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# Judicial Opinion Analysis

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# JUDICIAL OPINION ANALYSIS

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## INTRODUCTION

The aim of this paper is to suggest a method of judicial opinion analysis. This method has five essential aspects: (1) form; (2) procedure; (3) precedential-value; (4) authority; and (5) substance. Observation of these aspects in judicial opinions should broaden legal and jurisprudential perspective and cause critical analysis of case dispositions.

Such an opinion analysis will automatically raise the critical questions which should be asked when reading a judicial opinion:

1. What form aspects did the court use in trying to persuade and convince the reader of the opinion's soundness? (form analysis)
2. Did the court decide the narrow issue or issues squarely on the merits? (procedural analysis)
3. What is the narrowest and broadest holding the decision can be used for as precedent? (precedential-value analysis)
4. What type of authority, whether formal or nonformal, did the court use as grounds for the decision? (authority analysis)
5. From what doctrine or jurisprudential school did the court, or could the court, have derived its substance or reasons? (substance analysis)

Admittedly, the subject, i.e. judicial opinion analysis, is broad, so a number of qualifications are necessary. First, there will be no attempt to discuss in detail the many jurisprudential topics touched on while presenting the method of opinion analysis. This type of presentation is well beyond the scope of this paper. More

again the narrow purpose is to suggest a method of opinion analysis which will broaden perspective and facilitate critical opinion analysis. Second, the suggested method of analysis presented here is not intended to represent the only way to analyze opinions. The suggested method is not a closed system of legal method to be memorized. Third, since the suggested method of analysis can be applied to any area of the law, no attempt will be made to confine it to a particular field or sub-field of law, e.g. tort, criminal, or contract. Within these limits, this paper serves only as a pedagogical instrument by which opinion analysis is systemized and clarified.

Organization will be in two parts. Part I will give background information on United States v. Holmes.[1] This case will be used in an attempt to make explanation of the five aspects of case analysis more concrete and clear.[2] Part II will enumerate and explain the five aspects of opinion analysis and show how they could be applied to Holmes, supra. For pedagogical purposes, the order of presentation in Part II will move from the experiencial stage to the reflection stage. For example, it will be assumed that when one reads a judicial opinion one might

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[1] 26 F.Cas. 360 (No. 15,383) (C.C.E.D.Pa. 1842). Hereinafter cited as "Holmes."

[2] See Samuel Kermin's The Study of Jurisprudence--A Letter To A Hostile Student, 49 Mich.L.R. 39, et seq. (1950), for clearness in jurisprudential writing, i.e. the use of stipulation, conventional usage and example in the definition of concepts.

normally first observe the form aspect, i.e. language, rhetoric, style and logic. Thereafter, the procedural posture may be noticed and then the legal issues, holdings and reasons. Lastly, there is reflection on precedential-value, authority and jurisprudential substance.

## I. BACKGROUND: UNITED STATES v. HOLMES

Holmes was a seamen aboard the American ship William Brown sailing from England to the United States. After one month at sea, the ship hit an iceberg and began to sink. The long-boat and jolly-boat were launched and filled with the ship's passengers and crew, except for 31 persons who were obliged to stay behind on the ship.

After the ship went down, the long-boat and jolly-boat separated. The captain was in the jolly-boat and placed the first mate in charge of the long-boat. Before the separation, the captain told the crew members in the long-boat to obey the first mate's orders. They promised to do so.

The overloaded long-boat made its way adequately on the high sea until a rain storm caused it to fill with water. After a period of bailing and without adequate consideration of the degree and imminence of jeopardy,[3] the first mate ordered Holmes and the other crew members to throw some of the passengers overboard: "This work (bailing) won't do. Help me, God. Men, go to work."[4] (parenthesis added). The record shows that Holmes and the

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[3] Holmes at 361, top-right.

[4] Id.

crew did not proceed immediately upon this order.[5] After a time of reflection, the mate exclaimed again: "Men, you must go to work, or we shall all perish."[6] This time Holmes and the crew responded and 14 male passengers went involuntarily over the side to their death. No husband and wife who were present together at the time, or women, were involuntarily thrown over. Moreover, although the possibility of having to throw passengers overboard was forseen by the mate and the crew,[7] no notice was given or lots cast as a manner of selection before Holmes and the crew went to work.

Shortly thereafter, the long-boat and jolly-boat were rescued and the crew and passengers taken to the United States. Holmes was indicted for manslaughter on the high sea under a United States statute.[8] A jury trial was conducted in the federal circuit court for the Eastern District of Pennsylvania.[9]

After all the evidence was presented and the case went to the jury, a guilty verdict was returned with a

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[5] Id.

[6] Id.

[7] Id. at 361, top-left.

[8] The record is silent as to the indictment of other crewmen.

[9] In 1842, the year of the trial, the U. S. Circuit Courts had exclusive and original jurisdiction of all major federal crimes pursuant to the Justice Act of 1789. As a result, the action was not prosecuted in the federal district court.

recommendation for mercy. A motion for arrested judgment and a new trial was entered based on an error in the law instruction to the jury and insufficiency of the indictment. The motion was denied and no appeal followed to the United States Supreme Court, because at this time there was no provision in the federal law for criminal appeals.[10] However, there was a clemency plea made to the president which was denied.

During the trial, the government, and the court in its instructions to the jury, argued that as a matter of law Holmes, as a seamen, had an unqualified moral, social and legal duty to the passengers even where death was imminent and the indicted acts were carried out under orders from the first mate. The defense argued that the above extreme circumstances, i.e. weather and orders, qualified any duty Holmes had to the passengers. Consequently, he could not be held criminally responsible for his acts. These two positions point up the legal and jurisprudential issue, i.e. qualified or unqualified duty, which will be discussed throughout this paper.

Again, the Holmes case will be used in an attempt to concretize the five aspects of opinion analysis suggested in Part II and to show how these aspects of opinion analysis operate.

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[10] Appellate review of federal criminal convictions was not provided until later by the Criminal Appeals Act. 18 USC, Sec. 3731.

## II. METHOD OF JUDICIAL OPINION ANALYSIS

### A. Form Analysis

Form makes substance what it is, so was Mr. Justice Cardozo's faith.[11] For Cardozo this was true even though he readily admitted that maybe form and substance are philosophically inseparable.[12] A proper analysis of the form operating in judicial opinions clarifies substance and organizational patterns.

Form here will definitively have four aspects: (1) language levels; (2) rhetorical devices; (3) writing style; and (4) logical structure.[13] These aspects working together to deliver the substance or reasons for an opinion's final conclusion will be described as the form. The reasonableness and soundness of the opinion is in many instances determined by the persuasive and convincing nature of the form selected by the writing judge.

Such form analysis has many advantages: shifts in word and language meaning is observed, rhetorical devices are recognized, opinion styles are classified and compared, and logical structures are observed as they move to conclusions.

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[11] See Cardozo, Law and Literature, as presented in the Introduction to Law, p. 201, Selected Essays reprinted from the Har.L.Rev. (1968).

[12] Id. at 203.

[13] These aspects of form overlap sometimes, but for pedagogical reasons will be divided here.

1. Language levels

Judicial opinion writers consciously or unconsciously use language of various levels of abstraction. This is so, because the object or event of our experience is never fully captured by the symbols of language. The degree of specificity determines how close one's language comes to describing the object or event of one's experience. To illustrate, I borrow from S. I. Hayakawa's modified Korzybskian "abstraction ladder":[14]

(highest level) $L^X$--?

$L^1$--wealth

$L^2$--asset

$L^3$--farm asset

$L^4$--livestock

$L^5$--cow

$L^6$--Bessie

$L^7$--object of experience

$L^8$--unobservable characteristics of the object

(lowest level) $L^Y$--uninterpreted raw-data

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[14] Hayakawa, Language in Thought and Action, 178 (1964).

