangelicals have provided the "resiliency and stamina to endure a struggle that the less righteous would have abandoned?" *Id.*

Following Perry Miller, Heimert expresses the belief that "a 'pure rationalism' might have declared the independence of the American people, 'but it could never have inspired them to fight for it.' " HEIMERT, *supra* note 186, at 18 (quoting Perry Miller, *From the Covenant to the Revival, in* THE SHAPING OF AMERICAN RELIGION, 1 RELIGION IN AMERICAN LIFE 363 (James W. Smith & A. Leland Jamison eds., 1961)). Murrin acknowledges the possibility that the exhortatory rhetorical style and the "oral, face-to-face culture" of the evangelicals may have played a greater role than the more urbane and literary culture of the liberals in sustaining the morale necessary to continue the war effort, although he also recognizes the difficulty of measuring evangelical culture's contribution. Murrin, *supra* note 166, at 168. For discussions of the differences between evangelical and liberal rhetorical theory and style of preaching, see RICHARD L. BUSHMAN, FROM PURITAN TO YANKEE: CHARACTER AND THE SOCIAL ORDER IN CONNECTICUT, 1690-1765, at 178-81, 198-202 (1967); HEIMERT, *supra* note 186, at 208-36.

201. Murrin, *supra* note 166, at 167. On the importance of the militia's role in the war, Murrin cites in particular the work of John Shy. *Id.* at 167-68 (citing JOHN SHY, A PEOPLE NUMEROUS AND ARMED: REFLECTIONS ON THE MILITARY STRUGGLE FOR AMERICAN INDEPENDENCE 163-79, 193-224 (1976)).

202. *Id.*

"[s]peculation about its behavior would be quite pointless."[203]

I believe Murrin is right. Any attempt to describe antebellum America without evangelical Protestantism is fraught with uncertainty and bound to fail. Why is that so? To begin with, Murrin's third question is different from his other two. It has a quality of openness that they lack. It does not ask about the effect of the counterfactual antecedent on a specific event or set of events, or on a particular characteristic of antebellum culture or society. Nor does it call for a detailed description of a counterfactual world. Rather, the question as Murrin asks it—"With no Awakening, would the Republic of 1800 have been significantly different from the one we now love and study?"[204]—invites a limited range of answers: "yes, very," "no, hardly different at all," or, perhaps, "yes, different, but not as different as you might think."[205]

Even if Murrin's question did not seek a description of such a counterfactual world, can we not give one anyway? The problem with any such description lies in the pervasiveness of the changes we would find in such a counterfactual world. Our ability to make sense of alternative histories in the examples described above depends on our ability to hold much of the world constant and to isolate a limited realm of change. Where so much of the world changes, as Murrin rightly supposes would be the case in his third counterfactual question, it is difficult to use analogy and induction because the background is ever shifting and ever influencing changes in the foreground.

C. Eric McKitrick and Presidential Reconstruction

In contrast to Murrin, Eric McKitrick is a most reluctant and modest counterfactualist. Nevertheless, he indulges in a number of

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203. *Id.* at 169. Murrin argues that the Revolution "liberated the spirit of the Awakening," which had stagnated before the Revolution. *Id.* This, in turn, set the stage for a new wave of evangelism, the Second Great Awakening, which not only reshaped American religious life, but also transformed American political culture. Its millennial tone helped foster a flurry of reformist movements, including abolitionism, and imbued them with a perfectionist and immediatist temperament. He writes that:

> [I]f we are determined to attribute a major political and military upheaval to revival fervor, we would do far better to choose the Civil War, not the Revolution. The Union Army, not the Continentals, sometimes marched to combat singing *The Battle Hymn of the Republic*, whose millennial tone has no counterpart among either Confederate or Revolutionary War songs.

Id.

204. *Id.* at 163-64.

205. One might, of course, break Murrin's question down into a series of narrower questions that more closely resemble his first two, but as the list of questions lengthens the counterfactual exercise would become pointless, if not impossible. Moreover, Murrin's question would not remain the same if it were broken into its supposed components. His question is not intended as a shorthand for a series of counterfactual questions. It is, instead, another way of expressing the question: "Did the Awakening have a big historical impact on nineteenth century America or a small one?"

counterfactuals in his book *Andrew Johnson and Reconstruction.*[206] In a chapter entitled "Reconstruction as a Problem in Constitutional Theory," McKitrick outlines five approaches regarding the constitutional status of the Southern states advocated by various people during and after the Civil War.[207] In his discussion of one of these approaches, President Andrew Johnson's constitutional theory, McKitrick draws a sharp contrast between Johnson's approach and the way Lincoln likely would have dealt with post-War reconstruction had he survived.[208]

Any contemporary discussion of Reconstruction had to consider the constitutional status of the Southern states. Were they still part of the constitutional compact, and entitled to full participation under its terms, or had they severed that relationship, so that they might better be regarded as conquered provinces, as Thaddeus Stevens, House leader of Johnson's opponents, the Radical Republicans, regarded them?[209] Johnson held that the Southern states had never been outside of the Union, because secession was constitutionally impossible. Thus, he believed the problem in the South was not the status of the states, but the insurrection of their officers. Their treason would have to be punished or pardoned, while officers who were loyal assumed government leadership in those states. Until legitimate governments were restored, the states remained in a state of "suspended animation"[210] and would temporarily be governed by provisional governors appointed by the President. When the time came for full restoration, the President would breathe the "life-breath" into the Southern states, and they would return to their animated state with full rights under the Constitution.[211]

When McKitrick wrote, the conventional interpretation of Andrew Johnson's presidency saw Johnson as a victim of the Radical Republicans, who unreasonably and unremittingly vilified him for trying to carry out Abraham Lincoln's reconstruction program.[212] McKitrick

206. MCKITRICK, *supra* note 167. Because the book as a whole is intended as an evaluation of Andrew Johnson's stewardship during Reconstruction, the whole tone of the book is in a sense counterfactual. *See infra* note 214.

207. *Id.* at 93-119.

208. *Id.* at 101-10. For a different counterfactual treatment of Reconstruction, see C. VANN WOODWARD, *Reconstruction: A Counterfactual Playback, in* THE FUTURE OF THE PAST 183-202 (1989).

209. Senator Stevens believed that "we have the right to treat them [the Southern States] as we would any other provinces we might conquer." *See* MCKITRICK, *supra* note 167, at 99 n.10.

210. *Id.* at 102.

211. *Id.* & n.14. That would mean, for instance, that the Southern states alone would have the power to determine questions of suffrage. Johnson's insistence, on the one hand, that the Southern states were part of the Union, and on the other, that they were in a state of suspended animation and subject to presidential oversight of their internal affairs, left him susceptible to criticism from Southern and Republican critics alike. *Id.* at 102-03.

212. *See, e.g.,* HOWARD K. BEALE, THE CRITICAL YEAR 30-32, 54-57 (1930); CLAUDE G. BOWERS, THE TRAGIC ERA 11-12 (1929); GEORGE F. MILTON, THE AGE OF HATE 189 (1930). Although William Dunning's assessment of Johnson was not as flattering as Beale's or Milton's, he also saw presidential reconstruction under Johnson as a continuation of Lincoln's approach. WILLIAM A. DUNNING, RECONSTRUCTION, POLITICAL AND

hardly sought to vindicate the Radical Republicans, and he acknowledged that the outlines for Johnson's reconstruction policy for "the most part had been laid down by Lincoln himself."[213] Nonetheless, he sought, in his terms, to reopen the case of Andrew Johnson, and to reconsider the prevailing portrayal of him chiefly as victim in the episode of reconstruction.[214] In the background of any reevaluation of Johnson's presidency looms "the shadow of Abraham Lincoln."[215] Thus, in his discussion of Johnson's theory of reconstruction, McKitrick contrasts Johnson's approach to that which Lincoln likely would have pursued had he lived.

McKitrick is conservative in his counterfactual claims. Indeed, he avoids the subjunctive voice and reminds the reader of the speculative character of any assertions regarding what Lincoln would have done.[216] Yet his argument at least suggests differences between Johnson's theory of reconstruction and that which we would expect Lincoln to have developed.

McKitrick suggests that unlike Johnson, Lincoln would have pursued a strategy of "practical flexibility and theoretical vagueness" in his approach to postwar reconstruction.[217] He would not have confined himself, in other words, to an inflexible constitutional theory regarding the status of the states, or to a course of conduct that such a theory, or that any theory for that matter, required.

Essentially, McKitrick's argument relies on a contrast between Lincoln's and Johnson's personalities, as well as on the different institutional constraints that confronted each man. Specifically, he contrasts Johnson's intellectual rigidity and need for order with Lincoln's intellectual flexibility and tolerance for disorder. He suggests that Johnson, a former tailor, was never able to escape a tailor's mentality. Just as he prided himself on giving his customers " 'a good snug fit,' " so too did he seek a snug fit between constitutional

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ECONOMIC, 1865-1877, at 35-37 (1907); *cf.* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1865-1877 xix-xx (1988) (describing reconstruction historiography); KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877, at 7-8 (1965) (same).

213. MCKITRICK, *supra* note 167, at 3.

214. *Id.* McKitrick wrote that:

> How Andrew Johnson threw away his own power both as President and as party leader, how he assisted materially, in spite of himself, in blocking the reconciliation of North and South, and what his behavior did toward disrupting the political life of an entire nation will form the subject of this book.

Id. at 14. The evaluative tone of McKitrick's study casts the whole work in counterfactual terms. In suggesting that Johnson squandered an opportunity to effect a more successful reconstruction of the nation, McKitrick invokes a realm of unrealized historical possibilities.

215. *Id.* at 103.

216. *Id.*

217. *Id.* at 105.

doctrine and application.[218] His orderly habits, fastidiousness in matters of dress, and constitutional strict construction were all of one piece.[219] Lincoln, by contrast, was the opposite in his personal habits; the executive office was cluttered, and his dress was slovenly.[220] Such habits bespoke a willingness to tolerate conceptual untidiness, and imprecision and paradoxical constitutional theory. Lincoln's wartime conduct exemplifies these intellectual habits. McKitrick notes that the Lincoln administration sometimes characterized the war as a domestic insurrection and other times as a war against an alien enemy, thereby giving the government the advantages of being both a sovereign and a belligerent.[221]

McKitrick's discussion of the sources of the differences in Johnson's and Lincoln's personalities supports the conclusion that Lincoln's approach to reconstruction would have differed from Johnson's. Underlying Lincoln's humility was a "superior man's self-knowledge," which permitted public experimentation with ideas and policy alternatives and a willingness, as he said in his last speech, to break bad promises.[222] Johnson, on the other hand, was uncertain of his intellectual capacities and ever in need of the reassurance of public approval. McKitrick writes of Johnson that:

> He tended to hesitate in full realization of his own shortcomings. At bottom, general rules were an easy substitute for concrete thinking; confronted with a difficulty, Johnson's mind searched instinctively for such rules in order that it might once more close itself and be at rest. He was not really capable of intellectual courage until after he had made up his mind, and once he had, he would do anything rather than undergo the agony of further doubts.[223]

For such a man, a politics based on strict adherence to constitutional principles was very appealing. Johnson's experience and self-perception as a social and political outsider also helped to shape his political personality. "Politics for Andrew Johnson was essentially a matter of principles that had to be defended rather than of a party organization that had to win elections."[224] By contrast, "Lincoln could not imagine working without his party connections."[225] Consequently, Lincoln, unlike Johnson, brought to his office an acute political sensitivity and an ability to compromise.

