

POST-REALIST BLUES: FORMALISM, INSTRUMENTALISM, AND THE HYBRID NATURE OF COMMON LAW JURISPRUDENCE

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I. INTRODUCTION

On July 1, 1976, the Supreme Court of California issued its opinion in the case of *Tarasoff v. Regents of the University of California*.¹ A leader in the

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¹ 551 P.2d 334 (Cal. 1976). This was, in fact, the second opinion issued by the California Supreme Court in the *Tarasoff* case. The first was issued on December 23, 1974. *Tarasoff*

development of tort law operating at the zenith of its influence,² the court was fully aware of the national and international attention the opinion was likely to attract. Indeed, almost without question, *Tarasoff* is among a handful of the best-known tort law cases in American jurisprudence, particularly outside the legal community.³ It has been the subject of debate and analysis for more than thirty years.⁴

Doctrinally, the case made new law by recognizing, for the first time in any American jurisdiction, a duty on the part of a therapist to use reasonable care to protect a third person from serious danger of violence posed by the

v. Regents of the Univ. of Cal., 529 P.2d 553 (Cal. 1974). The second opinion was the result of a rehearing of the appellate case granted by the California Supreme Court in March 1975. Though both opinions are authored by Justice Mathew Tobriner, the second opinion makes no mention of the existence of the first, nor does the California Supreme Court anywhere offer any explanation for the granting of the rehearing in the case.

Peter H. Schuck and Daniel J. Givelber, citing an attorney who was then working as a clerk for the California Supreme Court, suggest that the justices came to believe that the duty to warn set forth in the first opinion was too narrow in scope and undertook the second opinion in an effort to broaden it. Peter H. Schuck & Daniel J. Givelber, *Tarasoff v. Regents of the University of California: The Therapist's Dilemma*, in TORTS STORIES 99, 100 n.2 (Robert L. Rabin & Stephen D. Sugarman, eds., 2003).

The opinion of the intermediate court of appeal in the case, the California Court of Appeal, can be found at *Tarasoff v. Regents of the Univ. of Cal.*, 108 Cal. Rptr. 878 (Cal. Ct. App. 1973).

² See Barry A. Fisher, *Devotion, Damages and Deprogrammers: Strategies and Counter-strategies in the Cult Wars*, 9 J.L. & RELIGION 151, 162 (1991); Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 2-3 (1997); Schuck & Givelber, *supra* note 1, at 106-07; Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435 (1979). For a discussion of a broader movement in the expansion of tort liability during this period, of which *Tarasoff* was arguably an important part, see Peter H. Schuck, *The New Judicial Ideology of Tort Law*, in 37 NEW DIRECTIONS IN LIABILITY LAW NO. 1, 4-16 (Walter Olson ed., 1988).

³ See Daniel J. Givelber, William J. Bowers & Carolyn L. Blitch, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443, 457-58 (1984) ("[I]t is a fair guess that there is no other legal decision, with the possible exception of controversial cases such as *Brown v. Board of Education*, which could command this level of recognition among a subgroup of laypersons."); Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97 (1994) (*Tarasoff* "is one of the single most celebrated cases in the recent history of American tort law. Virtually every lawyer who has taken a basic course in torts since the late 1970s knows of the case . . ."); Michael L. Perlin, *Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990's*, 16 LAW & PSYCHOL. REV. 29 (1992) ("Over the past fifteen years, the legend of the *Tarasoff* case has grown to mythic proportions."); D. L. Rosenhan et al., *Warning Third Parties: The Ripple Effects of Tarasoff*, 24 PAC. L.J. 1165, 1195, 1202 (1993) ("Over 84% of the entire sample [of 600 licensed psychiatrists and 1200 licensed psychologists in California in 1987] indicated that they have heard of *Tarasoff*. Further, of those therapists who answered this question, over 98% knew of the decision."); Schuck & Givelber, *supra* note 1, at 108, 114, 117, 127.

⁴ On March 20, 2007, Westlaw's KeyCite service listed 2782 documents that cited to the *Tarasoff* case, including 678 cases and 1028 law review articles. On this same date, the Lexis Shepard's Summary service yielded 1675 citing references, including 701 cases and 817 law review articles. This search updates a similar one performed on February 3, 2003 and reported in Schuck & Givelber, *supra* note 1, at 117 n.76, and confirms the authors' prediction that the number of citations to the case would continue to increase significantly.

therapist's patient, thereafter commonly known as the "*Tarasoff* duty."⁵ Prior to the *Tarasoff* case, an individual owed no duty to protect a third person reasonably from harm inflicted by another adult unless the defendant was in a specially recognized legal relationship with the harm producer at the time the harm was caused to the victim.⁶ Thus, prior to *Tarasoff*, unless the patient harmed the victim in the therapist's waiting room, or in the therapist's presence, or while under the therapist's direct care and control, the therapist owed the potential victim no duty to warn her reasonably of the possible danger posed to her by the patient.⁷

While there are many interesting aspects of the case that have been well noted and discussed, at least one aspect of the opinion has received much less attention: the strikingly modern jurisprudential approach that the court adopted to analyze the legal problem presented to it. Just ten years before, an appellate court faced with the prospect of creating a significant new common law doctrine, especially in a high profile case, could have been expected to devote the great majority of its published opinion to an identification and analysis of relevant precedent and a discussion of analogous existing legal doctrine, and to make a determined effort to place the newly-recognized duty in the broad, comforting context of existing rules and approaches.

This is the old style, the old school, jurisprudence, sometimes called formalist analysis or formalism.⁸ As an approach to analyzing legal issues, for-

⁵ *Tarasoff*, 551 P.2d at 340 ("When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.").

While it may have been the first, the Supreme Court of California was hardly the last appellate court to recognize this new duty. Less than two years later, the Superior Court of New Jersey followed suit in the case of *McIntosh v. Milano*, 403 A.2d 500 (N.J. Super. Ct. Law Div. 1979). According to Professor George Harris, "a majority of states now follow *Tarasoff*, either by statute or case law." George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote*, 74 WASH. L. REV. 33, 47 (1999). For two relatively recent, and well done, reviews of the post-*Tarasoff* cases in this country, see Fillmore Buckner & Marvin Firestone, "Where the Public Peril Begins" 25 Years After *Tarasoff*, 21 J. LEGAL MED. 187, 200-13 (2000) and Damon Muir Walcott, Pat Cerundolo & James C. Beck, *Current Analysis of the Tarasoff Duty: An Evolution Towards the Limitation of the Duty to Protect*, 19 BEHAV. SCI. & L. 325 (2001).

⁶ See *Richards v. Stanley*, 271 P.2d 23 (Cal. 1954); RESTATEMENT (SECOND) OF TORTS § 315 (1965); cases collected in West Digest key number 272k220.

⁷ It was on this basis that the California Court of Appeal upheld the Superior Court's dismissal of the plaintiff's failure to warn theory. *Tarasoff v. Regents of the Univ. of Cal.*, 108 Cal. Rptr. 878, 886 (Cal. Ct. App. 1973).

⁸ See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 9-64 (1995); GRANT GILMORE, THE AGES OF AMERICAN LAW 41-67 (1977); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 16-17 (1992); GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 13-33 (1995); ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 136-59 (1982). Christopher Columbus Langdell, Joseph H. Beale, Sir William Blackstone, and James Barr Ames are frequently identified as classical formalists.

As with any single label for a broad and sophisticated body of thought, "formalism" is not always taken as having a clear and univocal meaning. Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1144 (1999) (reviewing ANTHONY SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998)); Frederick Schauer, *Formalism*, 97 YALE

malism was the natural outgrowth of a particular shared conception of the work of the common law. In other words, the approach that an appellate court is likely to take in resolving specific issues in discreet cases is a function of the current consensus answer to the question, "what are we, the appellate courts, doing when we evaluate the status of, and then decide either to maintain or change, common law doctrine?"

In the next section of this Article, I briefly describe the traditional formalist conception of common law jurisprudence. I then discuss the profound challenge to this traditional view that took hold in earnest in the 1920s with the work of the legal realists and resulted in a shift in the conventional paradigm to what is now often called an instrumentalist approach to legal analysis.

In the third section of this Article, I analyze the famous case of *Tarasoff v. Regents of the University of California* as an example of classic modern instrumentalist analysis. After setting forth the facts and the holding in the case, I identify the major factors the court considered in deciding whether to recognize a formal therapist duty to warn and demonstrate that such considerations are thoroughly instrumentalist in nature.

In Section IV, I identify and describe a number of problematic aspects of modern instrumentalist jurisprudence. Many of these troublesome characteristics of instrumentalist legal analysis as currently practiced by appellate courts in this country are a function of the trial and appellate procedures within which the analysis is inevitably conducted. To a large extent, appellate courts are operating within a procedural structure that was developed during a period in which formalism was the conventional jurisprudential conception, and that is ill-suited to modern instrumentalist analysis. Section V concludes the Article.

II. FORMALISM AND INSTRUMENTALISM IN COMMON LAW JURISPRUDENCE

A. *The Formalist Approach to Common Law Jurisprudence*

The formalist approach to common law analysis emerged from what is often called the natural law view of legal doctrine.⁹ This view, which dominated the Anglo-American legal community during the nineteenth century, assumed the existence, at least theoretically, of a more or less ideal set of standards and principles by which human behavior should be governed – a so-called natural law.¹⁰ From this perspective, one critical task of the legal system

L.J. 509 (1988); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638 (1999). Neither, for that matter, is "natural law." M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 90 (7th ed. 2001).

⁹ The roots of natural law extend as far back as fifth century Athens. Henry Mather, *Natural Law and Liberalism*, 52 S.C. L. REV. 331, 332 (2001); Lloyd L. Weinreb, *A Secular Theory of Natural Law*, 72 FORDHAM L. REV. 2287, 2288-90 (2004). As a jurisprudential philosophy, it has exerted a profound influence on the Anglo-American legal tradition, including American constitutional law. Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2269, 2275-76 (2001). John Finnis has been a leading proponent of natural law in the modern era. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

¹⁰ See FREEMAN, *supra* note 8, at 90 ("[T]he essence of natural law may be said to lie in the constant assertion that there are objective moral principles which depend upon the nature of the universe. . . . An appropriate analogy are mathematical axioms which hold good even

in a given society is to develop the actual law of the jurisdiction over time so that it more and more closely approximates the ideal, natural law.¹¹

This concept of law and the work of a legal system has at least two obvious, and very powerful, influences. The first is the religious tradition, in which there very commonly exist absolute and immutable principles of human behavior, often directives from God, which religious communities strive in their various ways to understand, interpret, and apply to concrete situations.¹² Much as a particular organized religion may establish a formal structure within which to organize and memorialize its ongoing interpretation of religious doctrine, the natural law paradigm sees the appellate court system as one in which a jurisdiction's understanding of the secular common law is continually reviewed and refined. Both perspectives view this process as one that strives, over time, to align their current interpretations more closely with the ultimately correct meaning and proper interpretation of the ideal standards.

The second profound influence on the development of the natural law view was science and the scientific method.¹³ It is no surprise that those seeking a general understanding of the nature of the Anglo-American system of common law might reach for a model to what is among the most profoundly successful and influential human enterprises of the past two centuries: natural science.¹⁴ Traditionally, it is assumed that the natural world operates according to some set of basic rules and principles – that minerals and chemicals and

when misunderstood or undiscovered.”); Mather, *supra* note 9, at 332 (“Natural law theories assert that positive, man-made law should be formulated and evaluated according to a higher moral law (the natural law) that is not made by humans, but is inherent in the nature of the universe.”).

The renowned anthropologist Margaret Mead attempted to identify rules of behavior that were observed to be universal across all known cultures. Margaret Mead, *Some Anthropological Considerations Concerning Natural Law*, 6 NAT. L. F. 51 (1961).

¹¹ Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 1 (2001) (“A belief in formalism dominated jurisprudence during the nineteenth century. Principles of law were seen as existing as part of the natural law and the role of judges was to discover them. Judging was conceived as a relatively mechanical act of applying law to the facts of the particular case.”).

¹² See SAINT THOMAS AQUINAS, *THE TREATISE ON LAW [BEING SUMMA THEOLOGIAE, I-II, QQ. 90 through 97]* 160 (R. J. Henle ed. & trans., 1993); George, *supra* note 9, at 2269; Kent Greenawalt, *How Persuasive is Natural Law Theory?*, 75 NOTRE DAME L. REV. 1647, 1676-77 (2000); Patrick H. Martin, *Natural Law: Voegelin and the End of [Legal] Philosophy*, 62 LA. L. REV. 879, 881 (2002).

¹³ See GILMORE, *supra* note 8, at 42-43; MINDA, *supra* note 8, at 13 (“Langdell’s casebook ushered in the modern era because it offered a new methodology and pedagogy for law study that was nothing more than an expression of faith in the scientific method.”); Christopher C. Langdell, *Harvard Celebration Speeches*, in 3 L. Q. REV. 123 (1887), also available in 21 AM. L. REV. 123 (1887); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 271-72 (1997).

Even prominent opponents recognize this aspect of natural law. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (Gaunt, Inc. 1998) (1921) (“[T]he demon of formalism tempts the intellect with the lure of scientific order.”).

