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Part IV

**Counterfactual thinking in
the context of crime, justice,
and political history**

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10 Escape from reality

Prisoners' counterfactual thinking about crime, justice and punishment

*Mandeep K. Dhimi, David R. Mandel, and
Karen A. Souza*

I'm a non-violent, first-time offender with a 24-year sentence. I could have been a productive member of society, given the chance, but I will spend over two decades in prison.

(Anonymous prisoner)

Our understanding of an event is influenced not only by what actually happened, but also by what "coulda, woulda, or shoulda" happened. These thoughts about how the past might have happened differently are known as counterfactuals. Counterfactual thinking is prevalent in domains of ordinary personal life such as career and romance (Landman and Manis 1992), after traumatic life experiences such as bereavement (Davis *et al.* 1995), and in public life as observed during public inquiries (Reiss 2001) and court cases (Kassin *et al.* 1990).

Studies have found that counterfactual thinking is involved in a variety of psychological processes, including attributions of blame and responsibility (e.g., Branscombe *et al.* 1996; Miller and Gunasegaram 1990), perceptions of fairness (Buck and Miller 1994; Folger and Kass 2000), and feelings of guilt and shame (e.g., Nario-Redmond and Branscombe 1996; Niedenthal *et al.* 1994). The counterfactual thoughts of offenders, defendants, or prisoners are likely to center on issues of blame and fairness, and feelings of guilt and shame, much like victims, criminal justice agents, the media, and public focus on these issues when considering crime, justice, and punishment.

In this chapter, we review research on counterfactual thinking in prisoners. In the first section, we review and critique past research on counterfactual thinking in the legal domain. In the second section, we present an overview of our research on counterfactual thinking in prisoners, focusing on three issues. First, what effect does upward counterfactual thinking have on prisoners' attributions of blame and their feelings of guilt and shame? Second, what is the relation between prisoners' upward counterfactuals and their perceptions of fairness and feelings of anger? Third, what is the semantic content of prisoners' upward counterfactual thoughts? In the third section, we highlight theoretical implications of this research for the study

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of counterfactual thinking and we propose future research in the legal domain. In the final section, we outline implications of our research for improvements to the justice system.

Past research on counterfactual thinking in the legal domain

A growing body of literature has examined the role of counterfactual thinking in judgments, attributions, and emotional responses to cases involving acts of intentional or unintentional wrongdoing (e.g., Bothwell and Duhon 1994; Branscombe *et al.* 1996; Catellani and Milesi 2001; Macrae and Milne 1992; Macrae *et al.* 1993; Miller and McFarland 1986; Nario-Redmond and Branscombe 1996; Turley *et al.* 1995). Such research has shown that factors including agency, normality, and the direction of counterfactual thinking can influence attributions of blame and responsibility to offenders and victims. For example, Branscombe *et al.* (1996) found that blame assigned to the victim in a hypothetical rape case was greater when participants undid the outcome by changing her actions rather than the offender's actions. Similarly, participants assigned more blame to the offender when the outcome was undone by focusing on his actions rather than the victim's actions. In addition, Turley *et al.* (1995) reported that a hypothetical rape victim was considered more responsible for the offence when her preceding actions were unusual rather than usual. Nario-Redmond and Branscombe (1996) found that downward counterfactuals about how things could have been worse for the victim in a hypothetical rape case led to the offender being judged less culpable for his actions, whereas downward counterfactuals focused on the offender led to him being attributed greater culpability.

Research has also demonstrated that factors such as normality, direction of counterfactual thought, and perspective can influence the harshness of the penalty recommended for an offender. Turley *et al.* (1995) reported that participants proposed longer prison sentences for an offender when they focused on unusual behaviors of the victim, and shorter sentences when they focused on unusual behaviors of the offender. Similar results have been obtained by studies involving civil cases. For instance, Wiener *et al.* (1994) found that determinations of negligence were related to mock jurors' ability to mutate the negligent act, which in turn was related to perceptions of the abnormality of the defendant's behavior. Antecedent abnormality may influence mock jurors' award compensations such that compensations are higher when a negative event is experienced after uncommon rather than common circumstances (Macrae 1992; Macrae and Milne 1992; Miller and McFarland 1986). Macrae *et al.* (1993) reported that the availability of upward counterfactuals suggesting how things could have been better were associated with recommendations for more severe punishment of a hypothetical offender. Finally, Bothwell and Duhon (1994) demonstrated that compensation awards to the plaintiff were lower if mock jurors took the perspective of the

1 plaintiff rather than the defendant when imagining how the event could
2 have been avoided.

3 *Critique of past research*

4
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6 Although advances in this research area have been made, there are also
7 important limitations worth noting. First, most studies have used hypothet-
8 ical cases, and virtually all involved events whose descriptions were highly
9 simplified. Real crime and victimization tend to be much more complex
10 than those depicted in brief vignettes in terms of, for example, the inten-
11 tions, motivations, and capabilities of offenders and the emotional and phys-
12 ical harm experienced by victims. Because researchers have rarely
13 manipulated such contextual factors it is unclear how they influence the
14 counterfactual thoughts of offenders and victims.

15 Second, researchers have mostly studied counterfactual thinking in the
16 context of serious crimes against the person, especially rape. However, most
17 crimes are less serious and are committed against property (e.g., theft or
18 burglary). Thus, it is unclear whether the counterfactual research findings
19 involving crimes against the person would generalize to crimes against prop-
20 erty. For instance, counterfactual thoughts in the context of crimes against
21 the person may be more likely to focus on other people as a self-serving
22 strategy of deflecting blame than in the context of crimes against property.