Finally, McKitrick infers from his knowledge of Lincoln as a master politician that he must have recognized the advantages to the

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218. *Id.* at 103.
219. *Id.* at 87-88.
220. *Id.* at 85, 87.
221. *Id.* at 103-04. As McKitrick notes, the Supreme Court also adopted the dual theory of the Civil War in the *Prize Cases*. *Id.* at 104 (citing Prize Cases, 67 U.S. (2 Black) 876, 885 (1863)).
222. *Id.* at 89. For Lincoln's statement that bad promises were better broken than kept, see VIII THE COLLECTED WORKS OF ABRAHAM LINCOLN 402 (Roy P. Blaser ed., 1953).
223. MCKITRICK, *supra* note 167, at 89.
224. *Id.* at 88.
225. *Id.*

government of a dual theory of the war as both war and insurrection and understood that to take advantage of the dual theory he would have to maintain pragmatic flexibility at the level of policy and avoid or obscure issues of constitutional theory. McKitrick relies heavily in this argument not only on his inferences about what a politician with Lincoln's acumen would have done, but also on Lincoln's actions during the war. He shows that in his conduct and his statements, Lincoln pursued an approach of practical flexibility and theoretical avoidance.[226]

McKitrick uses a two-pronged argument to support his belief that Lincoln's approach to reconstruction would have differed from Johnson's. First, by offering a causal explanation of Johnson's inflexibility that is grounded in Johnson's character and experience, he implies that someone lacking that character and experience (Lincoln, for instance) would have acted differently. Lincoln, in other words, would have acted differently because he was not Johnson, or enough like Johnson, under circumstances where being like Johnson mattered. Second, by describing certain relevant aspects of Lincoln's personality and some of the ways that they manifested themselves in his political conduct, McKitrick is able to predict something about Lincoln's likely approach to reconstruction relative to the approach taken by Johnson. He argues inductively, in other words, from what he knows about Lincoln's character and past conduct.

D. Lessons

The story is told by someone about the man who was asked whether he believed in baptism by total immersion. "Believe in it?" he replied, "Why I've seen it with my own eyes!" This excursion into the writings of John Murrin and Eric McKitrick shows by concrete examples that it is possible to think at once counterfactually and intelligently. These examples ought to extinguish at least the most extreme versions of counterfactual dread. They show that assertions that counterfactual inquiry can be used productively are based not merely in belief, but in fact.

In reviewing Murrin's and McKitrick's writings, what have we seen with our own eyes? First, we have seen two different types of counterfactuals: those that focus on causation and those that focus on unrealized alternative outcomes. Viewed more closely, they are not so sharply dichotomous, but rather blur into one another. We cannot meaningfully say that q would not have occurred had p not occurred unless we have confidence in our ability to say something

226. *Id.* at 105-07.

about what a not-*p* world would look like.[227] But the difference in emphasis is real. To use Professor Jarle Simensen's terms, counterfactual statements are either "negative" or "positive."[228] Negative counterfactuals typically take the form "if not *A* in a situation *S* then not *B*."[229] Positive counterfactuals often take the form "if not *A* in *S* then not *B*, but *C-D-E*, etc."[230]

We explore negative counterfactuals to test assertions of causal responsibility. Murrin's counterfactual explorations fall mostly within this category. Starting with the proffered explanation of an historical event, he tests the counterfactual implied by that explanation.[231] For example, to test Gipson's thesis that elimination of the French-Canadian threat unleashed the Colonies to pursue independence, Murrin restores them in North America after 1763 and examines whether the Revolution still would have occurred.

Ultimately, the negative counterfactual may either confirm or make us revise our notions of what caused a particular event, or our causal ranking of various factors contributing to the occurrence of that event. It can also help us to identify "suppressed historical alternatives,"[232] and "possibilities and alternatives obscured or obliterated by the deceptive wisdom of hindsight."[233] In so doing, it reinforces our notions of historical contingency and choice in lieu of competing notions of fatalism and historical inevitability.

Positive counterfactuals, descriptions of alternative outcomes, are rarer historiographical creatures than their negative counterparts, although both Murrin and McKitrick use them. Generally, historians approach positive counterfactuals hesitantly and with modest ambitions.[234] Murrin and McKitrick qualify their positive counterfactual assertions and keep them vague and general.[235] We see the contours of what might have been, but none of the detail: Lincoln would have adopted a more flexible and pragmatic approach to reconstruction than Johnson, and deliberately would have kept its constitutional underpinnings vague; nineteenth century America in a world not having experienced the Great Awakening

227. We may not have concluded much if we say "if not *P* then not *Q*," if instead of *Q* we get a near equivalent substitute.

228. Simensen, *supra* note 159, at 172-73. Simensen credits Ottar Dahl for distinguishing negative from positive counterfactuals. *Id.* at 172, 173.

229. *Id.* at 172.

230. *Id.* at 173.

231. Or in Gipson's case, the counterfactual expressly stated by Gipson as entailed by his explanation. *See supra* text accompanying note 172.

232. *See* MOORE, *supra* note 157, at 377. One such exploration of suppressed alternatives is Murrin's discussion of the possibility that had Britain adopted a more conciliatory policy toward the colonies, it could have averted the Revolution. *See supra* note 184.

233. MOORE, *supra* note 157, at 376.

234. *See* ARON, *supra* note 161, at 79. My selection of examples exaggerates this point somewhat.

235. *See supra* notes 203 & 216-17 and accompanying text. Murrin's assertion that even without its evangelical leadership, New Jersey's delegates to the Continental Congress would have voted for independence is the one notable exception. *See supra* text accompanying notes 195-99.

would have been dramatically different. Indeed, McKitrick's description of the approach that Lincoln would have taken to reconstruction is little more than the negation of his description of Johnson's.

We also see an inclination to limit the scope of the counterfactual. More restrictive questions are less daunting and more manageable, perhaps because our mistakes are likely to conform to scale. Hence, Murrin is reluctant to elaborate on the lasting differences in an America that had not experienced the Awakening, other than to say that they would be pervasive.[236]

Vagueness and restrictive scope are not simply a product of Murrin's and McKitrick's care not to exceed their inferential powers. They are also a function of the questions they ask. Murrin and McKitrick understand that their positive counterfactuals should not exceed the scope of their questions. Murrin refrains from describing the detail of an un-Awakened nineteenth century America not simply because he doubts his ability to do so accurately—no doubt he could make many noncontroversial statements about such a world—but because the detail does not matter given the question posed. Murrin and McKitrick are not interested in positive counterfactuals for their own sake; purely imaginary worlds are the province of science fiction. The relevance of the positive counterfactual always relates to the actual world. Its purpose is comparative and evaluative, to examine the consequences of real acts in the actual past in light of unrealized alternatives.[237] Sometimes, notably in economic history, that will lead the historian to pose questions that demand a detailed description of *aspects* of a counterfactual world.[238] More often, such detail is unnecessary for the kind of comparisons the historian wants to make.

We also have seen that many kinds of arguments may be used to resolve counterfactual questions. Many of these are conventionally empirical and do not differ from the factual analysis that historians

236. *See supra* note 203 and accompanying text; *cf.* ALEXANDER GERSCHENKRON, *Postscript* to *Some Methodological Problems in Economic History*, *in* CONTINUITY IN HISTORY AND OTHER ESSAYS 55 (1968) ("[C]ounterfactual history should be essentially regarded as an instrument for the elucidation of relatively short-term changes . . . . Once the period under review lengthens, the number of unconsidered and nonconsiderable factors that bear on the outcome increases fast and the significance of the results diminishes even faster."); *id.* at 51 ("The degree of plausibility . . . will vary with the magnitude of the problem and the length of the period under consideration.").

237. One might liken the positive counterfactual in the hands of the historian to the economist's concept of opportunity costs.

238. For instance, the historian may ask how much it would cost to ship various goods by alternative means in a railroadless United States or what British industrial output would have been in 1907 had the rate of growth in the value of British exports between 1872 and 1907 kept pace with the rate of growth for the period 1854 to 1872. *See* FISHLOW, *supra* note 157; FOGEL, *supra* note 157; MEYER, *supra* note 157.

generally engage in to validate their causal statements. For example, Murrin questions the representativeness and reliability of the contemporary sources marshaled by Gipson to support his thesis and questions the accuracy of Gipson's description of the sense of security felt by colonial Americans after the Treaty of Paris removed the French from the continent.[239] Also, in discussing the possible relationship between the Awakening and the decision to declare independence in July of 1776, Murrin alludes to (really asserts the existence of) a better alternative causal explanation.[240] None of these arguments are remarkable in their structure or in their content; they resemble countless other arguments that one might find in conventional historical writing.[241]

I do not mean to suggest that there is nothing uniquely counterfactual about counterfactual history, that there is no analytic method or argument structure contained therein that cannot be found in plain vanilla historiography.[242] Yet, even were that true, there is something to be gained in sometimes asking counterfactual questions. Identification of implied counterfactuals helps us to see what is at stake in our causal explanations. Counterfactual questions focus our attention on the assumptions and implications of accepted explanations in ways that expose their weaknesses.[243] They call our attention to instances of causal overdetermination thereby

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239. *See supra* notes 182-83 and accompanying text.

240. *See supra* notes 196-99 and accompanying text. Alexander Gerschenkron notes that often the refutation of a causal statement relies not on counterfactual arguments but on factual arguments that either undermine the basis for believing the proffered explanation or show that an alternative explanation is better. He writes:

> If I make a causal statement, "The bear died, because I shot it through the heart," I am implying . . . that the lethal event was not the result of any ailment or accident to which a member of the ursine family is susceptible and which may cause its sudden death. Again, an investigation can refute my statement. But it will do so not in any counterfactual fashion, but by establishing the *fact* that death was caused not by a bullet, but by a stroke of lightning or a heart infarct . . . .

GERSCHENKRON, *supra* note 236, at 54. He adds that the refutation may be purely negative, proof that there is no bullet hole in the bear's body, or positive, proof establishing an alternative cause of death. *Id.* at n.12.

241. For that matter, these argument types should resonate familiarly for lawyers and legal decisionmakers.

242. For a discussion of counterfactual method, see *infra* notes 246-52 and accompanying text. Simensen, however, does conclude, at least with regard to negative counterfactuals, that there is no peculiarly counterfactual method. He writes that:

> Our material . . . contains no example of a systematic use of counterfactual reasoning as an independent analytic device. What we have seen is that theories about necessary and sufficient causes, arrived at by ordinary factual analysis, have been re-formulated into counterfactual language for the purpose of emphasis and illustration. . . . In general, it is difficult to see how a counterfactual argument in itself can ever validate a causal statement which is not already validated in other ways, empirical or logical.

Simensen, *supra* note 159, at 174.

243. For example, Murrin's discussion of the effect that elimination of the French had on the Americans' sense of security, *see supra* note 162 and accompanying text, or his examinations of whether concentrations of evangelicals can be found at centers of patriot resistance, *see supra* notes 191-94 and accompanying text.

Patrick Gardiner similarly notes that: "The implications of an historian's use of the word 'cause' in a particular connexion can frequently be illuminated by translating the explanation in question into a different grammatical form, the form of the contrary-to-

causing us to reassess the importance that we assign to a causal candidate. They also reveal gaps in our knowledge and thereby help set a research agenda.[244]

Murrin and McKitrick do not limit themselves, however, to answering counterfactual questions by factual proxy. They also explicitly explore counterfactual suppositions and attempt to resolve them directly. Even when they do, however, they rest on the historian's knowledge of the actual world.[245]

When historians embrace a false antecedent and attempt to describe the consequent that follows from it, they naturally look to that which they know best to help them decide what inferences they may make within the scope of their supposition. They reason by analogy to other historic events.[246] Like Murrin,[247] they may use analogies to test the sufficiency or necessity of a purported cause under circumstances similar to those described by the counterfactual. Historians also use historical analogy to help construct positive counterfactuals. They fill in the consequent with reference to similar events.[248]

Murrin draws his conclusions about how American colonists probably would have behaved in a counterfactual setting by analogical inference. He has the advantage of knowing something about the behavior of reasonably comparable groups (inhabitants of particular colonies) under circumstances that allow for comparisons with his counterfactual. By looking at certain events, he suggests certain laws of behavior that would apply to comparable groups in other

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fact conditional." PATRICK GARDINER, THE NATURE OF HISTORICAL EXPLANATION 106 (Oxford Univ. Press 1955) (1952).