¹⁴ Robert Summers has offered the interesting suggestion that the very visible advance of technology during the late nineteenth and early twentieth centuries operated as an important factor in the decline of formalism and the rise of instrumentalism because it “reinforced the instrumentalist view that man can transform the social order by his own effort.” SUMMERS, *supra* note 8, at 30.

planets alike possess consistent, stable characteristics and respond to similar stimuli in a similar fashion over time. These basic principles of science are, tellingly, sometimes referred to as the "laws of nature."¹⁵

It is the task of fundamental science to identify and articulate these laws of nature. At any given time, the scientific community will have a working draft, a tentative set of hypotheses, that represents its current best understanding of the actual principles. Through experimentation and the scientific method, by a case-by-case testing of the current hypotheses, science as a whole hopes over time to move its current understanding closer and closer to the actual.¹⁶

Analogously, from a natural law perspective, litigation in a common law system serves as the concrete case-by-case experiments that test the efficacy of the current common law doctrine.¹⁷ When application of an existing doctrine to a live dispute produces a satisfying result, the wisdom, thus the accuracy, of the rule is affirmed and its status as common law is strengthened. When proper application of the existing rule results in an unacceptable result, pressure builds to revise the rule or perhaps to create an exception to it. Over the course of thousands of cases and decades of decisions, the common law of a jurisdiction should significantly improve and evolve ever closer to the ideal, abstract, natural law.¹⁸

In a common law system based upon such a conception, the primary function of a trial court, after shepherding the litigation through the pleading, discovery, and fact determination stages, is to identify the appropriate general rules of law, insure that these rules are deductively applied to the specific facts of the case, and announce a result.¹⁹ In a sense, while going about the specific

¹⁵ H.L.A. Hart has notoriously rejected the comparison of natural law in its jurisprudential sense with the so-called laws of nature, arguing that the two concepts employ the idea of law in importantly different senses and illustrating his argument by pointing out that while humans can violate legal requirements that perfectly embody natural law, humans cannot, as a definitional matter, violate a law of nature. H.L.A. HART, *THE CONCEPT OF LAW* 183 (1961).

¹⁶ This is what Thomas Kuhn has famously called "normal science." THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 23-34 (3d ed. 1996).

¹⁷ See MINDA, *supra* note 8, at 24 ("During the first part of this century, the study of jurisprudence was like an inductive science: principles of law were pragmatically derived from the raw data of appellate opinions much in the same way that the laws of nature were derived from scientific experiments."); James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 460 (1985) ("To support the prevailing image that judges did not make law, but only applied law, lawyers combined Langdell's two beliefs that law was a science and that principles, once discovered, were perpetually valid, with Holmes' theory that liability should be limited to objective injury. . . . Judges believed they were scientists who objectively discovered the right decision by applying the proper underlying principles to the objective facts of harm.").

¹⁸ SUMMERS, *supra* note 8, at 140 ("Blackstone held that judges do not make law, they only search out and discover it." (citing WILLIAM BLACKSTONE, 1 COMMENTARIES 69-70 (William G. Hammond ed., 1890))). See also Roy Boyne & Ali Rattansi, *The Theory and Politics of Postmodernism: By Way of an Introduction*, in POSTMODERNISM AND SOCIETY 13-16 (Roy Boyne & Ali Rattansi eds., 1990).

¹⁹ Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND. L. REV. 57, 69 (2003) ("The formalist adjudicative theory thus depicted entails a deductive procedure. It is deductive in the sense that a rule as a major premise and a set of facts as a minor premise generates a right answer."); Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 309 (2003) ("Formalist arguments

business of resolving genuine disputes among persons, the trial courts also perform the important function of testing the efficacy of existing common law doctrine across a wide spectrum of actual cases. Much like the role of empirical experimentation in the scientific enterprise, the resolution of cases at the trial court level continually tests the accuracy of existing common law doctrine by demonstrating the specific consequences of those doctrines in a wide range of actual disputes.

The primary function of an appellate court in such a system is to review the logical soundness of the work of the trial court. Much like a scientific review panel might confirm the basic structure and analysis of a certain experiment before publishing a report of its results, the appellate court's primary task is to "check the math" of the trial court below, to insure that the appropriate rules of law were selected to resolve the matter and to see that they were accurately applied to the facts to determine the final outcome.²⁰ Just as the review panel in science is unlikely to perform the actual experiment again, or to audit the accuracy of the empirical data seriously, so, too, do appellate courts refrain from gathering any new facts about the case or engaging in any revision of the facts established during the trial court process.²¹

are deductive in nature, and conform to the structure of a syllogism of deductive logic: the rule of law is the major premise, the facts of the case are the minor premise, and the legal result is the conclusion.""); Leiter, *supra* note 8, at 1145 ("Pure formalists view the judicial system as if it were a giant syllogism machine, with a determinate, externally-mandated legal rule supplying the major premise, and objectively 'true' pre-existing facts providing the minor premise. The judge's job is to act as a highly skilled mechanic with significant responsibility for identifying the 'right' externally-mandated rule, but with little legitimate discretion over the choice of the rule." (quoting Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 421 (1992))).

²⁰ As a general and fundamental matter of appellate practice, only those issues raised at trial can be challenged on appeal. DAVID G. KNIBB, *FEDERAL COURT OF APPEALS MANUAL* 3 (4th ed. 2000); DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* 55-56 (1994); ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 38-71 (1941).

For a discussion of the origin and rationale of this general rule, and a description of some of the exceptions that exist, see ROBERT J. MARTINEAU, *MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS* 34-42 (1983); Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved, Part I*, 7 WIS. L. REV. 91 (1932); Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved, Part II*, 7 WIS. L. REV. 160 (1932); Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved, Part III*, 8 WIS. L. REV. 147 (1933); Note, *Raising New Issues on Appeal*, 64 HARV. L. REV. 652 (1951). An excellent treatment of this subject, suggesting increasing confusion on the part of appellate courts regarding the operation of the basic rule and its exceptions, can be found at Robert J. Martineau, *Considering New Issues On Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023 (1987). The most recent discussion of this subject in the academic literature is Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253 (2002).

²¹ See *United States v. Vest*, 116 F.3d 1179, 1189 n.4 (7th Cir. 1997), cert. denied 522 U.S. 1119 (1998) (citing *United States v. Mason*, 974 F.2d 897, 901 (7th Cir. 1992) and *United States v. Fazio*, 914 F.2d 950, 959 n.15 (7th Cir. 1990)). See also KNIBB, *supra* note 20, at 467 ("In reality, however, the court of appeals will rarely look beyond the transmitted record."); MEADOR & BERNSTEIN, *supra* note 20, at 55 ("[A]n appellate court considers only

Occasionally, an appellate court might find that the deductively accurate resolution of a particular case leads to such a manifestly unacceptable result that it will decide instead to make a change to existing common law doctrine. Consistent with the normal progress of the natural sciences, appellate courts operating within the formalist tradition should be rather conservative about altering the common law and should be more resistant to changing older, well-established doctrine than more recently-created law. Moreover, such courts are always particularly mindful of crafting any new doctrine to fit carefully within the existing pattern of precedent. In the same way that one would not expect the scientific community to embrace a fundamental change to previously understood principles on the basis of just a few problematic experimental results, one would not expect the appellate courts of a given jurisdiction to endorse a significant alteration or addition to the existing common law without the pressure of a number of problematic trial-level results urging such action.

The evolution of the common law under a formalist conception is, therefore, conservatively incremental and likely to occupy only a small percentage of the time and attention of the appellate courts.²² The normal work of appellate courts under such a view is the routine review and approval, or correction, of the work of the trial courts.²³ Inevitably, such work will entail the refinement and clarification of the existing common law in the jurisdiction. Only rarely, however, would one expect an appellate court opinion to effect dramatic change to existing doctrine or to announce the creation of strikingly new law.

The basic structure of appellate litigation, and the thrust of appellate procedure, is consistent with a formalist conception of common law jurisprudence. Appellate courts do not seek, nor do they permit, additional facts about the case under consideration. They do not hear new testimony from the witnesses at trial or from the parties. They do not seek additional clarifying information from expert witnesses. They do not interview any of the jurors. They do not question the trial judge. They do not review video or audio tapes of the trial. Instead, appellate courts review and determine the adequacy of the trial below, no matter how long the trial or complex the matter tried, on the basis of the written record of the trial, the formal written briefs of counsel, and often no more than thirty minutes of oral argument by each side.

those facts that were established at trial and reviews only those questions that were properly raised and presented in the trial court as evidenced by the record.”).

Though rare, courts of appeals will occasionally consider materials outside of the record, *Young v. City of Augusta, Ga.*, 59 F.3d 1160, 1168 (11th Cir. 1995) (citing *Jones v. White*, 992 F.2d 1548, 1566-68 (11th Cir. 1993)), and will generally do so on a case-by-case basis. *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1555 (11th Cir. 1989); *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986).

One of the exceptions to the general rule sometimes followed by appellate courts is the consideration of so-called “legislative” facts, which might include social science data presented by the parties for the first time on appeal. 1 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, *FEDERAL RULES OF EVIDENCE MANUAL* 123-31 (7th ed. 1998).

²² SUMMERS, *supra* note 8, at 139-40.

²³ Leiter, *supra* note 8, at 1145-46 (“[W]e may characterize formalism as the descriptive theory of adjudication according to which (1) the law is rationally determinate, and (2) judging is mechanical. It follows, moreover, from (1), that (3) legal reasoning is *autonomous*, since the class of *legal* reasons suffices to justify a unique outcome; no recourse to non-legal reasons is demanded or required.”).

Pretty clearly, then, when a supervisory court reviews the usually difficult and subtle work of a subordinate court on the basis of the dry transcript, a few written submissions, and a brief verbal presentation, the superior court is not seriously engaged in a thorough audit of the adequacy of the work below, but is instead more or less "checking the math" of the trial court, reviewing only questions of law to insure that the trial judge reached for the correct doctrine and applied it to the situation in a logical manner.

Entirely appropriate to this conception of the appellate process is the fact that the active participants are all attorneys. Counsel to the parties brief the case and participate in oral argument, and the appellate judges decide. Consistent with the analogy of appellate review to a scientific panel's oversight of an experimental report, only the experts in the formal analysis need participate. In the appellate process it is only the state certified and licensed experts in legal analysis, the attorneys and the judges, who participate. No one else is thought to be needed for the kind of technical review of the deductive work of the lower court that is contemplated from a formalist perspective.

For many decades the formalist conception was the primary means by which the Anglo-American legal community understood the function and operation of common law jurisprudence. Trial courts handled all of the work associated with the issue clarification, factual investigation, trial, and disposition of particular cases. The appellate courts reviewed the trial court's handling of questions of law and in the process tried incrementally to improve the quality of the common law in the jurisdiction by making occasional, modest changes to it. The fundamentally cautious and conservative nature of the change that appellate courts were expected to make to the common law is illustrated, and also enforced, by the rule of stare decisis that requires subordinate courts to follow as precedent only the holding of prior superior court opinions and not the dicta.²⁴

B. *The Shift from Formalism to Instrumentalism*

This dominant formalist conception of common law jurisprudence eventually came under increasingly serious challenge. To more and more participants, as well as observers, the notion of trial courts as mere managers of the case and predictable administrators of existing doctrine failed to describe what was actually happening in the disposition of these cases.²⁵ Similarly, the actual work of the appellate courts, and the opinions that they issued, did not seem to be captured in a satisfying way by the formalist narrative.²⁶

²⁴ Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 24-26 (1983).

²⁵ See Felix S. Cohen, *The Problems of a Functional Jurisprudence*, in THE LEGAL CONSCIENCE 77, 81-82 (Lucy Kramer Cohen ed., 1960) ("Judicial opinions have been viewed as no more and no less reliable than the statements in which octogenarians, golf champions, or successful bankers explain their achievements."); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1000-02 (1972). See generally PAUL L. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE (1972).

²⁶ See MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 156 (1988); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 281 (1973).

One powerful critique of the formalist account focused on the supposedly tight logical structure of induction and deduction that was said to characterize common law jurisprudence.²⁷ From a formalist perspective, a common law doctrine begins as the concrete resolution of a dispute, or a series of similar disputes, that are rationalized by an articulated general principle of decision. This generalized principle of decision should, if designed correctly, harmonize and make consistent the varied results in specific cases from which it was induced. This principle of decision, once established, is then relied upon by courts later facing a similar dispute and is deductively applied to reach a disposition in the new case.²⁸

The general legal doctrine that is developed through this process of induction is, then, in a sense, tested to see if it produces an acceptable result each time it is deductively applied to a new case. Occasionally, on review, an appellate court will be unsatisfied with the operation of the doctrine and will tinker with it by amending it slightly or by recognizing an exception to it. In this way, much like the currently understood principles of science, the body of common law in a jurisdiction, continually tested by the results of empirical experiments, slowly evolves and improves. Just as we hope that our currently understood principles of science move closer and closer to being the actual laws of nature, so, too, we hope in a formalist world that our actual common law moves ever closer to an ideal set of legal principles, often referred to as natural law.²⁹

Starting most famously in the 1920s with writers like Karl Llewellyn and a movement that came to be known as legal realism, the formalist description of the work of the courts was challenged as being unsatisfying and insufficient.³⁰

²⁷ See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810-12 (1935); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3, 9-14 (1980). See generally PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 99-265 (1965).

²⁸ See Cox, *supra* note 19, at 92, 94 ("[I]t is important to again recognize that the classical formalists were engaged in an inductive project of identifying principles that would reconcile, systemize, and render coherent the common law. . . . Science, for classical formalists, entailed the paradigm of a closed logical system. The objective was to render law on the model of geometry.").

²⁹ Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J. L. & PUB. POL'Y 655, 658 (1997) ("Americans at the founding of the United States well-accepted the idea that the world, including worldly governments, is governed by laws or principles that dictate how society ought to be structured, in the very same way that such natural laws dictate how buildings ought to be built or how crops ought to be planted." (citing Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993))).