The above diagram shows the levels of meaning which could be given or predicated of our experience of the object "cow." In descending order, each meaning is more specific and hence closer to the object of experience. By coming down the ladder, a concept's referent is clarified and ambiguities are removed.

This diagram can also be used to clarify high level legal language. For example, in the Holmes case a hypothetical problem of high symbolization might have materialized if Supreme Court review had been available. If the Supreme Court had reviewed the circuit court's refusal of a new trial and just stated "Reversed and Remanded" the lower court would not have known exactly what to do absent specific instructions in the opinion.[15] The "Reversed and Remanded" language alone would have been too high on the ladder of abstraction. The court may have meant a full new trial on one or all the contentions of error or possibly an acquittal. On the other hand, maybe a partial new trial could have been intended. When reading language as high as "Reversed and Remanded" a descent down the ladder of abstraction will aid clarification of specific meaning.

In the Holmes opinion different levels of language can be observed along with shifts from one level to another. In the court's fact narrative a summary of the facts of the record is presented in detail. However, this detail is a

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[15] Cf. Bell, Appellate Court Opinions and the Remand Process, 2 Ga.L.Rev. 526 (1968).

higher level of abstraction than the exact statements on the record. Moreover, the record statements are on a higher level than what actually in fact transpired at the scene of the alleged crime. As the facts are observed and testified to and subsequently recorded and summarized, a movement to a higher level of language is observed. In addition, a noticeable shift can be observed from the judge's statement of facts down to the direct quotes concerning witness observations and abstractions of the actual event.[16]

> "This law,"--i.e. the law of nature,--"cannot be supposed to oblige a man to expose his life to such dangers as may be guarded against, and to wait till the danger is just coming upon him, before it allows him to secure himself." In other words, he need not wait till the certainty of the danger has been proved, past doubt, by its result. (emphasis added)

The second sentence above shows the defense's attempt to clarify a previous higher level statement of the law by a lower level verbal explanation. This verbal explanation could have been further lowered on the abstraction ladder by the use of a concrete example. In this case, the language shift was down and not up as was the case in the judge's narration of the facts discussed previously. Observing the language levels and shifts is also critical in reading a judicial opinion for its holding, because this reveals

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[16] Eg. See Holmes at 361 for shift from the judge's fact narrative down to direct quotes of witness fact observations.

the many possible holdings which can be fairly attributed to an opinion. Precedential holdings will be discussed in Part II, C, infra.

Language study in the law is a broad subject.[17] Without getting into its many problems, the two points of emphasis here for the opinion analyzer are: (1) watch for the levels of language used; and (2) look for the shifts from a higher to a lower level or vice-versa. If the opinion analyzer is conscious of these points he should not be confused by high level abstractions which have not been lowered to a concrete level. By using the ladder of abstraction device, one can pierce the high level rhetoric.

2. Rhetorical Devices

The rhetorical devices employed by the opinion writer are consciously or unconsciously used to supplement his logic and empiric evidence. Traditionally, rhetorical devices are considered to be the words or language used to persuade the whole being and not just the reasoning faculties.[18] So in a sense, rhetoric is a means of persuasion which takes up where logic ends.[19] After logic

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[17] See note 14, supra.

[18] Cf. Richard M. Weaver, A Rhetoric and Handbook, 134-135 (1967).

[19] Id. at 134.

has convinced the mind, rhetoric wins the full assent.[20] "A man convinced against his will is of the same opinion still."[21]

Since logic addresses itself only to the mind,[22] arguments to be effective normally take a form which persuades, affects attitudes and emotions, as well as convinces the mind that all the logical and evidential laws have been obeyed. Keeping in mind this distinction between being convinced and being persuaded is essential, because it keeps one from being unnecessarily convinced by rhetoric instead of logic and evidence.

Many types of rhetorical devices can be observed in judicial opinions. The more emotional types are easy to detect. For example, in Holmes, the defense started its argument with obvious rhetoric apparently intended to convince by persuasion:

> We protest against the prisoner being made a victim to the reputation of the marine law of the country. It cannot be, God forbid that it should ever be, that the sacrifice of innocence shall be the price at which the name and honour of American jurisprudence is to be preserved in this country, or in foreign lands.[23] (emphasis added)

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[20] Id.

[21] Id.

[22] Id. at 136.

[23] Holmes at 364, bottom left. Hereinafter referred to as "opinion."

Here the defense is trying to convince the court of Holmes' innocence by highly emotional rhetoric. It is not an argument based on the evidence and/or the law.

At other times, legal argument in opinions can be seen appealing covertly to the emotions and not just the mind by the use of seemingly objective rhetoric. This device, sometimes referred to as "semantically purified"[24] speech, is harder to detect than the emotional rhetoric. It uses terms such as "fact," "objective," and "concrete." The use of these terms implies that the propositions asserted are per se beyond question, especially since they take on an unemotional language form. In Holmes, this device was used when the defense stated: "It is a well-known fact that in no marine on the ocean is obedience to orders so habitual and so implicit as in our own."[25] This language, and especially the word "fact," gives the air of unbias, objective and nonrhetorical discourse when in fact an appeal to the mind through the emotions is being made.

The opinion analyzer should be on the lookout for these and other rhetorical devices, especially the modern claims of objectivity. On the other hand and as has been implied, all language has some rhetorical content, but this should not necessarily detract from the conclusion if it is

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[24]Richard M. Weaver, The Ethics of Rhetoric, 7 (1968).

[25]Holmes at 365, bottom right.

a sound one. "Sound" as used here means the premises of the arguments are in fact true and the conclusion likewise logically follows. In short, there is "good" rhetoric and "bad" rhetoric. The former seeks to convince through persuasion where in fact the position is logically and empirically sound; whereas, the latter seeks to convince by persuasion where the logic and/or evidence are weak. Arguments in judicial opinions should convince as well as persuade.

3. Style

At the outset, it should be said that there seems to be a relation between the types of style hereinafter discussed and the logical structure modes which will be discussed in the next section as the fourth aspect of form.[26] Such a relation is interesting and a proper subject of investigation, but beyond the scope of this paper. An attempted discussion here would produce too broad a treatment. Consequently, I will narrow my presentation on the style aspect of form to an enumeration of opinion styles as set forth in Cardozo's Law and Literature,[27] thereafter applying them actually and hypothetically to Holmes. A consciousness of style is important, because style has a persuasive nature and may camouflage specious argumentation.

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[26] See Part II, A, 4, infra., p.

[27] See Cardozo, supra, note 11 at 205-215.

Cardozo loosely classified opinion styles into six groups:[28] (1) the magisterial or imperative; (2) the laconic or sententious; (3) the conversational or homely; (4) the refined or artificial; (5) the demonstrative or persuasive; and (6) the tonsorial or agglutinative.

The magisterial or imperative style takes on an air of aloofness and absolute formal and material certitude.[29] This style uses the syllogistic inference of deduction discussed later without the aid of induction, analogy, or the dialectic. It was historically used by the philosophical and analytical schools of jurisprudence and is often referred to as judicial formalism.[30] Today it is still used by masters in a field who consider their opinions as metaphysical truth. Its chief characteristics are an attitude or mood of dignity and a consciousness of power and the use of the deductive syllogism.

The Holmes opinion[31] does not appear to be of the magisterial or imperative style, notwithstanding the

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[28] Id. at 205.

[29] Id.

[30] See generally, Llewellyn, The Common Law Tradition: Deciding Appeals, 38 et seq. (1960) wherein he discusses the Formal Style and compares it with the Grand Style.