244. For example, Murrin notes the need for additional research regarding the composition of the colonial militia. *See supra* notes 201-02 and accompanying text.

245. For this reason, David Fischer's argument that a statement cannot be counterfactual and factual at the same time, *see supra* note 2, is misleading. Fischer means that counterfactual statements differ from statements of fact because they are not verifiable or falsifiable in the manner of statements of fact. Hence, a statement is either factual or counterfactual, but not both. Yet the acceptability of a historian's counterfactual will depend on its grounding in fact. Although the statement rests upon a counterfactual supposition, the strength of the assertions made within the supposition will depend on the empirical bases for the inferences that the historian makes. Thus, historians' counterfactuals, to be plausible or acceptable, must be both factual and counterfactual. *Cf.* GERSCHENKRON, *supra* note 236, at 55 ("[A] mass of factual research must be carried out before counterfactual questions can begin to be raised."); WEBER, *supra* note 18, at 174 (contending that knowledge of historical possibilities rests on our knowledge of facts, "ontological knowledge," and on our knowledge of rules of human behavior, "nomological knowledge").

246. *See* ARON, *supra* note 161, at 79-80; Pork, *supra* note 80, at 66.

247. *See supra* notes 173-81 and accompanying text.

248. *See, e.g.*, FINKELMAN, *supra* note 157, at 324-36 (drawing on earlier Supreme Court slavery cases to predict course of Court's slavery jurisprudence had the Civil War not occurred).

similar circumstances. In this sense, Murrin's argument has a lawlike structure.[249]

McKitrick must construct his argument differently. Like Murrin, he must describe the effect that a counterfactual change of real events would have on the decisions of historical actors. He has no ready analogy to draw upon, however, and it would be silly (as historians and at least some philosophers recognize) to attempt to articulate general laws of presidential behavior to explain Johnson's approach to reconstruction. Instead, he must draw his inferences from his knowledge of Lincoln's and Johnson's political and private personalities and from his knowledge of human behavior. In both instances he must draw heavily on a part of what J.H. Hexter calls the historian's "second record"—his knowledge of the world and of human behavior.[250]

McKitrick builds his argument on contrasting characterizations of Lincoln and Johnson. While Lincoln was flexible, Johnson was rigid. While Lincoln was undaunted by intellectual paradox or disorder, paradox and disorder terrified Johnson. While Lincoln was pragmatic and politically sensitive, Johnson was politically dogmatic and therefore possessed a political tin ear.[251] Dispositional statements such as these help predict how their subjects would behave in a variety of circumstances.[252] They lead McKitrick to conclude that Lincoln would have been more flexible and pragmatic in his approach to reconstruction than Johnson was.

By showing the genesis and effect of some of these traits, McKitrick bolsters his claim to have correctly characterized the two men. At the same time, his examples support his inferences regarding how Lincoln would have approached reconstruction by demonstrating other instances when Lincoln acted in much the same manner as he predicts Lincoln would have acted had he lived to preside over postwar reconstruction.

McKitrick and Murrin draw on their knowledge of the past, about specific historical actors, and about human behavior in general to predict how events might have been under a counterfactual scenario. This knowledge of history and of human behavior allows them to make coherent and plausible, if perhaps cautious, counterfactual judgments. What remains for us to consider is whether these methods and arguments can help the legal decisionmaker.

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249. By "lawlike" I am suggesting that his discussion is consistent with the positivist attempt to assimilate historical explanation to scientific explanation. *See* Carl G. Hempel, *The Function of General Laws in History*, 39 J. PHIL. 36 (1942), *reprinted in* THEORIES OF HISTORY 344 (Patrick Gardiner ed., 1959).

250. HEXTER, *supra* note 132, at 80-109. Hexter defines historians' second record as "the reservoir of what they know, have learned, and are—on which they must draw to force from the first record an understanding of what happened in the past and what the past was like." *Id.* at 85.

251. *See supra* notes 218-26 and accompanying text.

252. *See* GARDINER, *supra* note 243, at 124-25. In his discussion of mental causation, Gardiner draws heavily on Gilbert Ryle's discussion of dispositions. *Id.* at 120-39 (citing GILBERT RYLE, THE CONCEPT OF MIND (1949)).

III. Counterfactuals in Law Revisited

A. "And It Will Never Be History"[253]

Are there lessons for lawyers in historians' use of counterfactuals? To decide, we must consider the differences between law and history.

Certainly there are differences. Lawyers and legal decisionmakers follow different norms and work under different constraints on their factfinding than those experienced by historians.[254] Historians and legal decisionmakers also have different standards for explanations or interpretations of past events.[255] Finality is an important value underlying the norms of legal decisionmaking.[256] Historians, by contrast, recognize that in writing history, they engage in an ongoing dialogue with other historians, past and future. Historical explanations and interpretations are, in other words, always provisional, always incomplete, and always a product not only of the historical record, but also of their author's worldview.[257]

Underlying many of these differences are the different reasons why we ask legal and historical questions and the obvious fact that

253. I have adapted this title from and with apologies to Lance Davis. *See* Lance E. Davis, *"And It Will Never Be Literature"—The New Economic History: A Critique, in* QUANTIFICATION IN AMERICAN HISTORY: THEORY AND RESEARCH 274 (Robert P. Swierenga ed., 1970).

254. As Nicholas Rescher and Carey Joynt have noted, the primary goal of a trial is adjudicatory, not investigative. Rescher & Joynt, *supra* note 153, at 566. Although the historian's "primary obligation is to the truth," *id.* at 567, the purpose of a trial is truth finding only "secondarily, insofar as is necessary in the interests of reasonable adjudication," *id.* at 566-67. Moreover, legal institutions must balance their commitment to truth seeking against other values in ways that historians, who have no analog to suppression hearings, discovery limits, hearsay objections, or rules of claim or issue preclusion, are not obliged to do. *Id.* at 567-68.

255. In law, typically, we use a preponderance standard applied to each element of a claim, and in certain types of cases we use the more rigorous clear and convincing or beyond a reasonable doubt standards. Historians tend to focus instead on whether a particular historical work provides a better, more plausible, account than its competitors. MARTIN, *supra* note 179, at 30-31; Rescher & Joynt, *supra* note 153, at 564. Professor Allen argues that we should model our proof rules for civil trials on the way historians assess competing historiographical visions of historical events. Ronald J. Allen, *The Nature of Juridical Proof,* 13 CARDOZO L. REV. 373, 382, 388-91.

256. Concern for finality manifests itself in various legal rules. Most notably, in the trial setting, statutes of limitation and repose, and doctrines of issue and claim preclusion reflect the law's valuation of closure in legal disputes and a related concern to protect settled expectations. *See, e.g.,* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.3 (1985).

257. This observation does not mean that there is not overwhelming consensus over many issues of historical fact. Nor do I mean that historians attempt to give less than the best possible account of their subject. Yet most historians would acknowledge that revision and reinterpretation is an intrinsic part of engagement with the past. Historian Robert Dallek has noted regarding his and Robert Caro's conflicting interpretations of Lyndon Johnson's career: " 'I'm not a believer in definitive history or biography. No one's going to have the last word.' " Joseph A. Cincotti, *"No One's Going to Have the Last Word,"* N.Y. TIMES, July 21, 1991, § 7 (Book Review), at 30.

the outcome of a legal dispute has very different consequences than the outcome of an historical debate. No one need pay money damages or surrender property because historians conclude that Lawrence Gipson, John Murrin, or somebody else has best explained the American Revolution. Andrew Johnson's reputation may suffer at the hands of Eric McKitrick compared to earlier treatments of his presidency, but Johnson is, after all, long dead.[258] Obviously, the stakes can be high in a legal dispute both for the parties to the dispute and for society as a whole. Also, resolution of a legal dispute by a court or administrative agency implicates state power in the redistribution of wealth among the parties. Given these differences between legal disputes and historians' arguments, should we not be more cautious in our use of counterfactuals in the law?

The argument for an affirmative answer rests on a misplaced comparison. The costs of faulty counterfactual thinking are no doubt lower in historiography than in law, but only because error costs will usually be higher in legal disputes than in historiographical ones, regardless of the means we adopt to resolve them and the kinds of error we commit. A more appropriate comparison is between the probable error costs of using counterfactual inquiry and the probable error costs of avoiding it.[259] We do not escape the costs of

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258. The stakes in a historian's arguments may, nevertheless, be quite high. Certainly, what we teach our children as the "official" version of their past matters. *See generally* FRANCES FITZGERALD, AMERICA REVISED: HISTORY SCHOOLBOOKS IN THE TWENTIETH CENTURY (1979). Because of the importance of the version of the past that we teach our children, members of various religious organizations (as well as historians) have criticized the tendency of American history textbooks to write religion out of the American past. *See* Smith v. Board of School Comm'rs, 655 F. Supp. 939, 983-85 (S.D. Ala. 1987), *rev'd*, 827 F.2d 684 (11th Cir. 1987); O.L. DAVIS ET AL., LOOKING AT HISTORY: A REVIEW OF MAJOR U.S. HISTORY TEXTBOOKS (1986); George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 868-71 (1988); Paul Vitz, *Religion and Traditional Values in Public School Textbooks*, 84 PUB. INT. 79 (1986). The lesson that there is power in control of the reigning historical interpretation has not been lost on authoritarian regimes, as can be seen in the energy devoted over the years to revising Soviet history (including photographs from the October Revolution) to recast the roles of Trotsky, Bukharin, Zinoviev, and Kamenev, among others, or to expunge them altogether. More recently, as a consequence of *glasnost*, Soviet schools cancelled history finals for their students because the Soviet textbook writers had not yet provided a new official history to supplant the old, repudiated version. *See* Esther B. Fein, *Soviet Pupils Spared Exams While History is Rewritten*, N.Y. TIMES, May 31, 1988, at A1. Nationalist movements, as well as groups historically excluded from power, also have recognized the importance of how history is told and have sought to ensure that their stories be included in the telling of the past. *See, e.g.*, Renate Bridenthal & Claudia Koonz, *Introduction* to BECOMING VISIBLE: WOMEN IN EUROPEAN HISTORY 1 (Renate Bridenthal & Claudia Koonz eds., 1977); CAROLL SMITH-ROSENBERG, *Hearing Women's Words: A Feminist Reconstruction of History*, *in* DISORDERLY CONDUCT 11 (1985).

259. By the term "probable error costs," I mean the amount of overpayment or underpayment (viewed from the perspective of governing substantive legal norms and our assumed omniscience) that would result from a faulty legal decision, discounted by the probability that the decisionmaker will err. It is a concept similar to the PL variables in the Hand formula. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (stating test of negligence in algebraic terms of "whether B < PL," with B standing for burden, P for probability of harm, and L for injury). Indeed, the comparison between the probable error costs of counterfactual inquiry and the probable error costs of alternative noncounterfactual approaches translates to the Hand Formula, with the probable error costs of alternatives taking the place of the B (or burden of forgoing counterfactual inquiry) variable in the formula. We may not be able to quantify these

uncertainty and error simply by prohibiting counterfactual inquiry. Remedial abnegation to avoid framing a remedy that would require counterfactual speculation can have high costs, as was shown regarding denial of make-whole relief in bad faith bargaining cases.[260] And denial of a claim or a remedy as "speculative" implicates the state in the distribution of wealth as inescapably as do decisions allowing the claim or granting the requested relief. In deciding how to treat claims grounded on uncertain causal assertions, or whether to grant or deny speculative remedies, courts favor one activity over some other activity and thereby enrich the former at the expense of the latter.[261]

The risk of counterfactual error matters, but there is no *a priori* basis for choosing between denying or limiting claims or remedies to avoid the costs and distributional effects of counterfactual error, or entertaining such claims or remedial requests to avoid the costs and distributional effects of circumscribed liability or remedy rules. As discussed further below, we can only justify a decision with broader reference to tolerable levels of risk of error, to the risk of error inherent in the alternative approaches, to our preferences regarding which party should bear the greater risk of error, and to the public consequences of adopting one rule or the other.[262] In other words, we need to make plain what we risk by engaging or declining to engage in a particular counterfactual inquiry.