³⁰ Karl Llewellyn and Jerome Frank are frequently identified as the two central figures in the emergence of legal realism. White, *supra* note 25, at 1017. Other prominent realists include Felix Cohen, Walter Wheeler Cook, Leon Green, Joseph Hutchenson, Underhill Moore, Herman Oliphant, Max Radin, and Hessel Yntema. The first self-conscious statement of legal realism is said to be Karl Llewellyn, *A Realistic Jurisprudence - The Next Step*, 30 COLUM. L. REV. 431 (1930), followed shortly thereafter by Karl Llewellyn, *Some Realism about Realism - Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

A very fine description of the realist appraisal of formalism can be found at HORWITZ, *supra* note 8, at 183-230.

Legal realism has been characterized as being part of a much larger intellectual movement of that era that involved "a general reorientation from a deductive rationalism to an

The realists claimed that the actual work of both the trial and appellate courts was far more expansive and value-laden than was captured by the tight process of logical induction and deduction and the strict discipline of prior precedent, holding, and dicta imposed by the doctrine of stare decisis that is so much a part of the formalist conception.³¹

The legal realists offered a very different account of the structure and process of common law jurisprudence. As much as treatise writers and codifiers might have presented it in that way, the realists did not look at the common law and see a coherent, cohesive, relatively well-organized body of rules analogous to the current state of understanding in a mature natural science like physics or chemistry. Instead, the realists saw the common law as more of a cloud of assorted principles, aphorisms, and maxims, some relatively tightly organized around particular topics and issues, and others not much integrated into a larger structure at all.³² To varying degrees, there existed support in the way of precedent for most all of the many tenets and precepts that constituted the common law. Thus, most all of it possessed formal status under the doctrine of stare decisis.

The critical feature of the common law that significantly distinguished it from the body of principles that made up a natural science, said the realists, was the fact that some, perhaps many, of the rules and maxims that were contained within the common law were potentially in direct contradiction with one

inductive empiricism." Christopher Shannon, *The Dance of History*, 8 YALE J. L. & HUMAN. 495, 496 (1996) (reviewing JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995)) (citing MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1949)).

While it is, of course, problematic to characterize a broad and powerful intellectual movement like legal realism in a simple, univocal manner, see DUXBURY, *supra* note 8, at 65, it has been said that one common unifying theme in realist thought is its critical analysis of classic formalism. See MINDA, *supra* note 8, at 26 ("The only foundational belief shared by the realists was their common skepticism about the claims of legal formalists. What united and defined the legal realist movement was the criticism it raised about the formal style of modern jurisprudence."); ANTHONY SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 75 (1998) ("Antiformalism in law is at the foundation of legal realism."). See also Leiter, *supra* note 8, at 1147 n.30 (1999) ("Realists were certainly antiformalists, but this way of describing Realism obscures the fact that Realists shared a positive view about what goes on in adjudication.").

³¹ See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Cohen, *supra* note 27, at 809; John Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17 (1924); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). For a more recent reaffirmation of this critique, made in the context of an article that partially defends formalism, see Cox, *supra* note 19, at 84, which states:

I do not believe that legal decision in hard cases can be thought of as compelled by past practice, even though that practice will substantially limit the alternatives. Indeed, I do not even believe that "reason" determines the choice between the alternatives thrown up by past practice. . . . The pretense of decision compelled by reference to principle may be a necessary pretense in such cases, but it is, I think, absurd to believe, as our legal culture asserts and purports to believe, that there are correct answers in hard cases, discoverable through reason.

(citing PAUL F. CAMPOS, *JURISMANIA: THE MADNESS OF AMERICAN LAW* (1998)).

³² See FRANK, *supra* note 31, at 130; Kenneth M. Casebeer, *Escape From Liberalism: Fact and Value in Karl Llewellyn*, 1977 DUKE L.J. 671, 684-702 (1977).

another.³³ A judge, faced with the task of resolving a particular legal issue in a case, could look to the existing common law in the relevant jurisdiction and likely find two or more honored principles, either of which could be logically applied to resolve the issue, and each of which, when deductively applied to the problem, would yield an opposite result.³⁴

For example, imagine the first time that a court had to deal with the problem of an inaccurate offer in contract law, made without the fault of the offering party. Suppose that *B* is a very successful retailer of clothes, currently quite fashionable and in vogue. In order to gain exposure and access to the large market that *B* currently enjoys, *A*, a manufacturer of clothing, sends to *B* an offer to sell certain clothing produced by *A* for "\$1.50 a piece." Due to no mistake or carelessness on the part of *A*, the message that is received by *B* states "\$1 a piece." *B* reads the offer, reasonably believes that it is a genuine offer from *A*, and promptly accepts. Is *A* bound by *B*'s acceptance of the offer?

A court looking at this problem as an issue of first impression, long before the modern consensus on the issue had been formed,³⁵ might reasonably determine that the well-accepted contract law maxim that an offeror is the master of his offer should appropriately apply, and therefore that *A* is bound to *B*.³⁶ The same court could just as well determine that the appropriate principle to apply to this issue is the equally honored notion that a binding contract should only arise from an authentic meeting of the minds of the potentially contracting parties, and therefore because *A* never actually intended to make such an offer to *B*, *A* is not legally bound to *B*.³⁷

In a strictly formalist system, either decision is technically correct and ought to be upheld on appeal. Both approaches start with widely-recognized

³³ Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1232-39 (1985); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 470 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)). See also Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873-75 (1930).

³⁴ Llewellyn's classic statement of this position appears in Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). See also Llewellyn, *supra* note 30, at 1239 ("[I]n any case doubtful enough to make litigation respectable the available authoritative premises . . . are at least two, and . . . the two are mutually contradictory as applied to the case in hand.").

³⁵ The current consensus is stated in RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981).

³⁶ See, e.g., *Ayer v. W. Union Tel. Co.*, 10 A. 495, 497 (Me. 1887). This result represents the so-called objective theory of assent in contract law. See generally Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107 (1984); E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939 (1976); Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 (2000).

³⁷ See, e.g., *Holtz v. W. Union Tel. Co.*, 3 N.E.2d 180, 182-83 (Mass. 1936). This result represents the so-called subjective theory of assent in contract law. The maxim that a contractual obligation requires a meeting of the minds of the contracting parties is still respectfully cited by courts in this country. Relatively recent examples among just the federal courts include: *Dumas v. First Fed. Sav. & Loan Ass'n*, 654 F.2d 359, 360 (5th Cir. Unit B Aug. 1981) ("A binding contract must be predicated upon a meeting of the minds."); *Interstate Indus., Inc. v. Barclay Indus., Inc.*, 540 F.2d 868, 870 (7th Cir. 1976) ("To form a contract then, it is necessary to show agreement or a meeting of the minds."); *Katz v. Abrams*, 549 F. Supp. 668, 672 (E.D. Pa. 1982) ("Furthermore, it is the meeting of the minds of the parties that is relevant in contracting.").

doctrines of the common law and apply them with deductive accuracy to reach their different results. Neither approach gets "the math" wrong in a way that should invoke an appellate reversal. And yet each approach leads to different resolutions of the exact same issue arising in the same case from a single set of facts.

The thrust of the realist critique on this point was that the formalist conception of common law adjudication was, in practice, largely indeterminate.³⁸ Not just subtly indeterminate in cases of unusually difficult logical challenges or especially ambivalent facts, but profoundly indeterminate along a wide spectrum of potential issues.³⁹ The source of this indeterminacy, said the realists, was the co-existence of equally established but potentially contradictory principles and maxims residing within the universe of principles and maxims that constituted the common law in a given jurisdiction at any given time.⁴⁰

The existence of equally authoritative principles that could result in importantly different outcomes when logically applied to the facts of a specific case meant that the real action in deciding these cases was not taking place in the deductive application of the common law to the facts of the case, as was supposed by the formalist model. Instead, it was occurring at the point of choosing which of the possible common law principles should be selected and applied to resolve the dispute.⁴¹ From this perspective, the ultimate resolution of most cases was decided and sealed once the court selected the legal principle that was to be applied. In practice, only rarely did a genuine and significant issue exist regarding the logical application of the selected principle to the facts of the specific case.⁴²

This characterization of the operation of the common law legal system can be seen as having its counterpart in the larger world as well. That is to say that a person trying to decide how to proceed in a given situation can reach for one

³⁸ See David B. Wilkins, *Legal Realism For Lawyers*, 104 HARV. L. REV. 468, 478-84 (1990).

³⁹ See FRANK, *supra* note 31, at 3-75.

⁴⁰ See MINDA, *supra* note 8, at 41-42 ("Even if one were to accept the existence of 'reasoned elaboration,' 'neutral principles,' or 'objective interpretation,' judges would still need guidelines to know how to choose between any number of possible competing principles ascertainable from different interpretations of the constitution, legislation and prior court decisions."); Addison Mueller & Murray L. Schwartz, *The Principle of Neutral Principles*, 7 UCLA L. REV. 571, 586 (1960) ("The difficulty . . . is that there will *always* be a point at which an extension of the logic of any constitutional principle of decision will run into the similarly extended logic of competing principles.").

⁴¹ See Schauer, *supra* note 8, at 513-14 ("Thus, one view of the vice of formalism takes that vice to be one of deception, either of oneself or of others. To disguise a choice in the language of definitional inexorability obscures that choice and thus obstructs questions of how it was made and whether it could have been made differently."). See also Cohen, *supra* note 27; Dewey, *supra* note 31; Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 9-25 (1984).

⁴² One of the most famous quotes by Justice Oliver Wendell Holmes, Jr. appears at the very beginning of his 1881 book, *THE COMMON LAW*:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

or another of a variety of well-recognized and generally accepted maxims, or principles, of conventional wisdom and can end up deciding to act in either one or another of two polar opposite directions, depending upon the specific maxim that is selected.

For example, should I buy a new computer system for my business? Well, a penny saved is a penny earned; but, you've got to spend money to make money. Should I stay up late into the night again and polish this brief? I know that in order to succeed, I need to keep my nose to the grindstone; although on the other hand, all work and no play makes Jack a dull boy. Should I worry that being away from home so much is distancing me from the ones I love? They say that absence makes the heart grow fonder, but they also say that out of sight is out of mind. When I get back home, and the kids misbehave, should I respond with physical punishment? If I spare the rod, then I'll spoil the child; although, of course, violence teaches violence.

Regardless of the larger philosophical status of the conflict between formalism and realism, the legal realist critique of formalism and the realists' alternative account of common law jurisprudence resonated with large numbers of lawyers and legal academics. Before long, the realist conception of the work of the courts became the prevailing perspective.⁴³ Fewer and fewer observers continued to believe that the primary work of the appellate courts was a more or less technical review of the deductive logic of the lower courts, with an occasional revision of the existing common law.⁴⁴ Increasingly, both observers and participants came to view the work of the appellate courts as heavily value-laden, involving the selection of specific principles, and thus resultant specific outcomes, from a variety of nearly equal logical possibilities.⁴⁵ The values and policies that guided these selections might be more or less explicit, or tacitly underlying, but in either case they were nevertheless operative in the process.⁴⁶

If the common law were no longer to be seen as analogous to the laws of nature, something that may not at present be in a completely satisfactory form but which we strive to improve upon over time as we test it against the constant flow of cases that are processed by the court systems, what then is a more acceptable concept of it? Why should the courts prefer one possible version of a common law doctrine to another? On what broader principled basis could an advocate try to convince a court to create a new exception to an existing com-

⁴³ See Singer, *supra* note 33, at 467 ("All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now.").

⁴⁴ Chemerinsky, *supra* note 11, at 2 ("Now, a century after the legal realists' attack on formalism, we all surely would say that formalism is gone. Everyone recognizes, of course, that the values of the judges making the decisions largely determines all law, and particularly constitutional law."). This is particularly true of legal academics and legal education. MINDA, *supra* note 8, at 32 ("Most law teachers today regard themselves as legal realists."); Wilkins, *supra* note 38, at 469 ("Legal realism has dominated American legal education for over half a century.").

⁴⁵ See GILMORE, *supra* note 8, at 87; Arthur J. Jacobson, *Taking Responsibility: Law's Relation to Justice and D'Amato's Deconstructive Practice*, 90 Nw. U. L. Rev. 1755, 1755 (1996) ("Not one rule suffers from determinacy in the United States today. Mere law words have completely stopped constraining any judicial decision. I know. I've litigated.").

⁴⁶ See Wilson, *supra* note 17, at 460 ("By focusing on the policy effects and on the diverse resolutions of similar cases, the realists demonstrated how judges made law according to their underlying beliefs. The process was inherently political.").

mon law rule or to recognize a new common law doctrine altogether? What is the reason for asking an advocate to place her preferred resolution of a case into the structure of a jurisdiction's existing precedent if we did not have faith that the existing precedents represent some settled understanding of the best treatment of a particular issue?

C. *The Instrumentalist Approach to Common Law Jurisprudence*

As the formalist paradigm waned under the continuing critical challenge of the realist movement, the emerging perspective that came to replace it viewed the common law not as the current product of a long-term search for the best, the ideal, the natural law, but instead as a social tool, one among many, that could be brought to bear to try to achieve particular social outcomes or solve particular social problems.⁴⁷ From such a perspective the primary purpose of contract law, then, is not so much to discover the abstractly optimal set of rules governing the exchange of promises among members of society, but is instead to maximize beneficial reliance and to minimize friction in executory transactions.⁴⁸ Similarly, the goal of tort law is much less to articulate the proper obligation owed by one who harms another than to fashion a set of rules that maximizes compensation to victims and deters future harm producing behavior.⁴⁹

Thus, tort law would be seen much less as a great social statement on the responsibility of citizens for harm caused to others or their property than as a particular social system, operating within a complicated complex of other social systems, such as criminal law, insurance, and government benefit programs, seeking to minimize injury and to provide adequate compensation to the injured. From this perspective, the common law generally is seen primarily as another tool, or an instrument, for attaining desired results in society. Thus this view of the law is often called instrumentalism.⁵⁰

From an instrumentalist perspective the practical force of precedent in the determination of the outcome of a given case is inevitably far less than it would

⁴⁷ See Jerry Elmer, *Legal Realism, Legal Formalism and the D'Oench Duhme Doctrine: A Perspective on R.I. Depositors Econ. Prot. Corp. v. NFD*, 53 R.I. B.J. 9, 11 (2004) ("Today, we are all Legal Realists. Being Realists, we understand two things: that judges do make law, not just find it, and that public policy considerations may properly enter into a judge's deliberations."); Huhn, *supra* note 19, at 305 ("Starting about 1910, legal realism – or policy analysis – entered legal reasoning to the point that today it would be unusual to find a judicial opinion or brief that fails to explore the policy implications of an interpretation of the law.").