[31] United States v. Holmes is not technically an opinion in the appellate sense, but a report of the trial proceedings. The Holmes case was an original jurisdiction case in the United States Circuit Court. For details on the jurisdictional authority see note 9, supra. Most likely opinions were not written at the trial level in the federal system in 1842 as is done sometimes by the federal

authoritative mood that can be sensed from time to time in the opinion. The judge did not use the traditional or contemporary deductive mode of logic which is characteristic of the imperative style. If the judge had started out with the "sailor unqualified duty to passenger" premise with a minor premise characterizing Holmes a sailor and a conclusion of unqualified duty for Holmes, this would have been employment of the deductive mode. However, here the judge did not reach his "unqualified sailor duty to passenger" premise until after he had fully discussed some of the qualifications of the law of homicide and its application in different situations.[32] As will be seen infra,[33] he used other styles, i.e. the refined and demonstrative, in developing his argument. Accordingly, it does not appear as if the imperative style was utilized.

The laconic or sententious style can be recognized by its use of many proverbs and maxims.[34] This style seeks to persuade by the use of language which seems per se sacred and inherently authoritative. For example, the

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district court's today in cases of precedential value. Nevertheless, the instructions in their argumentive form and style will be treated here as an opinion. Because the Holmes case is so rich in legal and jurisprudential issues, the fact that it is not technically an opinion (by an accident of history) does not detract from its use in this paper.

[32] Holmes at 366.

[33] Id. at 367.

[34] See Cardozo, supra, note 11, at 208-210.

laconic stylist might solely rest a case on a latin maxim such as "Damnum Absque Injuria." This style was not employed in Holmes, since the judge did not rely on any proverb or maxim, but turned the case on more involved grounds.

Where the laconic style appeals to authority the conversational or homely style appeals to the customs and beliefs of the common man as embodied in layman's language. This style seeks to over simplify the issues by analogizing them to the everyday problems of the common man. Sophisticated legal argument and highly complex concepts are rarely used. The sophisticated argumentation used by the Holmes court clearly disallows it being labeled a homely style.

Passing to the refined or artificial style one can see a style which seeks legal percision analogous to the drafter of a legal document. This style employs very narrow and allegedly concrete language and trys to cover all possible related situations. Traces of this style can be seen in the Holmes opinion. For example, early in the opinion the judge drew a fine legal distinction between extenuation and justification of Holmes' act.[35] "It is one thing to give a favorable interpretation to evidence in order to mitigate an offense. It is a different thing

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[35] Holmes at 366, top-right.

when we are asked, not to extenuate, but to justify, the act."[36] (emphasis added)

This type of subtle distinction is evidence of a refined style.

Later in the decision, the judge drew another distinction peculiar to the refined style when he gave a situation wherein homicide would have been justified, i.e. if notice had been given and lots had fairly been cast.[37] He compared this justified situation with the Holmes situation and reasoned that had the situation at bar been as above the homicide would have been justified. This again shows the use of situation analysis and the refined style. Of course, this style can be abused when it draws distinctions without a difference attempting to force a certain result. Nevertheless, within bounds it reflects a careful reasoning process and has a definite persuasive value.

The next style to be discussed is the demonstrative or persuasive style. Here there is the force of the imperative style with less aloofness. Moreover, this style is eclectic in approach, since it utilizes many logical modes, history, illustration, and other devices.[38] It has the dignity and power of the imperative style, but

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[36] Id. at 366, top-right.

[37] Id. at 367, bottom-left and top-right.

[38] Cardozo, supra, note 11, at 212.

it uses more than the deductive mode. It has a tone more suggestive of the groping scientific method of inquiry than that of an intuitive leap to truth. It seeks to persuade by testing premises, by seeking out the apparent immediate consequences of their application. Although it gives the appearance of being slow and careful, it, like the refined style, can be used to justify a result desired which was conceived antecedant to the reasoning process.

In Holmes the judge appears to have used the demonstrative style as well as the refined style, since his opinion reveals many characteristics of this style. First, the judge utilized the non-deductive logical mode of analogy where he compared vehicle common carrier responsibility to marine common carrier responsibility.[39] Second, history and custom were used to establish that Holmes and the sailors had an unqualified duty to the passengers. Third, the refined style situation argumentation was varied by the use of the argument from consequence. The judge reasoned that to allow sailors to cancel their duty to the passengers on their own motion, without notice and/or discussion, would create choatic situations on the high sea.[40] The use of the above characteristics, inter alia, indicates that the eclectic demonstrative style was employed as well as the refined style.

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[39] Holmes at 366-367.

[40] Id. at 367.

Lastly, there is the tonsorial style with its dreary series of quotes followed by a conclusion. This style is normally used in the per curiam opinion wherein a full exposition of a rationale is considered unnecessary. However, unfortunately sometimes this style is used when a full opinion is justified. Because the Holmes opinion utilized the refined and demonstrative styles and there is no evidence of a sole series of citations, by definition, the tonsorial or agglutinative style does not seem to be used. Moreover, there was not even a partial application of the tonsorial style, since the judge tried to develop a reasoned argument and did not rely solely or partially on dreary citations without application and/or explanation of the citations.

Style recognition has many advantages to the opinion analyzer. As mentioned at the outset, it helps reveal the persuasive nature of the particular style employed and this helps the analyzer to avoid being mesmerized by the different styles. In addition, recognition of the style aspect of form aids the recall of opinions and their authors. For these reasons, inter alia, it is an essential element of opinion analysis.

4. Logical Structure

When a judge writes an opinion some form of logical[41] structure or plan must be utilized to make normal comprehension possible. This is expected in everyday non-judicial exposition and argument and should be expected in legal opinions.[42] However, a rigid and abstract logical structure with regard to the fact contingencies of legal problems should not be expected.[43] Speculative reason, i.e. logic, math, and traditional metaphysics, aims at truth within a system; whereas judicial opinions seek to dispose of factual problems on a lower level by the use of practical reason.[44] A choice made by the judge "is not logical in the sense of being deductively inferred from given premises, but it has a kind of logic of its own, being based on rational considerations which differentiate it sharply from mere arbitrary assertion."[45] Legal rulings are usually regarded as right if they are based upon "cumulative reasons which are found to be acceptable."[46]

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[41] "Logic" here will connote the consistency between propositional inferences and not material or factual truth. An exhaustive treatment of the technical notions of logic is beyond the scope of this paper. However, certain logical terms will be borrowed to describe certain observed processes of logical argumentation used in judicial opinions.

[42] Cf. Wasserstrom, The Judicial Decision, 24 (1961).

[43] See Wu, Jurisprudence, 16-17 (1958).

[44] Id., Wu, citing St. Thomas Aquinas, Summa Theologica, I-II, Q. 94, a, 4.

[45] Lloyd, Introduction to Jurisprudence, 399 (1959).

[46] Id.

In spite of what was said above about judicial opinions not necessarily having to take on a rigid logical structure, many different modes of logic are employed in the disposition of cases in accord with practical reason. These modes are the subject of this section. They will be explained and applied to the Holmes opinion, actually and hypothetically. This will be to show the degree logic plays in judicial opinions and how these modes properly or improperly are used. For example, just because a logical mode, e.g. deduction, is logically valid in a judicial opinion, this does not mean that the conclusion is true. The conclusion may be factually false. Again, logical validity, i.e. a conclusion which follows from certain premises without logical error, does not necessarily insure the truth of the conclusion.

Four basic modes of logic will be used to demonstrate how logical modes and structure operate in judicial opinions: (1) deduction; (2) induction; (3) analogy; and (4) the dialectic. These modes sometimes are mixed and overlap, but for pedagogical reasons will be treated separately here.