23 Third, participants in most studies are university students who are
24 required to merely imagine being the offender, victim, judge, or juror.
25 Whereas real offenders and victims are likely to be deeply influenced by
26 their experiences of criminality and victimization, respectively, and to be
27 highly involved in their cases, student participants have no personal involve-
28 ment in the cases presented to them. Moreover, whereas real judges and
29 jurors are likely to feel accountable for their decisions, and, in addition,
30 judges' views may be influenced by their training and experience, mock
31 judges and jurors will tend to be lacking in these features.

32 Finally, in those studies where participants were instructed to imagine
33 being a judge or juror, they were not given the type of guidelines that real
34 judges and jurors would be required to consider in the course of making judg-
35 ments about a case. These guidelines are important because they set con-
36 straints on the nature of admissible evidence (e.g., a prior criminal record may
37 be ruled inadmissible), on judgment procedures (e.g., in a criminal trial there
38 is a presumption of innocence), and on the range of possible judgments that
39 can be rendered (e.g., lack of intention to kill rules out a conviction for murder
40 but not manslaughter). Moreover, mock judges or jurors are not provided with
41 response formats that are representative of how real judges and jurors would be
42 required to respond, and it is unclear how such measures would be translated
43 into legal decisions. For example, even a severe judgment of blame provided
44 on a rating scale would not necessarily be translated into a guilty verdict.

45 Given the threats to external validity that we have highlighted, the

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question remains: how, if at all, does counterfactual thinking impact the judgments and feelings of real offenders, victims, and legal decision makers when they consider real criminal or civil cases? The aim of our research program has been to examine the role of counterfactual thinking in prisoners with a view to testing and expanding theories of counterfactual thinking in a real-world, high-stakes context, and with a view to revealing how prisons can enhance their rehabilitative functions. Employing both quantitative and qualitative methodologies, we have examined the role of counterfactual thinking in prisoners' attributions of blame, their feelings of shame, guilt, and anger, and their perceptions of fairness.

Upward counterfactual thinking in prisoners

Like social comparisons, counterfactual comparisons are directional. *Upward* counterfactuals bring to mind possible worlds that are better than reality, whereas *downward* counterfactuals bring to mind worse possible worlds. Although people also construct *downward* counterfactuals, studies indicate that upward counterfactuals are much more prevalent (e.g., Mandel 2003a; Sanna *et al.* 1999). Moreover, people are more likely to generate upward counterfactuals after negative events than after positive ones (e.g., Gleicher *et al.* 1990; Grieve *et al.* 1999; Markman *et al.* 1993). Clearly, being sentenced to imprisonment is a negative event that can have harmful consequences for an individual (Bukstel and Kilmann 1980). Hence, we thought it likely that prisoners would engage in upward counterfactual thinking about the chain of events that led to their imprisonment.

Functional accounts posit that upward counterfactuals tend to prepare individuals for avoiding negative outcomes in the future (Roose 1994; Roose and Olson 1995b, 1997; see Chapter 5, Markman and McMullen, for a more recent account) by identifying conditions that would have been sufficient to prevent a negative outcome from having occurred. Accordingly, upward counterfactuals have been shown to influence judgments of causality (Wells and Gavanski 1989), preventability (Mandel and Lehman 1996), and blame (Branscombe *et al.* 1996; Miller and Gunasegaram 1990). Upward counterfactual thinking can also amplify negative affect (Gleicher *et al.* 1990; Roose and Olson 1997). According to Kahneman and Miller's (1986) emotional amplification hypothesis, people feel worse after contemplating better possible worlds due to a contrast effect. That is, by contrasting reality to a more positive (or less negative) alternative our affective reactions to that reality are likely to become more negative. Specifically, past research has shown that upward counterfactual thinking can heighten negative emotions such as regret (Landman 1987; Zeelenberg *et al.* 1998d), distress (Davis *et al.* 1995), shame and guilt (Niedenthal *et al.* 1994), and disappointment and sadness (Mandel 2003a). Our research examines the relation between upward counterfactual thinking, attributions of blame and fairness, and feelings of guilt, shame, and anger.

Effect of thinking focus on blame, guilt, and shame

Two important claims in the counterfactual literature are that counterfactual thinking influences attributions of blame and emotional reactions to outcomes. Nevertheless, there is a lack of direct evidence to support these claims. The aim of our first study (Mandel and Dhimi in press) was to directly compare the effect of factual versus counterfactual thinking on prisoners' attributions of blame and their feelings of guilt and shame.

Past research has found that blame assigned to an actor was more severe when an actor's behavior was exceptional rather than routine (e.g., Kahneman and Tversky 1982b; Macrae 1992; Macrae and Milne 1992; Miller and McFarland 1986). These studies were motivated by norm theory (Kahneman and Miller 1986), which proposes that counterfactual thinking is activated more strongly in cases where a negative outcome is preceded by an abnormal act rather than a normal one. Other studies have reported significant positive correlations between self-blame and frequency of self-implicating upward counterfactuals (e.g., Davis *et al.* 1996; Mandel 2003a). Moreover, as noted earlier, Branscombe *et al.* (1996) found that the focus of counterfactual thinking influences the severity of blame assigned to victims and offenders. Although these studies suggest an effect of counterfactual thinking on blame assignment, none manipulated whether participants were directed to think counterfactually as opposed to factually about a case and then measured the effect of that manipulation on blame assignment. Indeed, the only previous study that directly manipulated thinking focus did not find a differential effect of counterfactual versus factual thinking on a composite measure of attributional judgments (Mandel 2003b). An important goal of our research, then, was to seek direct evidence that counterfactual thinking *per se* influences blame.