⁴⁸ SUMMERS, *supra* note 8, at 151.

⁴⁹ Cox, *supra* note 19, at 93-94 ("The law of torts, of contract, of property are now largely conceptualized in these instrumental terms both within academia and within the profession.").

⁵⁰ See SUMMERS, *supra* note 8, at 20-21. See also Cardozo, *supra* note 13, at 66 ("The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence.").

For an effort to elaborate upon, and to complicate, the conventional notion of instrumentalism, see R. S. Summers, *Naïve Instrumentalism and the Law*, in LAW, MORALITY, AND SOCIETY 119-31 (P.M.S. Hacker & J. Raz eds., 1977).

be under a formalist conception.⁵¹ For the formalist, the existing common law represents the distillate of many decades of articulation, testing, tinkering, and improvement of the doctrine. It is our current best formulation of ideal regulation in the field, and it is not to be disregarded or tampered with lightly. In fact, a court operating within a formalist model would be required to meet a heavy burden before resolving a particular dispute in a manner that was not consistent with the existing pattern of precedent in the jurisdiction.⁵²

For an instrumentalist, adherence to the existing precedent in a jurisdiction may be valuable to the extent that it permits parties to anticipate accurately the outcome of disputes, thus reducing the volume of costly litigation brought into the system. It may also be valued because such adherence will result in a more consistent resolution of similar cases brought into the system at different times or decided by different courts within the same system, thus advancing a certain kind of fairness. On the other hand, adherence to an existing precedent from an instrumentalist perspective is a hindrance to the extent that it slows the alteration of the common law to achieve desired outcomes more effectively, or it makes more difficult the changing of existing common law to reflect new goals or to respond to new problems.⁵³

For the formalist, the existing common law is a carefully constructed social canon in which decades of painstaking thought and practical testing have been invested. To the instrumentalist, it is a tool, one whose primary value is its ability to be used at a given time and place to respond to the currently understood needs of the society.⁵⁴ If the tool is no longer doing the job that is currently required, then the obligation of the user is to modify the instrument until it performs more effectively.

III. *TARASOFF v. REGENTS OF THE UNIVERSITY OF CALIFORNIA*

A. *The Facts of the Case*

The facts of the *Tarasoff* case are as simple as they are sad.⁵⁵ Dr. Lawrence Moore was a psychologist working for the Cowell Memorial Hospital at

⁵¹ See SUMMERS, *supra* note 8, at 143, 162-63, 167, 170; G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 Sw. L.J. 819, 828 (1986) ("By the 1940s it was no longer possible for judges to ground decisions on appeals to law as a disembodied entity or as a bundle of settled precedents.").

⁵² SUMMERS, *supra* note 8, at 149-50 (describing the use of legal fiction by formalist judges to maintain the appearance of adherence to existing precedent).

⁵³ See, e.g., EISENBERG, *supra* note 26, at 153. For a very sophisticated treatment of the nature of precedent within both formalist and instrumentalist conceptions of the common law, see Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

⁵⁴ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 30 (1977) ("Law was no longer conceived of as an eternal set of principles expressed in custom and derived from natural law. Nor was it regarded primarily as a body of rules designed to achieve justice only in the individual case. Instead, judges came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change.").

⁵⁵ The barest facts of the case are set forth by the California Supreme Court in its opinion. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 339-40, 341 (Cal. 1976). A slightly

the University of California at Berkeley.⁵⁶ On August 20, 1969, during the course of his treatment, Prosenjit Poddar, a patient, indicated to Dr. Moore his intention to kill Tatiana Tarasoff upon her return to the United States from Brazil, which he expected at the end of the summer.⁵⁷ Moore was apparently convinced of the genuineness of Poddar's stated intent because he, along with two other colleagues, sought to have Poddar committed for observation in a mental hospital, an effort that was thwarted when members of the campus police department who were enlisted to detain Poddar physically released him in exchange for his assurance that he would leave Tatiana alone.⁵⁸ Two months later, on October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff.⁵⁹

Tatiana's parents filed suit against Dr. Moore and his colleagues, the campus police, and the University of California at Berkeley.⁶⁰ They claimed that the defendants negligently failed, during the slightly more than two months between Poddar's stated intent and the actual fatal assault, to warn Tatiana of the danger posed to her by Poddar.⁶¹ They also claimed that the defendants were negligent in failing to confine Poddar successfully when they tried to do so on August 20, 1969.⁶² The California Superior Court in which the case was initially filed granted the defendants' demurrers to both of the plaintiffs' theo-

more expansive description of the factual allegations set forth in the plaintiff's complaint is provided by the California Court of Appeal in its intermediate appellate decision. *Tarasoff v. Regents of the Univ. of Cal.*, 108 Cal. Rptr. 878, 880-81 (Cal. Ct. App. 1973).

⁵⁶ *Tarasoff*, 551 P.2d at 339.

⁵⁷ *Id.* at 341.

⁵⁸ Dr. Moore told the campus police that if they would bring Poddar to the appropriate state facility, he would arrange to have him committed involuntarily on an emergency basis for at least seventy-two hours. Subsequently, Dr. Moore's supervisor and the Director of Psychiatry at Cowell Memorial Hospital, Dr. Harvey Powelson, directed the psychiatric staff at the hospital, including Dr. Moore, to stop all attempts to commit Poddar involuntarily. *Tarasoff*, 108 Cal. Rptr. at 880. Poddar never returned to Dr. Moore or to the Cowell Memorial Hospital for further treatment.

⁵⁹ Poddar was arrested and criminally prosecuted for causing the death of Tatiana Tarasoff. He was convicted of second degree murder and the conviction was appealed to both the California Court of Appeals and the California Supreme Court, the latter of which found the trial court's instruction to the jury regarding diminished capacity to be prejudicial error and vacated the conviction. *People v. Poddar*, 518 P.2d 342 (Cal. 1974); *People v. Poddar*, 103 Cal. Rptr. 84 (Cal. Ct. App. 1972).

It is from the reports and records of the criminal case against Poddar that a much richer version of the facts in the *Tarasoff* case can be found. A fascinating account of these facts can be found in Buckner & Firestone, *supra* note 5, at 192-96, and in Schuck & Givelber, *supra* note 1, at 99-106.

It is entirely possible that Tatiana's parents learned of the actions, and inactions, of Dr. Moore and the other employees of the University of California for the first time while attending Poddar's criminal trial. After the California Supreme Court overturned Poddar's conviction, the State of California, in exchange for his agreement to leave the United States and never return, did not retry him. He went back to India and, according to one author, as of 1976, he was happily married. Alan A. Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976). According to another source, he married an attorney. Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263, 290 (1982).

⁶⁰ *Tarasoff*, 551 P.2d at 340.

⁶¹ *Id.*

⁶² *Id.*

ries of liability without leave to amend.⁶³ The California Court of Appeal upheld the Superior Court's ruling.⁶⁴ The Supreme Court of California sustained the Superior Court's judgment with respect to the plaintiff's failure to detain theory, but, in the part of the opinion that has made it so famous, reversed and remanded regarding the failure to warn claim.⁶⁵

The holding of the *Tarasoff* case is succinctly stated in the fourth paragraph of the majority opinion. The court writes, "[w]hen a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger."⁶⁶ This was the first time in California, or in any American jurisdiction, that a court had formally recognized such a duty.

And so the *Tarasoff* case emerged in the summer of 1976 as a significant new addition to the common law of torts, issued by a nationally influential court with the likely ambition to change long-standing tort law doctrine across the country. By all measures it is an important case, decided by a court that was well aware of its importance. What was the nature of the analysis that led to the court's conclusion in the case? What arguments mattered? What did the court consider when it contemplated creating new tort law?

One might expect a court facing an issue like the one in *Tarasoff* from a formalist perspective to devote a very significant portion of its opinion to a description of the current doctrine surrounding the issue, a consideration of the most salient cases, and a careful characterization of the newly-announced rule as residing harmoniously within the existing pattern of precedent.⁶⁷ While the majority opinion in *Tarasoff* does briefly address the then current case law in California, no real argumentative energy is expended in the debate among the majority, the concurrence, and the dissent regarding the characterization of existing case law; nor in a demonstration that the newly-announced rule can or cannot be seen as a logical extension of already-established doctrine. There is, in short, little deference shown to a traditional formalist approach to the problem.⁶⁸

⁶³ *Id.*

⁶⁴ *Tarasoff v. Regents of the Univ. of Cal.*, 108 Cal. Rptr. 878 (Cal. Ct. App. 1973).

⁶⁵ As discussed in *supra* note 1, the California Supreme Court issued two different opinions in the *Tarasoff* case, the second published a little more than eighteen months after the first and occasioned by the granting of an unusual appellate rehearing in the case. It is the second opinion, issued on July 1, 1976, that carries the force of precedent and is the prominent decision in the case. For a description of the differences between the two opinions, see Buckner & Firestone, *supra* note 5, at 196-97, and Schuck & Givelber, *supra* note 1, at 111 n.50, 124 n.112.

⁶⁶ *Tarasoff*, 551 P.2d at 340.

⁶⁷ See SUMMERS, *supra* note 8, at 142.

⁶⁸ The majority opinion does make some attempt to reconcile the new duty that it is about to announce with some existing aspects of the California, and the common, law of torts. *Tarasoff*, 551 P.2d at 342-44. Most notably, the opinion tries to position the holding in the case as consistent with, even if not the necessary logical product of, existing exceptions to the general rule of no duty to control others based on a special relationship between the defendant and either the direct harm producer or the victim. *Id.* at 343-44. Ultimately, at the conclusion of this discussion, the best that the majority can do is to claim, quoting from a 1974 law review article, that the newly proclaimed *Tarasoff* duty is not "in any way opposed

Instead, the court in *Tarasoff* – majority, concurrence,⁶⁹ and dissent⁷⁰ alike – most eagerly view the problem as one of discerning the likely practical consequences of either adopting or rejecting the new doctrine, and balancing the anticipated costs of these likely consequences against the expected benefits. Should a brand new duty be recognized? “In analyzing this issue, we bear in mind that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done,” the majority tells us.⁷¹ Moreover, “[duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”⁷²

On this point the majority and the dissent agree, with the dissenting opinion stating flatly that, “[p]olicy generally determines duty.”⁷³ And so, thoroughly modern and instrumentalist in its approach, the court sets out for itself the task of identifying and weighing the relative merits of a legal duty imposed upon psychiatrists to warn others of a serious threat posed by a patient.

B. Arguments For and Against a Therapist Duty to Warn

1. Reduction in Victim Injuries and Deaths

In this analysis, the plaintiffs’ side of the case enjoys the more straightforward presentation. The basic thrust of the argument for the plaintiffs is that there will be fewer deaths and serious physical injuries if psychiatrists in the position of defendant Dr. Moore respond to credible threats made by their patients by reasonably warning the intended victims rather than failing to do so.

to contemporary ground rules on the duty relationship.” *Id.* at 344 (quoting John G. Fleming & Bruce Maximov, *The Patient or His Victim: The Therapist’s Dilemma*, 62 CAL. L. REV. 1025, 1030 (1974)).

The Fleming and Maximov article was published during the period between the issuance of the decision by the California Court of Appeal and the first opinion of the California Supreme Court. It addresses itself directly to the facts of the case. A number of commentators have noted the strong influence that the article seems to have had on the second opinion by the California Supreme Court. Buckner and Firestone observe that “[t]he second opinion follows the format established by Fleming and Maximov to a much greater extent than does the first. It is almost as if the court uses their law review article as intellectual justification for reaching its decision, seemingly made more independently the first time.” Buckner & Firestone, *supra* note 5, at 197. See also *id.* at 188-90; Stone, *supra* note 59, at 361-63.

⁶⁹ Justice Mosk, concurring and dissenting, betrays no interest at all in *Tarasoff*’s logical consistency with the larger scheme of duty doctrine in tort law. Instead, his objection is with that part of the *Tarasoff* duty that could hold a therapist liable for negligently failing to anticipate a patient’s future violent behavior, given Justice Mosk’s view that therapists are “incredibly inaccurate” at making such predictions – a thoroughly instrumentalist concern. *Tarasoff*, 551 P.2d at 353-54.

⁷⁰ Justice Clark’s dissenting opinion, joined by Justice McComb, is similarly unconcerned with any traditionally formalist aspects of the case, focusing instead on the proper interpretation and application of California’s Lanterman-Petris-Short Act and on the likely detrimental effects of a formal duty to warn on the efficacy of psychological therapy. *Id.* at 354-58 (Clark, J., dissenting).

⁷¹ *Id.* at 342.

⁷² *Id.* (quoting *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968) (quoting WILLIAM L. PROSSER, *LAW OF TORTS* 332-33 (3d ed. 1964))).

⁷³ *Id.* at 358 (Clark, J., dissenting).

