

A Philosophical Basis for Judicial Restraint

MICHAEL EVAN GOLD*

I. MORAL PHILOSOPHY	481
II. JUDICIAL RESTRAINT	496
A. A Principle of Judicial Restraint Grounded in Moral Philosophy	496
B. Application of the Principle	500

“Judges ought to remember that their office is jus dicere, and not jus dare; to interpret law, and not to make law or give law.”

Francis Bacon, 1626

The purpose of this article is to establish a principled basis for restraint of judicial lawmaking. The principle is that all findings of fact, whether of legislative or adjudicative facts, must be based on evidence in the record of a case. This principle is grounded in moral philosophy. I will begin with a discussion of the relevant aspect of moral philosophy, then state and defend the principle, and finally apply it to a line of cases.

I. MORAL PHILOSOPHY

A profound issue in law and in ethics is whether to judge a case or an act by considerations *a priori* or *a posteriori*.¹ Once the choice is made, a principled way to constrain judicial lawmaking emerges.

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1. See generally Bruce Russell, *A Priori Justification and Knowledge*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May 19, 2014), <https://plato.stanford.edu/entries/apriori/>; Michael DePaul & Amelia Hicks, *A Priorism in Moral Epistemology*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 28, 2016), <https://plato.stanford.edu/archives/fall2016/entries/moral-epistemology-a-priori>.

To judge *a posteriori* (Latin for “from what comes after”) is to judge based on the future, in other words, based on consequences.² In law, a policy argument is *a posteriori*: “If the court rules in favor of my client, children will go to bed on time without protest, and peace will come to the Middle East; but if the court rules against my client, birds will no longer sing, and husbands and wives will argue endlessly.” In ethics, a utilitarian argument is *a posteriori*: “Given the choice between drinking champagne or contributing to the home for retired professors, the latter is the moral choice because it will produce more happiness for more persons.”

To judge *a priori* (Latin for “from what comes before”) is to judge based on the past, in other words, rules or standards.³ In law, an argument based on precedent is *a priori*: “*Up v. Down* is analogous to *Back v. Forth* and therefore should have the same outcome.” A contract is *a priori*: “The creditor was entitled to assess a late fee because the contract requires payment by the twenty-fifth of each month and adds a fee of thirty-nine dollars for a late payment, and the debtor’s check reached the creditor on the twenty-sixth.” In ethics, a deontological argument is *a priori*: “One has a duty to show respect to one’s teachers.”

Arguments *a priori* and *a posteriori* are equally legitimate, and I know of no generally accepted method of choosing between them when such arguments point in opposite directions in a case. In this essay, I will propose a method to make such a choice.

Before explaining this method, however, I must consider two common ways of choosing between arguments, whether they be of the same type (e.g. *a priori* versus *a priori*) or of different types (*a priori* versus *a posteriori*). One common way of choosing between arguments is to identify a flaw in one of the arguments: “*Left v. Right* is not a precedent for the case at bar because the cases are distinguishable in that . . .” or “The rule advocated by the plaintiff will not lead to . . ., but will lead instead to . . .” This method of choosing between arguments is legitimate (though I will have a few words to say below on predictions). A flawed argument is no basis for decision.

A second common way of choosing between competing arguments occurs when the arguments are not flawed. Indeed, they are forcible and, upon reading them, for example, in majority and dissent-

2. Russell, *supra* note 1.

3. *Id.*

ing opinions, a reasonable, informed, and disinterested person says to oneself, “I don’t know why the judges voted as they did.” Typically, the judges write (if they write anything at all on the choice), “Argument *A* outweighs argument *B*” or “*A* is stronger than *B*” or “*A* is more convincing than *B*.” Of course, this is not an explanation, but a choice without a justification. The choice may be based on a reason present in the judge’s mind, but the judge prefers not to express it. The choice may be based on a reason inchoate in the judge’s mind, though not formed sufficiently for the judge to articulate. The choice may be based on no reason at all other than a feeling. Whatever the reason, a choice based on it is not exposed to the adversarial process and, as a result, is subject to error, bias, and caprice, and has no place in reasoned discourse. If a judge is confronted with competing, unflawed arguments and cannot, or will not, articulate a reasoned basis for choosing between them, the judge should recuse oneself from the case. If all judges of a court recuse themselves, resolution of the issue may better be left to another court or agency of government.

Now suppose that an argument *a priori* and an argument *a posteriori* stand in competition, and neither is flawed. Must an honest judge recuse oneself from the decision? The answer is no. A principled method exists for choosing between such arguments.

As I stated at the outset of this essay, the struggle between arguments *a priori* and arguments *a posteriori* is profound. It is also long-standing, and it is enshrined in competing schools of thought. Consequentialists hold that decisions should be grounded on *a posteriori* facts, that is, consequences of actions.⁴ Deontologists (New Latin for “those who study duty”) hold that decisions should be grounded on *a priori* principles, that is, duties or norms.⁵ Not surprisingly, hybrid or mixed schools exist, which I will call “non-consequentialism.” Non-consequentialists hold that decisions may be grounded on consequences, on duties, or on both.⁶ I intend to show that, correctly understood, the differences among these schools disappear.

4. See Larry Alexander & Michael Moore, *Deontological Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 17, 2016), <https://plato.stanford.edu/entries/ethics-deontological/> (“Consequentialists hold that choices—acts and/or intentions—are to be morally assessed solely by the states of affairs they bring about.” § 1, Deontology’s Foil: Consequentialism); see also Michael Slote, *Satisficing Consequentialism*, in PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPPLEMENTARY VOLUMES 140–142 (Blackwell Publishing 1984).

5. Alexander & Moore, *supra* note 4 (“For such deontologists, what makes a choice right is its conformity with a moral norm.” § 2, Deontological Theories.”).

6. *Id.*

Nonetheless, conflict between arguments *a priori* and *a posteriori* will continue to occur. I will show that, based on a correct understanding, a method exists to weigh deontological and consequential arguments against one another.

Every moral theory has two elements: a theory of the good and a theory of right action that leads to the good.⁷ For a utilitarian, the good is happiness and right action maximizes happiness.⁸ (“Utility” is a synonym for “happiness.”) Thus, utilitarianism is a consequentialist theory: an act is right or wrong depending on whether it has the consequence of maximizing happiness. I am agnostic on utilitarianism’s theory of the good, but I embrace consequentialism because of three insights in John Stuart Mill’s essay *Utilitarianism*.

A.

The first insight is that, however vigorously a deontologist may eschew arguments *a posteriori*, in the end, the only reason a deontologist can provide for a moral law is consequential:

Nor is there any school of thought which refuses to admit that the influence of actions on happiness is a most material and even predominant consideration in many of the details of morals, however unwilling to acknowledge it as the fundamental principle of morality and the source of moral obligation. I might go much further, and say, that, to all those *à priori* moralists who deem it necessary to argue at all, utilitarian arguments are indispensable. It is not my present purpose to criticize these thinkers; but I cannot help referring, for illustration, to a systematic treatise by one of the most illustrious of them—the “*Metaphysics of Ethics*,” by Kant. This remarkable man, whose system of thought will long remain one of the landmarks in the history of philosophical speculation, does, in the treatise in question, lay down an universal first principle as the origin and ground of moral obligation. It is this: “So act, that the rule [or maxim] on which thou actest would admit of being adopted as law by all rational beings.” But, when he begins to deduce from this precept any of the actual duties of morality, he fails, almost

7. See, e.g., David Lyons, *Utilitarianism*, in *ENCYCLOPEDIA OF ETHICS* 1261, 1262 (Lawrence Becker & Charlotte Becker eds., 1992) (“A utilitarian theory may be seen as combining (1) a conception of ‘intrinsic’ value, or fundamental good, which says how consequences are basically to be appraised, with (2) a view about the relation between ‘rightness’ and ‘goodness,’ i.e., between morally required or defensible conduct and the intrinsic value that can be realized”); STEVEN CAHN & ANDREW FORCEHIMES, *PRINCIPLES OF MORAL PHILOSOPHY* 4, 6 (2017).