Generally, the deductive mode can be said to involve at least two forms, i.e. immediate implication and mediate inference.[47] Immediate implication or suggestion concerns

[47] The many syllogistic forms often described in the logic texts are beyond the scope of this paper.

a proposition and a conclusion immediately or directly implied therefrom.[48] Immediate implication deals with the relation between universals and particulars.[49] For example, in Holmes, if the judge said, "All seamen owe an unqualified duty of care to the ship's passengers," it could be immediately implied that some seamen, or Holmes individually (as a seamen), owes such a duty. The implication or suggestion is immediate, because the conclusion logically follows from the antecedant proposition without the need of a second premise. The logical immediate implication above compels the above conclusion in form, because some seamen and Holmes individually is a logical part of "all" seamen, but this does not compel the material facts to be so classified. Holmes must be shown to factually fit into the seaman category before a duty arises and he can justifiably be placed into the logical mode's minor premise.

Factually whether or not a party or case fits into an omnibus "all premise" is a matter of judgment and not logical form. Classifications in theory differ from classifications of fact.[50] In Holmes, the jury determined that Holmes factually was the type of seaman who would fit into the logical class of "all seamen owing an unqualified duty

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[48] Morris, How Lawyers Think, 58-59 (1962).

[49] Id. at 44-45.

[50] Id. at 75-94.

to ship passengers." The jury made the judgment on Holmes' factual status and then placed him in the logical class given to them by the judge.

The deductive mode's second form of mediate inference, unlike immediate implication, requires a second premise and is called syllogistic inference. This logical structure is a closed system of propositional inferences. Deduction in this sense is based on the setting up a class and the placing of an object within the class, and then drawing a conclusion.[51] In Holmes, the judge's logical structure could have taken the following syllogistic form:

> All seamen by status owe an unqualified duty of care to the ship's passengers.
> Holmes has the status of a seamen.
> Holmes owes an unqualified duty of care to the ship's passengers.

This form of deductive inference has been criticized,[52] because some judges have used it in a rigid manner without any attempt to ascertain the factual consequences to the parties in a legal dispute. A major premise concept or class is established without qualification and a party is generally related to this concept or class in a minor premise. The deductive conclusion is that the party is within the major premise concept or class. In recent opinions, as will be seen later, when the dialectical mode is discussed, the major premise concept or class is highly

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[51] Cf. Id. at 61-74.

[52] Bodenheimer, Jurisprudence, 331-338 (1962); Ibid., Wasserstrom at 15.

qualified before a highly qualified fact minor premise is applied. As a result, in an expository sense, deductive syllogistic inference is still used, but in a highly qualified and restrictive manner.[53]

The second logical mode is induction. Induction is conventionally said to be the process of inferring a general rule from descriptions received from the examination of particular instances which form a class.[54] The process is an open system allowing for future observation and generalization. For example, case$^1$, case$^2$, and case$^3$ are individually examined for common characteristics. This results in a broad generalization about the common characteristics of case$^1$ through case$^3$. In Holmes, the judge's generalization that all seamen by status owe an unqualified duty of care to the ship's passengers could have been, although in fact it was not,[55] a generalization arrived at subsequent to an exhaustive study of similar situation precedents. Further, had the judge generalized from all known similar cases only an imperfect induction would have been used.[56] The generalization would have been sound only to extent of the case inductions range.

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[53] Id. cf. Bodenheimer at 333.

[54] Weaver, A Rhetoric and Handbook, 114-115 (1967); Morris, note 48, supra, 107-125; Brumbaugh, Legal Reasoning and Briefing, 74 (1917).

[55] The Holmes court appears to have considered the case as one of first impression. See opinion at 367, bottom-left.

[56] Cf., Ibid., Brumbaugh 74-75.

Analogy,[57] like induction, proceeds from observation of factual situations and results in a generalization about the likeness of two things. The known similarity of two things, e.g. fact situations, is used as a reason for expecting them to be similar in other respects, e.g. in law application.[58] If a situation similar in fact to Holmes existed, such similarity would give argumentative force for expecting a similar law application. On the other hand, induction is a broader logical mode which would deal with a string of similar cases (more than two) when forming a generalization about the cases as a class. It is generally held that deduction moves from whole to part, induction from parts to whole, and analogy from part to part.

The last logical mode to be discussed is the dialectic. This mode is the most flexible, since it may utilize all of the previously discussed logical modes, along with other argument forms.

The dialectical mode as a form of logical structure can be seen operating in debate, judicial opinions, courts of law and in many other places of argumentation. The dialectic process seeks truth by means of posing and defending contradictory arguments.[59] This mode weighs the

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[57] See generally, Levi, An Introduction to Legal Reasoning (1949) for the thesis that the analogical mode is the basis of judicial reasoning.

[58] Black, Critical Thinking, 436 (1952).

[59] Bodenheimer, A Neglected Theory of Legal Reasoning, 21 Jour.L.Ed. 373 et seq. N 4 (1968). See also Aristotle, Topica, in Organon, Vol. II, Bk. I i, 100a-b (Forster

merits of opposing views, by considering the practical consequences of their respective adoption, and by arriving at a conclusion after a thorough appraisal of all facts and angles of the problem.[60] Again, as was generally stated above, the dialectic is an eclectic mode in that it uses the other modes of logic, e.g. deduction, induction, and analogy, as well as arguments from consequence, circumstance, situation comparison and the "ideal case" technique. In short, this mode gropes around[61] with a modern attitude of doubt and skepticism before it reaches a pained conclusion.[62]

As the dialectic is used in legal and judicial reasoning, it is problem oriented, rather than system

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transl., Loeb Class. Lib. Ed. 1950) (In practice the Platonic dialogues were illustrative of the dialectical method, but Aristotle presented the first systematic account of the dialectic); Weaver, The Ethics of Rhetoric, 27-54 (1968); J. Stone, Legal System and Lawyers' Reasonings 327-328 (1964); and Peulman, The Idea of Justice and the Problem of Argument 161-167 (1963).

[60] Id. Bodenheimer at 378.

[61] E.g. See Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185 (1920); Cert. den. 254 U.S. 643, 41 S.Ct. 14, 65 L.Ed. 454 (1920) wherein Cardozo uses a groping dialectical mode.

[62] E.g. See State of Israel v. M/V "Nili," 5 Cir. 1970, ___ F.2d ___ (No. 27126, Oct. 23, 1970), wherein a pained conclusion was reached by balancing circumstances where the deductive, inductive, and analogical modes provided little help. "Occasionally courts find themselves hard put to provide a clear answer by logical deduction or induction abstraction, and are forced to balance consequences." (emphasis added)

oriented.[63] It looks to the narrow fact situation for decision rather than an abstract legal system. Although this dialectic approach can be used in disposition of any case, it is normally used in cases of first impression, i.e. no formal legal precedent (case, statute, or constitutional law) is available, and in situations where unclear and/or undesirable precedent is overruled. In the latter three situations, no formal precedent is available or adequate, so the court must use some informal sources of law, i.e. equitable principles, needs of the time, and empiric and conceptual reasonings. Where the law is unsettled or nonexistent in a particular area the dialectical mode is valuable, since it helps courts to derive premises from the informal sources of the law in a manner which considers all facets of a case.

Many of the dialectic type arguments can be seen in the Holmes opinion. First, as characteristic of the situation analysis argument, the court did not over-generalize the situation. It narrowed the crime to voluntary manslaughter, distinguishing between malicious and non-malicious intentional homicide. Second, the court used the argument from consequence to show the results of a holding that the sailor's duty was unqualified.[64] Third,

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[63] Cf. Wills, Legal Problem Solving, 36 Tul.L.Rev. 297 et seq. (1962).

