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The Temptation of Common Sense

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by

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> "the metaphysics of savages…." (Bertrand Russell on common sense)

A while back a lawyer wrote that 'common sense' compelled victory on his motion. That's nice, I thought. So why had I bothered to read the cases? Common sense would have been enough.

Common sense is argued to juries all the time; but also to judges. Some think sentencing is a matter of common sense: intuition is good enough. Common sense is often argued under other banners—a party's position is "obviously" right or wrong, or, more subtly, the argument is presented as an implied syllogism. For example, a party attacked in a discovery dispute for not producing an item will note it has produced a million other items; common sense tells us it has done enough.

The use of common sense argument in the political sphere puts us on our guard. Do we not cringe when someone presents a 'common sense' budget or a 'common sense' reform or argues for 'common sense' government? We wonder: What are we being sold?

As Justice Mosk noted, the United States Supreme Court frequently resorts to "common sense," but rarely in a useful way. *Commercial Life Ins. Co. v. Superior Court,* 47 Cal.3d 473, 485 (1988) (Mosk, J., dissenting). There are quite literally thousands of California cases which invoke 'common sense'; and I am sure I too have thought, and surely written, that some argument or other made no sense or made good sense (read: accorded with common sense). But I can't resist; here's one of my favorites:

> In *Metropolitan Life,* we said that in deciding whether a law "regulates insurance" under ERISA's saving clause, we start with a "**common-sense** view of the matter," 471 U.S., at 740, 105 S.Ct. 2380, under which "a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry." *Pilot Life Ins. Co. v. Dedeaux, supra,* at 50, 107 S.Ct. 1549. We then test the results of the **commonsense** enquiry by employing the three factors used to point to insurance laws spared from federal preemption under the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* Although this is not the place to plot the exact perimeter of the saving clause, it is generally fair to think of the combined "**common-sense**" and McCarran-Ferguson factors as parsing the "who" and the "what": when insurers are regulated with respect to their insurance practices, the state law survives ERISA. Cf. *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 211, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979) (explaining that the "business of insurance" is not coextensive with the "business of insurers").

Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 365-66 (2002)(bolded emphasis supplied, note omitted).

Of course, calling this "common sense" is not helpful. One needs a pretty good idea of how insurance and preemption work before this makes any sense at all. The use of the epithet 'common sense' is just another way of saying that the issue is resolved; we're done. Or: don't look behind the curtain.

We are built this way. We use common sense to navigate most interactions, from our basic social skills to driving on the freeway. Common sense implements our practical, often unconscious, experience. It is the collection of heuristics, or rules-of-thumb and defaults, that we rely on to get through the day without expending much mental energy. It works beautifully to figure out basic problems such as driving, opening doors, greeting friends on the street, and anticipating where a billiard ball will go when struck—at least its first bounce or two.

Because common sense works so well in these areas, we may think it works in more complex areas as well. We would be wrong.

Common sense works because it extrapolates from a set of common experiences to the next instance. It fails when there is no common set. Simple situations tend to resolve the same way, time after time: the billiard ball moves thusly, a car going through a red light is likely to hit another car, and so on.

But in complex situations, the specific constellation of factors are rare, and together they have unpredictable results. Corporate reorganizations, wars, long-term weather and stock market patterns—and sometimes, legal analyses—are complex. They have a lot of moving parts, and the parts interact in unpredictable ways, sometimes eliminating and sometimes aggravating the impact of other parts. The parts might consist of apparently conflicting rules, or facts which are not well covered by a rule. We may have shifting and elusive burdens of proof; and of persuasion. Or we might have the law's darling: multi-factor tests across a broad spectrum, such as the multiple factors for trademark infringement, whether someone is an employee or independent contractor, whether an arbitration clause is conscionable or a police search fails under the Fourth Amendment; the reasonableness of a lawyer's hourly rate. (The "totality of the circumstances" language can be the tell-tale for this sort of test.) In these sorts of complex situations, extrapolating from an earlier experience is not always obvious—and it is not always a matter of common sense.

Even when prior experiences might provide a guide to future behavior, we may never have actually learned anything from the earlier situation. As Daniel Kahneman has reminded us, even those with putatively great expertise or experience may not actually be any good at what they do, unless there is some mechanism to provide them corrective feedback.[1] Pilots get this feedback every time they land a plane. "Expert" investment gurus often do not. Do judges and lawyers? Maybe not. It can be unclear how or why a lawyer successfully navigated a complex case. It can be years before trial judges get feedback from appellate courts, assuming someone appeals. And appellate courts may never get it at all. When past experience is an unreliable guide, then 'common sense'—a nice shorthand for past experience—is no better.

Relying on common sense can be a trap. 'Common sense' may be a poor substitute for legal analysis. It is a call to default thinking; a device of rhetoric.

And the trap is insidious. It can be difficult to tell the difference between complex and simple systems: complex systems may be comprised of many simple systems: which one, actually, is the

[1] THINKING, FAST AND SLOW (2011). See also, http://www.nytimes.com/2011/10/23/magazine/dont-blink-the-hazards-of-confidence.html?pagewanted=all&_r=0

judge being asked to solve? We may mistake *familiar* systems for *simple* systems. We also mistake *complicated* problems, such as building a nuclear weapon, for *complex* problems such as guaranteeing the safety of nuclear weapons. The former may be difficult and require specialized knowledge, but it can be (ultimately) figured out in advance. The latter is a function of an indeterminate set of factors the specific interactions of which may not be predicable.

Legal problems too may be both simple and complicated, such as monstrous discovery disputes or some summary judgment motions. And we may see *complex* problems in some anti-SLAPP motions, sometimes in petitions to compel arbitration, and on occasion with expert admissibility problems and special verdict forms; these complex issues can erupt in apparently "simple" cases.

As judges, let's not guess. And when we hear the siren song from lawyers—the appeal to common sense—we must take a deep breath.

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My thanks to Duncan J. Watts, EVERYTHING IS OBVIOUS: HOW COMMON SENSE FAILS US (2011)