8. See Julia Driver, *The History of Utilitarianism*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Sept. 22, 2014), <https://plato.stanford.edu/entries/utilitarianism-history/>.

grotesquely, to show that there would be any contradiction, any logical (not to say physical) impossibility, in the adoption by all rational beings of the most outrageously immoral rules of conduct. All he shows is, that the *consequences* of their universal adoption would be such as no one would choose to incur.⁹

Mill does not accomplish what he essays. His rendition of “Kant’s ‘universal first principle’” is accurate enough. (Kant himself calls it the “categorical imperative,” and renders it, “Act only in accordance with that maxim which you at the same time can will that it become a universal law.”¹⁰) Then Mill asserts that utilitarian arguments are indispensable to the theories of *a priori* moralists, a group that includes Kant.¹¹ This assertion is ambiguous. It could mean that utilitarian arguments are indispensable to establishing that the categorical imperative is the universal first principle. Alternatively, the assertion could mean that a duty that can be deduced from the categorical imperative cannot be justified on the ground that the opposite of that duty would be physically or logically impossible, but can be justified only on the ground that the opposite duty would have intolerable consequences. Regrettably, Mill disappoints us with whichever interpretation we choose, for he offers neither evidence nor argument to support the assertion. Yet support for one or the other of these interpretations seems essential to the viability of consequentialism. I shall not attempt to support the first interpretation (that consequential arguments are indispensable to establishing the categorical imperative). I think that this meaning is the less plausible interpretation of Mill’s assertion, and, even if Mill intended this meaning, I doubt that it is true because I suspect that the categorical imperative rests on intuition. Instead, I will stand on a proposition, the truth of which Mill evidently thinks, and I agree, is self-evident: Kant’s attempt to defend a system of ethics based solely on reasons *a priori* would be significantly weakened by the second interpretation (that Kant’s own applications of the categorical imperative are justifiable only by their consequences). My goal will be to prove that Kantian duties are justifiable only by reasons *a posteriori*.

9. JOHN STUART MILL, *UTILITARIANISM* 8–9 (The Floating Press 2009) (1879) [hereinafter *UTILITARIANISM*].

10. IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS*, 119 (Allen W. Wood ed., 2002)(1797) (emphasis deleted) [hereinafter *METAPHYSICAL FOUNDATIONS*].

11. *UTILITARIANISM*, *supra* note 9, at 9.

In the treatise which Mill mentions (the title of which has been variously translated¹²), Kant applies the categorical imperative to four cases. Suicide is the first:

1. A man, while reduced to despair by a series of misfortunes and feeling wearied of life, is still so far in possession of his reason that he can ask himself whether it would not be contrary to his duty to himself to take his own life. Now he inquires whether the maxim of his action could become a general law of nature. His maxim is: Out of self-love I consider it a principle to shorten my life when continuing it is likely to bring more misfortune than satisfaction. The question then simply is whether this principle of self-love could become a general law of nature. Now we see at once that a system of nature, whose law would be to destroy life by the very feeling designed to compel the maintenance of life, would contradict itself, and therefore could not exist as a system of nature; hence that maxim cannot possibly be a general law of nature and consequently it would be wholly inconsistent with the supreme principle of all duty.¹³

Mill claims correctly that Kant fails to show a physical or logical impossibility. Obviously, suicide is not physically impossible. Is it a logical contradiction? One may doubt that suicide is based on “self-love”; perhaps self-loathing and despair are better candidates. One may also doubt that self-love is “designed to compel the maintenance of life.” The obvious response to this teleological, indeed, religious argument in disguise, is to ask, by whom or what was self-love designed, and how do we know that it was designed for this purpose? A Kantian today might improve the argument by casting it in evolutionary terms: humans have evolved self-love, and it promotes life. But even accepting that suicide is based on self-love and that self-love promotes life, I find no contradiction in believing that we have no duty to express an evolved trait. Humans have evolved to take revenge on those who injure us, but we have no duty to act on this instinct. Nor do I find a contradiction in believing that self-love promotes life only so long as life is valuable. Would self-love prohibit suicide if one were suffering from a terminal and painful illness, or if the sacrifice of one’s life would save the lives of several others? Mill also claims that Kant shows only that the consequences of what he condemns would be un-

12. See, e.g., METAPHYSICAL FOUNDATIONS, *supra* note 10; IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS (Thomas Kingsmill Abbott, trans., Global Grey 2018) (1785) [hereinafter METAPHYSICS OF MORALS].

13. METAPHYSICAL FOUNDATIONS, *supra* note 10, at 170–71.

acceptable, and again Mill is correct.¹⁴ Kant's conclusion about suicide—but not his reasoning—is right because a duty or “principle to shorten [one's] life” when one is in despair would have intolerable consequences.¹⁵

I will discuss Kant's second application of the categorical imperative below. His third application is developing one's talents:

3. A third man finds in himself a talent which with the help of some education might make him a useful man in many respects. But he finds himself in comfortable circumstances, and prefers to indulge in pleasure rather than to take pains in developing and improving his fortunate natural capacities. He asks, however, whether his maxim of neglecting his natural gifts . . . agrees also with what is called duty. He sees that nature could indeed subsist according to such a general law, though men (like the South Sea Islanders) let their talents rust and devote their lives merely to . . . enjoyment. Be he cannot possibly *will* that this should be a general law or nature. . . . For, as a rational being, he necessarily wills that his faculties be developed, since they have been given to serve him for all sorts of possible purposes.¹⁶

Let us ignore the unsavory implication that South Sea Islanders, and others who do not develop their talents, are not rational beings, and instead focus on Kant's reason that duty requires us to develop our faculties. The reason is that a rational being “necessarily wills that his faculties be developed, since they have been given to serve him for all sorts of possible purposes.”¹⁷ This argument, like the one about suicide, is teleological, if not religious, and my response to its modernized form is similar: that a trait has evolved does not entail that it be expressed. In addition, I see no reason why a rational being could not live by the maxim, “I will pursue my pleasure as long as I do not interfere with another's doing the same.” On this maxim, one has no duty to develop one's talents. Kant is right that developing one's talents is desirable, not because one cannot rationally fail to do it, but because the consequences of developing one's talents are usually better for oneself and others.

Charity is another application of the categorical imperative:

4. A fourth, prosperous man, while seeing others whom he could help having to struggle with great hardship thinks: What concern is

14. *Id.*

15. *Id.*

16. *Id.* at 171–72.

