Summer 8-15-2003

Does Counterfactual History Have Any Lessons for Law Teachers and Lawyers? Does It Have Any Value for You, in Particular, in Your Area of Research or Teaching?

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Original Citation

Arthur R. Landever, Does Counterfactual History Have Any Lessons for Law Teachers and Lawyers? Does It Have Any Value for You, in Particular, in Your Area of Research or Teaching?, Presentation, Sept. 15, 2003.

Does Counterfactual History Have Any Lessons for Law Teachers and Lawyers? Does It Have Any Value for You, in Particular, in Your Area of Research or Teaching? (Revised 8/29/03)

Arthur R. Landever* Talk on Monday, September 15, 2003 Noon (LB 215)

We engage in counterfactual history or counterfactuals all the time. We ask: Suppose we hadn't taken a certain job. What might have been our career path? Pitched at a loftier level: Suppose the British had won the American Revolutionary War (the Rebel Insurgency in the Americas). Aside from a few, hot-head, American rebel leaders being hanged, what would have been the British policy in North America? Punitive? Would the "Americans" have made a second effort at independence? Would slavery have ended before 1865, as it did in some other British possessions? Would "North America below Canada" have developed pretty much as Canada did? Would we have entered World War I earlier? Pitching a counterfactual more narrowly, more recently, suppose First Energy had acted differently in the first stages of its grid failure. Would there still have been a blackout of the Northeast in August 2003?

What we are doing above is speculating on the consequences if particular events had not happened as they did. Some more counterfactuals: Suppose Hitler had died in 1920 of wounds suffered in World War I. Would there have been a WWII? Suppose Cleopatra had been less attractive. For example, suppose she had had a much bigger nose. Would Julius Caesar and Marc Antony have risked their fate and the Roman Republic upon an infatuation with her?

We can carry on these "parlor games" endlessly. **But is the enterprise useful? Scholarly?** There is a controversy among scholars as to the utility of speculating about events that never took place.

But as law teachers, lawyers, and perhaps policy makers, counterfactual history has much value for us. Its value, however, clearly depends upon the care we take in choosing a plausible counterfactual assertion, the degree of its breadth or, alternatively, its limited nature, and how we make use of the counterfactual.

Here are my seven hypotheses (Yes, I know; they might profitably have been reduced to clusters of two or three. Indeed, I'm delighted that my talk comes on September 15, and not later, so that I don't come up with any more hypotheses):

1- Engaging in counterfactual history makes law scholars focus on some important areas that are typically glossed over. Consider two counterfactuals: **(1) Suppose John Marshall had not been appointed to the Supreme Court and his predecessor, Oliver Ellsworth, the "father of the 1789 Judiciary Act" had remained on the Court until his death in 1807. It is unclear whether the Court would have invoked judicial review in Marbury. Without John Marshall around, our focus, though, would surely**

be upon the other early Supreme Court members. Such members traditionally are ignored, given the glaring light of Chief Justice Marshall. Marshall in Marbury v. Madison (1803) led the Court in striking down a section of the Federal Judiciary Act of 1789, thus establishing judicial review of Congressional legislation. Would Ellsworth, "the father of [that same] 1789 Judiciary Act" have done the same? Ellsworth, though committed to judicial review, had an emotional bond toward that law. Said Sen. Maclay: "This vile bill is a child of his and he defends it with the Care of a parent even with wrath and anger." Added, Rep. Abraham Baldwin of Georgia; "The Senate have before them a bill on the Judiciary department, in my opinion, admirably contrived. My chum Ellsworth has been at work at it night and day these three months." Wouldn't the absence of a John Marshall remind us that there are new things we can be learning about a subject constantly gone over? Would the Court be more reluctant to establish the doctrine of judicial review, as Marshall did, especially since the Court had a way to avoid it, by finding a plausible statutory construction? (The Court could have held that the legislation, in mentioning Supreme Court mandamus power, was not intending, by doing so, to give the Supreme Court a general original trial court jurisdiction). **(2) In 1805, the Senate had before it a bill calling for the conviction and removal of Justice Samuel Chase from the Supreme Court. (Chase had been impeached by the House of Representatives the year before). Suppose the Senate had voted to remove Justice Samuel Chase from the Court in 1805. Would the Court have become even more reluctant than it was to exercise judicial review of federal legislation, following Marbury v. Madison? Would the fear of impeachment have led the Court to recognize a power in Congress, superior to that of the Supreme Court?** After all, Marshall, in a letter to Chase, in January 23, 1804, in the midst of the latter's impeachment, had suggested as much: "I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault." Might not such a focus lead to a notion of the tentative nature of judicial review, consideration of new foci (e.g., the views of the pre-Marshall Court about judicial review, the perceptions of judges about slavery), new explanations-- all aided by hypothesizing counterfacts as well as newly discovered facts?