Even if harm cannot be averted in every case, there is little question that permitting the victim at least the possibility of flight, fight, or watchfulness would result in less overall harm to such victims.⁷⁴

In addition to the very traditional tort law argument that the existence of this legal duty will result in less harm and more compensation, the plaintiffs can argue that such a duty accurately articulates the preferred moral posture on the issue. Here there is invoked the image of the psychiatrist, having heard a credible threat by a patient against another, going about the remaining routine of his day, seeing other patients, returning phone calls, completing paperwork, driving home, having dinner, all while his patient stalks and kills the intended victim. Who could morally justify the doctor's failure to engage in merely reasonable efforts to try to warn the unwitting victim? Even if a complicated case for refraining to warn could be constructed, it is hard to ignore that complete inaction is a much easier option for the doctor than an effort to help. In addition, the issuance of a warning aligns the psychiatrist, at least in the patient's mind, on the side of a stranger and against the patient, who is, after all, the source of professional revenue for the doctor's practice.⁷⁵

2. Cost of False Warnings

The case against the creation of a therapist duty to warn is far more complicated. It begins with an appreciation of the social cost incurred when a phy-

⁷⁴ Interestingly, this aspect of the plaintiff's argument is given very little attention or scrutiny in any of the published *Tarasoff* opinions, nor in the subsequent academic literature. It is as if the basic thrust of the plaintiff's position, that the existence of a legal duty for therapists to warn will result in meaningfully fewer physical injuries to intended victims, is simply assumed to be true. The attention of courts and commentators is directed instead toward identifying and debating the various costs generated by the formal legal duty. Perhaps this has occurred because the claim seems to be so clearly plausible within the specific circumstances of the *Tarasoff* case, where two months passed between Poddar's voicing of the threat to Dr. Moore and his attack on Tatiana, time that Poddar used, in part, to insinuate himself with Tatiana's brother, a relationship that aided Poddar in determining when he could find Tatiana alone. Schuck & Givelber, *supra* note 1, at 102-04.

As a general matter, the degree to which the existence of a formal *Tarasoff* duty to warn can be expected to save the lives of, and prevent serious physical injury to, potential victims is not at all clear. After all, quite a few different and rather uncommon factors must all fall into place in a given situation in order for one to be able to say with confidence that the existence of the *Tarasoff* duty actually prevented harm. What would be required is not just a threat, not just a threat followed by an attempt, and not just a threat followed by a successful attempt, but all of: (1) a patient making a threat to a therapist that is sufficiently clear and credible to trigger the *Tarasoff* duty; (2) followed by a decision on the part of the therapist to try to warn the intended victim, though the therapist would not have done so in the absence of the formal *Tarasoff* duty; (3) followed by the actual receipt of the therapist's warning by the intended victim; (4) followed by a genuine attempt by the patient to harm the intended victim; and, finally (5) followed by the failure of the attempt to fully succeed when it otherwise would have succeeded had the therapist not warned the intended victim. Surely such a confluence of factors is not that common, and in circumstances such as these where the justification for the *Tarasoff* duty depends upon a balancing of expected costs and benefits, the degree to which such circumstances are common or not matters a great deal.

⁷⁵ See C.J. Meyers, *The Legal Perils of Psychotherapeutic Practice (pt. II): Coping with Hedlund and Jablonski*, 12 J. PSYCHIATRY & L. 39, 44 (1984); Thomas J. Rudegeair & Paul S. Appelbaum, *On the Duty to Protect an Evolutionary Perspective*, 20 BULL. AM. ACAD. PSYCHIATRY & L. 419, 424 (1992).

sician issues a formal warning to a third person that a patient under his care has threatened to inflict upon the recipient of the warning a serious bodily injury or to cause his death. Once a formal legal duty to issue such a warning is in place, psychiatrists will be advised to maintain a careful record of all such warnings issued, so one might expect the great majority of such warnings to be either immediately or eventually issued in writing.⁷⁶ The following is the text of an actual post-*Tarasoff* warning letter, with names redacted:⁷⁷

Dear _____:

As required by the *Tarasoff* Decision, we must notify those persons whose lives have been threatened. This to advise you that _____ has made threats against your life.

We have notified the Police Department and the Mental Health Authorities of this and we strongly advise you to take precautions in the event that _____ is discharged from the hospital. One of the avenues available to you is in obtaining a restraining order from the District Attorney's Office in _____.

Our plan is to discharge _____ upon stabilization, which may take up to 17 days. May we strongly advise you to take precautions in the event that he is released, as we are not able to force a person to leave the city.

For further information and/or assistance, you may contact this office at _____ during work hours; after hours you may call to speak to the "ON CALL" Psychiatrist at _____ (to have him paged), the Police Department, and/or the nearest Mental Health Clinic in your area.

Sincerely,

Chief of Psychiatry

Imagine being the recipient of such a letter. Assume that you are the spouse, parent, child, close friend, supervisor, or co-worker of the patient who presumably poses to you a threat so serious that such a letter is thought by the Chief of Psychiatry to be necessary.⁷⁸ Imagine further that you are the patient about whom the letter is sent to some combination of spouse, parent, child, friend, or co-worker. One can hardly doubt that the issuance of such a warning carries with it enormous social cost within the community of the patient's friends and relations – cost that will likely last for years, and quite possibly a lifetime.

If lives are saved, or serious physical injury averted, then all the pain and social disruption involved can be seen as necessary. But what if the warning was in fact not necessary? What if the patient would never have actually tried to act out the threat? In such cases, the enormous social harm caused by each unnecessary warning would have to be viewed as a cost of the rule that must be balanced against its expected benefits.⁷⁹

⁷⁶ Buckner & Firestone, *supra* note 5, at 221; Rosenhan et al., *supra* note 3, at 1220; Yoni P. Wise, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165, 182 n.88 (1978).

⁷⁷ A copy of this letter, similarly redacted, is in the possession of the author.

⁷⁸ AM. PSYCHIATRIC ASS'N, CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL 7-9, 28 (1974).

⁷⁹ Some evidence exists that many *Tarasoff* warnings will be unnecessary because the potential victim will already be aware of the threat posed by the patient. Buckner & Firestone, *supra* note 5, at 218 (citing Dale E. McNiel & Renee L. Binder, *Violence, Civil Commitment, and Hospitalization*, 174 J. NERVOUS & MENTAL DISEASE 107 (1986)). While warnings issued under such circumstances are unnecessary, they are not false in the sense

Unsurprisingly, opponents of a formal *Tarasoff* duty have argued that psychiatrists, and other therapists, are not at all good at predicting the likelihood of a particular patient acting out on hostile, physically aggressive feelings that he may have towards another.⁸⁰ Their training and experience all focus on treatment and healing and hardly at all on the making of accurate predictions of specific future patient behavior.⁸¹ Thus, they argue, the imposition upon therapists of a duty to warn of such future behavior will surely result in large numbers of false warnings and the corrosive social consequences that will inevitably follow.⁸²

that phrase is used herein and do not carry the same kind of social cost to the patient or the recipient.

⁸⁰ This is one of the central assertions advanced by critics of a formal *Tarasoff* duty, especially by those critics in the psychiatric community. For a sample of this literature, see AM. PSYCHIATRIC ASS'N, *supra* note 78, at 28; Joseph J. Cocozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1099 (1976); Bernard L. Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 447, 451 (1974); Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 696, 734, 752 (1974).

Some studies, however, have shown therapist identifications of violent patients that were statistically significant. Charles W. Lidz et al., *The Accuracy of Predictions of Violence to Others*, 269 JAMA 1007 (1993). Other evidence seems to suggest a meaningfully higher incidence of violent behavior in persons diagnosed as suffering from certain serious mental illnesses, though this evidence does not establish that therapists are able to predict which of those patients so diagnosed will actually exhibit violent behavior. Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence From the Epidemiologic Catchment Area Surveys*, 41 HOSP. & CMTY. PSYCHIATRY 761, 768-69 (1990).

Two excellent recent reviews of the empirical research that has been done on the ability of therapists to predict violent behavior by their patients are presented in Kevin S. Douglas & Jennifer L. Skeem, *Violence Risk Assessment: Getting Specific About Being Dynamic*, 11 PSYCHOL. PUB. POL'Y & L. 347, 353 (2005), and John Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 WASH. & LEE L. REV. 901 (2000).

⁸¹ Stephen D. Hart, *The Role of Psychopathy in Assessing Risk for Violence: Conceptual and Methodological Issues*, 3 LEGAL & CRIMINOLOGICAL PSYCHOL. 121-37 (1998).

Even now, more than thirty years after the *Tarasoff* decision, it is not at all clear that any clinical standards for the prediction of dangerous behavior in patients exist. See Paul S. Appelbaum, *Implications of Tarasoff for Clinical Practice*, in THE POTENTIALLY VIOLENT PATIENT AND THE *Tarasoff* Decision in Psychiatric Practice 94-106 (James C. Beck ed., 1985) ("[T]here is no professional standard for predicting future violence."); Douglas & Skeem, *supra* note 80, at 352 ("Currently, there are no empirically validated instruments specifically designed to assess risk state."). This led one prominent commentator discussing the *Tarasoff* case to say that "[o]ne can only wonder what it means to apply standards to skills which do not exist." Stone, *supra* note 59, at 371. See also Mark Kaufman, *Post-Tarasoff Legal Developments and the Mental Health Literature*, 55 BULL. MENNINGER CLIN. 308, 311 (1991); Robert M. Wettstein, *The Prediction of Violent Behavior and the Duty to Protect Third Parties*, 2 BEHAV. SCI. & L. 291, 311 (1984).

⁸² Brian Ginsberg, *Tarasoff at Thirty: Victim's Knowledge Shrinks the Psychotherapist's Duty to Warn and Protect*, 21 J. CONTEMP. HEALTH L. & POL'Y 1, 14-15 (2004); Stone, *supra* note 59, at 363 n.23.

Interestingly enough, during the period between its first and second opinions in *Tarasoff*, the Supreme Court of California issued an opinion in an altogether different case that voiced strong skepticism about the ability of therapists to predict future violence by their patients accurately. *People v. Burnick*, 535 P.2d 352, 364-66 (Cal. 1975).

This line of argument is embraced by both Justice Clark in dissent, and by Justice Mosk, who is both concurring and dissenting in the *Tarasoff* case. Justice Clark writes, "[b]oth the legal and psychiatric communities recognize that the process of determining potential violence in a patient is far from exact, being fraught with complexity and uncertainty."⁸³ Justice Mosk asserts that, "[p]redictions of dangerous behavior, no matter who makes them, are incredibly inaccurate, and there is a growing consensus that psychiatrists are not uniquely qualified to predict dangerous behavior and are, in fact, less accurate in their predictions than other professionals."⁸⁴

The majority in the case does not dispute that the recognition of a duty to warn will likely result in false warnings, nor does it engage with the dissenting Justices on the issue of psychiatrists' relative ability to predict the future violent behavior of their patients. Instead, it implicitly accepts the problematic nature of psychiatrists' predictive abilities and nevertheless maintains that, "professional inaccuracy in predicting violence cannot negate the therapist's duty to protect the threatened victim."⁸⁵ Implicitly, the majority balances the cost of false warnings against the benefit of genuine warnings and concludes that, "[t]he risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved."⁸⁶

3. *Burdens on the Therapeutic Process*

A second important theme of objection to a formal duty to warn highlights the many costs to the therapeutic process that might be experienced once such a duty becomes law. Essentially, this line of argument recognizes that a formal legal duty places both psychiatrist and patient in a difficult position. Both are likely to respond to difficulties they face in ways that will be profoundly detrimental to the therapeutic process.

Again, the starting point is an appreciation of the profound social cost to the patient that will be generated by the issuance of a *Tarasoff* warning. Psychiatrists have no choice but to be concerned about the possibility of legal action brought by a patient who has suffered such consequences and who feels that the doctor issued the warning on an insufficient basis.⁸⁷ Indeed, the court in *Tarasoff* makes it clear that such an action would be viable when it writes:

In the light of recent studies it is no longer heresy to question the reliability of psychiatric predictions. Psychiatrists themselves would be the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession. . . . "[I]t may legitimately be inquired whether there is anything in the education, training or experience of psychiatrists which renders them particularly adept at predicting dangerous behavior."

Id. at 365 (quoting *Murel v. Balt. City Crim. Ct.*, 407 U.S. 355, 364-65 n.2 (1972) (Douglas, J., dissenting from dismissal of certiorari)).

⁸³ *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 360 (Cal. 1976) (Clark, J., dissenting).

⁸⁴ *Id.* at 354 (quoting *Murel*, 407 U.S. at 364-65 n.2 (Douglas, J., dissenting from dismissal of certiorari)).

⁸⁵ *Id.* at 346.

⁸⁶ *Id.*

⁸⁷ See *Runyon v. Smith*, 749 A.2d 852 (N.J. 2000). The case was also discussed in Ginsberg, *supra* note 82, at 27-28. See also the cases cited in Merton, *supra* note 59, at 303 n.96.

[T]he therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger.⁸⁸

A therapist is thus placed between the rock of possible liability to the victim if the therapist does not warn and the patient in fact harms, and the hard place of possible liability to the patient if the therapist warns unnecessarily.⁸⁹ Faced with these twin exposures, therapists would be well-advised to disclose fully in advance to their patients the possibility that a warning will be issued if, in the course of treatment, the therapist believes that a credible threat exists.⁹⁰ In effect, at the very start of the therapeutic relationship, the healer turns to the afflicted and makes it clear that if their conversation turns in the wrong direction, the healer will cause profound damage to at least one of the patient's most intimate relationships.