17. *Id.*

it of mine? Let everyone be as happy as heaven pleases or as he can make himself. I will take nothing from him nor even envy him, but I do not wish either to contribute anything to his welfare or assist him in his distress. There is no doubt that if such a way of thinking were a general law, society might get along very well But although it is possible that a general law of nature might exist in terms of that maxim, it is impossible to *will* that such a principle should have the general validity of a law of nature. For a will which resolved this would contradict itself, inasmuch as many a time one would need the love and sympathy of others and by such a law of nature, sprung from one's own will, one would deprive himself of all hope of the aid he desires.¹⁸

Kant acknowledges that Ayn Rand's world is not a physical impossibility, but argues that one could not logically will it to exist because "many a time one would need the love and sympathy of others and . . . one would deprive himself of all hope of the aid he desires."¹⁹ This argument is superior to the ones about suicide and developing talents because this one does not assume the existence of a grand design or designer. Nonetheless, the argument depends on another assumption: everyone needs love and sympathy. Although this assumption is questionable—surely some persons never need charity—I will accept it *arguendo*.

The question becomes, could a rational being live by the maxim, "I will take nothing from him . . . [and] I do not wish either to contribute anything to his welfare or assist him in his distress"²⁰ Kant concedes that "it is possible that a general law of nature might exist in terms of that maxim."²¹ However, he adds, "[I]t is impossible to *will* that such a principle should have the general validity of a law of nature."²² I suspect that many persons would indeed will such a law in exchange for freedom from incessant requests for charity. Kant must mean that one cannot with logical consistency desire such a law to exist. Why not? Because, he says, we all need help, and one who needs help also wants it.²³ I disagree. Quite a few independent souls reject charity however desperate their need. The youth says, "I want to do it myself." The adult says, "I did it my way." The force of the

18. *Id.* at 172.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

example of charity springs from a belief, which most of us hold, that the world is better with charity than without it. This argument is plainly consequential.

Let us turn now to the best of Kant's applications of the categorical imperative, namely, the false promise:

2. Another man finds himself forced by dire need to borrow money. He knows that he will not be able to repay it, but he also sees that nothing will be lent him unless he promises firmly to repay it within a definite time. . . . [T]he maxim of his action would then be expressed thus: When I consider myself in want of money, I shall borrow money and promise to repay it although I know that I never can. . . . I then realize at once that [such a maxim] could never hold as a general law of nature but would necessarily contradict itself. For if it were a general law that anyone considering himself to be in difficulties would be able to promise whatever he pleases intending not to keep his promise, the promise itself and its object would become impossible since no one would believe that anything was promised him but would ridicule all such statements as vain pretenses.²⁴

Kant is correct that a false promise would tend to undermine, and in this sense would contradict, the system of reliance on promises. Accordingly, this is Kant's most successful example. Nonetheless, it fails for the same reason that the example of charity fails.

A world without promises could exist. As Kant certainly knew, promises meant little in the world of the *Iliad* and the *Odyssey*;²⁵ also, I know of functioning societies today which may value truth less than our society does (and in recent months I have begun to doubt how much we value truth).²⁶ Therefore, Kant does not mean that a world without the system of reliance on promises could not exist. Rather, he means that a rational being could not want such a world to exist. Therefore, the contradiction of the false promise matters to us only

24. *Id.* at 171.

25. Perhaps the best example is Odysseus, who deceived Clytemnestra by telling her that Iphigenia would be married to Achilles, conceived the idea of the Trojan Horse, and tricked his way out of the grasp of the cyclops Polyphemus. See generally HOMER, THE ODYSSEY VIII, IX (Samuel Butler, trans.) (700 B.C.); VIRGIL, AENEID (John Dryden, trans.) (19 B.C.) (The story of the Trojan Horse is told in book VIII of the Odyssey and in book II of the Aeneid. The tale of the escape from the cyclops Polyphemus appears in book IX of the Odyssey.). See also EURIPIDES, IPHIGENIA AT AULIS (410 B.C.) (wherein the deceit of Clytemnestra is dramatized).

26. WARREN L. D'AZEVEDO & MICHAEL EVAN GOLD, SOME TERMS FROM LIBERIAN SPEECH L-3 (1979) (In the speech of the majority of the population, the word "lie" can mean either a mistake or an intentional falsehood. If the distinction between mistakes and prevarications does not matter, the intent to tell the truth is somewhat less important to Liberians than to Americans.).

because we value the system of reliance on promises. He is right: our world is better with such a system than without it. But this is a consequential argument.

Kant provides another version of the categorical imperative: “Act so as to treat man, in your own person as well as in that of anyone else, always as an end, never merely as a means.”²⁷ The word “merely” is important. We all use other persons as means to our ends. For example, when an employer pays a worker to perform a job, the employer uses the worker as a means to get tasks performed, and the worker uses the employer as a means to get money. But if both parties enter into the relationship freely and treat one another respectfully (the employer pays a living wage and provides decent working conditions; the worker returns a day’s work for a day’s pay), each also treats the other as an end by facilitating the fulfillment of the other’s end.

However appealing this version of the categorical imperative may be, it does not dispose of Kant’s four examples. Consider suicide. If I kill myself to stop my suffering, one could say that I am using myself as a means to an end. Yet if I exercise in order to strengthen my heart, am I not also using myself as a means to the end of living longer? In both cases, the end is mine: I am using myself to achieve my own end. *A fortiori*, I am not using myself merely as a means; I am also fulfilling my ends.

The same reasoning applies to failing to develop my talents. Perhaps in some vague way I am using myself via inaction to achieve the end of enjoying leisure, but the end of leisure is mine. As for failing to give charity, I cannot see how hoarding my sympathy and my money is using another person as a means in any way. But if it is, the end is my own.

Once again, the false promise is Kant’s best example. A lender would not lend money to a borrower who the lender knew would not pay the debt. Therefore, the borrower’s deceit disrespects the lender’s dignity by compromising the lender’s autonomy. Autonomy has been valuable since the rise of individualism in the West in the last few centuries, but in earlier centuries, a person’s identity rested on the groups to which one belonged (e.g., Greek or Roman, pagan or Christian, noble or commoner) and individual autonomy was not a para-

27. METAPHYSICAL FOUNDATIONS, *supra* note 10, at 178 (emphasis deleted).

mount value.²⁸ This statement is true even today among many non-Western peoples, among whom one's tribe or religion is far more important than one's autonomy. A Kantian might reply that, even if autonomy is not valuable *a priori*, it remains true that everyone wishes to be treated with respect. Thus, the question becomes, is a false promise disrespectful *a priori*? The answer is no. The harm of a false promise depends on context and consequences. In a community that values social connections and mutual welfare, autonomy is unimportant, and a false promise is not disrespectful. In such a community, if the borrower puts the money to good use, perhaps even repays it with generous interest (though repayment was not foreseeable at the time of the loan)—in other words, if the consequences of the loan are good—the lender will be satisfied. A modern Westerner might also be satisfied on these facts.

That Kant ultimately relies on consequences is apparent from his response to the case of lying to a miscreant. Suppose an armed man asks you menacingly, "Where is your friend?" Kant says that you should tell the truth because if you lie, but your friend has moved from the place where you think he is to the place where you say he is, you would be responsible for his death.²⁹ Thus, Kant believes that you would be responsible for lying because the consequence might be bad. Should you not also be responsible for telling the truth because the consequence might be good?

I have argued that Mill is correct regarding Kant's examples of *a priori* duties—they are, upon analysis, grounded on their consequences—thereby weakening Kant's theory considerably. If Kant can't illustrate it, who can? Consequentialism, therefore, is the more plausible method of justifying moral claims.

B.

Now I will turn to the second insight in *Utilitarianism* that makes me a consequentialist. Mill says that when duties conflict, the choice between them rests on consequences. He may be mistaken in the case in which a higher-order duty takes precedence over a lower-order duty (for example, a constitution takes precedence over a statute, re-

28. John Christman, *Autonomy in Moral and Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 9, 2015), <https://plato.stanford.edu/entries/autonomy-moral/>.