Keep in mind that during Chief Justice Marshall's thirty years on the Supreme Court, the Marbury case was the only one in which judicial review was invoked to strike down federal legislation. Had the Court not done so, then, it becomes less likely that 50 years later, it would have done so in the notorious Dred Scott case. ((Dred Scott, in 1857, in important part, struck down the federal law prohibiting slavery in some of the Territories, a factor, according to most historians, in bringing on the Civil War). The two counterfactuals, especially taken together, make it that much less likely that judicial review, at least of federal legislation, would have survived as within the legitimate authority of the Supreme Court.

Historians who are determinists apparently are less interested in counterfactualism since "individual events don't matter. 'Time's arrow will lead to practically the same result in the end.'" These historians include "Carr, Fukuyama, Croce, Oakeshott" who see the

exercise as "meaningless if not counterproductive," since history is mapped out, whether by "God or the Hegelian concept of 'vast impersonal forces'" or otherwise. To Oakeshott, engaging in the exercise should not be confused with the study of history. "The question in history is never what must, or what might have taken place, but solely what the evidence obliges us to conclude did take place....The Historian is never called upon to consider what might have happened had circumstances been different." "Contingency" or "Great Men" historians take a quite different view, emphasizing the value of the counterfactual exercise.

2-Engaging in the counterfactual exercise is what we law teachers and lawyers do all the time, admittedly, employing a counterfactualism ordinarily pitched much more narrowly. To our students and to our young associates, we constantly hypothesize alternative fact situations (e.g., suppose "a" situation. What then? Suppose "b" situation. What then? Suppose "c" and "d" and "f" What then?). We believe that confronting a range of hypotheticals helps equip the student to better understand a particular subject and to better reason. Similarly, we want our graduates, as they counsel their clients, to make sure that such clients confront the range of possible scenarios. Only then will such clients be in a position to choose the course or courses to follow that are the best, or perhaps the "least worst." In considering policy change, we at the law school must constantly confront alternative fact hypotheticals as well. As to broader public policy analysis, such as what caused the "blackout" in mid-August 2003 and how to assure that there is no repeat, we engage in a similar kind of counterfactual exercise. (i.e., The cause was a,b,c,d,. Had we done y,z it would not have happened. If we do e,f,g, h, building in greater observation factors, prevention factors, and backup factors, we reduce the likelihood of repeat substantially—to near zero?).