Aside from the dissimilar consequences of resolving legal and historiographical disputes, history and law differ in the training and knowledge we expect of their practitioners. Few judges, jurors, or lawyers are also historians.

Is counterfactual inquiry a peculiarly historiographical endeavor that would be a perilous undertaking for those lacking the training of an historian? Our everyday experiences should dispel this idea.[263] Recall Weber's example of the mother and the cook.[264] Although Weber also relies on examples from history in his analysis, he readily uses an example from everyday life, a mother's explanation of why she hit her child, as a proxy for historical reconstruction

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variables with great specificity in most cases, but by thinking about when courts ought to engage in counterfactual inquiry in these terms (at least partly), we can get a clearer, albeit rough, sense of the risks and benefits of posing counterfactual questions.

260. *See supra* notes 107-10 and accompanying text.

261. The idea has been around at least since the legal realists. *See, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470-73 (1923). For a more recent expression of the same idea, see R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

262. *See infra* notes 290-94 and accompanying text.

263. Recall the examples of counterfactual statements that one might expect to hear in everyday discourse. *See supra* text accompanying note 11.

264. *See supra* text accompanying note 161.

and explanation.[265] The value of the examples from Murrin's and McKitrick's work is not that counterfactual thinking is peculiarly within the domain of historians, but rather that they are required by the standards of their craft to make their arguments and inferences more explicit in order to justify their conclusions.

Surely, one might argue, there is more of a difference than that between an historian's and a nonhistorian's performance of counterfactual thinking. At the very least, the requirement that historians make their assumptions and reasoning express and therefore susceptible to the criticism of their peers must sharpen their skill at counterfactual inquiry. Indeed, should we need a cautionary reminder of the pitfalls of amateur historical thinking, we need only consider the misuse of historical analogies by policymakers and other lay analysts.

Analogical thinking has produced some of mankind's great insights. Drawing on the Aristotelian belief that the microcosm of the living organism paralleled the macrocosm of the universe, William Harvey considered the cosmological cycle of evaporation of water followed by condensation as rain followed once again by evaporation in conceptualizing the circulation of blood.[266] Nevertheless, in light of such disastrous examples of faulty analogical thinking as the French reliance on the Maginot line, and the misuse of Munich and Vietnam analogies in crafting recent American foreign policy, can we help but be chary about decisionmaking by analogy?[267]

Given a record of inapt and inept use of historical analogies by policymakers, should we leave analogical argument to the historians? No, but we must distinguish among types of analogies. The vulnerability of analogical arguments like the ones that have led to such debacles as our involvement in the Vietnam War flows from the ahistorical use of *historical* examples. We are prone to err in such arguments if we are not sensitive to the differences between the historic settings that we wish to compare, and if, because of such insensitivity, we fail, in Peter Stearns' words to "test[] apparent, attractive similarities against situational change."[268] Historical analogy often leads to folly not because we are incapable of reasoning by analogy,

265. R.G. Collingwood discusses further the relationship between historical thinking and memory of one's own thoughts. COLLINGWOOD, *supra* note 153, at 293-96.

266. WILLIAM HARVEY, AN ANATOMICAL STUDY ON THE MOTION OF THE HEART AND BLOOD 70-71 (1628) (Chauncey D. Leake trans., 5th ed. 1970); *see also* Walter Pagel, *William Harvey and the Purpose of Circulation*, 42 ISIS 22, 23-24, 28-29 (1951). On the widespread adherence of sixteenth and seventeenth-century chemists and alchemists to a belief in the microcosm-macrocosm analogy between man and the universe, see ALAN G. DEBUS, THE CHEMICAL DREAM OF THE RENAISSANCE 15-16 (1968).

267. *See, e.g.*, FISCHER, *supra* note 2, at 248-51; ERNEST R. MAY, "LESSONS" OF THE PAST: THE USE AND MISUSE OF HISTORY IN AMERICAN FOREIGN POLICY (1973); PETER N. STEARNS, *History and Policy Analysis: Toward Maturity*, 4 PUB. HISTORIAN 5, 15-16 (1982); Charles Krauthammer, *Good Morning, Vietnam*, WASH. POST, Apr. 19, 1991, at A23.

268. Stearns, *supra* note 267, at 16. For a discussion of how policymakers can make better use of history, see generally RICHARD E. NEUSTADT & ERNEST R. MAY, THINKING IN TIME: THE USES OF HISTORY FOR DECISION-MAKERS (1986).

but because those who engage in such analogizing are not sufficiently understanding of the past to see beneath surface resemblances.

Thus, the argument that our misuse of the Munich analogy, for example, shows that we cannot successfully argue analogically, is itself grounded in a faulty analogy. Indeed, legal decisionmakers should be especially well equipped to engage in analogical argument because much of law's logic comes down to reasoning by analogy.[269]

B. Asking the Right Questions

If we are to use counterfactuals successfully in law, we must ask the right counterfactual questions. We must state the antecedent in legally relevant terms and similarly restrict our consequent within the perimeters of legal relevance. These are simple points, and generally courts have managed these issues well. Nevertheless, because courts and commentators have sometimes gone astray in this regard, they warrant some elaboration.

When we begin to change the past, the possible variations are endless. Is it any wonder, then, that some who have stared into the abyss have been overcome by counterfactual dread? Surely, though, we commit ourselves to something less heroic than such a boundless journey. We limit our task by our choice of questions, most notably at the outset by our decisions regarding the antecedent. Eric McKitrick focuses his counterfactual considerations by narrowly specifying one among many possible counterfactual antecedents. He does not explore, for example, the likely course of reconstruction under a Hannibal Hamlin or William Seward administration or under any other imaginable set of counterfactual circumstances.[270] John Murrin similarly restricts his explorations by his choice of counterfactual antecedent.[271] In crafting their antecedents McKitrick and Murrin

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269. Judge Aldisert has stated:

> Analogies can be considered the most important aspect of the study and practice of law. It is the method by which putative precedents are subjected to the acid test of searching analysis. It is the method to determine whether factual differences contained in the case at bar and those of the case compared are material or irrelevant.
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> . . . .
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> The importance of legal reasoning by analogy cannot be overstated. It is the heart of the study of law . . . .

RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 94-95 (1989).

270. Hannibal Hamlin was Vice President in the first Lincoln administration. *See generally* H. DRAPER HUNT, HANNIBAL HAMLIN OF MAINE: LINCOLN'S FIRST VICE-PRESIDENT (1969). William Seward, Lincoln's Secretary of State, was the preconvention favorite to capture the Republican party's presidential nomination in 1860. FINKELMAN, *supra* note 157, at 323; DAVID M. POTTER, THE IMPENDING CRISIS, 1848-1861, at 422-29 (1976).

271. He, for instance, imagines away the Great Awakening, but he does not consider

are guided by their perspectives, their sense of the plausibility of historical alternatives, and the questions posed by an ongoing historiographical discourse.[272]

In law, our choice of antecedent similarly should be circumscribed by the concerns of the governing substantive law. Robert Cole's argument that statements of causal necessity require us to ask broadly, "Had defendant not done x, what would he have done instead, and with what effect?" is wrong.[273] Instead, we should frame the antecedent in terms of legally mandated conduct and ask questions such as: "Had defendant driven at a reasonable speed would he have collided with plaintiff?"[274] As Richard Wright has shown, the point of the counterfactual inquiry is not to discover the next most likely scenario to the actual past, but to "determin[e] the causal effect of the tortious aspect of the defendant's conduct."[275] Failure to frame the counterfactual antecedent in terms of the tortious aspect of the conduct has led some courts astray in cases involving the failure to obtain a license to engage in an activity. By mistakenly framing the antecedent as "If defendant had not engaged in the activity . . ." rather than "If defendant had obtained a license . . .," they incorrectly identify the violation of a licensing law as a responsible cause of the accident.[276] The factfinder need not confront a limitless array of antecedents; the negligence inquiry (or the definition of the defect in a strict products liability case) defines the tortious element of the past that needs to be removed in framing the antecedent.

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replacing it with a wildfire spread of Antinomian or Arminian heresies, or with an outbreak of liberal Protestant evangelism along the lines of the Second Great Awakening.

272. Because the possibility of a Hamlin or a Seward administration in 1865 was remote relative to that of the continuation of the Lincoln administration, there is little reason to care about the approach that Hamlin, or even the far less obscure Seward, might have taken to reconstruction. Obviously, however, one's interest in such questions depends on the broader context in which one writes. A biographer of Hamlin or Seward might have a different perspective. The relative implausibility of the antecedent also affects our ability to resolve the counterfactual. Because many things would have had to be different about the world (besides the name of the President) for a Hamlin or Seward administration to have occurred, the counterfactual inquiry becomes much more difficult. This is the problem of cotenability with a vengeance. The historiographical value of counterfactuals with highly implausible, or even impossible, antecedents is the topic of an interesting debate among Jon Elster, Brian Barry, and Steven Lukes. *See* Brian Barry, *Superfox*, 28 POL. STUD. 136 (1980); Jon Elster, *The Treatment of Counterfactuals: Reply to Brian Barry*, 28 POL. STUD. 144 (1980); Steven Lukes, *Elster on Counterfactuals*, 23 INQUIRY 145 (1980); *see also* Jon Elster, *Reply to Comments*, 23 INQUIRY 213, 220-23 (1980).

273. *See* Robert H. Cole, *Windfall and Probability: A Study of "Cause" in Negligence Law* (pt. 2), 52 CAL. L. REV. 764, 768-77 (1964).

274. *See* HART & HONORÉ, *supra* note 29, at 411-12.

275. Wright, *supra* note 28, at 1806. For a convincing disposition of Robert Cole's argument that validation of statements of causal necessity requires such an inquiry into the whole array of hypothetical alternatives, limited somewhat by Cole's use of "neutral restrictions" on such alternatives, Cole, *supra* note 273 at 777-84, leading, in Cole's words, "to a pyramiding of conjectural possibilities," *id.* at 776, and an unmanageable "mass of contrafactual propositions," *id.* at 777, see Wright, *supra* note 28, at 1805-07.

276. For a discussion of licensing cases, see HART & HONORÉ, *supra* note 29, at lviii-lxi, 117-21, 210-11; KEETON ET AL., *supra* note 29, at 223-24; MACKIE, *supra* note 81, at 129-30.

We similarly bound the set of legally relevant consequents. Having defined their antecedents, Murrin and McKitrick do not succumb to counterfactual free fall. Their choice of questions about their hypothetical pasts focuses their inquiry and limits the range of counterfactual possibilities that they will explore to those that are responsive to their interests and to the debate within the community of historians. Our legal rules, those defining remedies, for instance, set comparable limits on the counterfactual explorations of legal factfinders.[277] Sometimes those rules may be disputed or unresolved, but within the disputing camps there will be clarity as to the focus the counterfactual inquiry should take. We see an example of such divisions in the debate over harmless error, where the debate centers on both the measure of certainty that we ought to satisfy before pronouncing trial error harmless, and on the definition of harm as either impairment of the truth-determining function of the trial or as encompassing broader interests than accurate outcomes.[278]

Our screens of legal relevance make the counterfactual inquiry more manageable, but our choice of antecedent inevitably raises questions regarding relevant conditions or cotenability.[279] Specifically, when a legal rule compels our choice of antecedent without regard to the likelihood of its occurrence, must we legitimate the antecedent by changing other aspects of the world to make its occurrence possible, or even likely? Must we follow Robert Cole in accounting for the possibility that had the defendant been disposed to drive at a reasonable speed, rather than at his actual unlawful speed, he might also have been disposed to be more attentive, to drive in a safer position on the street, or to be more careful in countless other ways that would not constitute the difference between negligent and nonnegligent conduct (and therefore not enter into our antecedent), but could change our counterfactual analysis?[280] Should we consider whether an employer who has committed unfair labor practices sufficient to warrant a *Gissel* bargaining

277. As Professor Leubsdorf states: "Our picture of the hypothetical world must have a point of view and a purpose." Leubsdorf, *supra* note 19, at 136 (noting, for example, that although courts may craft broad remedies in school desegregation cases to undo some of the broad educational and social consequences of segregation, they will not attempt to put the owner of the candy store across the street from the school in the position he would have been in absent segregation, because any harms he may have suffered are beyond the concern of desegregation law).