We predicted that prisoners engaged in counterfactual thinking about how they might have prevented the events leading up to their imprisonment would assign more blame to themselves than prisoners who engaged in thoughts about how they actually brought about those events. Our prediction is based on the idea that counterfactual thinking can identify a broader range of blame-relevant factors than a factual analysis of causes (Davis *et al.* 1996; Mandel and Lehman, 1996). According to judgment dissociation theory (Mandel 2003c), upward counterfactuals tend to focus on the functional goal of identifying ways in which a negative outcome could have been prevented. These thoughts can undo outcomes not only by negating direct causes, but also by negating enabling conditions or adding in disabling conditions. This suggests that there are more ways in which an actor could have prevented an outcome than ways in which the actor could have caused it. Thus, self-implicating upward counterfactuals are likely to draw attention to blame-implicating actions.

There has also been no direct test of the effect of counterfactual thinking on emotion. The emotional amplification hypothesis (Kahneman and Miller

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1986) states that negative emotion tends to be heightened by upward counterfactuals. Studies have varied factors such as normality, action, and outcome closeness, which are believed to influence counterfactual thinking (see Roese and Olson 1997; Sanna 2000). Although past findings are generally consistent with the emotional amplification hypothesis (e.g., Johnson 1986; Kahneman and Tversky 1982a; Landman 1987), none of the studies directly manipulated thinking focus. Furthermore, as others have noted (Lerner and Keltner 2000; van der Pligt *et al.* 1998), much of the research linking cognition and emotion has distinguished only between positive and negative emotions. We conducted a direct test of thinking focus on prisoners' emotions, and sought to refine the emotional amplification hypothesis by using an emotion-specific approach to examine how two emotions that share the same valence – guilt and shame – may be differentially affected by counterfactual thinking. Whereas regret and disappointment, which are likely to stem from intrapersonal harm (Berndsen *et al.* 2004), have often been compared in the counterfactual literature (for a review, see Chapter 8, Zeelenberg and van Dijk), guilt and shame, which are likely to be triggered by interpersonal harm, have received less attention. Our study of prisoners was an ideal context within which to examine these emotions because all of these individuals were found guilty of committing some form of harm to other persons, their property, or the state.

Our predictions build on studies showing that the effect of thinking on emotion is often mediated by attributional judgments such as blame assignment (Branscombe *et al.* 2003; Mandel 2003a; Roese and Olson 1997). For example, Zeelenberg *et al.* (2000a) found that the magnitude of the actor effect (i.e., the tendency usually attributed to the mediating role of counterfactual thinking for action to elicit more intense emotion than inaction) was predicted by the degree to which active versus passive actors were assigned responsibility for the outcomes. Similarly, we predicted that the effect of thinking focus on emotion would be mediated by blame. We further hypothesized that blame would be more strongly related to guilt than to shame. Blame and guilt are both believed to be elicited by moral transgressions (e.g., Alicke 2000; Smith *et al.* 2002), whereas shame typically implies a painful feeling that stems from having lost the respect of others due to improper or incompetent behavior. Smith *et al.* (2002) found that attributions of self-blame were more likely to be inferred from literary passages referring to guilt than to shame; and guilt, but not shame, was significantly correlated with a composite measure of blame and remorse. Our key positive prediction, then, was that thinking focus would have a significant effect on guilt that, in turn, would be mediated by blame. Our key negative prediction, by contrast, was that the main effect of thinking focus on shame would be unreliable due to the latter variable's weak relationship with blame.

We sampled ninety adult male prisoners from a medium-security UK prison, who were serving an average sentence of 5.15 years for crimes includ-

ing burglary, drugs, and violence. Thinking focus and stage were manipulated in a fully crossed design. The first factor was manipulated between-subjects via instructions in the survey. Participants in the *counterfactual* condition were asked to think about how things might have turned out better if only they “had done something differently” or “were a different kind of person.” Participants in the *factual* condition were asked to think about how things turned out the way they did because of “something they had done” or “the kind of person they are.”¹ Stage was manipulated within-subjects by asking participants to complete the relevant blame, guilt, and shame rating scales first with respect to the time they were caught, then with respect to the time they were convicted, and finally with respect to the time they were sentenced.

Blame

Providing direct empirical support for the hypothesis that counterfactual thinking has a causal effect on blame assignment, we found a significant main effect of thinking focus on blame. On average, prisoners who were directed to think counterfactually about being caught, convicted, and sentenced assigned significantly more blame to themselves than prisoners who were directed to think factually about the same events (see Figure 10.1). We