3-Engaging in the exercise, with its light on "alternative facts" or "counterfacts" should make us reflect upon the concept of "fact," the tentative nature of the consensus as to what particular facts have taken place, and the facts we deal with in teaching law. Indeed, much of the time, we deal, not with facts--actual or otherwise--but with "factoids," in attempting to understand legal doctrines and how law has developed. By factoids, I mean things that are parading around as facts but either really aren't-or are far-removed from an accurate account -and we ought to make sure our students understand that. I'm talking about things like **(a)** "fictions," (e.g., constructive notice, constructive trust, constructive possession, apparent agency, the corporate legal creation at times protected as a person or citizen, the slave treated by the law as part person and part chattel, the marriage unity, the "cy pres" doctrine, estoppel) (Query, to what extent has the "growth of the common law" been aided by "fictions" ((e.g. the "trespass to land" cause of action assisted by the fiction of the owner's having a "tenant in possession" ?) **(b)** judicial appellate abstractions distorted or drained of reality or **(c)** inaccurate judicial or administrative fact conclusions—whether because of 1-a failure to meet the burden of proof , 2-the presence of an irrebuttable presumption (e.g., that the H of the marriage is the father of the child born to the W of the marriage), 3-rules limiting admissibility of relevant evidence (e.g., because of privilege--attorney-client, priest-penitent, or the absence of warrant or absence of Miranda warnings) 4-facts not uncovered, 5-counsel option not to present evidence, or 6-erroneous fact-finder

determinations (e.g., given believability of a mistaken witness) and **(d)** the trial as a setting for advocacy, not truth (typically with uneven matchups--repeat players like prosecutors, creditors, insurance companies, counsel knowingly not preserving or presenting information, or counsel being devious in responding to discovery orders in complex litigation).

4-Engaging in the exercise, pitching counterfactualism, at times broadly, and at times more narrowly, is part of the process of identifying causation, either while attempting to advance knowledge or while being an advocate. Cardozo contended that the common law advanced, in part, through the method of sociology and utility, the judges making calculations as to what avenues met public need. As to particular events, admittedly, scientists typically are usually able to test their counterfactual notions by experiment. Lawyers, at times, ask juries to speculate about alternative fact hypotheticals (or theories) in order to make a finding as to legal causation in a given case; social scientists may counterfactually speculate about alternative outcomes if particular elements are present; military commanders train their officers based upon counterfactual hypotheses about battle elements and outcomes.

In the process of court trials, counterfactuals are present, if we only look for them. Here are some examples of counterfactuals that Professor Strassfeld reminds us pertain to maters of ordinary torts causation:
1. Suppose a reasonable person. What would that person have done in the particular situation before the court?
2. Suppose the absence of the negligent act committed by the defendant. Would the injury to the plaintiff have taken place? To the same degree?
3. Suppose a decedent had not died. What finances would s/he have expended upon himself or herself and thus not be available to the estate?
4. Suppose the railroad had placed a safety warning at the crossing. Would the decedent have heeded the warning?
5. Suppose there had been medical information supplied (i.e., a warning of the possible injuries). Would plaintiff have gone forward with the operation anyway?

5. Employing counterfactualism may provide a powerful tool of analysis in understanding troubling or puzzling doctrine. (Why did the Court come up with a particular doctrine? What was the environment and precedent? Suppose it had been different. What doctrine might have arisen?).

6. Developing a model of counterfactualism—so that we can better achieve plausible, manageable chunks of supposition, as to the past, the present, the future—may enlarge our opportunity for understanding of correlation, causation, and workable policy.

7. According to Strassfeld, we inevitably deal with counterfactuals in the law, even if we don't realize it. We should recognize their value and limits. Then, says Strassfeld, "we [can] make reasoned decisions about when and how to use them." The point is that we must attempt to make ourselves aware of our thought

processes, and the patterns of counterfactuals ever implicit in our study, including law research. Counterfactuals should not be seen as only occasional, ad hoc adventures into the territory of non-facts for enjoyment or random possibilities. Our periodic introspection will open up a world of unseen factors, variables, elements, and patterns of human behavior that will, as Robert Strassfeld quotes George Steiner as saying, "make up a grammar of constant renewal. They force us to proceed afresh in the morning, to leave failed history behind." They energize us to think anew.