29. See generally James Edwin Mahon, *The Truth About Kant on Lies*, in THE PHILOSOPHY OF DECEPTION 211–224 (Clancy W. Martin ed. 2009), <https://philpapers.org/archive/MAHTTA.pdf>.

ardless of consequences), but he is right in the far more common case in which duties of equal rank (or duties the relative rank of which is indeterminate) point in opposite directions. Mill writes:

There exists no moral system under which there do not arise unequivocal cases of conflicting obligation If utility is the ultimate source of moral obligations, utility may be invoked to decide between them when their demands are incompatible. Though the application of the standard may be difficult, it is better than none at all: while in other systems, the moral laws all claiming independent authority, there is no common umpire entitled to interfere between them; their claims to precedence one over another rest on little better than sophistry; and unless determined, as they generally are, by the unacknowledged influence of considerations of utility, afford a free scope for the action of personal desires and partialities.³⁰

Once again focusing on the consequentialism of Mill's argument, while remaining agnostic on happiness as the ultimate good, I believe that Mill is correct. Kant does not admit that duties can conflict, and it may seem plausible that maxims by which all rational beings can live would be consistent with one another. Yet duties derived from the categorical imperative do conflict. Consider suicide. I must not commit suicide because it would be motivated by self-love, a principle that promotes life. At the same time, I must honor the duty of charity by providing for my dependents after my death. Surely, I would violate that duty by allowing a lengthy incurable disease to consume the assets that I have saved for the benefit of my family. The way to resolve this and other conflicts of duty is to weigh the good against the bad that observance of the conflicting duties would cause.

C.

The third insight in *Utilitarianism* that makes me a consequentialist is Mill's response to the venerable criticism of consequentialism that a moral agent cannot weigh the consequences of every decision.³¹ An agent has neither the time nor the information, and perhaps not the capacity, to perform the appropriate calculations.³² I will deepen this criticism by noting that weighing the consequences of a decision requires predictions about the future, and predictions are problem-

30. UTILITARIANISM, *supra* note 9, at 45–46.

31. *Id.*

32. *Id.*

atic.³³ For easy decisions, we may be certain of our predictions. If *A* punches *B* in the nose, we can be sure that *B* will not like it. But for difficult decisions, especially decisions regarding social policy, predictions are uncertain. If I keep my reservations for a long-planned trip to Europe and miss my sister's recently announced wedding, will she understand or bear a grudge, and will Mother take Sister's side or mine? If the tax on gasoline, which is generating decreasing revenue due to more fuel-efficient cars, is replaced with a tax on miles driven, will the public's incentive to purchase efficient vehicles be diminished? Decisions should not be based on uncertain predictions, which are open to error and to influence by interest, bias, unexamined assumptions, and so forth.

Although Mill seems to have in mind only the first of these criticisms, what he says defeats them both.

The answer to the objection is, that there has been ample time; namely, the whole past duration of the human species. During all that time, mankind have been learning by experience the tendencies of actions, on which experience all the prudence as well as all the morality of life are dependent. People talk as if the commencement of this course of experience had hitherto been put off, and as if, at the moment when some man feels tempted to meddle with the property or life of another, he had to begin considering for the first time whether murder and theft are injurious to human happiness. . . . It is truly a whimsical supposition, that [mankind] would remain without any agreement as to what *is* useful, and would take no measures for having their notions on the subject taught to the young, and enforced by law and opinion [M]ankind must by this time have acquired positive beliefs as to the effects of some actions on their happiness; and the beliefs which have thus come down are the rules of morality for the multitude, and for the philosopher, until he has succeeded in finding better. . . . Whatever we adopt as the fundamental principle of morality, we require subordinate principles to apply it by: the impossibility of doing without them, being common to all systems, can afford no argument against any one in particular. . . .³⁴

A consequentialist cannot puzzle over the effects of every decision. Instead, one may rely on "subordinate principles" or the "rules of morality," which are the product of "experience [as to] the tendencies of

33. Aaron Lester, *The Problem with Predictions*, HARV. GAZETTE (Apr. 25, 2013), <https://news.harvard.edu/gazette/story/2013/04/the-problem-with-predictions/>.

34. UTILITARIANISM, *supra* note 9, at 42–44.

actions” to promote the good.³⁵ And one who relies on principles need not make troublesome predictions, for principles grow out of past experience.

May a consequentialist deviate from a moral rule? May an agent perform an act that a secondary principle or corollary forbids if the agent believes the act would be beneficial in this instance? Mill’s answer is unclear:

In the case of abstinences indeed—of things which people forbear to do from moral considerations, though the consequences in the particular case might be beneficial—it would be unworthy of an intelligent agent not to be consciously aware that the action is of a class, which, if practiced generally, would be generally injurious, and that this is the ground of the obligation to abstain from it. The amount of regard for the public interest implied in this recognition is no greater than is demanded by every system of morals; for they all enjoin to abstain from whatever is manifestly pernicious to society.³⁶

Mill may hold that the agent should always follow a moral rule: performing the forbidden act would violate “the obligation to abstain from it.”³⁷ Yet, he also recognizes that moral principles improve. He wrote, “The corollaries from the principle of utility, like the precepts of every practical art, admit of indefinite improvement; and, in a progressive state of the human mind, their improvement is perpetually going on.”³⁸ Perhaps the most common way for a principle to improve, or begin to improve, is for exceptions to be recognized. Also, Mill states that the reason for following a rule is that “the action is of a class, which, if practiced generally, would be generally injurious.”³⁹ If Mill would allow sub-classes within a class—after all, nearly every class of act is a sub-class of a larger class—he would recognize exceptions because an act can be injurious in other sub-classes (even in all other sub-classes), but not injurious in the sub-class at hand. For example, as a general rule, one should tell the truth, but not in the sub-class of cases in which a lie would make happier all concerned agents (and not merely the liar). An exception is simply another, typically more specific corollary, to the fundamental principle.

35. *Id.*

36. *Id.* at 35.

37. *Id.*

38. *Id.* at 43.

39. *Id.* at 35.

In sum, the ultimate test of whether an act is right or wrong is the consequences of the act. We should not attempt to predict the consequences of each act that we contemplate performing. The facts are too uncertain; the calculations are too complex and time consuming; and our interests and biases are too likely to affect our predictions. In fact, we rarely attempt such predictions. Instead, we follow moral principles which we derive from experience. Moral principles lead us to the right action most of the time, but not always, and improvement (as via exceptions) is ongoing.

Another way to express this conclusion is that the major premise of a practical syllogism is not an *a priori* truth, but a principle that is an inference or conclusion of inductive reasoning using experience.

1

INDUCTIVE REASONING

EXPERIENCE

In the large majority of cases in which someone lied, the consequences would have been better if the agent had told the truth.

INDUCTIVE INFERENCE

Following the principle of telling the truth usually leads to a good outcome.

PRACTICAL SYLLOGISM

MAJOR PREMISE

Following the principle of telling the truth usually leads to a good outcome.

MINOR PREMISE

Nothing is unusual about the present situation.

CONCLUSION

I should tell the truth.

2

INDUCTIVE REASONING

EXPERIENCE

In unusual cases in which someone lied, the consequences for all concerned agents were better than if the agent had told the truth.

INDUCTIVE INFERENCE

An exception to the principle of telling the truth arises in the unusual case in which a lie would make all concerned agents happier.

