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THE LAWYER'S FALLACY

JAMES LINDGREN*

When Ring Lardner was a young man, he played professional baseball. Although Lardner went on to write many fine stories and essays, F. Scott Fitzgerald believed that baseball had stunted Lardner's talent:

Imagine life conceived as a business of beautiful muscular organization—an arising, an effort, a good break, a sweat, a bath, a meal, a love, a sleep—imagine it achieved; then imagine trying to apply that standard to the horribly complicated mess of living, where nothing, even the greatest conceptions and workings and achievements, is else but messy, spotty, tortuous—and then one can imagine the confusion that Ring faced on coming out of the ball park.¹

Fitzgerald harshly concluded: "However deeply Ring might cut into it, his cake had exactly the diameter of Frank Chance's diamond."²

Lawyers have their own version of Ring Lardner's problem. They view the world as lawyers—which is not necessarily a defect, especially when arguing with other lawyers. Yet they fall into a logical fallacy when they begin to think that lay people experience the world as lawyers would or that people live in legal categories. The purpose of this Essay is to identify and briefly discuss that fallacy. Not all bad, false, or invalid arguments are fallacies. Philosophers usually reserve that term for a bad, false, or invalid argument that is plausible on its surface, an argument that may persuade the gullible because, though faulty, it is attractive.³

The lawyer's fallacy arises when we *incorrectly* assume that people who have an experience that has legal consequences act in legal categories or understand that experience as a lawyer or legal expert would, as if they had the benefit of legal training and research. Of course, sometimes people do act in legal categories. And it's the purpose of some laws, for example, will formality statutes, to channel behavior into legal pigeonholes. Although this fallacy may take several forms, it usually assumes that people understand the classifications in which lawyers put

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1. F. Scott Fitzgerald, *Ring* (1933), in F. SCOTT FITZGERALD, *THE CRACK-UP* 34, 37 (E. Edmund Wilson ed., 1956).

2. *Id.* at 36.

3. IRVING M. COPI, *INTRODUCTION TO LOGIC* 72-73 (4th ed. 1972).

their behavior and accordingly do or should act as lawyers or legal experts would. It gets its name by analogy with two previously identified fallacies—the *psychologist's fallacy*⁴ and the *historian's fallacy*.⁵

I. FALLACY VERSION 1: PORNO SHOPS USE LEGAL DEFINITIONS TO KNOW WHAT TO ORDER

In her essay *On Collaboration*, Catharine MacKinnon responds to criticisms of her and Andrea Dworkin's pornography definition by urging that their definition is "an exact description of what [pornographers] do."⁶

Our definition of pornography is, in fact, the pornographers' definition: pornography is created by formula, it does not vary. No pornographer has any trouble knowing what to make. No adult bookstore or theater has any trouble knowing what to stock. No consumer has any trouble knowing what to buy. We only described what they all already know and do.⁷

Here MacKinnon is assuming that pornographers know or experience pornography in the legal categories created by feminists and legal academics. She implies that pornographers use something like her abstract legal definition⁸ of pornography to know what to buy and stock. One can at least be skeptical that pornographers usually experience pornography in feminist terminology, such as *subordination*⁹ or *sexual objects*.¹⁰

4. See WILLIAM JAMES, PRINCIPLES OF PSYCHOLOGY 129 (Encyclopedia Britannica, Inc. 23rd prtg. 1980) (the error is assuming that a person who has a psychic experience knows it, when he has it, to be all that an observing psychologist would know it to be); see also DAVID HACKETT FISCHER, HISTORIANS' FALLACIES 209 (1970).

5. See FISCHER, *supra* note 4, at 209-13 ("[T]he historians' fallacy is the error of assuming that a man who has a given historical experience knows it, when he has it, to be all that a historian would know it to be, with the advantage of historical perspective.").

6. CATHARINE MACKINNON, FEMINISM UNMODIFIED 204 (1987).

7. *Id.*

8. Under the MacKinnon-Dworkin model statute:

Pornography is the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

- (i) women are presented dehumanized as sexual objects, things or commodities; or
- (ii) women are presented as sexual objects who enjoy pain or humiliation; or
- (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or
- (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
- (v) women are presented in postures of sexual submission, servility or display; or
- (vi) women's body parts—including but not limited to vaginas, breasts, and buttocks—are exhibited, such that women are reduced to those parts; or
- (vii) women are presented as whores by nature; or
- (viii) women are presented being penetrated by objects or animals; or
- (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

Id. at 262 n.1.

9. See Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, in

Further, that bookstores know what kinds of pornography to stock doesn't mean that legal academics can or have come up with an adequate definition. Museums, art galleries, and symphonies know what to buy and present without there being a legal definition of excellence in art. The market may be a far more accurate determinant of what pornography to buy or stock than a legal definition.

