The Nirvana Fallacy is Not the “Fiction” Fallacy
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In a response to my essay, The Trespass Fallacy in Patent Law, in which I explain why patent scholars like Michael Meurer, James Bessen, T.J. Chiang and others are committing the nirvana fallacy in their critiques of the patent system, my colleague, T.J. Chiang writes at PrawfsBlawq:

The Nirvana fallacy, at least as I understand it, is to compare an imperfect existing arrangement (such as the existing patent system) to a hypothetical idealized system. But the people comparing the patent system to real property—and I count myself among them—are not comparing it to an idealized fictional system, whether conceptualized as land boundaries or as estate boundaries. We are saying that, based on our everyday experiences, the real property system seems to work reasonably well because we don’t feel too uncertain about our real property rights and don’t get into too many disputes with our neighbors. This is admittedly a loose intuition, but it is not an idealization in the sense of using a fictional baseline. It is the same as saying that the patent system seems to work reasonably well because we see a lot of new technology in our everyday experience.

I would like to make two quick points in response to T.J.’s attempt at wiggling out from serving as one of the examples I identify in my essay as a patent scholar who uses trespass doctrine in a way that reflects the nirvana fallacy.

First, what T.J. describes as what he is doing — comparing an actual institutional system to a “loose intuition” about another institutional system — is exactly what Harold Demsetz identified as the nirvana fallacy (when he roughly coined the term in 1969). When economists or legal scholars commit the nirvana fallacy, they always justify their idealized counterfactual standard by appeal to some intuition or gestalt sense of the world; in fact, Demsetz’s example of the nirvana fallacy is when economists have a loose intuition that regulation always works perfectly to fix market failures. These economists do this for the simple reason that they’re social scientists, and so they have to make their critiques seem practical.

It’s like the infamous statement by Pauline Kael in 1972 (quoting from memory): “I can’t believe Nixon won, because I don’t know anyone who voted for him.” Similarly, what patent scholars like T.J. are doing is saying: “I can’t believe that trespass isn’t clear and efficient,
because I don’t know anyone who has been involved in a trespass lawsuit or I don’t hear of any serious trespass lawsuits.” Economists or legal scholars always have some anecdotal evidence — either personal experiences or merely an impressionistic intuition about other people — to offer as support for their counterfactual by which they’re evaluating (and criticizing) the actual facts of the world. The question is whether such an idealized counterfactual is a valid empirical metric or not; of course, it is not. To do this is exactly what Demsetz criticized as the nirvana fallacy.

Ultimately, no social scientist or legal scholar ever commits the “nirvana fallacy” as T.J. has defined it in his blog posting, and this leads to my second point. The best way to test T.J.’s definition is to ask: Does anyone know a single lawyer, legal scholar or economist who has committed the “nirvana fallacy” as defined by T.J.? What economist or lawyer appeals to a completely imaginary “fictional baseline” as the standard for evaluating a real-world institution?

The answer to this question is obvious. In fact, when I posited this exact question to T.J. in an exchange we had before he made his blog posting, he could not answer it. The reason why he couldn’t answer it is because no one says in legal scholarship or in economic scholarship: “I have a completely made-up, imaginary ‘fictionalized’ world to which I’m going to compare to a real-world institution or legal doctrine.” This is certainly is not the meaning of the nirvana fallacy, and I’m fairly sure Demsetz would be surprised to learn that he identified a fallacy that according to T.J. has never been committed by a single economist or legal scholar. Ever.

In sum, what T.J. describes in his blog posting — using a “loose intuition” of an institution an empirical standard for critiquing the operation of another institution — is the nirvana fallacy. Philosophers may posit completely imaginary and fictionalized baselines — it’s what they call “other worlds” — but that is not what social scientists and legal scholars do. Demsetz was not talking about philosophers when he identified the nirvana fallacy. Rather, he was talking about exactly what T.J. admits he does in his blog posting (and which he has done in his scholarship).

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