[64] Holmes at 367, middle-right.

the ideal situation argument was used to show what type of situation would have justified Holmes' acts.[65] Fourth, although it did not use the deductive or inductive modes, it did use, as shown previously, the analogical mode of argument. Fifth, from a negative standpoint, the court used the argument from circumstance raised by the defense, i.e. the novel emergency circumstances made Holmes incapable of criminal intent, to strengthen its argument by showing that the argument was without merit. Lastly, the groping characteristic can be seen in the court's approach to this novel situation. For example, the court did not easily and systematically arrive at its conclusion as a matter of law to impose an unqualified duty of care on Holmes. It groped around slowly and carefully looking for formal precedents. Finding no formal precedents, the court used a general principle of duty which was said to be derivative from Holmes' status as a seamen. Accordingly, given the presence of all of the above dialectical characteristics, it seems apparent that the Holmes opinion was logically structured in the dialectical mode.

Recognizing the dialectic in judicial opinions is important, because it enables the opinion analyzer to discern when an opinion is not based on formal legal precedent nor on the more corventional modes of logic. It signals that possible weak consequence and circumstance

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[65] Id. at 367.

arguments are being employed. Moreover, it places one on guard for certain situation analysis techniques which may slip narrowed fact situations unjustifiably out from under broad legal concepts. Recognizing the dialectic also warns of a possible "ideal case" device. Such a device trys to avoid the pain of a close case by saying that the decision would have been otherwise if the facts at bar had been in a certain ideal frame.

A close watch on the logical modes just reviewed, as they operate in judicial opinions, enables the opinion analyzer to follow the logical structure of an opinion and helps to reveal logical fallacy.

## B. Procedural Analysis

The crucial question under procedural analysis is, "did the court rule on the merits of the case?" Too often the opinion analyzer races past the procedural statements of an opinion in order to get to the "rule" of the case. The consequences of this hurried approach are disasterous. For example, in the Holmes case had the Circuit Court dismissed the Government's case against Holmes for lack of jurisdiction over the subject matter (assume the federal District Courts had exclusive jurisdiction over homicide on the high seas), there would have been no ruling by the court on the criminal guilt or responsibility of Holmes or on the "merits" of the case. Moreover, had the court dismissed the case on

jurisdictional grounds, but had discussed the constitutionally *vel non* of the federal statute under which Holmes was indicted, such a discussion could not have been considered a ruling on the "merits" of the statute's constitutionality. *A fortiori* it would be error to cite the *Holmes* case as one testing the statute's constitutionality, since the case was disposed of on jurisdictional grounds and not the "merits" of the statute.

There are many other situations where hasty procedural analysis can lead to trouble. Courts have many ways of disposing of cases without going to the merits of the dispute. A court may dismiss the case, because the *statute of limitations* has run to bar the action. For example, in *Holmes* had there been a one year time period in which to prosecute embodied in the statute and had the government failed to prosecute seasonably within this period, the merits of Holmes' criminal guilt or responsibility would have never been determined. The claim against Holmes would be considered stale and release would follow. At another time, a court may dismiss the case, because the merits have been *mooted*. For example, had Holmes died previous to his indictment the action would be considered moot and the merits of his guilt never determined as a matter of law. Further, the court may determine that the doctrines of *res judicata* or *double jeopardy* should apply and fail to rule on the merits. In the *res judicata* situation had Holmes been able to sue the government civilly,

for perhaps false imprisonment, and such an issue had been squarely determined on the merits by a court previously, the second civil action would be barred pursuant to the res judicata doctrine. Here the merits, i.e. false imprisonment vel non, was litigated previously on the merits and the merits will not be decided again. On the criminal side had Holmes been tried and convicted of "homicide on the high seas" previously by a competent court with proper jurisdiction and in accordance with the law, a second trial would twice place his life and/or liberty in jeopardy and the double jeopardy doctrine would apply to bar determination of the merits of his guilt anew. Again, the point is, a careful procedural analysis is critical to a proper analysis of the merits.

Sometimes there are situations where the appellate courts rule sub silento on the merits of an issue without any lucidly expressed discussion. For example, assume the Supreme Court decided for the first time that criminals should be represented by counsel in criminal cases whether the criminal elects to accept counsel or not, and that Holmes had declined counsel and the Circuit Judge had permitted such action without an attempt to appoint counsel. Assume further that the Supreme Court had failed to say whether or not the "new ruling" was "retroactive" to the Holmes case. A lower court in the same case, or the Supreme Court or a lower court in a subsequent case, could read the

Holmes case as applying at least to Holmes sub silento. This would especially be true if the Holmes opinion was full of language about the "forced" counsel right being in this country's jurisprudence since 1789. When this situation arises a close opinion analysis is necessary to insure that the ruling on the merits applies to the defendant. Had the Supreme Court ruled that Holmes was properly convicted below, but that counsel should have been provided, it would be critical to determine if the new procedural rule applies to Holmes to avoid the Court's affirmation of Holmes' conviction on the merits.

A close procedural analysis also illuminates what the consequences in fact were to the parties at bar. An opinion which says "reversed and remanded" should be closely scrutinized to see the consequences of such language. The language may mean that in a criminal case the evidence was insufficient to sustain the jury verdict and the judge should have granted judgment of acquittal, or it may mean that there has been only procedural error and a new trial is in order and not release of the defendant. With respect to the Holmes case had Holmes elected to appeal his denial of a new trial, assuming such appeal right existed in 1842, based on the allegedly erroneous jury instructions,[66] a Supreme Court reversal would have not

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[66] Holmes' counsel contended that the proper law standard was "state of nature" not "social nature"--see Holmes at 368.

resulted in an acquittal, nor would it have been a determination of non-responsibility. The procedural consequence would be a new trial under the corrected law standard, notwithstanding any discussion by the Supreme Court of Holmes' criminal responsibility. The consequence to the government is a retrial after picking a new jury; whereas, the consequence to Holmes is a delay in a determination of his guilt on the merits. Moreover, if bail pending appeal and retrial was not available, Holmes would have to await his fate in custody.

In addition to watching for the narrow procedural disposition of cases, the jurisprudential or philosophic implications of procedure should be observed. An activist court may allow liberal entry into the federal court on the humanistic premise that its institutional function is to reach out for the problems. For example, assume in the Holmes case that the indictment was weak and failed adequately to charge Holmes with murder on the high seas pursuant to the federal statute, but the Court felt the statute was unconstitutional on its face and as applied to Holmes. An activist court, notwithstanding Holmes' criminal guilt as to the sufficiency of the evidence, would overlook the defective indictment and rule on the merits of the constitutionality vel non of the statute. In this sense, the court has reached out for the case in an activistic manner. On the other hand, a passive court

would require a proper indictment before going to the merits of the statute and Holmes' criminal guilt. The passive court's philosophy being that the courts should only be used for case disposition when the case is properly filed.

The philosophical predisposition of the court has a strong bearing on the limits it places, or fails to place, on its jurisdiction and procedural devices. Another example of procedural philosophy in the Holmes case concerns the court's jurisdiction over Holmes. The Circuit Court took jurisdiction pursuant to the federal statute without considering another country's jurisdiction. Although this type of territorial jurisdiction over its vessels and nationals, i.e. Holmes, would likely be valid, unless contrary to some principle of international law,[67] there were good grounds for finding jurisdiction in a Great Britain or Ireland Court, since the victims were Scotch and Irish nationals. However, no jurisdiction issue was discussed or raised on the record leaving the strong implication that the court did not want to take a passive stance in the Holmes situation. It could have easily held that concurrent jurisdiction was proper and denied jurisdiction stating that it was for the British and/or Irish Courts to vindicate its nationals deaths. However, most likely, the Holmes court thought it could

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[67] Today the United States would have jurisdiction under the Convention On The High Seas, Geneva, April 28, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82, Article 11(1).

save its nationals from possibly harsher treatment and hence actively accepted and exercised its jurisdiction.

In summary, as far as procedural analysis goes, the opinion analyzer should strive to ascertain the exact holding of an opinion in the narrow procedural context. Moreover, at the same time, the analyzer should strive to find what philosophic or jurisprudential premise motivated such a procedural holding. Further, it is also crucial to see if the court squarely ruled on the merits of the narrow substantive issues at bar, without by-passing it on procedural grounds.