278. For an introduction to these issues, see generally ROGER TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970); Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988).

279. For a discussion of these concepts, see *supra* notes 118-19 and accompanying text.

280. Cole, *supra* note 273, at 775-76. Cole's example demonstrates the difficulty of the cotenability problem. Should we assume with him that a person who commits one

order may have conducted his prerepresentation-campaign relations with his employees in a manner that helped generate interest in the union? If, in light of his precampaign dispositions and behavior, we cannot imagine him refraining from unfair labor practices during the campaign, must we legitimate our counterfactual antecedent that he conducted a fair campaign by altering his precampaign dispositions and behavior as well and take account of those changes in resolving the counterfactual?[281]

Philosophers of history disagree over the need to legitimate counterfactuals by showing the circumstances under which the antecedent could have come about.[282] Whether working historians bother themselves with the problem of cotenability depends on their reasons for exploring counterfactuals. Historians assessing a particular cause's importance would have less reason to concern themselves with cotenability than would those seeking to explore plausible suppressed historical alternatives. In our examples, Murrin and McKitrick expend little energy on the problem of cotenability.[283]

Our response to the cotenability problem in law should likewise reflect our reasons for making the counterfactual inquiry. Often, we need not care if the defendant's dispositions are incompatible with the standard of behavior called for by our legal rule and expressed

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negligent act (speeding) also would be careless in various other ways, or should we assume that such a person, cognizant of the risks of speeding, would take extra care in all other matters while driving to accommodate his desire to speed?

281. The Board currently does not engage in counterfactual analysis in determining whether to issue *Gissel* bargaining orders. Instead, it applies a rule of thumb that if all other conditions for issuance of a bargaining order are met, the Board will issue such an order if there was a demonstration of majority support at some time prior to the election, and it will not issue such an order if the union cannot demonstrate prior majority support. For a discussion of *Gissel* bargaining orders, see *supra* notes 56-58 and accompanying text.

282. *Compare* TODD, *supra* note 162, at 205 ("When I assert 'If *A* then *B*,' knowing that *A* did not occur or will not occur, certain conditions have to be satisfied for the sentence to be plausible enough to be interesting. . . . When we consider the counterfactual possibility of *A*'s occurring, we usually assume that there are causal laws which, together with the occurrence of numerous past events, in fact brought about *A*'s non-occurrence. Thus, in order to suppose that *A* occurred, we . . . have to suppose that a whole range of events reaching into the past to an undetermined extent did not occur when we know that it did . . . . The hypothetical counterfactual then tells us that if the universe had been different enough to determine *A*'s occurrence rather than non-occurrence, *B* would then have occurred.") *with* MCCULLAGH, *supra* note 81, at 191 (arguing that historian need not "attempt to construct an alternative coherent hypothetical world in the manner Todd suggested") *and* McCullagh, *supra* note 178, at 446 (describing historians' normal interpretation of counterfactual "If not A then not B" as "If A had not been the case, and everything else (except B) had remained the same, then B would not have been the case").

283. Murrin does take the time to dispose of the principals in the Great Awakening, but he is motivated primarily by a spirit of mischief. *See supra* note 166. By contrast, Paul Finkelman, in his discussion of the direction that the Supreme Court's slavery jurisprudence would likely have taken had secession not occurred in 1860-61, takes pain to show how his counterfactual antecedent could have come about and that from the vantage point of the late 1850s it appeared quite plausible. Finkelman does this because the primary purpose of his counterfactual is to rebut the charge that Lincoln's statements regarding the threat of a nationalization of slavery were either cynical demagoguery or paranoid. FINKELMAN, *supra* note 157, at 320-24; *see also* MOORE, *supra* note 157, at 381-97.

in the antecedent. For example, inability to conform to tort law's reasonable person standard will not, under most circumstances, excuse failure to do so. We expect the individual to break loose of the constraints of disposition or ability.[284] In such cases, we select our antecedents on the basis of legal norms, not on the basis of what was predictable or plausible given the background circumstances, and therefore, we need not struggle to reconcile those circumstances to our antecedent.[285] Thus, we need not consider the possibility that had a driver been disposed to drive at the legal limit instead of eighty miles an hour, he might also have been disposed to be more attentive and careful, although we must consider that driving at the lower speed would have *permitted* the driver to be more attentive of his surroundings, including the child darting out from between parked cars.[286] Similarly, we need not change anything about an employer's precampaign relations with his employees in imagining a world in which he conducted a fair campaign.

Is Judge MacKinnon therefore correct in concluding in *Tiidee Products* that, given the employer's hostility toward the union, make-whole relief is inappropriate because no contract would have been reached even if the employer had bargained in good faith?[287] His analysis is only partly correct. He understands that to determine counterfactually what bargaining concessions the employer would have made had it bargained in good faith we ought to change it only enough to make it conform to the legal standard for good faith bargaining. We are not licensed to change its hostility to the union or its reluctance to make bargaining concessions. He also recognizes that the NLRA permits hard bargaining and specifically states that the good faith bargaining requirement "does not compel either party to agree to a proposal or require the making of a concession."[288] Yet the employer faced with a Board order to bargain in good faith and a claim for make-whole relief would seem to encounter a dilemma. Given its current bargaining obligations, it is unlikely that it can assert that it would have made no concessions had it previously bargained with the union without calling into question its current good faith.[289] Thus, the counterfactual calls for some revision of the employer's attitudes, not because the antecedent requires further counterfactual excursions to make its occurrence

284. *See* Vaughan v. Menlove, 132 Eng. Rep. 490, 493 (1837); OLIVER W. HOLMES, THE COMMON LAW, 108-10 (1881).

285. We assume, in David Lewis' words, an "inconspicuous miracle" allowing the actor to conform to the legal standard, even though conformance defies his dispositions, or even the laws of a deterministic world. LEWIS, *supra* note 118, at 75.

286. Wright, *supra* note 28, at 1806.

287. *See supra* note 122 and accompanying text.

288. 29 U.S.C. § 158(d) (1988).

289. It is difficult to be more definite because of the law's mixed message on this

possible, but because the legal definition of good faith requires that the parties come to the table with minds at least partly open.

Judge MacKinnon's approach, whatever its flaws, was at least easy to use. Once we abandon it, we return to the difficult task of imagining the outcome of bargaining that did not occur. Whether we can choose a better alternative to such conjecture is a topic of the next section, which takes up more generally the question of when we should use counterfactuals.

C. Knowing When to Ask

Whether in everyday conversation, in historical writing, or in legal discourse, we use counterfactuals selectively. We decide when to use them, and we then draw on our judgments of plausibility to choose among competing possibilities when we construct them or evaluate other people's counterfactuals. This section explores the choice of using or avoiding counterfactuals in the law. The next section considers our choices and methods in constructing them.

We should not engage in counterfactual inquiry unreflectively. Given our distrust of such inquiry and the disquiet it sometimes causes us, we also should not engage in such inquiry needlessly. We should, instead, make explicit the kinds of questions that we are asking and the demands that we are putting on such inquiry and consciously explore the costs and benefits of counterfactual inquiry and the possibility and consequences of its alternatives.

A precise cost/benefit analysis of counterfactual inquiry is unrealizable. Any calculus of costs and benefits will be rough at best. We should, nonetheless, ponder what such an analysis would entail as a reminder of the factors that we should consider in deciding whether to engage in a particular counterfactual inquiry. It should begin by comparing probable error costs of counterfactual inquiry and its alternatives.[290] Yet only in extreme cases is such a comparison likely to be illuminating.[291] In the hard cases, where we most want guidance, the sources of uncertainty that make us uncomfortable with

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issue. Stubbornness or adamance in bargaining is not per se indicative of bad faith, yet after some point the Board and courts have been willing to infer bad faith from bargaining intransigence. *Compare* NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952) (holding that company's insistence on broad management rights clause and refusal of grievance arbitration demand not a per se violation of good faith bargaining requirement of the Labor Act) *with* NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953) ("[I]f an employer can find nothing whatever to agree to in an ordinary current-day contract submitted to him, or in some of the union's related minor requests, and if the employer makes not a single serious proposal meeting the union at least part way, then certainly the Board must be able to conclude that this is at least some evidence of bad faith, that is, of a desire not to reach an agreement with the union."). *See generally* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 481-95 (1976) (noting that often only evidence of bad faith is substantive positions taken at bargaining table).

290. *See supra* note 259.

291. We might conclude, for example, that a no-speculative-remedy rule for a class of nontrivial harms would be such a case, but only if we were confident that a rule permitting remedies would not produce erroneously large awards resulting in graver maldistribution than the no-remedy rule. We might conclude in some instances that injunctive relief, restitutionary remedies, or specific performance might obviate any need for more

counterfactual thinking will typically also make it difficult for us to say much that is meaningful about error costs. Even where we know that the risks of counterfactual error are high, we may have trouble making meaningful comparisons. Our confidence in counterfactuals that build upon long sequences of contingent events "bound to their causes only by probability statements" should be quite low even if the probability of each step in the chain taken singly is quite high.[292] For example, we ought to be skeptical of damages awards for death or disabling injury that project over many years, yet we are hard pressed to say that a pay-as-you-go alternative would be preferable.[293]

Obviously, there are additional variables that we ought to consider in any cost/benefit analysis. If the choice of engaging in a counterfactual inquiry or of avoiding it in a particular class of cases makes a difference as to who bears the risk of factfinder error, or has incentive effects regarding future conduct in similar settings, our decision will have obvious social costs or benefits.[294] Similarly, rules of thumb, whether they are rules that obviate certain inquiries by precluding the remedies that would require such inquiries, or whether they are presumptions, can simplify litigation and reduce the costs of factfinding, but the savings will vary with the nature of

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speculative, and error-prone, remedial inquiries. We also might rely on the private ordering of the parties in certain contractual settings, through, for example, liquidated damages clauses.

292. Gould, *supra* note 156, at 200 & n.1.

293. A pay-as-you-go approach eliminates the uncertainty about future medical costs and the rate of inflation. It may even eliminate some of the uncertainty about the job history that the decedent or disabled plaintiff would have had (by providing more information about the general state of the economy, i.e., identifying periods of recession, depression, or inflation, and about the particular industry and firm in which she was employed, i.e., was she a cooper who would have faced limited career choices when the craft became automated). It provides no additional information to eliminate most of the uncertainty regarding the hypothetical job history, however, because waiting will not tell us whether she would have been promoted or discharged or would have quit or been killed in an industrial accident at some point had she continued to work.

Moreover, it imposes different costs on the parties resulting from the uncertainty of a nonfinal judgment, the costs of periodically reopening litigation, and the risk to the plaintiff of the defendant's future insolvency. Such an approach may also adversely affect an injured plaintiff's recovery, either by encouraging malingering, or by the deleterious psychological effects of prolonging her attention to her injury, which may retard the healing process. Finally, a pay-as-you-go approach imposes institutional costs of nonfinality that are different from and hard to compare to the costs of premature decisionmaking. For a discussion of "waiting and watching" as a means of dealing with uncertainty, see generally Leubsdorf, *supra* note 19, at 143-47 (citing sources). Although I take my example from tort, similar problems arise in awards of front pay damages in employment discrimination cases.