Whether aware of this possibility in advance, or informed of it at the start of therapy, one might expect the existence of such a serious risk to operate as a powerful deterrent for some persons to seek, or to continue, psychiatric treatment.⁹¹ In fact, because they face the greatest risk of triggering the warning and paying the resulting price, it is exactly those persons who are struggling

⁸⁸ *Tarasoff*, 551 P.2d at 347.

⁸⁹ Buckner & Firestone, *supra* note 5, at 221.

⁹⁰ See Fleming & Maximov, *supra* note 68, at 1056-60; Robert Sadoff, *Informed Consent, Confidentiality and Privilege in Psychiatry: Practical Applications*, 2 BULL. AM. ACAD. PSYCHIATRY & L. 101, 105 (1974); Recent Case, *Evidence - Sixth Circuit Holds That Tarasoff Disclosures Do Not Vitiating Psychotherapist-Patient Privilege - United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000), 114 HARV. L. REV. 2194, 2199 (2001).

A survey of therapists conducted in 1987 found that 65.8% of them "almost always" or "sometimes" discussed the possibility of disclosure to a third party with their patients, and that 22.1% of them always did so. Rosenhan et al., *supra* note 3, at 1212-13. These results led the authors of the study to conclude that, "[i]n accord with law, psychotherapists continue to warn patients that certain conversation is not confidential and will need to be revealed to relevant third parties." *Id.* at 1222.

⁹¹ See Ginsberg, *supra* note 82, at 13 ("[I]t can be logically argued that patients might be less willing to seek treatment if they know that any desire the therapist perceives as significant and violent must be communicated to a potential third party victim."); Rosenhan et al., *supra* note 3, at 1191 ("Without the psychotherapist's assurance of confidentiality, the patient's conscious and unconscious inhibitions may deter him from expressing his innermost thoughts."). This point is also made by one of the dissenting judges in *Tarasoff*. 551 P.2d at 359 (Clark, J., dissenting) (citing Ralph Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 187-88 (1960) and Abraham S. Goldstein & Jay Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 36 CONN. B. J. 175, 178 (1962)).

But see Buckner & Firestone, *supra* note 5, at 221, where the authors conclude that "[t]here is just no evidence thus far that patients have been discouraged from coming to therapy, or discouraged from speaking freely once there, for fear that their confidentiality will be breached." However, just one paragraph later, the authors note that "the studies thus far have been based upon information primarily obtained from direct questions posed to therapists" and they acknowledge the inherent limitations in drawing conclusions from such data. *Id.* at 221-22.

In an article frequently cited by the majority in *Tarasoff*, John Fleming and Bruce Maximov suggest that even if the existence of a *Tarasoff* duty to warn were to deter some patients with hostile tendencies from seeking therapy, it will also likely operate as an incentive to seek therapy for patients who wish to make such disclosures to the therapist as a "cry

with issues of hostility, aggression, and violent ideation, and who might pose the greatest risk of actually inflicting harm on others, who are presented with the strongest deterrent to seek treatment. For all such persons who respond to this disincentive by failing to seek help or who discontinue treatment, the possibility of preventing them from harming another as a result of effective therapeutic intervention is completely eliminated.⁹²

Even for those patients who do seek treatment, a powerful incentive continues to exist to withhold from the therapist any disclosure of hostile thoughts, feelings, wishes, or dreams that might possibly trigger the issuance of a warning.⁹³ To the extent that such disclosures are a valuable component of the therapist's ability to diagnose and act, the effectiveness of the treatment experienced by the patient will be significantly compromised.⁹⁴

Moreover, one would expect that a patient's ability to place his trust fully in the therapist would decrease along with the patient's understanding that the therapist may be forced to issue a *Tarasoff* warning and thereby to cause him great harm. Again, to the extent that a patient having trust in the therapist is important to the mode of therapy employed, the effectiveness of the patient's therapeutic experience will most likely be diminished as a result of the exis-

for help," hoping that the therapist will take control and prevent them from doing harm. Fleming & Maximov, *supra* note 68, at 1039-40.

⁹² Ginsberg, *supra* note 82, at 13.

⁹³ An oft-cited study conducted in the years immediately following the *Tarasoff* case found that 24.5% of the therapists surveyed noted a decrease in their patients' willingness to disclose violent thoughts once the patients became aware that the therapist might disclose this information to a third party. Wise, *supra* note 76, at 177 n.67. A later study, conducted in 1987, found that "sixty percent of responding psychotherapists felt their patients were at least somewhat more reluctant to divulge sensitive information when aware that their confidences could potentially be disclosed." Rosenhan et al., *supra* note 3, at 1214.

See also Stone, *supra* note 59, at 367, 369 ("[A] patient may refrain from expressing feelings which in fact embody no real intention to harm a third party if he must fear that the therapist, impelled by a legal duty, will reveal them to others. . . . The potentially violent patient is thereby put on notice that he should be alienated from the therapist and conceal any violent intentions if he believes it to be in his best interest.").

⁹⁴ Joseph Dubey, *Confidentiality as a Requirement of the Therapist: Technical Necessities for Absolute Privilege in Psychotherapy*, 131 AM. J. PSYCHIATRY 1093 (1974); Ginsberg, *supra* note 82, at 12 (citing BENJAMIN J. SADOCK & VIRGINIA A. SADOCK, 1 KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 470 (6th ed. 1995)). See also Rosenhan et al., *supra* note 3, at 1216 ("To the extent that candid disclosure is necessary for successful psychotherapy, patients' awareness of the limits of confidentiality may decrease the possibility of achieving successful therapeutic results.").

The United States Supreme Court, in considering the status of the psychotherapist-patient evidentiary privilege, has artfully articulated the role that full and free disclosure plays in the ultimate success of treatment: "Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. . . . [T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996). In this case, the Court also noted the words of the Judicial Conference Advisory Committee at the time that it recommended to Congress that it recognize a psychotherapist-patient privilege in the Federal Rules of Evidence: "[T]here is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment." *Advisory Committee's Notes to Proposed Rules*, 56 F.R.D. 183, 242 (1972) (quoting GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT NO. 45, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION IN THE PRACTICE OF PSYCHIATRY 92 (1960)).

tence of a formal duty to warn.⁹⁵ And again, this undesirable effect will operate most powerfully in the case of just those patients who could most use therapeutic intervention to help them avoid doing harm to others.

From the perspective of therapists, the prospect of legal liability attaching to the decision to warn or not to warn whenever a patient indicates that he may pose a threat to another makes the treatment of such patients relatively undesirable. If given a choice, one would expect therapists to choose to avoid such patients in favor of others who do not present symptoms of hostility and aggression.⁹⁶

As relatively undesirable patients, people struggling with violent impulses may have difficulty finding therapists willing to treat them. Those who do find treatment are likely to find it among therapists who have little or no choice in the selection of their patients. Moreover, therapists who do find themselves treating such patients may be tempted to engage in measures designed to mini-

⁹⁵ See DONALD J. DAWIDOFF, *THE MALPRACTICE OF PSYCHIATRISTS* 44 (1973) ("[T]he essence of much psychotherapy is the learning of trust in the external world by the formation of a trusting relationship with the therapist."); William O. Faustman & David J. Miller, *Considerations in Prewarning Clients of the Limitations of Confidentiality*, 60 *PSYCHOL. REP.* 195 (1987); Rosenhan et al., *supra* note 3, at 1192 ("Establishing a trusting relationship is considered a fundamental aspect of effective psychotherapy [I]f the trust between the therapist and patient is not developed because of the potential revelation of confidential communications to outside parties, the likelihood of achieving success in therapy may be frustrated."). But see *id.* at 1192 n.174 for a brief discussion of commentators who have suggested that the existence of the *Tarasoff* duty can have therapeutic benefits for patients.

The Federal Court of Appeals for the District of Columbia has written eloquently on the importance of trust and emotional intimacy in the relationship between therapist and patient:

The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition.

Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting M. GUTTMACHER & H. WEINOFEN, *PSYCHIATRY AND THE LAW* 272 (1952)).

⁹⁶ Two of the three most extensive empirical studies of the effect of the *Tarasoff* case on the practice of therapists found that this dynamic indeed existed. For example, a project conducted by a team of researchers in 1987 found that 46% of responding psychotherapists have in one way or another avoided treating potentially dangerous patients. Rosenhan et al., *supra* note 3, at 1209. They further found that among these therapists, 40.3% indicated that they avoid such patients at least in part out of fear for possible *Tarasoff* liability. *Id.* See also Wise, *supra* note 76.

Given that these two studies were based upon direct surveys of therapists, it is remarkable that they have uncovered significant evidence of avoidance of potentially violent patients. Such a result was not anticipated by Rudegeair and Appelbaum when they wrote, "Given that therapists are likely to be reluctant to describe any history of 'abandonment' when asked on a questionnaire, the demonstration of this predicted outcome would require a more oblique research instrument." Rudegeair & Appelbaum, *supra* note 75, at 424. Relying on more informal anecdotal data, Rudegeair and Appelbaum recount that "[w]e know many therapists who report avoiding 'dangerous' patients, in part because of their concern over the potential for liability." *Id.*

See also Paul S. Appelbaum et al., *Statutory Approaches to Limiting Psychiatrists' Liability for Their Patients' Violent Acts*, 146 *AM. J. PSYCHIATRY* 821 (1989) ("[I]t is claimed that . . . fear of liability may drive therapists away from treating potentially violent patients."); Howard Gurevitz, *Tarasoff: Protective Privilege Versus Public Peril*, 134 *AM. J. PSYCHIATRY* 289 (1977); Meyers, *supra* note 75, at 44; Stone, *supra* note 59, at 371-72.

mize their risk of *Tarasoff* liability. Such measures might include especially vigorous advance warnings to the patient of the possibility of the therapist having to issue a warning, steering conversation with the patient away from problematic topics, or subtly signaling to the patient in other ways that the therapist would find discussion of hostile impulses towards others unwelcome.⁹⁷

Viewed in this way, the adoption of a formal *Tarasoff* duty to warn can be seen as aligning the self-interest of both the patient and the therapist in the effort to avoid circumstances in which the obligation for the therapist to issue such a warning might arise. Patients may avoid treatment or avoid making any revelations during the course of treatment that could possibly trigger the obligation. Therapists may avoid problematic patients altogether or discourage any such patients that they treat from discussing thoughts or feelings that could be interpreted as constituting a threat. Each of these responses to the existence of a formal duty to warn will make it far less likely that persons wrestling with violent impulses towards others will be moved from the path of implementing those impulses by effective psychiatric treatment.

Further, because neither therapists nor patients can know in advance with much certainty whether their interactions will lead into this dangerous territory, the chilling effect on the willingness to seek treatment, on the selection of patients, and on the unfettered range of issues explored during therapy can be expected to exert its influence, to varying degrees, across the full spectrum of psychiatric practice. This is especially true with respect to the reduction in trust invested by patients in therapists once they learn that the therapist could, conceivably, be forced by law to reveal their confidences in a way that is almost certain to cause them great pain. Thus the existence of a *Tarasoff* duty can be argued to impose harm on the efficacy of psychiatric care far beyond the specific patients that are likely to trigger an actual *Tarasoff* warning.

4. *Involuntary Civil Commitment*

The third broad front of argument that can be mounted against the creation of a formal duty to warn revolves around the possibility of involuntary civil commitment. Now, as in California at the time of the *Tarasoff* case, it is possible for a person to be physically detained against his will without having engaged in any criminal activity, nor even having raised in anyone a reasonable suspicion of having committed a crime.⁹⁸ This possibility, a rare hole in the fabric of constitutional doctrine designed to limit the possibility of incarceration to, and even within, the criminal justice system, is created by the existence

⁹⁷ In the Stanford Study, conducted just one year after *Tarasoff*, a significant minority of responding therapists, approximately 25%, indicated that they were reluctant to discuss with patients issues that might reveal the patients' propensity for violence. Wise, *supra* note 76, at 188.

⁹⁸ Both at the time of the *Tarasoff* case and at present, involuntary civil commitment practice in California is governed by the Lanterman-Petris-Short Act. CAL. WELF. & INST. CODE §§ 5000-5550 (West 1998 & Supp. 2006). See Meredith Lenell, Note, *Lanterman-Petris-Short Act: A Review After Ten Years*, 7 GOLDEN GATE U. L. REV. 733 (1977). For a discussion of the conditions and circumstances that led to the passage of the act, see William M. Burke, Note, *The Need for Reform in the California Civil Commitment Procedure*, 19 STAN. L. REV. 992 (1967).

of what are commonly known as involuntary civil commitment statutes.⁹⁹ These statutes typically authorize the unconsented incarceration of a person thought to be mentally ill for the purpose of psychiatric evaluation and possible treatment.¹⁰⁰

The existence of involuntary civil commitment is relevant to an analysis of a formal therapist duty to warn in at least two ways. One is the much greater attractiveness to therapists of the involuntary commitment option in the presence of a formal therapist duty to warn.

Imagine a patient who behaves in a way that raises a reasonable suspicion that the patient may pose a risk to another in a jurisdiction that has adopted a therapist duty to warn. The therapist understands that from this point on he faces the twin-horned dilemma of either issuing a *Tarasoff* letter that may subsequently be determined to have been unnecessary or choosing not to warn and face the risk of the patient actually inflicting harm on another. With these two unappealing prospects looming, the therapist may see involuntary commitment of the patient as an appealing option. He could avoid issuing a potentially unnecessary warning to the possible victim and, at the same time, insure that the patient is not actually able to cause harm, at least during the period of involuntary commitment.