PRACTICAL SYLLOGISM

MAJOR PREMISE

An exception to the principle of telling the truth arises in the unusual case in which a lie would make all concerned agents happier.

MINOR PREMISE

The present situation is unusual because lying would make all concerned agents happier than telling the truth would.

CONCLUSION

I should lie in this situation.

This analysis obliterates the lines between the three schools of thought that I mentioned above. Deontologists, as well as non-consequentialists to the degree that they rely on arguments *a priori*, must recognize that a principle is a summary of experience and, therefore, principles derive from consequences. Deontologists remain free to base their moral decisions on principles; they may continue to follow the rules and do their duty. However, recognizing that principles can change, deontologists must be prepared to create exceptions to principles or create new ones. Consequentialists, as well as non-consequentialists to the degree that they rely on arguments *a posteriori*, must usually refrain from attempting to predict the consequences of each act and basing a decision on that prediction. Instead, they must (as they are inclined to do) base nearly all of their moral decisions on principles, but, knowing that principles can change, must be prepared to recognize exceptions and new principles. Properly understood, “reformed deontologist” and “reformed consequentialist” are two names for the same moral agent.

II. JUDICIAL RESTRAINT

A. A Principle of Judicial Restraint Grounded in Moral Philosophy

How should an agent deal with arguments *a priori* and *a posteriori* that conflict with one another? Before answering this question, I need to state the distinction drawn by Kenneth Culp Davis between

two types of fact: adjudicative and legislative.⁴⁰ An adjudicative fact is used to decide the dispute between the parties to the case at hand.⁴¹ An adjudicative fact, therefore, pertains only to these parties and is either true or false (more precisely, proven or unproven).⁴²

An adjudicative fact may have happened in the past or may be a prediction of the future.⁴³ For example, “A harassed and intimidated *B* on six occasions in the past two months and, unless enjoined by this court, is likely to continue doing so.” Predictions of adjudicative facts are permissible because they are limited to the parties to the case and are grounded on the parties’ own behavior.⁴⁴

In contrast, a legislative fact is used to create, amend, or rescind rules or principles.⁴⁵ A legislative fact, therefore, pertains to society as a whole, or a significant part of it. A legislative fact need not be true of all persons in all circumstances, but is usually true.⁴⁶ For example, “smoking cigarettes causes cancer” is a legislative fact, though many persons smoke for years and never develop cancer. A legislative fact may have happened in the past or may be a prediction of the future.⁴⁷ For example, in the second half of the twentieth century, children from disadvantaged environments scored lower on college admission tests than did children from advantaged environments and, without purposeful intervention, this discrepancy will continue in the future.

Both findings of past legislative facts and predictions of future legislative facts should be based on appropriate evidence, not on common knowledge or intuition.⁴⁸ The appropriate evidence for a finding of a legislative fact of the past might be historical accounts or the testimony of experts.⁴⁹ The appropriate evidence for a prediction of a legislative fact might be a theory.⁵⁰ In this event, the theory must be identified, meet the criterion of acceptability in the discipline, and be subject to rebuttal. The evidence for a prediction might also be a se-

40. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942).

41. *Id.*

42. *Id.* Adjudicative facts operate at a low level of abstraction. See Michael Evan Gold, *Levels of Abstraction in Legal Thinking*, 42 S. ILL. U. L.J. 117 (2018).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* Legislative facts operate at a high level of abstraction. Gold, *supra* note 42.

47. *Id.*

48. *Id.* at 408–09.

49. *Id.* at 410.

50. *Id.*

ries of decided cases in which the existing law leads to arguably unjust results. Prediction of this sort is fair because those cases are available to all parties to comment upon. A prediction may also be the result of applying a theory to a specific situation. Such a prediction should always be left to experts. All legislative facts must be subject to the adversarial process. Each party should have the opportunity to refute the other party's evidence.

My comments about finding legislative facts apply to administrative tribunals as well as to courts. An administrative tribunal should not find legislative facts based on the experience of its members. Members of an administrative tribunal, although knowledgeable, are not necessarily experts in any given theory. They cannot be cross-examined. The theories and applications that may appear in their opinions have not been exposed to contradiction by expert testimony. In consequence, their knowledge helps them understand evidence in the record, but their knowledge must not itself be evidence. Moreover, the members of the tribunal are supposed to be neutral, but they can hardly be neutral about theories, and applications of theories, which they themselves introduce into a case.⁵¹

The boundary between adjudicative and legislative facts is not so sharp as I have drawn it. An adjudicative fact that occurs frequently becomes a legislative fact; how else could a legislative fact be found? Furthermore, a legislative fact may be useful in determining whether an adjudicative fact is true in the present case; what usually happens probably did happen in this case. Nevertheless, a rule should not be grounded on a small number of adjudicative facts—most certainly not on the adjudicative facts of a single case—and the general truth of legislative facts may help, but never suffice, to prove the adjudicative facts in a given case.

Now I can answer the question stated at the outset of this essay: how should an agent deal with an argument *a priori*, grounded on principle that conflicts with an argument *a posteriori*, grounded on consequences? The argument *a priori* (most commonly, a precedent) is presumptively stronger. It is grounded on legislative facts of the past which experience has confirmed to be true.⁵² If for no other reason than that parties have conformed their behavior to principles, the predictions intrinsic to principles have been confirmed.

51. Thus, I disagree with Supreme Court's decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). See generally *id.*

52. Davis, *supra* note 40.

In some cases, however, the argument *a posteriori* is appealing. An argument *a posteriori* may justify creating an exception to a rule if the facts of the case at hand demonstrate that the exception would produce better consequences for the concerned parties than the rule would produce. Being grounded on the adjudicative facts of the case at hand, an exception does not require predictions, or makes predictions about the parties based on their own behavior in the past. Such an exception may operate in subsequent cases if the adjudicative facts of those cases, both facts of the past and predictions of the future, are analogous to the adjudicative facts of the case at bar. This reasoning also applies to a case *sui generis*, the disposition of which should apply only to the case at hand and to analogous subsequent cases.

When may a tribunal overturn an existing rule or standard, amend, or create a new one, on the basis of arguments *a posteriori*? The evidence must match the scope of the rule.⁵³ It is obvious that the adjudicative facts of a single case should not displace the experience of many cases that support the existing rule; at most, an exception may be justified in this circumstance. But suppose new legislative facts demonstrate that the existing rule has led to injustice in many prior cases? Such evidence is *a posteriori* in the sense that it is based on consequences in prior cases, but the evidence is not grounded on predictions; rather, the unjust consequences have occurred and are facts to be proved in the case at hand. In this circumstance, a tribunal would have adequate reason to overturn an existing rule or standard or create a new one. These are the easy cases.

The harder cases involve challenges to a rule or standard based on predictions of legislative facts. Two aspects of such predictions are relevant: the theory on which a prediction is based, and the application of the theory to the facts at hand. With regard to theory, whether it be common sense or scientific, the theory must be presented as evidence in the case. Too often, an advocate or a judge understands only part of a theory or misunderstands it altogether. Thus, justice requires that a theory be presented as evidence in order that it be open to the adversarial process. With regard to application of a theory, this task must be left to experts. Application by an advocate or a judge is far too likely to demonstrate the truth of the old saying that a little knowledge is dangerous.