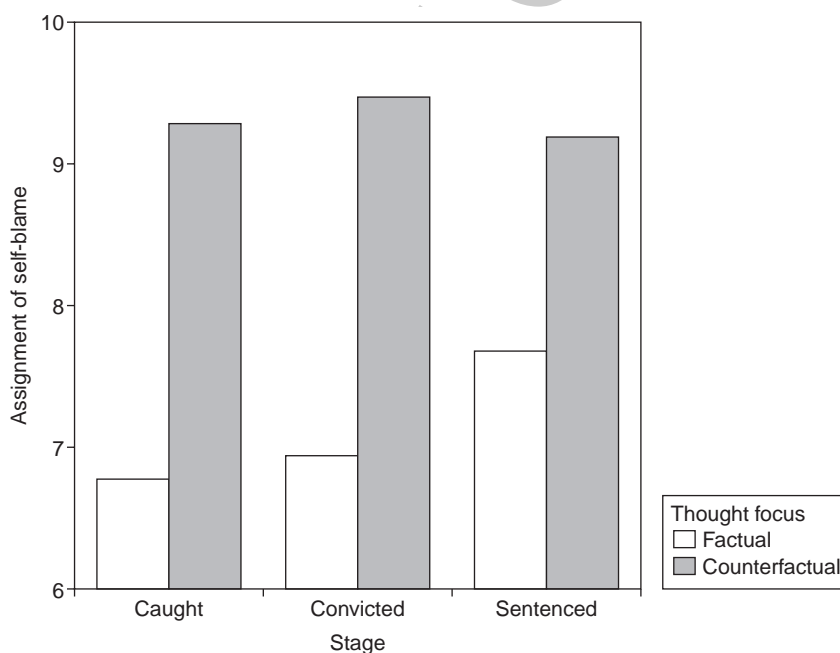


Figure 10.1 Mean self-blame assigned as a function of thinking focus and stage (source: Adapted from Mandel and Dhami (2004b)).

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explain the effect of thinking focus on blame in terms of the differential emphasis that counterfactual and factual thinking place on identifying self-focused means of preventing negative outcomes (Branscombe *et al.* 2003; Mandel and Lehman 1996; Morris *et al.* 1999). People may blame themselves for failing to prevent a negative outcome even if they do not view themselves as the primary cause of the outcome. In hindsight, it is easier to imagine ways in which one could have prevented a negative outcome than to imagine ways in which one caused it.

Interestingly, prisoners' self-blame was also related to the type of offence for which they were serving a sentence and to their past record with the criminal justice system. Consistent with a pattern of self-serving attributions (Miller and Ross 1975), prisoners convicted of a crime against the person (e.g., assault) assigned significantly *less* blame to themselves than those convicted of a crime against property (e.g., burglary). It may be easier to deflect blame on to a visible victim than on to a piece of property or its unseen owner. We also found that prisoners who had been previously tried for an offence reported feeling significantly *more* blameworthy than prisoners who had not been tried previously. This finding is compatible with Kelley's (1967) ANOVA model of attribution, which posits that attributions to an actor will be more likely when the actor exhibited consistent behavior in the past. Prisoners who have been tried previously have higher consistency in terms of their criminal behavior. The correlation between blame and length of sentence was nonsignificant.

Guilt and shame

There was a strong positive correlation ($r = 0.80$) between prisoners' feelings of guilt and shame. This relationship was stronger than that reported in other studies (e.g., Mandel 2003a), and may be explained by the fact that prisoners are publicly labeled and stigmatized for their actions, thus inducing feelings of shame in them (Braithwaite 1989). Both emotions were also significantly correlated with self-blame, controlling for the other emotion. However, blame was positively related to guilt ($r = 0.47$), whereas it was negatively related to shame ($r = -0.26$). Finally, feelings of guilt and shame were not significantly related to sentence length, time served, or prisoners' past record.

Turning to our key predictions, we found a significant main effect of thinking focus on emotion. On average, the reported intensity of emotion was greater in the counterfactual condition than in the factual condition. However, as Figure 10.2 shows, the effect of thinking focus, as we predicted, was significantly greater on prisoner's feelings of guilt than on their feelings of shame (the interactions with stage were nonsignificant). That is, prisoners who were directed to generate self-implicating upward counterfactuals about their arrest, conviction, and sentence reported feeling significantly guiltier than prisoners who were directed to generate self-implicating factual thoughts about the stages leading up to their imprisonment.

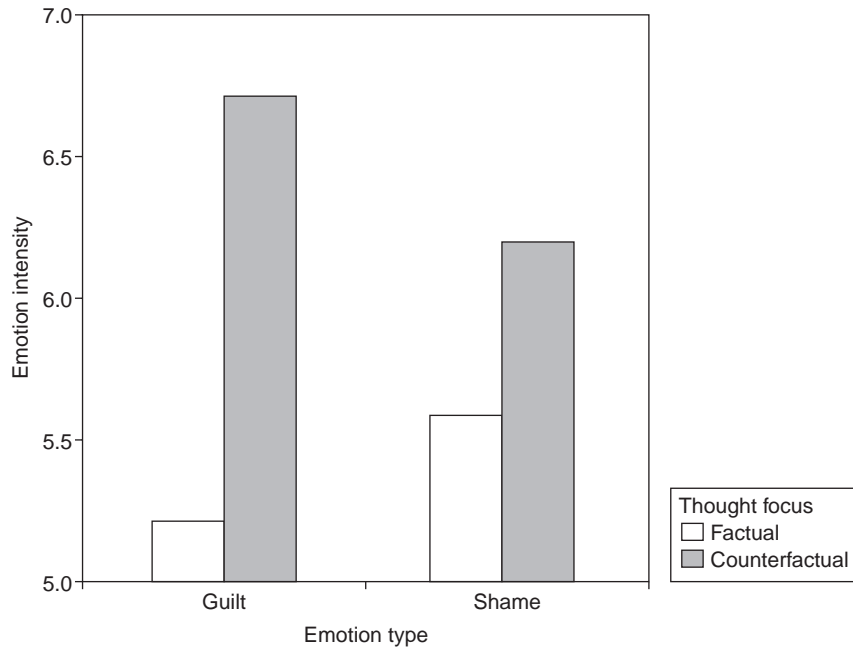


Figure 10.2 Mean emotional intensity as a function of emotion type and thinking focus (source: Adapted from Mandel and Dhami (2004b)).