### C. Precedential-Value Analysis

Stare decisis as a principle generally holds that prior cases which are like in fact should control subsequent cases.[68] The "rule of law" or "holding" in the previous like fact situations should control the subsequent like cases. However, this presents a problem. What statements in the previous cases are the "holding" or "rule"? How does the judge or lawyer determine which statements are binding and which are dicta[69] or obiter dicta?[70]

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[68] Cf. Ibid. Boderheimer, note 52, supra, at 368.

[69] Those statements which are supportive, but unnecessary to support the decision.

[70] Those statements which are unsupportive and hence unessential to the decision.

It is often thought erroneously that there is one holding to be found and only one. Some look to the general abstract statement of the law in the closing parts of the opinion and consider this the holding, or as some call it the ratio decidendi.[71] However, this approach overlooks the narrow fact and procedural context of the case. As a result, too broad a holding is abstracted and the opinion analyzer is only half right. For example, take the Holmes opinion and the ladder of abstraction presented previously.[72] On this ladder, many possible Holmes' holdings or ratio decidendis are possible:

(highest possible abstraction level) $L^X$

$L^1$ Higher law controls

$L^2$ Higher law controls positive law

$L^3$ Classic natural law principles control municipal statutes

$L^4$ Moral and social duty principles control the equities of a specific fact situation

$L^5$ One is criminally responsible if he violates moral and social duty principles even if it is an emergency situation if he has a duty status

$L^6$ Seamen who are charged with the protection of passengers have a moral and social duty to protect such passengers even in an emergency situation which threatens their life

$L^7$ Holmes was a seamen charged with the protection of the passengers and his acts of casting them overboard violated his moral and social

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[71] Ibid. Bodenheimer at 375. See also Williams, Learning the Law, 63 (4 ed. 1953).

[72] II, A, 1, text, supra, at 8.

duty underlying the statutory prohibitions against homicide on the high sea, even in an emergency situation.

$L^8$ As a matter of law it was a federal homicide for Holmes to caste the passengers overboard violating his . . . emergency situation.

$L^9$ In a situation where a seamen fails to protect passengers in his care by casting them overboard, without notice, casting of lots, even in a situation of emergency, he will be held criminally responsible for the federal homicide pursuant to federal statute 1 Stat. 155, Sec. 12 which is a positive law codification of the classic natural law principle of moral and social duty to one in your special care.

$L^Y$ (lowest possible abstraction level)

Each one of the above holdings are right to some degree, since they all are concerned with the same fact situation; however, the levels closest to the procedural and fact context of the case would seem to be the most correct statements, i.e. $L^6$ and down. In contrast, it should be noted here that if the opinion included statements about other fact situations, these statements would be dicta or obiter dicta, depending on the degree of remoteness to the fact situation at bar. Therefore, one precedent analysis can differ from another in a too abstract sense and in a sense that it is concerned with fact situations beyond the case at bar.

Precedent analysis can be made more meaningful if an attempt is made to abstract the highest and lowest possible holding or ratio decidendi. This way an analyzer can easily distinguish the case on its facts or use it as precedent by urging its broadest general theory. Moreover, narrowing the case to its operative facts and procedure context helps the analyzer to distinguish between the situation at bar and the different situations talked about in the opinion.

Another aid in precedent analysis, besides being aware of the levels of abstraction at play in judicial opinions, is to have some knowledge of the formally advanced theories on how to properly ascertain the holding or ratio decidendi of an opinion. At least four have been advanced.[73] First, Sir John Salmond and Professor Edmund Morgan put forth similar notions of the "ruling principle" theory. Salmond said: "A precedent . . . is a judicial decision which contains in itself a principle. The underlying principle . . . is the ratio decidendi."[74] Morgan in a like fashion defined ratio decidendi to be "those portions of the opinion setting forth the rules of law applied by the court, the application of which was required for the determination

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[73] Ibid., Bodenheimer at 375.

[74] John Salmond, Theory of Judicial Precedent, 16 L.Q.Rev. 376, at 387-388 (1900).

of the issues presented."[75] Second, Professor Arthur Goodhart proposes an empiric and nominalistic method: The ratio decidendi is found by finding the facts treated as material or operative by the judge who decided the case cited as precedent, and of his decision based on these facts.[76] Third, Professor Julius Stone holds the ratio decidendi to be a particular generalization which has evolved with regard to a particular legal problem after many cases have narrowed, expanded, interpreted, and reformed the doctrine.[77] Fourth, Professor Edgar Bodenheimer advances the view that the ratio decidendi is neither the material facts of the case nor the controlling principle, but "whether the rationale of public policy underlying the first decision (which the first court tried to cast into the form of a proposition of law) is equally applicable in the second case."[78]

All of these views could be used to ascertain a ratio decidendi or holding of the Holmes case. For example, under the "controlling principle" doctrine, the ratio decidendi would be the unqualified moral and social duty underlying the positive law which prohibits seamen from

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[75] Edmund M. Morgan, Introduction to the Study of Law, 155 (2d ed. 1958).

[76] A. Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L.J. 161 (1930).

[77] Cf. Stone, The Ratio of the Ratio Decidendi, 22 Mod.L.Rev. 597 (1959).

[78] Ibid. E. Bodenheimer, at 380.

sacrificing passengers in their care in times of high sea emergency. The "material fact" or nominalist view would look to the narrow situation and limit the holding to the specific operative facts. In Holmes, the material facts would be the existing duty relation between these seamen and passengers in these particular circumstances, i.e. where no notice of the need to reduce the number of passengers in the boat was given, no lots cast to determine who would go, and where no self defense situation existed. Clearly this holding, being narrower than the "controlling principle" view, could not be applied as loosely. The "evolving" doctrine of Stone would require a look at all similar emergency situations on the high sea to determine a ratio decidendi. Consequently, the Holmes case alone would only be one step in deciding a doctrine of law. The Holmes relation to other cases would give Stone his ratio decidendi. Lastly, the Bodenheimer "public policy" view would look to see if the Holmes public policy, i.e. a seaman's duty to passengers in his care to prevent murder of the weak on the high sea, fits the facts before the second court. If so, the Holmes case would be precedent and the ratio decidendi would rest on the public policy.

Awareness of the many possible levels of holdings and the various approaches to precedent will keep the opinion analyzer from looking for the rigid "rule" of the case. Moreover, this awareness will improve advocacy. The gap between the theory of law level and the fact level

provides flexibility to the advocate. When the law in general is favorable one can argue the broad doctrine; whereas, when the law is weak the facts can be stressed. The above mentioned features of precedential analysis are the key to legal advocacy.

## D. Authority Analysis

Authority analysis here will be stipulated to be a process in which the opinion reader seeks to uncover what apparently compelled the judge to reach a particular case disposition. For the opinion analyzer authority analysis normally might take place after the issue has been narrowed and a holding on the precise issue has been abstracted. Moreover, a check has been made to see if the holding was on the merits and not on jurisdictional or procedural grounds. At this point, the opinion analyzer looks for the authority base. Authority is a crucial element, because when it is located it can then be determined if the judge went out on his own or adhered to the doctrine of stare decisis. This principle of striving to apply the law precedents available and clearly applicable has traditionally been in the American law.

Authority or source of law may be formal or non-formal.[79] Formal authority has come to mean law sources

[79] See Ibid. Bodenheimer at 269 et seq.

which are available in an articulated textual formulation embodied in an authoritative legal document.[80] The chief examples of such formal sources are constitutions and statutes, executive orders, administrative regulations, ordinances, charters and bylaws of autonomous or semiautonomous bodies and organizations, treaties, and judicial precedents.[81] Conversely, nonformal authority or sources of law have been defined as legally significant materials and considerations which have not received an authoritative or at least articulated formulation and embodiment in a formalized legal document.[82] For example, a workable, but in no sense an exhaustive enumeration of nonformal sources might be, standards of justice, principles of reason and considerations of the nature of things, individual equity, public policy, moral convictions, social trends, and customary law.