53. See Gold, *supra* note 42, at 136–37.

B. Application of the Principle

Let us apply the foregoing ideas to the Supreme Court's opinions in *National Labor Relations Board v. Retail Store Employees Union, Local 876 (Safeco)*.⁵⁴ The Safeco Title Insurance Company insured buyers and lenders against defects in the titles to real estate which the buyers acquired.⁵⁵ Customers desiring title insurance did not deal directly with Safeco or its agents; instead, customers dealt with independent brokers, called "title companies," which performed escrow and other services as well as brokering title insurance.⁵⁶ The title companies dealt almost exclusively with Safeco; over ninety percent of their gross income derived from selling Safeco's policies.⁵⁷

Local 1001 of the Retail Store Employees Union represented some of Safeco's employees.⁵⁸ When collective bargaining between Safeco and the union reached an impasse, the union went on strike and set up picket lines not only at Safeco's offices, but also at the title companies' offices.⁵⁹ For reasons that I will explain below, the picket signs were carefully worded. They did not urge customers of the title companies to cease doing business with the companies.⁶⁰ Instead, the picket signs said that Safeco was a non-union firm and it did not have a contract with Local 1001.⁶¹ The union also distributed handbills asking customers to cancel their Safeco policies.⁶² The handbills were lawful and not an issue in the case. The issue was the picketing.

Safeco and one of the title companies accused the union of engaging in a secondary boycott.⁶³ A secondary boycott occurs when a union that has a labor dispute with an employer (the "primary employer") directs economic force against another employer (the "secondary employer") with the object of forcing the secondary employer to cease doing business with the primary employer.⁶⁴ Another term for "secondary employer" is "neutral employer."⁶⁵ The latter term is

54. See generally *NLRB v. Retail Store Employees Union, Local 876 (Safeco)* 447 U.S. 607 (1980) [hereinafter *Safeco*].

55. *Id.* at 609.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Safeco*, 447 U.S. at 609.

61. *Id.* at 609–10.

62. *Id.* at 610.

63. *Id.*

64. *Id.*

65. *Id.* at 612–13.

so plainly loaded—surely neutral firms deserve protection from damage caused by other parties’ labor disputes—that I will refrain from using that term, but I will reproduce it when a judge used it. Perhaps the most typical case involves a primary employer who sells goods or services to the secondary employer.⁶⁶ If the union can isolate the primary employer from its customers, the cost to the primary employer of continuing the labor dispute increases.⁶⁷ For example, suppose the primary employer, *P*, makes fur hats. The union has a dispute with *P* and goes on strike. *S*, the secondary employer, is a retail store that sells *P*’s fur hats. When the strike against *P* is unsuccessful, the union pickets *S*’s store. *S*, afraid of losing trade, stops selling *P*’s hats, and the pickets disappear. Having lost *S* as a customer, *P* feels increased pressure to settle with the union.⁶⁸

The National Labor Relations Act outlaws secondary boycotts,⁶⁹ but suppose a union pickets, not a secondary employer’s *business*, but a primary employer’s *product* which the secondary employer sells. Consider the example in the preceding paragraph. The union concedes that it may not picket *S*’s store with the object of turning away customers, but argues that it may picket the struck product, *P*’s fur hats, thereby urging customers not purchase those hats while leaving customers free to buy other items in *S*’s store.

The Supreme Court first ruled on product picketing in *National Labor Relations Board v. Fruit and Vegetable Packers and Warehousemen’s Union, Local 760 (Tree Fruits)*.⁷⁰ Local 760 of the Fruit Packers Union went on strike against employers that packed apples and sold them to Safeway grocery stores under the brand “Washington State Apples.”⁷¹ The employers continued to pack and ship apples in spite of the strike, and so Local 760 also picketed the Safeway stores.⁷² The picket signs were directed at the struck product, not at the stores: the

66. For example, in *NLRB v. Denver Building & Construction Trades Council (Gould & Preisner)*, 341 U.S. 675 (1951), the secondary employer was a general contractor who purchased services from a subcontractor who was the primary employer. Similarly, in *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964) [hereinafter *Tree Fruits*], discussed below, the secondary employer, a grocery store, purchased apples from the primary employer, a fruit packer. In *Safeco*, 447 U.S. at 609, also discussed below, the secondary employer, an insurance broker, purchased insurance policies from the primary employer, an insurance company.

67. ROBERT GORMAN & MATTHEW FINKIN, *BASIC TEXT ON LABOR LAW* 313–14 (2d ed. 2004).

68. This example is drawn from *Loewe v. Lawlor*, 208 U.S. 274 (1908).

69. See GORMAN & FINKIN, *supra* note 67, at chapter xii.

70. *Tree Fruits*, 377 U.S. at 58.

71. *Id.* at 59–60.

72. *Id.* at 60.

signs urged customers not to buy Washington State Apples, but did not urge customers to shop at other grocery stores.⁷³ The Court held that the pickets were lawful.

In *Safeco*, the union's basic argument was *a priori*: the precedent of *Tree Fruits* controlled the case at bar. The picket signs were lawful, argued the union, because its signs, like those in *Tree Fruits*, targeted the struck product, not the secondary employers.⁷⁴ *Safeco* and the title company advanced an argument *a posteriori*: because over ninety percent of the title companies' revenue came from *Safeco's* policies, the pickets could put the title companies out of business.⁷⁵ The majority of the Court, moved by the argument *a posteriori*, outlawed the picketing; the dissent, moved by the argument *a priori*, would have allowed the picketing.⁷⁶ Let us examine those two opinions, attending to the nature of the rules and the arguments, not to labor policy.

But first, a word about the relevant statute is necessary. The relevant section of the National Labor Relations Act reads:

(b) It shall be an unfair labor practice for a labor organization or its agents

...

(4)(i) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

...

(B) forcing or requiring any person to cease . . . selling . . . the products of any other producer . . . or to cease doing business with any other person. . . .⁷⁷

Two comments on the construction of this section are in order. First, the words "threaten, coerce, or restrain" suggest rather violent action. However, as *Tree Fruits* and *Safeco* demonstrate, these words have been interpreted to encompass peaceful picketing.⁷⁸ Second, the words "an object thereof" indicate a subjective standard in which the union's intent is crucial. However, the National Labor Relations Board and the courts have made the standard objective by applying the doctrine that one intends what is reasonably foreseeable: "the Union's secondary appeal against the central product sold by the title

73. *Id.*

74. *Id.*

75. *Safeco*, 447 U.S. at 607.

76. *Id.* at 615-16.

77. 29 U.S.C. § 158(b)(4)(i)(B).

78. *Safeco*, 447 U.S. at 616.

companies in this case is ‘reasonably calculated to induce customers not to patronize the neutral parties at all.’ . . . Product picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language or the purpose of § 8(b)(4)(ii)(B).”⁷⁹

It will be convenient to begin with the dissent, which Justice Brennan wrote. He argued that the precedent of *Tree Fruits* should be honored.⁸⁰ Accordingly, I will first examine *Tree Fruits*, and then I will turn to Justice Brennan’s dissent in *Safeco*.

The reader will recall that the union in *Tree Fruits* had a dispute with the packers of Washington State Apples and picketed Safeway stores with signs that urged customers to boycott the apples, but not the stores.⁸¹ In an opinion by Justice Brennan, the Court held that the picketing was lawful:

We come then to the question whether the picketing in this case, confined as it was to persuading customers to cease buying the product of the primary employer, falls within the area of secondary consumer picketing which Congress [intended] to prohibit under § 8 (b)(4)(ii). We hold that it did not fall within that area, and therefore did not “threaten, coerce, or restrain” Safeway.⁸²

Thus, the standard in *Tree Fruits* was that a union could picket a secondary employer as long as the picketing was aimed only at the struck product.⁸³ This was an *a priori* standard because it focused on the intent of the picketing, not on its effects.