In support of our mediational hypothesis, we found that blame significantly predicted guilt and, as already noted, both blame and guilt were influenced by thinking focus. If our mediational hypothesis is correct, then, we should find that the predictive effect of thinking focus on guilt is significantly attenuated when blame is controlled. Indeed, this was the case. After controlling for blame, thinking focus was no longer a significant predictor of guilt. (Conversely, the predictive effect of thinking focus on blame was not mediated by guilt.) Thus, the present findings suggest that the impact of counterfactual thinking on guilt is due to the mediating role of blame. These findings cohere with recent research indicating that blame and guilt are closely related (Mandel 2003a; Smith *et al.* 2002), and are consistent with the findings of Zeelenberg *et al.* (2000a), which revealed that responsibility attributions mediated the effect of counterfactual thinking on regret. Taken together, these findings suggest that the effect of counterfactual thinking on emotion is not only due to affective contrast – emotional amplification also appears to occur via an attributional route of influence.

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Upward counterfactual thinking, fairness perceptions, and anger

In our second study (Mandel and Dhmi 2005), we examined the relations between upward counterfactual thinking, prisoners' perceptions of fairness, and their feelings of anger. As noted earlier, literature suggests that upward counterfactual thinking can heighten negative emotions such as regret, guilt, distress, and sadness. However, little research has examined the relation between upward counterfactual thinking and anger. Prisoners often experience anger, and prisons typically provide counseling services to help prisoners manage their anger (see McDougall *et al.* 1987). Unlike self-focused emotions such as guilt, shame, and regret, anger is often directed at other people or factors, and it tends to be elicited by external attributions of responsibility for negative outcomes (Keltner *et al.* 1993). Consistent with this view, Mandel (2003a) found that anger was negatively correlated with perceived control and self-blame, and positively correlated with distrust of others.

One objective of our second study was to explore the role of situational context as a potential moderator of the relationship between cognitive and affective variables – in this case, the upward counterfactuals and feelings of anger reported by our prisoner sample. Demonstrating a moderating effect of context on cognition and emotion, Mandel (2003a) found that whether a negative experience occurred in either an interpersonal or academic context affected the content of counterfactuals and the likelihood of counterfactual activation. Context also influenced emotion, such that negative interpersonal experiences heightened other-focused emotions (namely, anger and distrust), whereas negative academic experiences heightened self-focused emotions (namely, regret, shame, and guilt).

We examined an overall context (i.e., the criminal justice system) that can be decomposed into sub-contexts or stages (e.g., committing the crime, being caught, convicted, and sentenced) that tend to unfold as a causal chain of events. Given that the control offenders have over their environment is increasingly reduced as they “progress” through the justice system, we predicted that they would be more likely to focus on themselves at early stages (i.e., when committing the crime) and that they would tend to focus on other people (e.g., police, witnesses, judge, jury, attorney) or external factors (e.g., laws) that exert greater control over outcomes at later stages of the justice process (i.e., being caught, convicted, and sentenced). Accordingly, we predicted that the relation between counterfactual thinking and anger would vary as a function of context, such that upward counterfactuals would be associated with less anger at the crime stage and with greater anger at the arrest, conviction, and sentencing stages.

A second objective of our study was to examine the relation between upward counterfactual thinking and perceived fairness. As Buck and Miller (1994: 29) pointed out, “people react not only to the nature and severity of a victim's fate but also by its perceived deservingness.” Thus, when consider-

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1 ing outcomes, people not only think about whether they could have been
2 better or worse, they also reflect on the fairness of the outcomes (distributive
3 justice) and the fairness of the procedures used to allocate the outcomes (pro-
4 cedural justice). Nario-Redmond and Branscombe (1996) found that down-
5 ward counterfactuals that focused on the offender in a hypothetical rape case
6 led to feelings of justice. By contrast, upward counterfactuals about conviction
7 and sentence may bring to mind ways in which legal procedures could
8 have been different such that they would have led to a more favorable
9 outcome for the defendant (viz. an acquittal and/or non-custodial or shorter
10 sentence). Thus, we predicted that prisoners who reported upward counter-
11 factuals about their conviction and sentence would perceive their trial and
12 sentence as less fair than prisoners who did not report such thoughts.

13 People tend to believe in a just world (Lerner 1980). They expect to
14 receive what they deserve and believe that they deserved what they received.
15 Buck and Miller (1994) found that incongruous outcomes were perceived as
16 more unfair and undeserved than equally severe and improbable congruous
17 outcomes. Congruity was defined as the extent to which the event was con-
18 sistent with existing knowledge. Adams's (1965) equity theory stipulates
19 that people evaluate their outcomes via comparison (either with oneself or
20 others) to form a sense of deservingness. Outcomes that are perceived as
21 being below an equitable level may lead to attributions of unfairness. There-
22 fore, we predicted that prisoners with no previous convictions would per-
23 ceive their trial and sentence to be less fair than those with previous
24 convictions because the former group has more incongruent information.

25 To test our predictions, we surveyed approximately 500 adult male pris-
26 oners serving sentences in three (low, medium, and high-security) US federal
27 prisons. The prisoners were serving an average sentence of 8.61 years for
28 crimes including fraud and forgery, drugs, and violence. In response to
29 closed-ended questions, prisoners indicated whether they had specific
30 thoughts about how things could have turned out *better* at different stages of
31 the justice process. The upward counterfactual thoughts listed were about
32 committing the crime (i.e., "I should not have committed the crime or
33 should have committed a less serious crime"), being caught (i.e., "I should
34 not have been caught"), being convicted (i.e., "I should have entered a differ-
35 ent plea or have been acquitted"), and being sentenced (i.e., "I should have
36 received a noncustodial sentence or a shorter prison sentence"). Prisoners also
37 rated how angry they had been feeling lately compared to before on a scale
38 ranging from "much less" through "same as before" to "much more." They
39 also rated the perceived fairness of their trial and sentence, separately. In
40 addition, we used open-ended questions to probe prisoners' counterfactual
41 thoughts. In the remainder of this subsection, we report the findings that
42 address the aforementioned predictions. In the subsequent subsection, we
43 summarize our study of prisoners' open-ended responses.
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Anger