294. Do we, for instance, want to adopt in a particular category of cases a rule that says that a wrongdoer, whose act put us in the position of having to imagine a hypothetical past, should bear the risks of our mistakes in constructing such a past, or do we want to encourage "efficient breach" by sheltering the breacher from speculative damages?

the counterfactual inquiry foreclosed and the nature of the factfinding necessary to determine whether the rule of thumb applies. Finally, there are important social costs if the parties and the public believe that legal decisions rest on unreliable factfinding or that the law repeatedly denies remedies for certain types of wrongs because of the difficulty in resolving counterfactual questions.

Short of attempting a cost/benefit analysis, we must consider our treatment of counterfactuals in any given class of cases in light of our willingness or unwillingness to undertake such inquiry elsewhere in the law. By looking broadly at the problem of counterfactuals in the law, and by attempting to reconcile their treatment in a particular class of cases with their treatment elsewhere, we will promote greater consistency in their use and diminish extreme and unjustified reactions of bravado or dread. Such analysis must be sensitive to the distinctive problems and substantive goals of different areas of the law, to the various uses to which counterfactuals can be put, and to the powers and limitations of counterfactuals when put to such tasks.

Such an analysis is beyond the scope of this Article. Given the reach of counterfactual questions throughout the law, it can only emerge dialogically. A few observations may help advance that dialogue. First, it is helpful to keep in mind the distinction between negative and positive counterfactuals.[295] Negative counterfactuals are causation testers. Typically, they neither give us pause, nor add to our understanding. Their assertion is merely an affirmation of our confidence in the causal statement that implies them, and we need not trouble ourselves to make them explicit.

Negative counterfactuals can be helpful, however, in cases of causal overdetermination or uncertainty. As a purely rhetorical matter, stating the issue in counterfactual "but-for" terms exposes causal overdetermination or uncertainty.[296] It is not clear whether we see uncertainty or overdetermination as a result of asking the counterfactual question, or whether we merely use the counterfactual to articulate an already drawn conclusion. At the very least, the habit of recognizing the counterfactuals implied by our causal assertions should heighten our sensitivity to instances of overdetermination or uncertainty.

That recognition of the implied counterfactual statement can help *resolve* causal uncertainty is a more questionable claim. Counterfactual restatement of the causal claim adds nothing to cure the problem of insufficient evidence of causation in these cases. Rather, as Murrin discovered in his consideration of the Awakening's contribution to the colonials' military success, it can reveal instances where we require more evidence.[297] Sometimes we may assert confidently

295. *See supra* notes 227-35 and accompanying text.

296. For example, in the merging fire cases, *see supra* note 68 and accompanying text, asking the but-for question calls attention to the duplicative cause. It does not, however, resolve the substantive law question of how to treat a duplicative or uncertain cause.

297. *See supra* text accompanying notes 200-02.

that a neglected safety precaution or missing safety device would have averted an accident even though we know little about how events actually unfolded.[298] Yet here again, it is likely that the but-for counterfactual less often guides the factfinder to its conclusion than it helps express an already formed causal judgment based on the factfinder's sense of the probabilities.[299]

Typically less dispensable, and concomitantly posing harder questions, are positive counterfactuals. Here the factfinder must do more than describe and explain what happened in the past or imaginatively remove an element from its story about the past to test whether it was, under the circumstances, a necessary cause of the rest of the story. It must, instead, construct an unreal alternative story, more or less detailed depending on the legal questions driving the inquiry, that is grounded in the real past and articulates the factfinder's reasoned prediction of how things would have turned out had certain aspects of the past differed in specified ways. As noted above, this is typically the factfinder's task when it determines a remedy. It is also the factfinder's task when it encounters questions of causation that require consideration of unrealized sequences of events, such as claims alleging lack of informed consent to medical treatment,[300] or failure to provide safety equipment where the question is whether the victim would have used the equipment.[301] Indeed, depending on the rules one adopts for dealing with preemptive causes, the factfinder may need to engage in this sort of inquiry whenever the purported cause appears to have preempted an alternative causal candidate.[302]

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298. *See, e.g.*, Rovegno v. San Jose Knights of Columbus Hall Ass'n, 291 P. 848 (Cal. Dist. Ct. App. 1930) (holding that jury could reasonably infer that having lifeguard stationed at pool would have averted drowning); City of Longmont v. Swearingen, 254 P. 1000 (Colo. 1927) (holding that evidence was sufficient to justify finding that failure to post lifeguard was proximate cause of drowning).

299. Where there is insufficient evidence of causation and no basis for concluding inductively from general experience what would have happened in the particular case (i.e., in most circumstances a trained lifeguard would be able to save a solitary swimmer from drowning in a pool, therefore had there been a lifeguard posted in this case, the plaintiff's decedent would not have drowned), we are thrown back on our burden of proof rules to determine outcomes. Whether or not Malone is right as a descriptive matter that we regularly decide these cases on policy grounds, we clearly sometimes relax the causation requirement for policy reasons. *See generally* Malone, *supra* note 19.

300. *See supra* notes 87-92 and accompanying text.

301. *See supra* notes 145-46 and accompanying text.

302. Sometimes this inquiry will be quite simple and the task will differ little from the task of considering a causation-testing negative counterfactual. For example, a boy falling from a bridge might touch negligently charged electrical wires and be electrocuted. Under certain circumstances, if, for instance, the fall was from sufficient height and the surface below was an expanse of jagged rocks, we easily might conclude with certitude that the boy was doomed to die, even had the wires not been charged. However, in the real case upon which I base my example, Dillon v. Twin States Gas & Electric Co., 163 A. 111 (N.H. 1932), the preempted sequence of events may have been far less clear, as the New Hampshire Supreme Court remanded for factual findings regarding whether the

Because negative counterfactuals are translations of our causal claims, their proof rests on the same evidence that supports the causal claims. Positive counterfactuals, having no such counterparts, rest on more elusive proof, but because they do not translate to something more palpable, our dependence on them is greater. Easy substitutes for positive counterfactuals, whether gross rules of thumb or blanket denials of certain types of claims or remedies, are often unattractive alternatives. Yet where we doubt our ability to resolve the counterfactual, we must consider possible substitute approaches. Thus, Professors Twerski and Cohen, in light of their conclusion that decision causation in informed decisionmaking claims is nonjusticiable, reconceptualize the claim in such cases to center on the harms resulting from the patient's exclusion from the decisionmaking *process,* rather than on the *outcome* of the treatment decision.[303] Similarly, we need not treat make-whole remedies in bad faith bargaining cases as restoring the wages and benefits that would have been obtained through good faith bargaining.[304] Instead, we should follow Professor St. Antoine's suggestion that the union's harm in such cases is really the loss of a chance to bargain, along the lines of claims asserting the denial of a chance to participate in a lottery or beauty pageant.[305] Recasting the make-whole remedy in this way eliminates the need to decide what the outcome of bargaining would have been by shifting the focus to the value of the lost opportunity to bargain.[306] So-recasted we have replaced

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boy would have fallen back onto the bridge or down to the surface below, whether he would have been killed, or merely crippled by the fall, and, if he otherwise would have lived, the extent to which his earning capacity would have been diminished due to injuries sustained in the fall, for purpose of comparison with the lost stream of income due to his electrocution. *Id.* at 114-15.

303. *See generally* Twerski & Cohen, *supra* note 87. For a discussion of Twerski & Cohen's approach, see *supra* note 92.

304. *See supra* notes 107-22 and accompanying text.

305. St. Antoine, *supra* note 109, at 1045-46. For examples of lost opportunity, see Mange v. Unicorn Press, 129 F. Supp. 727 (S.D.N.Y. 1955) (loss of chance to participate in contest); Wachtel v. National Alfalfa Journal Co., 176 N.W. 801 (Iowa 1920) (same); Chaplin v. Hicks, [1911] 2 K.B. 786 (C.A.) (lost opportunity to compete in beauty contest). There is considerable literature on loss of a chance claims. A good starting point is Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences,* 90 YALE L.J. 1353 (1981).

306. That approach requires agreement on some formula for valuing the lost opportunity to bargain. Although there are several different formulas that the NLRB might use, once the choice of formula is made, valuing the harm would not be difficult. For discussions of possible approaches to the valuation problem, see St. Antoine, *supra* note 109, at 1045-47; Schlossberg & Silard, *supra* note 109, at 1079-80. *Cf.* Phillip L. Martin & Daniel L. Egan, *The Makewhole Remedy in California Agriculture,* 43 INDUS. & LAB. REL. REV. 120, 124-30 (1989) (discussing make-whole remedy under the California Agricultural Labor Relations Act). Proposed amendments to the NLRA styled as The Labor Reform Act of 1977 would have permitted a make-whole remedy to be calculated on the basis of the Bureau of Labor Statistics' compilation of the average annual wage gains in occupations covered by collective bargaining agreements. H.R. 8410, 95th Cong., 1st Sess. § 8 (1977); *see also* H.R. REP. No. 637, 95th Cong., 1st Sess. 39 (1977).

The proposed use of the Bureau of Labor Statistics figures for average annual gains in wages and benefits in collective bargaining agreements to value the lost opportunity is a sensible one, so long as the figure is discounted by the percentage of first-contract negotiations where, in the absence of bad faith bargaining, no contract is reached. The employer also should have a limited opportunity to show that the measure of damages using this formula is inappropriate, by showing either its inability to pay, or, perhaps, by

one counterfactual question with a new one: what value would the employees (or an imagined market if we want an objective standard) have assigned to the opportunity to bargain? But we also have followed the historians' example by limiting the scope of our positive counterfactuals to questions resolvable with the evidence we possess.[307]

D. Constructing Assertable Counterfactuals

As J.L. Mackie noted, "we use counterfactuals discriminatingly."[308] "[W]e want to say 'If this bit of potassium had been exposed to air it would have burst into flame' but not 'If this bit of potassium had been exposed to air it would have turned into gold.' "[309] But because counterfactuals are not verifiable, how do we choose one consequent over another, or decide whether someone else's choice is persuasive?

We can begin with a small but important point. Whether our counterfactual performs its task adequately will depend partly on the definition of that task. A counterfactual statement that serves us well as a causation tester may be woefully incomplete as a positive counterfactual.[310] On the other hand, we often tolerate a level of vagueness regarding positive counterfactuals that is intolerable for our on-off causation questions.[311] Just as we should take care that our counterfactuals respond to our questions, we also should refrain

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showing that its particular industry diverged significantly from the Bureau of Labor Statistics averages.

307. See *supra* note 306 for a discussion of how we could go about doing this. We also will consider our counterfactual inquiry to be more successful if we follow the historians' lead further in permitting a higher level of imprecision and approximation in our positive counterfactuals. For example, we ought to admit that we can only approximate the value of the opportunity to bargain. Similarly, we can justify affirmative action remedies as attempts to create the circumstances of a counterfactual world without racial or gender discrimination. *See* Hardy Jones, *Fairness, Meritocracy, and Reverse Discrimination*, 4 SOC. THEORY & PRAC. 211, 211 (1977). Obviously, however, our remedies will be wrong in the descriptions of individual outcomes, and we should strive rather for the broad contours of such a counterfactual world and accept that we can only get our remedies "right" on a class-wide, and not an individual, basis.

308. MACKIE, *supra* note 20, at 77.

309. MACKIE, *supra* note 81, at 199.

310. For example, our evidence might support the conclusion that had the plaintiff's doctor properly chosen what was under the circumstances a preferred mode of treatment, the plaintiff would not have suffered the adverse effects of the treatment selected in its stead. If our evidence does not additionally allow us to predict how successful the alternative treatment likely would have been in treating the underlying ailment, and what would have been the likelihood of different adverse results of such treatment, we have not measured adequately the harms resulting from the improper medical decision.

311. We may need to know, for instance, within a matter of a few inches, how far a lamppost would have penetrated a differently designed automobile, or whether the decedent sunk so fast that having a life buoy on board ship would not have saved him. Speaking on remedies, Professor Leubsdorf suggests that we ought to shed our sense of guilt about our resort to estimation where we are unable to give a precise measure of the injured party's harm. Leubsdorf, *supra* note 19, at 158. I agree that often we should be

from pushing them beyond the scope of those questions. We will use counterfactuals better if we keep their purpose in mind.