Not only will the patient be physically unable to inflict harm during the period of involuntary commitment, the patient's physical confinement is likely to occur, if at all, quickly after the threat is manifested and thus might provide a critical cooling off period, reducing further the risk of eventual harm. Moreover, even an unsuccessful attempt to commit the patient may be beneficial to the therapist inasmuch as it creates a record of a formal determination that the patient's condition does not satisfy the standards for involuntary civil commitment, and thus may not rise to the legal requirement of issuing a *Tarasoff* warning. In addition, therapists operating in a *Tarasoff* jurisdiction are likely to be

⁹⁹ Two other circumstances in which citizens can be held against their will for a comparably long period of time without having been convicted of a crime are: (1) pretrial detention without bail, *United States v. Salerno*, 481 U.S. 739 (1987); and (2) civil detention of juveniles, *Schall v. Martin*, 467 U.S. 253 (1984).

¹⁰⁰ For example, the current statute in California provides:

When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, designated members of a mobile crisis team provided by Section 5651.7, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation.

Such facility shall require an application in writing stating the circumstances under which the person's condition was called to the attention of the officer, member of the attending staff, or professional person, and stating that the officer, member of the attending staff, or professional person has probable cause to believe that the person is, as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled. If the probable cause is based on the statement of a person other than the officer, member of the attending staff, or professional person, such person shall be liable in a civil action for intentionally giving a statement which he or she knows to be false.

CAL. WELF. & INST. CODE § 5150 (West 1998). A compilation of involuntary civil commitment statutes is available at A.B.A. COMM'N ON THE MENTALLY DISABLED, *INVOLUNTARY CIVIL COMMITMENT: A MANUAL FOR LAWYERS AND JUDGES* 85-128 (1988).

more sensitive and attentive to their patients' expressions of hostility towards others, and this, too, may lead to an increase in involuntary civil commitments.

For all of these reasons, therapists operating under a duty to warn regime may find the option of seeking the involuntary civil commitment of problematic patients significantly more attractive than therapists who do not operate under such a duty. To the extent that the involuntary commitment of mentally ill persons represents an undesirable, even if necessary, exception to the usual constitutional protections against incarceration without criminal fault, the creation of an incentive for therapists to seek such commitments in larger numbers and with greater vigor must be viewed as a social cost generated by a therapist duty to warn.¹⁰¹

The second way in which the existence of involuntary civil commitment statutes influences judicial determinations regarding a formal therapist duty to warn is more internal to the deliberations of, and the political constraints inevitably faced by, appellate courts. Given their unusual nature and the history of severe abuse associated with them in other countries, it is not surprising that involuntary civil commitment statutes have been the target of controversy and sustained constitutional challenge for more than thirty years.¹⁰² At the time of the *Tarasoff* case, and at present, the basic standard for the constitutionality of such statutes is that they must, at a minimum, require a determination by a psychiatric professional that the person subject to civil commitment poses a present danger to himself or to others and that this determination be reviewed and adjudicated before a neutral magistrate within three days of the start of confinement.¹⁰³

Any court, including the California Supreme Court in *Tarasoff*, comes to a case that raises the prospect of a formal duty to warn with an awareness of the rich history of constitutional litigation involving involuntary civil commitment

¹⁰¹ See SIDNEY BLOCH & PETER REDDAWAY, *RUSSIA'S POLITICAL HOSPITALS: THE ABUSE OF PSYCHIATRY IN THE SOVIET UNION* (1977); Svetlana V. Polubinskaya, *Law and Psychiatry in Russia: Looking Backward and Forward*, in *THE EVOLUTION OF MENTAL HEALTH LAW* 113, 113-15 (Lynda E. Frost & Richard J. Bonnie eds., 2001).

¹⁰² For interesting accounts of the long history of legal challenges to involuntary civil commitment, see ROBERT D. MILLER, *INVOLUNTARY CIVIL COMMITMENT OF THE MENTALLY ILL IN THE POST-REFORM ERA* xiii-xvii, 3-20 (1987); MICHAEL L. PERLIN, *1 MENTAL DISABILITY LAW* 1-36 (2d ed. 1998).

¹⁰³ RALPH REISNER, *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 330-33 (1985). The seminal United States Supreme Court case in the area is *Addington v. Texas*, 441 U.S. 418 (1979). Two important Supreme Court decisions leading up to the *Addington* case were *Jackson v. Indiana*, 406 U.S. 715 (1972) (applying the federal constitutional due process clause to involuntary civil commitment), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (finding a constitutional liberty right possessed by nondangerous persons who suffer from mental illness). See ROBERT F. SCHOPP, *COMPETENCE, CONDEMNATION, AND COMMITMENT* 28-32 (2001).

Unsurprisingly, some observers believe that the mere existence of these legal standards is insufficient to protect persons subject to involuntary civil commitment proceedings adequately. Bruce J. Winick, *The Civil Commitment Hearing: Applying the Law Therapeutically*, in *THE EVOLUTION OF MENTAL HEALTH LAW*, *supra* note 101, at 291, 293 ("Although due process theory may require a formal adversarial judicial hearing, a large gulf exists between law on the books and law in action in this context. The formal due process model is often undermined by the way many attorneys representing individuals in civil commitment hearings play their roles.").

statutes.¹⁰⁴ As a result, the justices must understand that no matter how factually persuasive they may find the argument that psychiatrists and therapists are not trained for, not experienced in, and not competent to make predictions of future violent behavior by their patients, it would be jurisprudentially awkward publicly to base a decision not to adopt a formal duty to warn on this rationale when the prevailing constitutional standard for involuntary civil commitment statutes implicitly depends for its soundness upon just such predictive competence by psychiatric professionals. Any published opinion in the duty to warn area that acknowledged the problematic aspects of therapist predictions of future harmful behavior by their patients could be expected to be quickly taken up by opponents of involuntary civil commitment in an effort to reopen that constitutional controversy.¹⁰⁵

Thus, a very important line of argument against the adoption of a formal therapist duty to warn – starting with therapists' lack of training, experience, and competence in the prediction of dangerous behavior, moving on to the high level of false warnings that are likely to be produced as a result, and then recognition of the enormous personal and social cost generated by these false warnings – is burdened by the consequence that embracing these arguments is likely to have on a largely unrelated area of jurisprudence. Moreover, this burden is wholly unrelated to the factual accuracy of the argument or to the courts' perception of the actual number of damaging false warnings likely to be issued as a result of the adoption of a duty to warn rule.

5. *Definitional Difficulties*

One last area of concern regarding the adoption of a formal therapist duty to warn is also somewhat internal to the operation of the rule within the common law court system. Appreciation of these concerns begins with recognition that, in many ways, the specifics of the *Tarasoff* case present to the courts a nearly ideal set of facts upon which to ground the creation of a therapist duty to

¹⁰⁴ Excellent summaries of the legal treatment of involuntary civil commitment in this country are provided by PAUL S. APPELBAUM, *ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE* 17-33 (1994); JOHN Q. LA FOND & MARY L. DURHAM, *BACK TO THE ASYLUM* 82-116 (1992); Perlin, *supra* note 102, at 52-61.

¹⁰⁵ Concerns about the ability of therapists to predict accurately the future violent behavior of those suffering from mental illness have always resided near the core of legal challenges to involuntary civil commitment statutes. SCHOPP, *supra* note 103, at 213-15; John J. Monahan & Henry J. Steadman, *Violence Risk Assessment: A Quarter Century of Research, in THE EVOLUTION OF MENTAL HEALTH LAW*, *supra* note 101, at 195-200.

After a period of relative dormancy, the movement to circumscribe involuntary civil commitment legally has been revived in response to the passage of modern sexual predator statutes. SCHOPP, *supra* note 103, at 135-87; CHRISTOPHER SLOBOGIN, *MINDING JUSTICE* 254 (2006) ("Since the resurgence of sexual predator statutes in the 1990s, literally hundreds of judicial decisions have grappled with the definition of mental abnormality in connection with commitment of sex offenders who have completed their prison terms."). The United States Supreme Court addressed federal constitutional due process, double jeopardy, and ex post facto aspects of a one such sexual predator statute in *Kansas v. Hendricks*, 521 U.S. 346 (1997).

The newest wave of legal challenge to involuntary civil commitment statutes and practices is based upon provisions of the Americans with Disabilities Act of 1990. *See, e.g.,* PERLIN, *supra* note 102, at 127-33.

warn. In the *Tarasoff* case a patient currently under the care of a fully licensed psychiatrist discloses to the doctor a concrete plan to kill a specifically named individual in the near future, and in fact actually causes that person's death within the announced time frame. The court then finds that under these circumstances the doctor had an obligation to inform the individual of the impending danger, and consequently a formal legal duty to warn is born.

However, one can hardly expect most of the cases that will come before the courts requiring adjudication under the *Tarasoff* duty to be as simple and as clean as the *Tarasoff* case itself. Hence, the adoption of this new duty will inevitably require the courts to confront variations of facts that will push the new duty, and its more precise definition, along a number of dimensions.

For example, what kind of harm must be threatened by the patient in order to trigger the therapist's formal duty to warn? *Tarasoff* involves a threat of death, but what about a threat of bodily harm that does not pose a risk of permanent physical injury or death? What about a threat of a moderate physical beating, or a single punch, or a slap across the face, or a shove or a trip? What about a threat to the intended victim's emotional well-being? Or to her property? Or her reputation?

Prosenjit Poddar indicated to Dr. Moore his intention to kill Tatiana Tarasoff. What if another patient indicated to his therapist his intention to kill a specific, but unnamed, individual? Or if the patient never specifically named the intended victim but the therapist deduced or could have reasonably deduced the identity? What if the therapist might have identified the victim with some modest investigative efforts, including non-therapeutic interrogation of the patient? If the patient threatens serious physical injury to "my family," or to "my enemies at work," or to "those lawyers," does the therapist have a legal duty to warn a threatened group of people, and of up to what size?

The threat in *Tarasoff* was communicated to, and thus the duty descended upon, a fully licensed medical doctor of psychiatry. What if the caregiver learning of the threat was a licensed therapist who was not a medical doctor, or a working therapist who did not require a license to practice in the jurisdiction, or a psychiatric nurse? Does, or should, the formal duty apply to a university or school counselor, a professor or a teacher, a licensed physician not providing psychiatric care to the patient, an attorney, a family member, or a best friend?

Though none of these many difficult questions need to be answered, or even confronted directly, in order to impose a formal duty to warn in the *Tarasoff* case, the court's adoption of a general duty in that case inevitably commits the jurisdiction to a future encounter with these many unresolved aspects of the doctrine. In addition, until these open issues are dealt with by courts, or by the legislature of the state, those who may be affected by the duty must operate under uncertainty and speculation as to the ultimate contours of the rule.

C. *Tarasoff as Instrumentalist Jurisprudence*

Given the preceding arguments both in favor and against the adoption in law of a formal therapist duty to warn, one can see the rather dramatic difference that the choice of a formalist or an instrumentalist approach to the prob-

lem would make. A formalist court would focus primarily upon the degree to which a newly recognized duty to warn could be found to have antecedents in the tort jurisprudence of the jurisdiction, whether it could be determined to be consistent, at least analogously, to broader tort principles and maxims, and how it might reside harmoniously among the existing precedents in the area. An instrumentalist court, on the other hand, would focus primarily on identifying and balancing the likely practical benefits of the new duty against its costs, as did the California Supreme Court.

The realist revolution, over the years, produced a fully-developed analysis of the many problems inherent in a formalist regime. As the newly ascendant and currently dominant paradigm, the instrumentalist approach has not yet been subjected to nearly as pervasive and widely accepted a critique. The *Tarasoff* case can serve as a useful and appropriate vehicle for a modest start at identifying some of the more obviously problematic aspects of the instrumentalist approach.

IV. THE PROBLEMATIC NATURE OF CONDUCTING INSTRUMENTALIST ANALYSIS WITHIN A FORMALIST PROCEDURAL STRUCTURE

Perhaps the most pervasive problem with the approach adopted by the *Tarasoff* court to the question of whether there should exist a formal duty to warn imposed upon therapists is that it engages in a primarily instrumentalist endeavor within the confines of a court structure and appellate procedures designed and built for a formalist world. In other words, the court in *Tarasoff* and appellate courts generally operating within the instrumentalist paradigm are committed to engage in analysis about the likely practical consequences of competing versions of legal doctrine without the benefit of any regular structured means by which to identify and scrutinize such consequences seriously. Appellate courts engaged in instrumentalist analysis are required to ground their decisions in an analysis of the likely consequences of these decisions on regulated communities about which the members of the court may have little or no actual knowledge or experience and about which appellate procedures provide them with almost no means to learn reliably.¹⁰⁶

For example, in the *Tarasoff* case it is absolutely clear that one critical element in an instrumentalist analysis of the issue is the determination of the extent to which the creation of a formal duty to warn will cause therapists to issue more false warnings than they would otherwise. Even more critically, the court must estimate the number of false warnings that will be issued by therapists in response to the duty compared to the number of valuable warnings that the existence of the duty will provoke. In other words, how will the ratio of false warnings to necessary warnings be altered when the jurisdiction moves from there being no duty to warn to the embrace of a *Tarasoff* duty?

Under current appellate procedures, this is seriously problematic. How are appellate court judges supposed to come to such a judgment? How are they expected even to begin a useful journey to such a determination?

¹⁰⁶ For an excellent and interesting explication of this point, see PHILIP SHUCHMAN, PROBLEMS OF KNOWLEDGE IN LEGAL SCHOLARSHIP 24-60 (1979).