My comments here are not an attack on the MacKinnon-Dworkin definition, only a criticism of one of dozens of arguments that MacKinnon uses to support her definition. Indeed, in one empirical test of her definition, I found it to be no worse (and perhaps better) than the Supreme Court's *Miller* test and Cass Sunstein's competing pornography definition.¹¹

II. FALLACY VERSION 2: IF SHE DOESN'T UNDERSTAND IT'S RAPE WHEN IT HAPPENS, IT'S NOT RAPE

When women are raped or sexually assaulted, especially by friends, they often don't fully understand what has happened to them, legally or psychologically. It may take days or weeks for the full import of their assault to register. Yet the truth of claims of assault are often tested according to how quickly the woman protested that she was raped and complained to the authorities. For assaults to be fully believed, the complainant must understand immediately that a crime has been committed and be quick and consistent in her complaints to authorities.¹²

To disbelieve claims of assault just because their legal import wasn't fully understood at the time the assault occurred is a version of the lawyer's fallacy. Even where a woman objected at the time of the assault, she may not fully understand whether a crime has been committed or whether she should go to the police or the hospital immediately. For example, a rape victim who is only thinking about her own welfare rather than preserving evidence for trial might reasonably decide to stay home with friends rather than go to the hospital, where evidence of rape can be gathered. Yet that failure may be used against her to suggest that perhaps she wasn't raped at all.

I have seen a similar lack of understanding of the legal import of

ROBERT M. BAIRD & STUART E. ROSENBAUM, *PORNOGRAPHY: PRIVATE RIGHT OR PUBLIC MENACE?* 57-59 (1991) (*subordination* is hierarchy, objectification, submission, and violence).

10. See *supra* note 8.

11. James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. (forthcoming 1993).

12. This problem is examined in some detail in Kim Lane Scheppele, *Just the Facts Maam: Sexualized Violence, Evidentiary Habits & the Revision of Truth*, 37 N.Y. L. SCH. L. REV. (forthcoming 1992).

actions in sexual harassment cases. I have counseled victims of harassment that the behavior they experienced was actionable sexual harassment, rather than just the nonactionable offensive behavior that they thought it was. If I were to assume that you can't be sexually harassed without understanding at the time it occurs that you are the victim of a tort, I would commit the lawyer's fallacy.

III. FALLACY VERSION 3: EVERYONE IS A LEGAL EXPERT

Perhaps the broadest version of the lawyer's fallacy is suggested by the maxim: "Everyone is presumed to know the law," or its corollary, "Ignorance of the law is no excuse." After criminal law professors have finished taking apart the corollary, it often amounts to little more than: "Ignorance of the criminal law is usually not an excuse."

Of course, there is nothing illogical in presuming that people know the law as long as we cling to that assumption because we think it works better than the alternative. But if one begins to believe that people really do know the law, then we have fallen into the lawyer's fallacy. We then assume that people experience the world as a legal expert would, knowing the law that applies to their behavior.

If everyone knew the law, we could probably do without law schools, law professors, and most lawyers and tax accountants. We would have little to teach, since our students would already know the law. If the presumption of universal knowledge is to be justified, it can't be because it's true. People don't know the law. Why do we pretend that they do? We pretend chiefly because we think that we couldn't run a legal system without this pretense. If we could enforce only laws that people knew, the law would become totally subjective. Each person would be subject only to those laws that were in her head. In the United States, we would have 250 million different legal systems. Further, it would be extraordinarily difficult to prove whether someone was aware of any law that might affect her. Last, we would have reversed incentives to learn the law. Currently, we learn the law because we know that it might be applied to us even if we don't know its contours. If ignorance were a general excuse, we would be rewarded for remaining ignorant of the law.

IV. FALLACY VERSION 4: LEGISLATORS KNOW THE EXISTING LAW

A variation of this presumption that everyone knows the law is the maxim that legislatures passing statutes are presumed to know the pre-existing statutes and court opinions. Sometimes judges have jumped

from the presumption of knowledge to the conclusion that the legislature must have actually known of the court's opinions.¹³ Courts have even presumed that voters know prior court decisions when they enact voter initiatives.¹⁴ Sometimes a majority of the legislature knows the existing law, sometimes only the proponents. And sometimes even the proponents of the legislation don't know the existing law. It's reasonable to assume that legislatures pass statutes to change the legal consequences of activities, but to assume that they know all the underlying laws that their statutes might affect is nonsensical. Unless there is a good reason that is not apparent, courts should not assume that legislatures are omniscient.

For example, the main federal extortion statute, the Hobbs Act,¹⁵ was enacted in 1946 to reassert federal control over violent extortion by labor unions.¹⁶ To explain the Act, its proponent Congressman Hobbs stated that its definition of extortion was taken from New York law and was the same as New York's.¹⁷ But as his only example of color-of-office extortion, he offered the situation of a citizen pretending to be a public official.¹⁸ In New York, however, extortion under color of official right was restricted by statute to public officials.¹⁹ A court today trying to determine whether the Hobbs Act applies to private citizens will find the question difficult. But if a judge began by assuming that the Act's proponent knew the underlying law, she would face an impossible task. She would have to assume that Hobbs knew that the New York law of official extortion both was and was not limited to public officials. Down that road lies at best confusion—and at worst schizophrenia.