As we have seen, when we think counterfactually we reason from known facts and certain accepted generalizations (or laws) to unrealized possibilities beyond those facts or the previously identified extension of those generalizations. We will consider presently that manner of thinking more fully, but we should not forget that we resolve certain causal questions without projecting our knowledge onto unrealized instances. We may sidestep temporarily a causal assertion's implied counterfactual by undermining the reasons to believe its causal claims, or by offering a better causal explanation. Murrin relies heavily on this technique in his two essays.[312] It is an important technique for legal factfinders, also, as in the railroad crossing collision case, *Thomas v. Baltimore & Ohio Railroad,*[313] and in other cases involving proof of an alternative cause.[314] Having discovered enough to reject or replace the original causal candidate, we do confront the counterfactual statement that it implied, but only to say, "*even if* events had transpired the way you say they ought to have (for example, even if defendant had acted reasonably), the harm would have occurred."[315]

What should we do when we cannot sidestep counterfactual questions in this manner? Mackie replies with a suppositional account of conditionals, including counterfactuals.[316] According to Mackie, a counterfactual introduces a supposition—the antecedent—and then asserts something—the consequent—within the scope of the supposition.[317] But this reframes the problem without telling us how to distinguish between proper and improper assertions within the scope of the supposition. How are we to decide whether the potassium would have burst into flame or turned into gold had it been exposed to air? We choose our counterfactual in this example with reference to certain laws of nature: potassium ignites when exposed to oxygen, and oxygen is a component of air. It is therefore reasonable, if we suppose that we exposed a bit of potassium to air, to assert the consequent that it burst into flame.[318] Accordingly, it is reasonable to assert counterfactuals that rest on generalizations that we have confidence are extendible to unrealized cases. For Mackie, laws of nature are the paradigmatic case of such generalizations, and what distinguishes them from other statements that do not sustain counterfactuals is that they are supported by "good inductive evidence," which permits the projection of the generalizations onto

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satisfied with our best approximations, but I do not detect the same strong currents of guilt.

312. *See supra* notes 182-83 & 191-99 and accompanying text.

313. 310 A.2d 186 (Md. Ct. Spec. App. 1973).

314. *See supra* notes 140-44 and accompanying text.

315. For a discussion of "even if" statements, see GOODMAN, *supra* note 10, at 5-6; MACKIE, *supra* note 20, at 72-73, 93-94, 96-97.

316. MACKIE, *supra* note 81, at 53-56, 199-203; MACKIE, *supra* note 20, at 92-119.

317. MACKIE, *supra* note 81, at 53-54.

318. *Id.* at 200.

"additional (contrary-to-fact) instances of the subject term."[319]

Most historians' generalizations and many relied upon by legal factfinders are probabilistic and are not, therefore, extendible to any unrealized case with complete certainty.[320] Consequently, they give weaker support to counterfactual statements than do absolute laws of nature. Whether such generalizations support a legal counterfactual adequately depends both on the strength of the underlying inductive evidence and on the applicable standard of proof.

Legal questions about what might have been touch on so many aspects of life that we necessarily draw on many kinds of arguments and evidence to answer them. My aim here is not a complete catalogue and analysis of these modes of argument and kinds of evidentiary support, or a theory of inductive proof. My goal is, instead, to initiate a discussion of these questions by offering some preliminary observations and criticisms of how we construct counterfactuals in the law.

In many instances we can resolve legal counterfactuals by relying on scientific laws.[321] Such reliance, though imperfect given the incompleteness of our scientific knowledge and our continuing need to revise mistaken scientific theories,[322] fulfills Mackie's criteria for assertable counterfactuals. We must note one distinction between the scientific knowledge and generalizations that we often rely on in the law and such laws of nature that are typified by Mackie's example that potassium ignites when exposed to oxygen. Often, the scientific laws that legal factfinders rely on are probabilistic. We may know the probabilities both of success and of adverse consequences had the plaintiff's doctor chosen an alternative treatment, but we cannot be certain what would have happened in that particular case. Such scientific knowledge may meet the legal criteria of proof, but it does not permit absolute confidence in our counterfactual assertions.

Where helpful scientific laws do not stand at the ready, we may

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319. MACKIE, *supra* note 20, at 118. Mackie argues that "[t]he sustaining of counterfactuals by laws or 'nomic universals' is nothing more than the projective force of inductive evidence in a new guise." *Id.* Accidental generalizations, such as "All the coins in my pocket are shiny," by contrast, do not sustain counterfactuals because the counterfactual supposition that some other coin is in my pocket undermines our reason to retain the generalization. *Id.* at 114-16; MACKIE, *supra* note 81, at 200-01.

320. Often the probabilistic nature of these generalizations remain unexpressed, or they may be stated in qualitative, not quantitative terms. *See* MCCULLAGH, *supra* note 81, at 51-52.

321. By contrast, few historians would be interested in counterfactual questions that were resolvable with reference to scientific laws, and the historiographical model says little to these cases.

322. *See, e.g.*, EPSTEIN, *supra* note 48, at 374-77 (discussing uncertain or questionable science in the Benedectin cases, the Agent Orange litigation, and the line of tort actions asserting that as a result of the cuts or bruises sustained by plaintiff due to defendant's negligence, plaintiff subsequently developed cancer in that area).

look to analogous events for our counterfactual-sustaining generalizations and for evidence that supports our drawing of inferences from one event or set or events to an analogous hypothetical occurrence. As we have seen, historians rely heavily on arguments by analogy in their counterfactual explorations, both to challenge other historians' causal explanations and to suggest unrealized historical alternatives. Analogical argument is especially helpful in analyzing group behavior, where we have little access to the thoughts and feelings of the individuals comprising the group and therefore often are unable to draw inferences from what we know with particularity about their thoughts or personalities. For the same reason it is helpful when we attempt to draw on knowledge about patterns of group behavior to sustain a counterfactual relating to a member of that group. Arguments that rely on statistical evidence to support their counterfactual claims are closely related to analogical argument.[323] They seek to extend generalities about group experience to a particular hypothetical instance, based on the subject's membership in the group.

Such arguments abound in law. We ground our attempt to determine damages in a wrongful death or disabling injury case on such arguments for predictions of such things as the victim's life expectancy and stream of income absent the injury, as well as a prediction of the future rate of inflation. The read and heed presumption in products liability failure to warn cases projects from a generalization about group conduct to an unrealized and counterfactual instance of individual conduct.[324] Elsewhere, the law excludes such arguments, but we might revise it to permit their use. For instance, the NLRB could abandon its rule of thumb approach toward *Gissel* bargaining orders, under which the union must demonstrate prior majority support as a prerequisite for a bargaining order, in favor of analyzing the counterfactual question whether the employees would have selected the union in a fair election.[325]

Such generalizations must rest on a strong empirical base to sustain legal counterfactuals. Here again, we see an instance where asking the counterfactual question reveals how much we need to learn. For instance, we still have much to learn about what determines the outcome of union representation elections, and until we do, any counterfactual judgments that we make in the *Gissel* setting

323. For a discussion of statistical and analogical arguments in history, of the relationship between the two, and a skeptical treatment of analogical argument, see McCULLAGH, *supra* note 81, at 45-73, 85-90.

324. Similarly, one might interpret the decision in Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert denied*, 409 U.S. 1064 (1972), holding that the plaintiff in an informed medical consent case must show causation "on an objective basis: in terms of what a prudent person in the patient's position would have decided if suitably informed," *id.* at 791, as reflecting the idea that we can best resolve the counterfactual problem posed by such cases by assuming that in most cases the plaintiff would have acted just like most other people. The court does not justify its decision in quite these terms, however. Also, by speaking of "a prudent person in the patient's position," the court modifies the objective approach to take account of the patient's idiosyncrasies.

325. For a discussion of *Gissel*, see *supra* notes 56-58 and accompanying text.

will be unsound.[326] As the historians' arguments demonstrate, we also must search for possible counterexamples that might undermine the generalizations that we advance.[327]

Some additional caution is necessary regarding the law's use of analogical argument. As previously noted, some of man's most dramatic intellectual blunders have been the product of bad analogical thinking. Many of these blunders resulted from the misuse of historical analogies—the reliance on apparent similarities without any attention to context or historical flow. Given the law's—indeed modern American society's—devaluation of the past, the risk of misuse of historical analogies in the resolution of legal counterfactuals

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326. *See* Thomas F. Reed, *Do Union Organizers Matter? Individual Characteristics and Representation Election Outcomes*, 43 INDUS. & LAB. REL. REV. 103 (1989).

Much has been written on the subject, beginning with the Getman-Goldberg-Herman study of representation elections, which downplayed the effects of campaign election tactics (legal and illegal) on the employees' ultimate vote. *See* JULES GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976). The study has spurred considerable criticism. *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 233-39 (1984); William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560 (1983); Patricia Eames, *An Analysis of the Union Voting Study From a Trade-Unionist's Point of View*, 28 STAN. L. REV. 1181 (1976); Robert J. Flanagan, *The Behavioral Foundations of Union Election Regulation*, 28 STAN. L. REV. 1195 (1976); Thomas A. Kochan, *Legal Nonsense, Empirical Examination and Policy Evaluation*, 29 STAN. L. REV. 1115 (1976); James E. Martin, *Employee Characteristics and Representation Election Outcomes*, 38 INDUS. & LAB. REL. REV. 365 (1985); Thomas F. Phalen, Jr., *The Demise of* Hollywood Ceromics: *Facts and Fantasy*, 46 U. CIN. L. REV. 450 (1977); Paul Weiler, *Promises to Keep: Securing Workers' Right to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1784-85 (1983); Raymond Goetz & Edward L. Wike, *Book Review*, 25 KAN. L. REV. 375 (1977); Cornelius Peck, *Book Review*, 53 U. WASH. L. REV. 197 (1977); Myron Roomkin, *Book Review*, 27 CASE W. RES. L. REV. 1056 (1977). Getman, Goldberg, and Brett have defended their study in Stephen B. Goldberg et al., *Union Representation Elections: Law and Reality — The Authors Respond to the Critics*, 79 MICH. L. REV. 564 (1981); Stephen B. Goldberg et al., *The Relationship Between Free Choice and Labor Board Doctrine: Differing Empirical Approaches*, 79 NW. U. L. REV. 721 (1984). A study by Professor Laura Cooper supports some of the Getman, Goldberg, Herman conclusions. *See* Laura Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's* Gissel *Decision*, 79 NW. U. L. REV. 87 (1974).

Other studies have identified other factors affecting election success. *See* William N. Cooke, *Determinants of the Outcomes of Union Certification Elections*, 36 INDUS. & LAB. REL. REV. 402 (1983), John J. Lawler, *The Influence of Management Consultants on the Outcome of Union Certification Elections*, 38 INDUS. & LAB. REL. REV. 38 (1984); Cheryl L. Maranto & Jack Fiorito, *The Effect of Union Characteristics on the Outcome of NLRB Certification Elections*, 40 INDUS. & LAB. REL. REV. 225 (1987); Reed, *supra*.

Yet for all of the debate and studies, it is not clear that we have learned to predict representation election outcomes. As an antidote for uncertain behavioral assumptions, Professors Roomkin and Abrams have proposed that the NLRB create an empirical research unit. *See* Myron Roomkin & Roger I. Abrams, *Using Behavioral Evidence in NLRB Regulation: A Proposal*, 90 HARV. L. REV. 1441, 1459-73 (1977).

As previously noted, the read and heed presumption in products liability failure-to-warn cases rests, at best, on an unstated empirical base and fails to distinguish between categories of products or consumers, for which it might be more or less sound. *See supra* note 150.