With respect to authority source application, it is important to observe whether the case is novel or one subject to a clear cut precedent. As the analytical positivists[83] hold, it is clear that where a formalized, authoritative source of law provides a clear-cut answer to a legal problem, the nonformal sources need not and should

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[80] Ibid. at 271.

[81] Ibid.

[82] Ibid.

[83] See Part II, E, infra, for discussion of positivistic school.

not, in the large majority of instances, be consulted.[84] However, an exception may become necessary in certain rare situations where the application of a formal source of law would clash with fundamental, compelling, and over-riding postulates of justice and equity. As for the first situation, Holmes presents a good example, because as the court states in the opinion there was apparently no precedent of any kind which would control the Holmes situation. Accordingly, in this type situation the court would normally be free to create a legal standard which derives solely from nonformal sources of law or by analogically deriving a legal standard from another area of the formal law. As to a nonformal source, the Holmes court appears to have premised its decision on moral conviction and customary law. However, full discussion of the Holmes court's application of a nonformal source of authority will be delayed until later. As to the analogical use of some other formal area of the law, the Holmes court could possibly have drawn a parallel precedent from some of the snowbound trampers cases wherein, because of the extreme circumstances, one tramper might have been thrown out in a snow storm to die.

With respect to the rare situation where the formal law is apparently "just" with regard to the common good, but an application thereof would be "unjust" to the individual,

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[84] Ibid. Bodenheimer, at 271.

the court may fashion an exception to the general rule and attempt to avoid misapplication of the exception by clearly and unequivocally tieing the exception to the narrow facts at bar. This was not the case in Holmes, because, as stated previously, no clear precedent of any kind was applicable or even existent in the United States jurisdiction or elsewhere. If there had been a clear, "just" formal law precedent (e.g. factually similar sound cases interpreting and fleshing out the homicide on the high sea statute) whose application would be "unjust" in the particular Holmes fact set, the court, because ontologically (by nature) every fact set differs in some respect, could have distinguished the Holmes facts and created an exception to the general rule as developed by the formal case law. Assuming the court ties the exception to the narrow Holmes facts, and no subsequent court ignores this limitation, justice would be preserved as to Holmes individually and as to the common good.

Other situations concerning formal authority application present problems for the courts. Sometimes there is a conflict in the formal authority, or the formal authority is vague (no definitive referent exist), or ambiguous (more than one referent exist), or it is clearly wrong. For example, if in the Holmes situation there had existed formal case precedent which had been developed by another Circuit Court, but which was in conflict with the Holmes Circuit Court's case precedent and there had been no conflict

resolution by the Supreme Court, the Holmes court could use one of the nonformal sources of law mentioned previously to justify its application of its own rule or theory. On the other hand, if the conflict in the only existing formal law was between Circuit Courts other than the Holmes Circuit Court, the Holmes Court could develop its own standard derivative from a nonformal source of law. Further, if the opinions of the formal case law theoretically controlling the Holmes facts were vague or ambiguous, application of a nonformal source would be justified. When the law is unclear no one is bound. Lastly, if the developed case law was apparently wrong in that it placed no qualified or unqualified duty at all on a seamen to protect the passengers, then the Holmes Court would seem to be justified in applying a nonformal source of law to protect the weak (passengers) from the strong (seamen) on the high sea. Accordingly, the previous situations discussed and the situations noted above signal the importance in authority analysis of observing the narrow type situation before the court and the present status of the formal law authority. This enables the opinion analyzer to adequately test the application of formal and/or nonformal authority.

Finding the formal and/or nonformal authority is important, because this is the premise on which the decision stands. A successful attack on the authority as to its weakness or inappropriateness, will cause the decision to

lose its binding power. Such an analysis helps the opinion analyzer to distinguish between opinions based on the formal or nonformal authorities and opinions of arbitrary fiat.[85]

When applying these theories of authority analysis to Holmes, the judge seems to have relied on nonformal authority even though the case arose pursuant to a federal criminal statute,[86] a formal authority. The judge's language strongly implies that he considered the nonformal source of law to control the formal source. The nonformal source was the classical natural law,[87] i.e. moral and social duty of Holmes (as a seamen), to reframe from sacrificing the passengers in the fact context of the Holmes case. The Court said:

> . . . the municipal or civil law, as thus comprehensive, as founded in moral and social justice,--the law of the land, in short, as existing and administered amongst us and all enlightened nations,--that regulates the social duties of men, the duties of man towards his neighbour, everywhere. Everywhere are civilized men under its protection: everywhere, subject to its authority. It is part of the universal law. We cannot escape it in a case where it is applicable; and if, for the decision of any question, the proper

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[85] See generally L. Fuller, Reason and Fiat in Case Law, 59 Harv.L.Rev. 376 (1946).

[86] Holmes at 363 and note 8, supra.

[87] Here the classic natural law theory will be given the conventional definition which refers to moral or legal principles which evolve historically from the practice of men. The principles that are derivative from the evolving customs of men. For more discussion of this approach see Part II, E, text, infra, re the historical jurisprudential school.

> rule is to be found in the municipal law, no code can be referred to as annulling its authority. Varying however, or however modified, the laws of all civilized nations, and, indeed, the very nature of the social constitution, place sailors and passengers in different relations. And, without stopping to speculate upon over-nice questions not before us, or to involve ourselves in the labyrinth of ethical subtleties we may safely say that the sailor's duty is the protection of the persons intrusted to his care, not their sacrifice,--a duty we must again declare our opinion, that rests on him in every emergency. (emphasis added)[88]

The above language strongly implies that even had this not been a case of first impression in the sense that no formal case law was present, the judge would have applied the nonformal source, i.e. classic natural law moral and social duty principle (moral conviction and custom), notwithstanding existing clear formal sources of authority. To the Holmes judge, Holmes was criminally responsible if the jury found the facts at bar violative of first, the classic historic natural law, and residually the positive formal federal statutory law. The Holmes case is a good example of where a formal, i.e. a federal statute undefined by case law as to the Holmes fact set, and a nonformal source of authority was utilized, but where the formal source was completely derivative from the nonformal source.

A close opinion authority analysis is advantageous, because it forces the opinion analyzer to narrow the issue, look for the narrow holding, and then look for the authority,

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[88] Holmes at 368.

whether formal or nonformal. Where nonformal authority is used, often the area of the law is new, in conflict, vague or ambiguous, wrong, or the judge has deliberately by-passed proper formal authority. Of course, where formal authority is used, the area of law most likely is settled or the judge has strained to utilize formal authority. Accordingly, a close authority analysis reveals what apparently really compelled the judge to decide the case as he did and what the state of the law is in that particular area.

## E. Substance Analysis

Substance is the fifth and last aspect of opinion analysis. "Substance" or "argument content" will be used here to mean the reasons given in judicial opinions in support of conclusions and holdings. These reasons, knowingly or unknowingly, are derivative from one or more schools of jurisprudential thought. A "jurisprudential school" is generally regarded to mean a particular group of scholars and commentators on the law who hold to a particular view or theory about the nature and function of the LAW. Recognizing the jurisprudential roots, historically and contemporaneously, behind the reasons given to support judicial conclusions will help the opinion analyzer to contrast the possible jurisprudential postures which could have been assumed by the court--with those actually assumed. As a result, the opinion analyzer has

a broader base from which to criticize or evaluate the substance or reasons given for the court's conclusions.