Critique:

1. To treat counterfactualism as encompassing both a narrow, quite limited issue and also a question with billions of events is like comparing a gnat to an elephant and saying, in essence that they are both the same. This is what happens when we say that counterfactualism relating to legal causation in a particular court case or narrow problem is similar to counterfactualism pertaining to the question, would there have been a World War II without Hitler?

2. One is engaged in a parlor game without value in attempting to ask broad- based questions bearing upon the effect if Hitler had died in World War I.

3. While the scholar should constantly reexamine his or her premises, that is less a matter of counterfactualism than one of reassessing what the facts really are. Thus, counterfactualism is less valuable than making sure of our facts—Did a person die? Did a particular event take place? Most particularly, what was the nature of a particular phenomena and what was the range of causes and effects? Our reexamination is not a mater of counterfactualism, since we are not imagining facts that did not take place. Rather we are engaging in the scientific enterprise of testing hypotheses to see which ones fit the events that we do know took place. We are also considering the nature of facts, their level of breadth or narrowness, and their moral component.

4. It is not necessary to engage in counterfactualism in order to stimulate interest in an historical problem or to refocus attention in some way. Indeed, a new attention to the early justices, for example, has taken place without employment of the device of counterfactualism.

5. It is hard enough to send lawyers and law teachers off to look back at history, whether in their own area or otherwise, and to expect an even-handed, careful account. Not only are lawyers not trained in history, but they have been trained in advocacy. The result more likely will be "law office" [distorted] history, an account. which, not coincidentally, arrives at the very position that the lawyer is trying to prove. On top of that, to have them further venture off to the realm of "counterfactual" history is just asking too much of them.

Rebuttal:

1. Admittedly it is troubling to place under the counterfactual umbrella both a matter of minute causation as to a particular event and the imponderable about whether the absence of Hitler would have meant the absence of WW II. The matter, however, is one of semantics. It does not prove the lack of value of engaging in the process of counterfactualism, in some contexts, at least. Perhaps the more narrow contexts, as seen in legal hypotheticals, and legal causation, might be more profitably seen as "alternative" factual settings, rather than "counterfactual" ones.

2. There is value in considering predictive, somewhat broad stroke counterfactual questions providing we limit those to those which are plausible and manageable. Certainly, much research is needed to select the right questions. Perhaps instead of asking about whether there would have been a WW II without Hitler, we might more profitably ask the following: To what extent would the Nazi Party have grown in the 1920s without Hitler? Would the level of Anti-Semitism have been the same without Hitler during that period? Such questions, in turn, would have led to new foci pertaining to the surrounding environment—economic, cultural, technological. Clearly, counterfactuals not only would refocus attention but stimulate interest in these areas.

3. Given the uncertainty of past explanatory themes, there is constant revisionism, so that we are less certain about the facts and explanatory explanations we previously asserted without hesitation. Moreover, especially in this generation, we employ alternative hypotheses and computer simulations to help us figure out causes or realities (e.g., to project a more recent reality (e.g. how a child would appear ten years later) or how an incident might have happened (e.g., testing to guess at how a rocket disaster might have taken place—and might have been avoided-- or to determine how a regional grid system's backup safeguards might have failed). Moreover, we constantly reexamine phenomena to determine the weight of causative factors.

4. Lawyers, law teachers and policy planners constantly reexamine hypotheticals and scenarios at varying levels—counterfactuals or alternative fact situations, however they may be called. Such individuals profitably employ the device—whether in insuring student learning, preparing individuals for a moot court, considering how the law develops or should develop, reflecting upon how to proceed in the next step of research, having clients make decisions, choosing among policy options, speculating about a particular setting in which behavior took place, attempting to understand the many layers of causation, or unmasking hidden patterns of activity and determining the importance of such patterns. Will an end-product which draws upon counterfactual history or alternative facts be of any value, especially when the exercise is performed by lawyers, trained as advocates? That question can only be answered in the continuing dialogue (challenges, disagreements) among researchers.

***(My apologies to historians and philosophers for entering their territories).**

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