Consistent with our prediction, prisoners who had upward counterfactuals about their crime felt significantly *less* angry than those who did not report having such thoughts. By contrast, prisoners who had upward counterfactuals about being caught, convicted, or sentenced felt significantly angrier than those who did not report having such thoughts (see Figure 10.3). These findings are consistent with the notion that anger is an emotion triggered by external attributions of responsibility (e.g., Keltner *et al.* 1993; Mandel 2003a) because upward counterfactual thinking was associated with more intense anger in contexts where we would expect there to be a higher degree of focus on other people or factors. Furthermore, these findings support the idea that the situational context to which counterfactual thinking refers can shape the content of these thoughts and their subsequent effects on emotion.

Fairness

As predicted, prisoners who reported having upward counterfactuals about being convicted perceived their trial to be significantly less fair than those who did not report such thoughts (see Figure 10.4). Similarly, prisoners who reported upward counterfactuals regarding their sentence perceived their

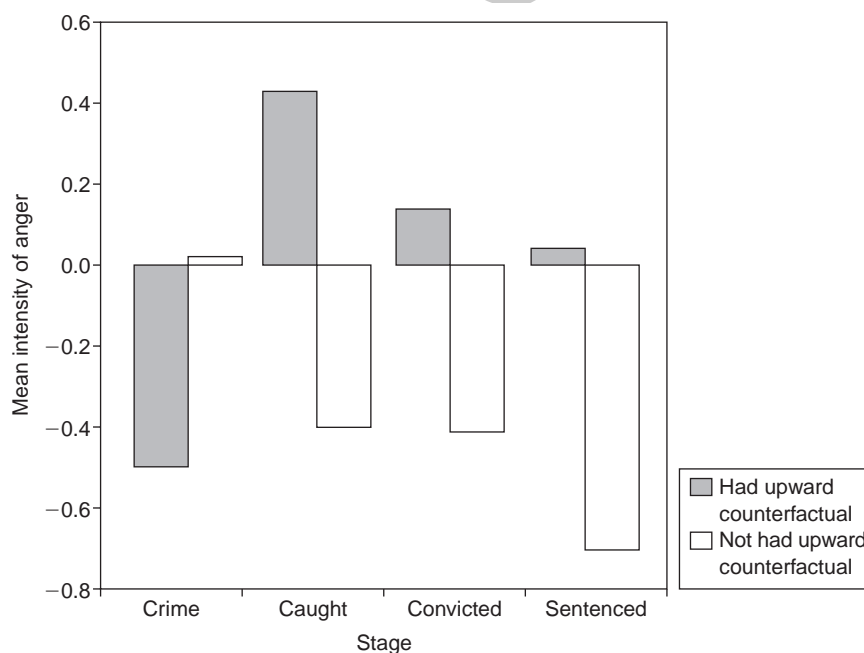


Figure 10.3 Mean intensity of anger as a function of upward counterfactuals and stage (source: Adapted from Mandel and Dhimi (2004a)).

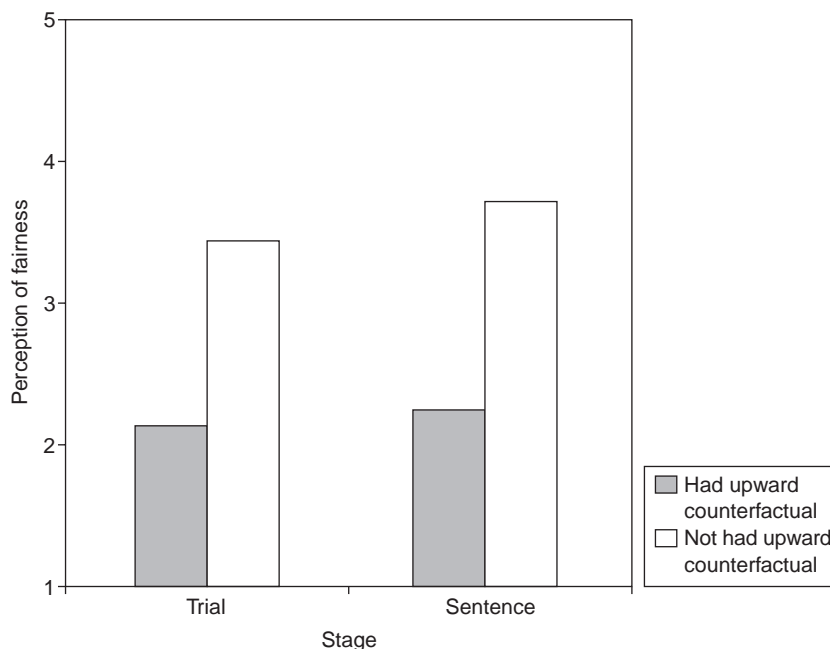


Figure 10.4 Mean perception of fairness as a function of upward counterfactuals about trial and sentence (source: Adapted from Mandel and Dhimi (2004a)).

sentence to be less fair than those who did not report such thoughts. Although our findings are correlational, they are consistent with the hypothesis that thinking about how one might have entered a different plea or have been acquitted and how one might have received a noncustodial or shorter sentence can lead to perceptions of unfairness. Consistent with Buck and Miller's (1994) "incongruence hypothesis," we also found that prisoners who had previous convictions rated both their trial and sentence as significantly fairer than prisoners who had no previous convictions.