327. *See supra* notes 174-81 and accompanying text.

is small.[328] Lawyers do not attempt to establish future damages in a tort action by relying on actuarial tables from the 1880s.[329] Yet even if our counterfactual-supporting analogies do not flounder because of distances in time, they will tend to mislead if we are not sensitive to differences in context and between comparison groups.[330]

The probabilistic character of the generalizations supported by these analogies is further ground for caution. As previously noted, counterfactuals built upon long sequences of probabilistic inferences become implausible after several steps along the chain of inferences.[331] Also, we will have greater confidence in counterfactuals built on probabilistic inferences if those counterfactuals are meant to represent an average of many instances rather than a singular occurrence.

Finally, we must recognize that analogical argument to resolve a counterfactual is often only the opening move and is susceptible to rebuttal by more particularized evidence that distinguishes an individual case from what one would predict from group experience. For example, particularized evidence can destroy the basis for the read and heed presumption.[332] Such particularized evidence will often support inferences about individual behavior under counterfactual circumstances, which brings us to those arguments that rest on an understanding of an individual's thoughts and dispositions, the final category of counterfactual-sustaining argument.

Many of the law's counterfactuals revolve around questions of individual choices or conduct under changed circumstances.[333] If scientific laws are our usual source of support for counterfactuals

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328. This brash assertion is certainly an oversimplification of a complex issue. After all, legal actors look to precedent to understand law and to decide cases. Indeed, in our use of precedent, we often demonstrate a second attitude toward the past that is different from disregard: a willingness to use the past without acknowledging its pastness, suggesting that we do misuse historical analogies in the law, although not typically to support legal counterfactuals. I offer as my inadequate foundation for this assertion only the following anecdote: A friend tells me that the federal district court judge for whom he clerked would shoo him from chambers if he brought the judge old authority for a proposition that the judge wanted to assert, saying something to the effect of: "He's dead. Don't bring me opinions written by dead judges."

329. Nor should one expect to see the argument over issuance of a *Gissel* bargaining order in the 1990s framed in terms of the patterns of election outcomes in the late 1940s and early 1950s, the heyday of union density.

330. The academic literature discussing the misapprehensions that result from imposing a male (or upper middle-class white Protestant male) model of "reasonableness" in constructing the law's reasonable person in areas such as the definition of self-defense, or of sexual harassment demonstrates one such instance. *See, e.g.*, Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Dolores Donovan & Stephanie Wildman, *Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. (1981); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, YALE J.L. & FEMINISM 41, 57-65 (1989); Howard A. Simon, Ellison v. Brady, *A "Reasonable Woman" Standard for Sexual Harassment*, 17 EMPLOYEE REL. L.J. 71 (1991).

331. *See supra* note 292 and accompanying text.

332. *See supra* note 100 and accompanying text.

333. For example: would the plaintiff have used safety equipment had his employer supplied it; would the plaintiff have opted for an alternative mode of treatment had the

about objects, and arguments from analogy our usual source of support for counterfactuals about groups or their members, dispositional statements drawn from an understanding of a person's experience and personality are the likeliest source of support for counterfactuals about individuals. Such statements license our predictions about a person's behavior in unrealized instances.

We derive these dispositional statements from many sources. In part, this is argument from analogy in another form. We draw upon the acts of other people and the psychological generalizations that we construct from observation of those acts. We look to our subject's acts in similar situations, or in situations that would implicate similar traits of personality, and reason analogically from them. And we plumb our own experiences and relive our responses for clues to help us predict our subject's responses. Although dispositional statements represent patterns of behavior, we go beyond the outer shell of observed conduct in forming such statements. These behaviors are, after all, the product of someone's thoughts, desires, and purposes. Often we can penetrate observed acts to understand the thoughts, purposes, and feelings that lie beneath.[334] Our generalizations about human behavior inform that act of understanding, but they are also subject to revision on account of it.

That counterfactual-sustaining dispositional statements require both knowledge of patterns of human and individual behavior and an understanding of the glue that holds those patterns together—the thoughts, purposes, and feelings of the actors—suggests that we ought to think of the factfinder's inquiry in these cases in broad terms. We should interpret our discovery rules and our rules regarding the admissibility of character evidence liberally and expand their scope where they interfere with this inquiry.[335] More important, we must reconceive the factfinder's inquiry as not simply an

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defendant adequately informed him of the risks and alternatives; what sort of job performance would the plaintiff have given and what future promotions would she have earned had she not been denied promotion because of her race.

334. The literature on this approach to historical understanding is quite rich. For a good introduction, see COLLINGWOOD, *supra* note 153; LOUIS O. MINK, HISTORICAL UNDERSTANDING (Brian Fay et al. eds., 1987)

335. Most jurisdictions preclude the circumstantial use of character evidence in civil cases. *See* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE, 105-08 (1978) (describing limitations on admissibility of character evidence and rationales for those limitations); *see also* FED. R. EVID. 404 advisory committee's note (discussing rule and rationales for its restrictive scope). Moreover, when courts permit the introduction of character evidence they restrict the methods of proof. *See* LILLY, *supra*, at 110-12; FED. R. EVID. 405.

Although these restrictions advance important values, described in the sources noted above, courts should balance against those values the often high probative value of character evidence for counterfactual inference drawing. Perhaps, in a considerable number of cases courts already do this. An exception to the general rule that bars character evidence in civil trials permits introduction of character evidence where character is "an element of a . . . claim, or defense." *See* FED. R. EVID. 404 advisory committee's note; *see*

investigation of what happened, but an attempt to understand how what happened fit into the experience of the parties, and to understand the parties well enough to imagine their responses under counterfactual circumstances.

Thus expressed, we see an ideal that usually will be beyond the reach of legal factfinding, and with it we see the limits of the historiographical model's applicability to law. What distinguishes Eric McKitrick's task from the legal factfinder's is less a difference between historians and legal factfinders or between the ways that they think about the past than it is one of context of inquiry and available evidence. McKitrick did not begin his study of Andrew Johnson from scratch. He entered into an ongoing debate and built upon the achievements of that debate, even though he rejected the interpretations of his predecessors. Moreover, he could draw on historical works dealing generally with nineteenth century American politics and culture and with the Civil War and Reconstruction, as well as on prior interpretations of Lincoln's and Johnson's lives and careers, to enrich his understanding of Johnson. Legal factfinders do not have the benefit of an equivalent intergenerational discourse.[336]

More important, the kinds of evidence available to McKitrick and to legal factfinders are different. McKitrick could not put Johnson on the witness stand.[337] But because the subject of his study was a public figure, whose deeds and words are well documented, he has a kind of access to Johnson's thoughts and feelings that the legal factfinder in a products liability failure to warn case will not have.[338]

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also LILLY, *supra*, at 103-04. Examples include the competence of a driver in a negligent entrustment of an automobile action, and the character of a plaintiff in a defamation action. Read broadly, this exception would capture the use of character evidence to support legally relevant counterfactuals. For example, character is in issue in determining the stream of income that a decedent in a wrongful death claim would have earned, and character evidence relating to the likelihood of promotions or dismissal ought, therefore, to be heard. It seems likely that in many cases courts do regard such character evidence to be admissible.

336. Some litigation is protracted, either because of its complexity or because of the delaying tactics of one of the parties. A notorious example is the case involving Darlington Manufacturing Company's decision to close its plant after the Textile Workers Union won a representation election among its employees. The plant closed in November of 1956. The United States Supreme Court rendered a decision in the case in 1965, Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965), which remanded to the court of appeals with instructions to remand to the NLRB. The NLRB rendered its decision in 1967, but the NLRB General Counsel and Deering Milliken (Darlington's parent) did not reach a compromise backpay settlement until 1980, 24 years after the closing of the mill. *See* DOUGLAS L. LESLIE, CASES AND MATERIALS ON LABOR LAW: PROCESS AND POLICY 290 (2d ed. 1985) (describing history of *Darlington* litigation). Participants in the legal system and outsiders generally agree that such examples of protracted litigation are both anomalous and instances of institutional failure.

337. Obviously, some historians can talk to the participants in the events they choose to study.

338. The important distinction here is not between historical study and legal factfinding. It is between the subject of study of *some* historical work and a lawsuit. Much historical writing focuses on the lives of people who left little or no record of their words or deeds. Although, with great ingenuity, some historians have revealed much about the thoughts, beliefs, and feelings of such anonymous people, they can tell us little about individuals except as members of larger groups. Examples abound. For three arbitrarily chosen ones, see EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1974); LAWRENCE W. LEVINE, BLACK CULTURE AND BLACK CONSCIOUSNESS: AFRO-

Legal factfinders simply will not know enough about the parties to a dispute to understand them and make dispositional statements about them with the same depth and assurance as McKitrick does. We nonetheless should strive to meet the demands of this model, but we should not be disappointed if our efforts fall short.

To this point I have spoken of legal counterfactuals in terms akin to a painful medical procedure: they may be necessary in light of the alternatives, but hardly something gleefully experienced. Yet they offer us more than just a way of resolving certain legal questions. They enrich the law. They do so first by the demands that they sometimes put on legal factfinders and decisionmakers to penetrate other people's deeds in order to reach a level of empathetic understanding. With that understanding comes a recognition of how law is perceived and experienced by people unlike oneself, of the law's meaning for others, and with that recognition we enhance the possibilities of doing justice as well as law.[339]

The value of counterfactual thinking in the law extends beyond its educating legal factfinders and decisionmakers to be more adept at empathetic understanding and beyond the legal change that may result from such understanding. To think and speak counterfactually is to engage in the language of possibilities and "alternates."[340] Counterfactuals, George Steiner writes, "make up a grammar of constant renewal. They force us to proceed afresh in the morning, to leave failed history behind."[341] It is our ability to think counterfactually that allows us to get off "the treadmill of the present . . . to gainsay or 'un-say' the world, to image and speak it otherwise."[342] Legal counterfactuals enable us to see the possible as well as the actual in the law. By consciously embracing counterfactual thinking in the law, we will better come to see within it its transformative—indeed its utopian—possibilities.

Conclusion

Can we know what might have been? The question misleads. Whatever we may say about what might have been, we cannot know

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AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM (1977); SEAN WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1790-1865 (1984).

339. Much has been written on empathy and law. For a good introduction, see Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Linda R. Hirshman, *Brontë, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177 (1988); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

340. GEORGE STEINER, AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION 216, 217 (1975). Steiner's discussion of counterfactuals rests heavily on the thought of Ernst Bloch.

341. *Id.*

342. *Id.* at 218.

it in the way that we know facts. As Jon Elster has noted, "counterfactual propositions are law-users and not law-confirmers. If, on the basis of a certain generalization, a counterfactual proposition is asserted, this does not constitute further proof of the generalization."[343] Our assertion of a particular consequent within the scope of a counterfactual is not an instance of that consequent's occurrence.[344]

We can and do make intelligible and well-supported assertions about what might have been, however. Counterfactual thinking is necessary to legal factfinding. It has been this Article's purpose to show that we can make our use of legal counterfactuals more consistent and sensible by recognizing them for what they are and examining their use in law and in history. Only then can we make reasoned decisions about when and how to use them. That examination should encompass the broad sweep of legal doctrines and subspecialties, and it therefore must emerge dialogically. I hope to have begun that dialogue.

343. ELSTER, *supra* note 35, at 219 n.3. In this regard, Elster recounts Karl Popper's story about an exchange with Alfred Adler:

> Once, in 1919, I reported to him a case which to me did not seem particularly Adlerian, but which he found no difficulty in analysing in terms of his theory of inferiority feelings, although he had never seen the child. Slightly shocked, I asked him how he could be so sure. "Because of my thousandfold experience," he replied, whereupon I could not help saying: "And with this new case, I suppose, your experience has become thousand-and-one fold."

Id. (quoting KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 35 (1963)).

344. Our asking of counterfactual questions nonetheless can contribute to our knowledge. First, and perhaps trivially, such questions can further our self-knowledge. Asking such questions can make us confront the depth of our belief in various generalizations. More important, such questions help us recognize the potential that inhered in different moments and events. We can know that within those moments and events lay various unrealized possibilities as an aspect of our empirical knowledge about real events.