Legislatures do not know everything about existing laws. Courts should not pretend that they do.

V. FALLACY VERSION 5: SINCE I AM NOT BOUND BY THE LOWER COURTS, NEITHER ARE YOU

One of the narrowest examples of the lawyer's fallacy is *State v.*

13. *Schwartz v. Volvo*, 554 So. d 927, 940 (Ala. 1989) (Hornsby, C.J., concurring in part, dissenting in part): "Congress is presumed to know of the courts' interpretations of its law Furthermore, when Congress reenacts a statute, . . . it is presumed to be aware of and to incorporate judicial interpretation of that statute Congress, then, must have been aware of the courts' holdings"

14. *People v. Aldana*, 199 Cal. Rptr. 156, 159 (Cal. Ct. App. 1984): "Those who enact legislation are presumed to know of existing laws and decisions"

15. 18 U.S.C. § 1951 (1990).

16. See James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 889-90 (1988) (discussing reason for Hobbs Act).

17. 89 CONG. REC. 3227 (1943) (statement of Rep. Hobbs); 91 CONG. REC. at 11,906 (statement of Rep. Robsion).

18. 89 CONG. REC. 3229 (1943) (statement of Rep. Hobbs).

19. N.Y. PENAL LAW § 855 (1909).

Striggles.²⁰ In that case, Striggles was prosecuted for putting a gum or mint vending machine in his restaurant, which the Iowa Supreme Court later determined was a gambling machine. At the time Striggles installed the machine, there had been a decision of the Des Moines municipal court holding that the machine wasn't a gambling machine and both the mayor and the county attorney had signed letters "stating that the machine was not a gambling device."²¹ Relying on this court opinion and these letters from the chief enforcement officials, Striggles installed the machine. Striggles' conviction was upheld on appeal by the Iowa Supreme Court:

We are disposed to hold . . . that, when the highest court of a jurisdiction passes on any given proposition, all citizens are entitled to rely upon such decision; but we refuse to hold that the decisions of any court below, inferior to the Supreme Court, are available as a defense under similar circumstances.²²

In other words, if we Iowa Supreme Court justices don't treat lower court judgments as authoritative, neither should you. Here the Iowa Supreme Court said that a litigant could rely on the Iowa Supreme Court's own decisions, but not on those of the mayor, the county prosecutor, or even the lower state courts. Here the court was looking at the world, not as just any lawyer would look at it, but as a state supreme court justice would look at it. By making the reasonableness of reliance turn on a sophisticated knowledge of the state court system, it assumes that people understand the different levels of state courts and their interaction. Also, it somewhat arbitrarily picks its own decisions as the first that one may rely on. Much as the Iowa Supreme Court may overrule a lower Iowa court, the United States Supreme Court may overrule the Iowa Supreme Court.²³ Yet because a state supreme court justice doesn't treat lower court decisions as authoritative, he tells citizens that they are acting unreasonably if they don't experience the world as he does.

VI. CONCLUSION: "YOU COULD LOOK IT UP."

Lawyers are a contentious lot. They are paid to find fault with other lawyer's arguments. And yet when a lawyer attacks an opponent's argument, she usually treats her opponent's mistake as if it were *sui generis*,

20. 210 N.W. 137 (Iowa 1926).

21. *Id.* at 138.

22. *Id.*

23. Of course, the Iowa Supreme Court is supposed to be the final arbiter of Iowa law, but many state supreme courts that thought they were determining state law questions found that the federal Constitution controlled the outcome of the case. In *Striggles*, for example, the United States Supreme Court might have reasonably concluded that his conviction violated due process.

as if the error in reasoning were a product of a confusion shared by no one else. This rhetorical blindness is nearly as common among legal academics as among practitioners. Yet in fact, bad arguments often fall into patterns. Being able to recognize the type of error should make it easier to counter.

This Essay has tried to identify one such error—the lawyer's fallacy. It's more than just viewing the world as lawyers do. It assumes that people who may not be lawyers understand their legal experiences as a lawyer or legal expert would. It turns the sports cliché, "You could look it up," (about which Ring Lardner built one of his more memorable short stories) into an assumption that you *have* looked it up. Yet as Fitzgerald noted, the world is "messy, spotty, tortuous."²⁴ We commit the lawyer's fallacy if we see people knowingly separating themselves and their activities into neat legal categories—and then climbing into pigeonholes where we can easily find them.

24. See FITZGERALD, *supra* note 1, at 37 (quoted in text at *supra* note 1).