Content of prisoners' upward counterfactual thoughts

As noted earlier, the prisoners in our US sample (Mandel and Dhimi 2005) responded to open-ended questions asking "How could things have turned out better?" and "What do you think could have made your trial (and sentence) fairer?" We coded prisoners' initially listed counterfactuals for mutability features and we coded the semantic content of prisoners' fairness-related responses.

Some features of reality are more mutable than others (Kahneman and Miller 1986). For instance, research suggests that people are more likely to

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mutate their own behaviors than those of others (e.g., Davis *et al.* 1996). Studies on the effect of controllability on counterfactual thinking suggest that people most often mutate features of their own behavior rather than their character (e.g., Mandel and Lehman 1996). There is also evidence that after a negative event people are more likely to generate counterfactuals that specify the addition of an antecedent that was not present in reality rather than the subtraction of an antecedent that was present (e.g., Roese and Olson 1993).

We found that the content of prisoners' upward counterfactual thoughts generally coincided with that reported in previous research. Forty-three percent of the prisoners' upward counterfactuals focused on the self. Of these self-focused counterfactuals, 80 percent had a behavioral focus. Finally, in line with Roese and Olson's (1993) earlier findings, the majority (63 percent) of prisoners' counterfactuals were additive.

As Table 10.1 shows, when asked about how things could have turned out better, prisoners thought that the criminal justice system could have been better in terms of them having a more effective defense lawyer, a fairer judge, and an unbiased jury. Prisoners also thought they should have received a noncustodial sentence or a shorter prison sentence. Some prisoners believed that they could have been better people, for instance, by having an education, employment, not abusing drugs and alcohol, and having more strength of character. Other prisoners focused on their crime by suggesting that they should not have committed the crime as it occurred, they could have committed a less serious crime, or they should not have been caught. Finally, some prisoners reported that they could have had better relationships with their family and friends.

Consideration of how their *trial* could have been fairer led prisoners to report upward counterfactuals focused on how the criminal justice system could have been less corrupt and unbiased in terms of prejudice and discrimination, the witnesses not telling lies, the police not setting up the prisoner, and the police and prosecutors not threatening or intimidating the prisoner (see Table 10.1). By contrast, prisoners' counterfactual thoughts concerning how their *sentence* could have been fairer centered primarily on them receiving a less punitive sentence (i.e., noncustodial sentence or shorter sentence) or a sentence that was proportionate to the seriousness of the offense, to the responsibility of the offender, or congruent with sentences for other similar offenders and crimes (see Table 10.1).

In addition, prisoners tended to report that their trial and sentence could have been fairer if there were better people working in the justice system, such as more competent and effective defense lawyers, more reasonable and unbiased judges, and more representative juries. They also tended to report that their trial and sentence could have been fairer if there were better laws, guidelines, and procedures. For instance, prisoners thought that only factual (rather than circumstantial) evidence should have been presented in court, that mitigating circumstances should have been taken into account, that

Table 10.1 Prisoners' counterfactuals about how things could have turned out better and fairer

<i>Content category</i>	<i>Prisoners (%)</i>	<i>Examples</i>
<i>Things could have turned out better if . . .</i>		
Better justice system	20	"The prosecution would act justly instead of manipulating people for convictions"
Shorter/non-custodial sentence	19	"I could have been released to do work in the community instead of prison time"
Better self	15	"I didn't start doing drugs"
Crime-related factor	14	"I had just broken his legs"
Better relationships with family/friends	11	"I had a better family life as a child"
Other	21	
<i>Trial could have been fairer if . . .</i>		
Less corruption/bias	26	"There was no perjury by the prosecution's expert witness"
Better justice system	26	"I had a better lawyer. I had a court appointed one"
Better laws/guidelines/procedures	18	"If due process of law was followed"
Other	30	
<i>Sentence could have been fairer if . . .</i>		
Sentence-related factor	42	"If ran the state and federal charges concurrent"
Better laws/guidelines/procedures	24	"I got less time for a first offence"
Better justice system	11	"A judge who is trying to get elected to a higher position and is tough on crime for his election benefit is unfair. If only I had a more reasonable judge"
Other	23	

Source: Adapted from Mandel and Dhami (2004a).

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there should not have been any plea bargains, and that certain laws should have been different, such as the mandatory minimum sentencing guidelines.

The content of prisoners' upward counterfactuals, therefore, coincided with theorists' characterizations of distributive and procedural justice (e.g., Adams 1965; Leventhal 1980). Adams (1965) stated that distributive justice includes features such as equity. A just outcome is expected in light of the perceived input, and inequity refers to any inequality between one input–output ratio and another input–output ratio. According to the prisoners in our sample, a fairer sentence would have been proportionate to the seriousness of the offence and the responsibility of the offender, and should have been similar to that of other offenders who were convicted of similar crimes. Leventhal (1980) lists features of procedural justice that were mentioned by prisoners in our sample. For instance, prisoners reported that judges and jurors should have been unbiased, jurors should have been more representative, criminal justice agents should have behaved ethically (e.g., by not lying), legal professionals should have relied on valid information and well informed opinion, and that sentencing decisions should have been consistent across offenders. Finally, although few prisoners said that their conviction or sentence should be reviewed, revised, or reversed in response to the questions that probed their counterfactual thoughts, many did mention this “correctability” feature of procedural justice to us when we conducted the research.