The judges may have no direct experience whatsoever with psychiatrists or therapists, or their patients, or the therapeutic process. Worse still, they personally may have had some direct personal experience with therapists and psychiatric therapy and, as a result, be tempted to over-extrapolate from this very specific personal experience to therapists and patients and therapy in general. Moreover, this utterly uncertain and wholly random possession of specialized knowledge and experience regarding the activity affected by the legal doctrine at issue characterizes as much the attorneys who develop and deliver the arguments to the court as it does the judges who evaluate those arguments and ultimately decide.

Not only is there no assurance that the professionals developing instrumentalist arguments, or those analyzing them, possess any particular substantive experience or expertise on the activity being regulated, existing appellate procedures provide the court with practically no opportunity to bring such expertise into the process. Appellate courts generally work with the record of the proceedings in the lower courts, the written briefs of the parties, and perhaps *amici curiae*, and the oral arguments of counsel. The parties may make assertions regarding the likely consequences of one interpretation of a legal doctrine or another, and these assertions may be footnoted in the briefs, but they are not permitted to bring persons with relevant expertise or experience into the appellate proceedings to testify and be cross-examined for the benefit of the appellate court. Similarly, appellate courts do not routinely seek independent experts to educate and advise them as to the likely practical consequences of their decisions.

While the kind of expert testimony, independent expert input, and factual investigation that are little part of the appellate process are indeed a regular part of trial court procedure, procedures at the trial level of litigation are designed primarily to provide a fair forum for the resolution of specific disputes between parties. As such, they are poorly suited to create a record that provides appellate courts with a factual picture that is accurate or representative of the regulated community as a whole. By its nature, the fact finding process at the trial level is focused on the specific history of the parties and their disputes and has no concern with, and makes no investment in, determining the degree to which the specific facts of the instant case fairly represent the regulated community as a whole.

Even if the actual real life facts of a specific case would be considered to be reasonably representative of the larger community affected by the legal doctrine at issue, there are many aspects of trial procedure that make it unlikely that the abstracted legal facts developed to determine the eventual outcome of the case at the trial level will provide the appellate courts with a good and sufficient factual basis for instrumental analysis. In other words, there are many reasons to believe that the factual representation of any specific case that comes before an appellate court enjoys only a modest correspondence to the actual factual incidents that transpired among the parties. Thus there is less reason to believe that the factual version of the case presented to the appellate courts bears strong correspondence to the usual experience of participants in the regulated community.

The dynamics by which the actual facts of a dispute may differ significantly from the presentation of those facts to an appellate court begin with the inevitable sophistication of parties who become regular, recurring, albeit reluctant, participants in litigation. Such parties learn fairly quickly to develop their methods of recording facts and to design their systems for maintaining, organizing, and purging factual records in a manner that provides them with maximum strategic advantage in possible future litigation. Thus, in such cases, the framework within which the basic facts of a transaction are gathered, maintained, and made available for legal discovery is oriented far less toward historical or empirical accuracy than it is towards the tactical advantage of the party in possession of the factual records.

Once litigation commences, the process of factual investigation is undertaken exclusively by the interested parties themselves. In the pursuit of factual discovery the parties are, of course, motivated far more by a desire to uncover or conceal information that is strategically relevant to the litigation rather than any ambition to develop a full and accurate factual picture of events. Thus, the process of factual investigation is heavily influenced by, indeed it operates entirely within, the specific contours created by the relevancy of information as determined by the legal doctrines likely to be applied to the case and by the admissibility of that information as determined by the rules of evidence. Moreover, the accuracy and thoroughness of the factual picture developed by the discovery process is also compromised by the financial limitations faced by the parties, limitations that place pressure on the attorneys to focus their investigative efforts narrowly on only the most strategically valuable information.

Even beyond the distorting effect of possible future litigation on the maintenance of factual data and the vast difference between an objective empirical investigation and the legal discovery process, there are a plethora of legal doctrines that routinely come into play during litigation that cause the official version of facts in a trial to vary significantly from the actual historic events.¹⁰⁷ Included among these devices are factual stipulations entered into by the parties and admissions, both of which are routinely encouraged by trial court judges, and neither of which are required to be empirically accurate in order to become an undisputed part of the factual record of the case.¹⁰⁸ In a similar way, other

¹⁰⁷ During the 31st Annual Benjamin N. Cardozo Lecture, delivered before the Association of the Bar of the City of New York in 1974, Marvin E. Frankel, United States District Judge, famously stated that "our adversary system rates truth too low among the values that institutions of justice are meant to serve." Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975).

¹⁰⁸ See *Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co.*, 149 S.E.2d 625, 631 (N.C. 1966) ("[Parties] may, by stipulation or judicial admission, establish any material fact which has been in controversy between them, and thereby eliminate the necessity of submitting an issue to the jury with reference to it. Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position."); *Andrews v. Olaff*, 122 A. 108, 111 (Conn. 1923) ("A stipulatory agreement thus arrived at ought not to be disturbed or relief afforded contravening it, unless one party deceived the other by false and fraudulent statements known to be untrue, or recklessly made without regard to the fact, or definite information."); MARLA K. CLARK, 26 INDIANA LAW ENCYCLOPEDIA § 10 (2005) ("[O]nce the parties enter into a stipulation and the court approves it, the stipulation is binding on all involved, even if one of the parties learns later through discovery that the stipulated facts are not true.").

doctrinal devices such as formal presumptions and burdens of proof, while critical aids to fairness and efficiency, alter the operation of the fact finding process in litigation so that it potentially operates quite differently than would an objective empirical investigation.¹⁰⁹

Witness testimony is still another area of concern. To the extent that the primary mode of presentation at trial is the live testimony of witnesses, the dependability of the factual result will suffer from the notoriously problematic accuracy of the testimony of witnesses, many of whom are unaware of the importance of the events in question at the time they observed them, who may have made the observations years before they testify about them at trial, and who by the date of their court appearance are typically hyper-aware of the consequences of what they might say.¹¹⁰

In addition to the above, the facts of a situation brought forward at trial may not include many of the salient features of the actual situation due to the existence of standard rules of evidence that exclude relevant, material information from the finder of fact. Sometimes otherwise valuable evidence is excluded because of a concern that, while probative, it is also unacceptably prejudicial to a party.¹¹¹ At other times, accurate information is kept out of the trial process because it falls within one of a number of recognized privileges, including marital,¹¹² doctor-patient¹¹³ and attorney-client.¹¹⁴ In all three cases, the law recognizes that other important societal interests may, under certain circumstances, override the truth-seeking function of a trial.¹¹⁵ While long-standing, well recognized and generally uncontroversial, these evidentiary rules

Of course, courts should not accept stipulations agreed to by the parties that are demonstrably false. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 497 (1951); *Dillon, Read & Co. v. United States*, 875 F.2d 293, 300 (Fed. Cir. 1989).

¹⁰⁹ See CLIFFORD S. FISHMAN, *JONES ON EVIDENCE: CIVIL AND CRIMINAL* § 4:8 (7th ed. 1992). See generally *id.* at §§ 3:1-3:45, 4:1-4:16 ("Likewise courts and legislatures sometimes create presumptions to implement social policy by assisting one class of litigants against another.").

The United States Supreme Court has disfavored the use of mandatory presumptions in criminal cases, saying that such presumptions "invade the fact-finding function of the jury." *Carella v. California*, 491 U.S. 263, 268 (1989) (Scalia, J., concurring) (quoting *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979)).

¹¹⁰ See ELIZABETH F. LOFTUS & JAMES M. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* 9-93 (Lexis Law Publishing 1997); Gary L. Wells, *Scientific Status, in SCIENCE IN THE LAW: SOCIAL AND BEHAVIORAL SCIENCE ISSUES* 391, 402-13 (David L. Faigman et al. eds., 2002).

¹¹¹ "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. A trial court's determination that evidence should be excluded on the basis of unfair prejudice is typically given great deference by appellate courts. *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1340 (1st Cir. 1988) ("Only rarely – and in extraordinarily compelling circumstances – will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect.").

¹¹² UNIF. R. EVID. 504.

¹¹³ UNIF. R. EVID. 503.

¹¹⁴ UNIF. R. EVID. 502.

¹¹⁵ David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110 (1956) ("[W]hatever handicapping of the adjudica-

nevertheless have the consequence of causing the formal legal record of facts in a given case to deviate, possibly quite significantly, from the actual factual experience of the parties.¹¹⁶

Finally, even after the conclusion of all trial activity and the issuance of a final judgment, it may not be at all clear to an appellate court what precise version of disputed facts was adopted by the finder of fact in the case. For example, in a case that is tried before a jury that returns a general verdict, the appellate court receives the trial record containing evidence presented by the parties, some of it potentially conflicting and contradictory, and also sees the jury's general verdict. From these materials, there is often no way for the appellate court to know what version of disputed facts was relied upon by the jury in reaching its verdict. In fact, the appellate court has no real guarantee that the jury as a group actually agreed on a specific, coherent characterization of the facts of the case.

For all of the above-described reasons, appellate courts can not confidently assume that the facts presented to them in any given case accurately reflect the actual factual history of the parties. Moreover, the appellate courts have no serious factual basis for believing that the presented facts of any given case represent the typical behavior of similarly-situated parties, or in any way present a reasonably accurate picture of the regulated community at large. In the absence of such assurances, the development of important legal doctrine on a case by case basis by appellate courts employing an instrumentalist approach seems, at best, to be problematic.

V. CONCLUSION

A fundamental change has taken place in the way in which the legal community views the nature of common law jurisprudence in this country. At the beginning of the twentieth century, it was widely accepted that appellate courts determined the outcome of disputed issues of law predominately by the application of pre-existing precedent and time-honored legal maxims. When a particular case presented a novel problem, the court would strive to place the new issue appropriately securely within the existing pattern of precedent and to reason by analogy from existing principles. The common law would develop and evolve incrementally as solutions to these new problems that were thought to

tory process is caused by recognition of the privileges, it is not too great a price to pay for secrecy in certain communicative relations.”).

¹¹⁶ *State v. 62.96247 Acres of Land in New Castle Hundred*, 193 A.2d 799 (Del. Super. Ct. 1963) (“There are many exclusionary rules of evidence that are intended to withhold evidence which is regarded as unreliable or regarded as prejudicial or misleading, but rules of privileged communications have no such purpose. Such rules of privilege preclude the consideration of competent evidence which could aid in determining the outcome of a case.”); KENNETH S. BROUN, *McCORMICK ON EVIDENCE* § 72 (6th ed. 2006) (“[T]he rules of privilege . . . are not designed or intended to facilitate the fact-finding process or to safeguard its integrity. Their effect instead is clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light.”); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* 285 (3rd ed. 2003) (“[Privileges] are not designed to enhance the reliability of the fact finding process. On the contrary, they impede the search for truth by excluding evidence that may be highly probative.”).

be harmonious with existing doctrines came to be recognized and accepted. The primary work of the common law courts was thought to be this distinctive identification, maintenance, inductive development, and case-specific deductive application of the body of precedent in its jurisdiction. This is sometimes known as formalism.

Now, at the beginning of the twenty-first century, few members of the legal community believe that the operation of common law courts is fundamentally formalist in nature. Starting with the influence of the legal realists in the 1920s, a profound shift has taken place in the dominant conception of the nature of common law jurisprudence. Currently, it is widely understood that common law courts should, and do, approach the resolution of disputed issues of law by comparing the anticipated costs and benefits of competing versions of doctrine and adopting the rule that offers the greatest promise of influencing the behavior of members of the regulated community in a way that will most effectively address perceived social needs.

This is common law seen less as the logical working out of basic first principles into an ever fuller, more detailed and complete canon, than it is a view of the common law as a practical social tool by which certain desirable goals are pursued. Common law from this perspective does not stand apart as some kind of distinctive body of logically-derived high principle, but instead joins other governmental and social mechanisms in an ongoing effort to solve current social problems and achieve communal goals. This currently dominant paradigm of common law adjudication can be called instrumentalism.

One of the most distinctive characteristics of our current system of common law is that, while widely understood to be instrumentalist in its analysis, it operates within a structure and follows basic procedures that are profoundly formalist in nature. Thus, while appellate courts, like the California Supreme Court in the *Tarasoff* case, consider the creation of significant new common law doctrine by identifying and weighing its likely consequences in the regulated community and beyond, the appellate courts do not have available to them the procedural tools to investigate adequately the factual nature of the regulated community at issue or the anticipated consequences in that community of one version of legal doctrine or another.

Moreover, the nature of factual investigation in civil litigation is such that an appellate court cannot with confidence view the record below as being an accurate and complete depiction of what actually transpired between the parties in the instant case. It has essentially no empirical basis for believing that the facts of the instant case are fairly or usefully representative of the larger regulated community. In the absence of reasonable means by which to investigate seriously the salient factual features of the regulated community and to determine the likely effects of one legal rule or another on the behavior of participants in that community, appellate courts engaged in instrumentalist analysis are grounding their conclusions, and thus basing the common law itself, on essentially intuitive and seemingly commonsensical beliefs and notions regarding the regulated community and the dynamics of its operation, notions that may or may not correspond to the actual reality of the situation.

The above analysis attempts to illustrate the shift that has occurred in common law jurisprudence from formalism to instrumentalism, using the well-

known case of *Tarasoff v. Regents of the University of California* as an example. In addition, I have tried to describe the many difficulties that courts face, especially appellate courts, when they engage in instrumentalist legal analysis within the procedural confines of our still predominately formalist system of common law adjudication.

I am in no way arguing for a return to a more formalist past. The fundamental paradigm shift has occurred and our current understanding of common law jurisprudence is now dominantly instrumentalist in nature. Less vigorously noted and analyzed, however, are the many interesting consequences that flow from the operation of instrumentalist jurisprudence within a largely formalist procedural structure. It is my hope that the preceding analysis helps in moving such a discussion forward, and in some small way may stimulate further work in this area.