As the standard in *Tree Fruits* was *a priori*, so were the reasons for the standard. (It would be interesting to inquire whether *a priori* reasons and *a priori* rules tend to be associated, and likewise for *a posteriori* reasons and rules.) Justice Brennan examined the legislative history at length and concluded:

It does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and, particularly, any concern with peaceful picketing when it is limited, as here, to persuading Safeway customers not to buy Washington State apples when they traded in the Safeway stores. All that the legislative history shows in the way of an “isolated evil” believed to require proscription of peaceful consumer picketing at secondary

79. *Id.* at 614–15 (footnotes omitted).

80. *Id.* at 620 (Brennan, J., dissenting).

81. *Tree Fruits*, 377 U.S. at 60.

82. *Id.* at 71.

83. *Id.*

sites, was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct and peaceful picketing at the secondary site directed only at the struck product. In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute. This is not to say that this distinction was expressly alluded to in the debates. It is to say, however, that the consumer picketing carried on in this case is not attended by the abuses at which the statute was directed.⁸⁴

The purpose of a statute (the "abuses" at which it is aimed) and its legislative history are *a priori* reasons because they occur before the statute is passed and before the acts of the parties to the case.

As Justice Brennan wrote the Court's opinion in *Tree Fruits* and the dissent in *Safeco*, we should not be surprised that both the rule and the reasons for it were *a priori* in the latter opinion as well. Justice Brennan wrote in *Safeco*:

[T]he pivotal question in secondary site picketing is determining when the pressure imposed by consumer picketing is illegitimate, and therefore deemed to "coerce" the secondary employer. *Tree Fruits* addressed this problem by focusing upon whether picketing at the secondary site is directed at the primary employer's product, or whether it more broadly exhorts customers to withhold patronage from the full range of goods carried by the secondary retailer, including those goods originating from nonprimary sources. The *Tree Fruits* test reflects the distinction between economic damage sustained by the secondary firm solely by virtue of its dependence upon the primary employer's goods, and injuries inflicted upon interests of the secondary firm that are unrelated to the primary dispute. . . .⁸⁵ *Tree Fruits* expressly rejected the notion that the coerciveness of picketing should depend upon the extent of loss suffered

84. *Id.* at 63-64.

85. *Safeco*, 447 U.S. at 620 (Brennan, J., dissenting).

by the secondary firm through diminished purchases of the primary product.⁸⁶

Justice Brennan relied on precedent, a species of *a priori* argument, and the rule he advocated turned on the intent of the picketing, an *a priori* standard.⁸⁷ The legislative facts undergirding Justice Brennan's opinion were facts in the record of *Tree Fruits*, not predictions. Nonetheless, he did not pay sufficient attention to more recent experience, as I will show after discussing the opinion of the majority of the Court.

Justice Powell's opinion for the majority held that the legality of product picketing depends on its effect on the secondary employer.⁸⁸ This holding operated *a posteriori* because the effects occurred after the picketing occurred. Justice Powell stated the rule thus: "Since successful secondary picketing would put the title companies to a choice between their survival and the severance of ties with Safeco, the picketing plainly violates the statutory ban on the coercion of neutrals"⁸⁹ That liability under this rule depends on the consequences of the picketing is clear from the following passage:

The picketing in *Tree Fruits* and the picketing in this case are relatively extreme examples of the spectrum of conduct that the Board and the courts will encounter in complaints charging violations of § 8(b)(4)(ii)(B). If secondary picketing were directed against a product representing a major portion of a neutral's business, but significantly less than that represented by a single dominant product, neither *Tree Fruits* nor today's decision necessarily would control. The critical question would be whether, by encouraging customers to reject the struck product, the secondary appeal is reasonably likely to threaten the neutral party with ruin or substantial loss. Resolution in each case will be entrusted to the Board's expertise.⁹⁰

As the rule of *Safeco* was *a posteriori*, so also were the reasons for the rule. Although Justice Powell referred to the text, purpose, and legislative history of the statute, the most influential reason, I believe, was the effect of product picketing on the title companies. He wrote: "Although *Tree Fruits* suggested that secondary picketing against a struck product and secondary picketing against a neutral party were

86. *Id.* at 622.

87. *Id.*

88. *Id.*

89. *Id.* at 615 (majority opinion).

90. *Id.* at 616, n.11.

‘poles apart,’ the courts soon discovered that product picketing could have the same effect as an illegal secondary boycott.”⁹¹ He continued:

The product picketed in *Tree Fruits* was but one item among the many that made up the retailer’s trade. . . . In [*Safeco*,] on the other hand, the title companies sell only the primary employer’s product and perform the services associated with it. Secondary picketing against consumption of the primary product leaves responsive consumers no realistic option other than to boycott the title companies altogether. . . .As long as secondary picketing only discourages consumption of a struck product, incidental injury to a neutral is a natural consequence of an effective primary boycott. But the Union’s secondary appeal against the central product sold by the title companies in this case is “reasonably calculated to induce customers not to patronize the neutral parties at all. 226 N.L.R.B., at 757. The resulting injury to their businesses is distinctly different from the injury that the Court considered in *Tree Fruits*. . . . [S]uccessful secondary picketing would put the title companies to a choice between their survival and the severance of their ties with Safeco . . . (citation omitted). We do not disagree with Mr. Justice Brennan’s dissenting view that successful secondary product picketing may have no greater effect upon a neutral than a legal primary boycott. But when the neutral’s business depends upon the products of a particular primary employer, secondary product picketing can produce injury almost identical to the harm resulting from an illegal secondary boycott. Congress intended § 8 (b)(4)(ii)(B) to protect neutrals from that type of coercion. Mr. Justice Brennan’s view that the legality of secondary picketing should depend upon whether the pickets “urge only a boycott of the primary employer’s product” would provide little or no protection.⁹²

A posteriori arguments usually incorporate predictions of the future, and three predictions were embedded in the foregoing passage. Only the first of them was justified.

Justice Powell’s first prediction was that secondary picketing against consumption of the primary product leaves responsive consumers no realistic option other than to boycott the title companies altogether.⁹³ This prediction is not supported by evidence in the record but is obviously correct. Given that the title companies sold only

91. *Safeco*, 447 U.S. at 612 (citation omitted).

92. *Id.* at 613–16, n.8 (citations and other footnotes omitted).

93. *Id.* at 611.

Safeco policies, boycotting Safeco policies could only mean boycotting the title companies.⁹⁴

Justice Powell's second prediction lay in this sentence: "[S]uccessful secondary picketing would put the title companies to a choice between their survival and the severance of their ties with Safeco"⁹⁵ This prediction is not supported by any evidence in the record, and the prediction is not obviously correct. Indeed, it seems false. Even if the picketing turned away all potential buyers of Safeco's insurance policies, the title companies would not have needed to sever their ties to Safeco. The companies could simply have added to their inventory other insurance companies' policies, just as they would have done if they had lost trade because other insurance companies offered customers better policies at lower prices or offered the title companies higher commissions. But this is my prediction, and it is as unimportant as Justice Powell's was unless supported by evidence in the record.