Implications

The study of counterfactual thinking

Our research on counterfactual thinking in prisoners overcomes some of the methodological limitations of past research on counterfactual thinking in the legal domain. There is some evidence that counterfactual availability is heightened by involvement (e.g., Macrae and Milne 1992), and that the generation of counterfactuals may be strongly influenced by internal states of the individual such as intention and motivation (e.g., Catellani and Milesi 2001). The prisoners in our studies were directly involved in the criminal justice system, and were asked to consider real, and often complex, events that were personally relevant to them such as committing the crime, being caught, convicted, and sentenced to imprisonment. We studied crimes that varied in severity, and compared the effect of crimes against the person and other crimes, as well as the effect of having previous convictions or not, on measures of cognition and emotion. Finally, we examined counterfactual thinking at different stages of the justice process.

The findings of our research contribute to theoretical developments in the area of counterfactual thinking in several ways. First, we demonstrated that counterfactual thinking has a stronger effect than factual thinking on the assignment of self-blame and on feelings of guilt. Second, we found that the

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1 relation between counterfactual thinking and emotion is mediated by attri-
2 bution. Third, we showed that the context in which counterfactual thinking
3 occurs can moderate the relation between counterfactual thinking and
4 emotion (specifically, anger). Finally, we demonstrated that the availability
5 of counterfactual thoughts is related to perceptions of fairness.

6 Our research extended the range of dependent variables examined in
7 counterfactual thinking research to include anger and fairness. Future
8 research could examine the relation between counterfactual thinking and
9 perceptions of fairness in such a manner that clearly distinguishes between
10 distributive and procedural fairness (e.g., Folger and Kass 2000). From our
11 research (see also Mandel 2003a), it is clear that context can have important
12 moderating effects on the interplay of cognition and emotion, and future
13 research is needed to more fully explore the effect of context on
14 cognition–emotion interactions. Researchers could also manipulate
15 factors that are relevant to the study of criminal justice processes such as
16 the intentions, motivations, and capabilities of the offender, and the
17 harm experienced by the victim. Future research could also examine how
18 legal guidelines and procedures constrain the content of counterfactual
19 thoughts and the effect of thinking focus manipulations on judgments made
20 by others involved in the criminal justice system such as victims, judges,
21 and juries.

Crime control and rehabilitation

22
23
24
25 Our research on prisoners' counterfactual thinking has also addressed several
26 issues pertaining to the effectiveness of prison sentences. Imprisonment has
27 several functions (Mathiesen 1990). As a method of crime control, it is theo-
28 rized to work in at least two ways. First, severe sanctions such as long prison
29 sentences are meant to deter people from committing premeditated crimes.
30 Second, prisons are meant to provide offenders with an opportunity for re-
31 education and rehabilitation leading to effective reintegration into society
32 and reduced rates of recidivism. Beyond these functions, imprisonment may
33 also serve a retributive function by punishing offenders for their crimes.

34 Our findings suggest that some of the objectives of imprisonment are not
35 being effectively met. First, we did not find a significant correlation between
36 length of sentence and either the intensity of guilt or shame, or the degree of
37 self-blame, experienced by prisoners. This is contrary to the belief under-
38 lying the retributive function of imprisonment that punishment involves
39 inducing negative self-attributions and emotions in prisoners. Second, we
40 did not find a significant correlation between the duration of time served by
41 prisoners and either the intensity of guilt or shame, or the degree of self-
42 blame, experienced by prisoners. This is contrary to the notion that prisons
43 can rehabilitate offenders by providing them with the time and means for
44 reflecting on their moral wrongdoings and acknowledging their responsi-
45 bility for the offense. Finally, contrary to the notion that prisons act as

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specific deterrents to crime, 54 percent of the UK prisoners in our research had been previously convicted and 48 percent had served a prison sentence in the past for over eight years on average. Similarly, 60 percent of the US prisoners in our research had at least one previous conviction, and they had served, on average, one prison sentence in the past.

There is a need to find methods of crime control that are more effective than incarcerating offenders for long periods of time at high economic and social costs to society (Haney and Zimbardo 1998). In the meantime, it may be worth while exploring how counterfactual thinking can contribute to offender rehabilitation. For instance, parole boards require that an offender acknowledges guilt and accepts blame for the offense. Our research suggests that prison programs designed to stimulate and explore prisoners' upward counterfactual thoughts about their crime, arrest, conviction, and sentence may increase prisoners' attributions of self-blame, and enhance their feelings of guilt.

Upward counterfactual thinking can function to help people gain mastery over their environment by avoiding the recurrence of negative outcomes and by increasing the chances of achieving positive outcomes in the future (e.g., Roese and Olson 1997). It is important, however, to recognize that such thoughts may lead prisoners to either abstain from reoffending or to be more effective at avoiding capture and penalties in the future. For instance, a prisoner told us that "I should have taken a second [mortgage] on my house instead of taking up bank robbery." By contrast, another prisoner said that things could have turned out better if "I'd worn a mask." While upward counterfactual thinking may be functional for the individual prisoner, it may, in some cases, be dysfunctional for society. The consequences of counterfactual escapes from reality ultimately depend on the chosen escape route: some counterfactual escapes might facilitate lawful reintegration, whereas others might facilitate escaping detection for future crimes.

Notes

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- 1 As the reader may have noted, we also manipulated the content focus of prisoners' sentence completion stems so that they either focused on a behavioral aspect of self or a characterological aspect. Niedenthal *et al.* (1994) proposed and found partial support for the idea that guilt is more likely to be influenced by behavior-focused upward counterfactuals than by character-focused upward counterfactuals, and that the opposite was true for shame. In the present study, however, we did not find support for this hypothesis. The content focus by emotion type interaction effect was nonsignificant and, moreover, content focus did not interact with thinking focus or stage. Therefore, we do not discuss this factor further in this chapter.