Justice Powell's third prediction was implicit throughout his opinion: he implied that the picketing would be successful and that it might reduce the title companies' revenue by as much as ninety percent.⁹⁶ To have been this successful, the picketing would have had to persuade every customer to patronize other title companies that sold other insurance policies. The likelihood of such perfection approaches zero. Indeed, as between the extremes—all customers honored the picket line, no customers honored the picket line—the latter was more likely. Once again, however, these are my predictions, which are no better and no worse than Justice Powell's. Evidence was needed, not intuition. Yet the reports of the case contain no evidence that the picketing caused the title companies to lose any revenue.

Evidently recognizing that a precedent should not be overruled on the basis of a single case, Justice Powell invoked a line of cases in which the primary employer's product merged into the secondary employer's product so that a consumer could not boycott only the primary's product ("merged-product" cases).⁹⁷ For example, in *American Bread*,⁹⁸ which Justice Powell cited in a footnote, Local 327

94. *Id.* at 610.

95. *Id.* at 615.

96. *Id.* at 609–10.

97. *Safeco*, 447 U.S. at 613, n.7.

98. *American Bread Co. v. NLRB*, 411 F.2d 147, 150 (6th Cir. 1969).

of the Teamsters had a labor dispute with a company that made bread under the label “Sunbeam” and sold it to restaurants.⁹⁹ The union engaged in product picketing at the restaurants; the picket signs read, “Attn: Customers. Sunbeam bread sold here. Local 327.”¹⁰⁰ But Sunbeam bread had lost its identity in the restaurants; a customer could not identify and avoid it, for it was merged into the meals the restaurant served.¹⁰¹ Therefore, as a practical matter, the picket signs called for a boycott of the restaurants. In *Cement Masons*,¹⁰² which Justice Powell discussed in the text of his opinion, Whitney, a general contractor (the primary employer), built houses in a subdivision owned by Shuler (the secondary employer), who sold the houses to customers.¹⁰³ A dispute arose between Whitney and the union because Whitney paid non-union masons less than union scale, and the union picketed the only entrance to the subdivision.¹⁰⁴ The picket signs mentioned the dispute between Whitney and the union, then added, “PLEASE DO NOT PURCHASE THESE HOMES.”¹⁰⁵ The picketing was illegal because it asked customers to boycott Shuler. (I believe the outcome of *Cement Masons* would have been the same if the picket signs had read, “PLEASE DON’T PURCHASE HOMES BUILT BY WHITNEY” or “PLEASE DON’T PURCHASE HOMES BUILT BY UNDERPAID MASONS” because Whitney’s underpaid masons had worked on all of the houses in the subdivision.) Justice Powell quoted from the opinion of the Court of Appeals: “[W]hen a union’s interest in picketing a primary employer at a “[merged-] product” site [directly conflicts] with the need to protect . . . neutral employers from the labor disputes of others,’ Congress has determined that the neutrals’ interests should prevail.”¹⁰⁶

My goal is not to criticize the cases I have just discussed on the ground of labor policy; therefore, I will accept *arguendo* that the picketing in *American Bread* and *Cement Masons* violated the statute. My goal is to consider whether these cases provided the Court with sufficient reasons *a posteriori* to overrule the precedent of *Tree Fruits*. I have argued above that the evidence in support of a new rule (or any

99. *Safeco*, 447 U.S. at 610, nn.2–3.

100. *American Bread Co.*, 411 F.2d at 150.

101. *Id.*

102. *Hoffman ex rel. NLRB v. Cement Masons Local 337*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 983 (1973).

103. *Safeco*, 447 U.S. at 612–13.

104. *Hoffman*, 468 F.2d at 1190.

105. *Id.*

106. *Safeco*, 447 U.S. at 612–613 (quoting *Hoffman*, 468 F.2d at 1191) (citation omitted).

rule, for that matter) should match its scope. To overturn an existing rule, the new legislative facts must show that the rule has led to injustice in many prior cases. But the evidence for the new rule in *Safeco* was a narrow line of cases in which the secondary employers offered products from which the struck product could not be isolated.¹⁰⁷ Sunbeam's bread could not be separated from the restaurants' meals. Whitney's underpaid masonry could not be separated from Shuler's houses. Safeco's insurance policies could not be separated from the title companies' services. As a result, the experience captured in the cases on which Justice Powell relied, justified creating an exception to the rule of *Tree Fruits*, but did not justify abandoning that rule. By overruling *Tree Fruits*, Justice Powell implicitly predicted that the new rule promulgated in *Safeco*, which yielded better results in merged-product cases than the rule of *Tree Fruits* would have yielded, would also yield better results in all other product-picketing cases; but he had no basis in the record for this prediction—no theory, no expert testimony, no experience extracted from prior cases.¹⁰⁸ He had only his intuition, which was not open to the adversarial process.

One might reply to my arguments that Justice Powell simply deferred to the expertise of the Labor Board.¹⁰⁹ The argument is that the members of this administrative tribunal are chosen for their knowledge of labor relations, and they are entitled to find legislative facts based on their experience. Thus, continues the reply, it was the Board, not Justice Powell, that predicted the legislative facts on which *Safeco* overruled *Tree Fruits*. But this reply is mistaken. Neither explicitly nor implicitly did the Board find the legislative facts or make the predictions that Justice Powell did.

In contrast to both the majority of the Supreme Court and the dissent, the Labor Board took a correct approach to *Safeco*.¹¹⁰ Continuing to assume that the picketing put unfair pressure on the title companies, I believe that Justice Brennan's dissent unjustly ignored this harm: following *Tree Fruits* would have allowed the picketing to continue. As well, the majority unjustifiably overruled *Tree Fruits*; the record did not contain evidence of the legislative facts necessary to take this step. Only the Labor Board found a solution that was both just and justifiable.

107. *Id.*

108. See generally *Tree Fruits*, 377 U.S. at 58; *Safeco*, 447 U.S. at 607.

109. *Id.* at 615, n.11.

110. *Id.* at 616.

The Board followed its precedent in *Dow Chemical*.¹¹¹ A union had a dispute with an oil refinery and picketed the gasoline stations that sold the refinery's product.¹¹² Although the picket signs asked consumers to boycott the gasoline, not the stations, the Board ruled that the picketing was a secondary boycott.¹¹³ *Dow Chemical* was a merged-product case: the oil refinery's product was merged into the business of the service stations. *Safeco* was analogous to *Dow Chemical*, *American Bread*, and *Cement Masons* because Safeco's insurance policies were merged into the business of the title companies, and so the picketing put unfair pressure on the companies.¹¹⁴ By prohibiting the picketing, the Board relieved the companies of this pressure. In addition, advocates before the Board in *Safeco* had ample opportunity to criticize the line of merged-product cases and to offer new evidence.¹¹⁵ The Board chose to rely on the experience reflected in those cases to maintain the merged-product exception to *Tree Fruits*.¹¹⁶ The Board had before it no evidence of the application of the *Tree Fruits* doctrine to product picketing in cases not involving a merged product, and, quite properly, the Board did not question that doctrine.

Based on evidence, not on speculative prediction, the Board created a warranted exception to a precedent and did justice in the case at hand. Justices Powell and Brennan should have done the same.

111. See *Local 14055, United Steelworkers (Dow Chemical Co.)*, 211 N.L.R.B. 649, 649 (1974), *enf. denied*, 173 U.S. App. D.C. 299, 524 F.2d 853 (1975).

112. *Id.*

113. *Id.* at 651.

114. *Safeco*, 447 U.S. at 610.

115. *Id.* at 616, n.7.

116. *Id.* at 613, 615.