Here the philosophical, analytical, historical, and sociological jurisprudential schools will be explained[89] and applied to Holmes. Application will involve a two-step process. First, the jurisprudential schools will be applied to the raw facts of the Holmes case, in a pre-opinion setting, to show what kind of conclusion and reasons or substance each particular school might apply. Second, the Holmes opinion and language will be analyzed to speculate on what type of jurisprudential reasons or substance the court[90] and the defense did use to support their conclusions.

Before moving to the schools and their application to Holmes, something should be said about one of the pitfalls of jurisprudential "classification," i.e. overlaping theories. The classification of schools that follows will not be a rigid closed system and there may be some overlap. For example, one early Greek philosophical school, i.e. the Sophists, like the sociological school, would hold that law should be made relative to the particular situation,[91]

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[89] Because of the survey nature of this paper, an exhaustive and comprehensive treatment of each major jurisprudential school will be impossible. Such a presentation would only hinder discussion of opinion analysis, the main subject. Nevertheless, throughout the following pages citation will be made to the major jurisprudential sources to facilitate further study by the diligent student.

[90] The government position is similar to that of the Holmes court and will not be discussed.

[91] Cf. Ibid., Bodenheimer at 5.

in spite of any developed precedent to the contrary. While both of these theories are quite similar there are enough historical differences[92] to make the overlap in this aspect unimportant. Nevertheless, even where some overlap exist, this does not impair the valuable insights which can be acquired from jurisprudential classification if one keeps in mind that the classification is just for pedagogical purposes. It is a device to make theories manageable. A four school classification will be used here to house the theories of jurisprudence, so as to facilitate their application to the Holmes case.

1. The Schools and Holmes

In Roscoe Pound's, Jurisprudence,[93] four general jurisprudential schools are set forth: (1) Philosophical; (2) Analytical; (3) Historical; and (4) the Sociological.[94] Although there are many sub-classes[95] to these general classes, this paper will only use the general classes as

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[92] See text, infra, at 62.

[93] Volume I, Part I, Chapters 2-6, 25 et seq. (1959). Also, See generally, Ibid., Bodenheimer, Jurisprudence, Part I, Chapters I-IX, 3 et seq. (5th ed. 1967); Lloyd, Introduction to Jurisprudence (2d ed. 1965).

[94] See Ibid., Bodenheimer at 116 for theory that legal realism is an off-shoot of the sociological school.

[95] For example, the philosophical school today could be further divided: (1) Neo-idealists of a number of forms; (2) realists, positivists, and utilitarians, having much in common even if arrived at in different ways, and (3) neo-scholastics. Ibid., Found at 90.

set forth. Moreover, mutual exclusion between the general classes will be assumed to exist to facilitate presentation.

In point of time, the philosophical school can be said to have originated first. The Greeks, i.e. Socrates, Plato, and Aristotle along with later the theologians, e.g. St. Thomas Aquinas, had begun to consider the philosophical-theological bases of right.[96] However, by the time of the Reformation little development was attained and the philosophical school's influence declined until a resurgence in the nineteenth century.[97] Today the philosophic school, although not as influential as before, can be seen operating in judicial opinions. Six major characteristics can be attributed to the philosophical school:

1. A concern for the ideal ends which "ought" to be in the law and not what they have been in the past.[98]
2. A belief that the law is "found" or "discovered" and not "made." Thereafter, law is to be formalized into principles and subjected to a philosophical critique.[99]
3. These discovered principles ethically and morally bind all, i.e. the governed and the governor.[100]
4. No particular preference for any form of law, e.g. case, statutory.[101]

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[96] Ibid., Pound at 27-29, 47.

[97] Ibid. at 178.

[98] Ibid. at 89.

[99] Ibid. at 89-90.

[100] Ibid.

[101] Ibid.

5. Favored in times of change and often the initiator and leader of change.
6. A preference for the use of speculative reason.[102]

The philosophic school assumes the abstract justice of a rule or principle and this gives the rule or principle its efficacy.[103]

The strength of the philosophical school is that it has a tendency to provide an extra-legal check on the positive law and encourages aspiration and perspective in the law. On the other hand, its weaknesses are that it often uses highly abstract and ambiguous language and it tends to apply its developed abstract principles too mechanically.

What conclusion and substance the philosophic school would want applied to Holmes would vary with the "ideal" premise of the particular philosophic school. If the school holds the "ideal" that the law "ought" to universally and always protect innocent life, i.e. the Holmes passengers, then Holmes' conviction would be justified. The substance or reasons for this conclusion would sound something like this: (1) Seamen should or "ought" to owe passengers a moral, social and legal duty not to involuntarily sacrifice them in times of peril, even if no positive law declares such a duty; (2) such a duty is universal and

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[102] Speculative reason here is stipulated to mean knowledge derived by intuitive and/or a priori means absent the aid of empiric data.

[103] Id. 1116., found at 87-90.

immutable and "discoverable" (not made) by speculative reason; (3) this duty binds all in spite of any positive laws or orders to the contrary. However, on the other hand, if the particular philosophic school holds a relativistic "compassion" ideal or "ought" in the law, Holmes' acquittal would be justified under the extreme circumstances, e.g. orders, harsh weather conditions, extreme peril. This second philosophic position would hold that the "compassion" ideal is discoverable through speculative reason and binding on all men and institutions. However, neither philosophic school would care whether or not their "ideal" was embodied in a statute, case, or a legally recognized principle, because the "ideal" is the law even though positive (man-made) legal institutions do not adhere to it. The substance or type of reasons given by the philosophic schools would sound alike even if their abstract "ideals" or "oughts" were different.

The second general jurisprudential school is point of time is the analytical which gained prominence during the Roman period and thereafter in the nineteenth and twentieth centuries. At least six characteristics are common to this school:

1. A concern for only the developed, present systems of law, i.e. "the pure fact of law."[104] For example, the Roman Law and the Anglo-American common law. The concern is with the law that "is" not what "ought" to be.

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[104] Ibid., Pound at 74 citing Sheldon Amos, Systematic View of the Science of Jurisprudence 18 (1872).

2. A regard that the law is something made consciously, whether legislative or judicial. Law is the will and command of the sovereign.[105] Law is imperative and positivistic.
3. Enforcement is a vital element in the law. There must be sanction by force or no law exist.[106]
4. The statute consciously imposed by the will of the sovereign is the preferred form of law.[107] England is considered the home of the analytical school, because of the wide acceptance of the supremacy of Parliament. For a modern version of the analytical approach see the writings of Hans Kelsen and H. L. A. Hart.[108]
5. Method is logical and formal. Consistency takes preference over equity in the individual case. Law is a closed system and only certain legal questions therein can be considered important. Clarity is sought over justice in the individual case.[109]
6. Most hold a strict separation of law and morals.[110]

The strength of the analytic school is its tendency to seek stability, predictability, and clarity in the positive law, whereby reliance and expectations can be

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[105] Ibid. at 76.

[106] Ibid. at 77. Also note that for this reason the analytical school commonly denies that international law is true law. Enforcement by coercive means is a necessary element of the law for the analytic school.

[107] Ibid.

[108] Ibid. at 79; See also Ibid., Bodenheimer at 95-102.

[109] Ibid., Bodenheimer at 99.

[110] See Hart, Positivism and the Separation of Law and Morals, 71 Harv.L.Rev. 593 (1956). Analytical thinkers would grant a popular public "practiced" morality without the aspiration element, but not that law should be made pursuant to moral ideals generally or commonly held.

satisfied. Conversely, its weaknesses are that it tends to be mechanical and abstract, sometimes disregarding equity in the individual case.

With respect to the Holmes case, the analytical school would approach Holmes' criminal responsibility as a matter of pure sovereign positive law, e.g. statute, judicial precedent, constitutional provision. This school would want the law which "is" within the legal system applied in spite of harsh consequences to a party. If the law held a seamen criminally responsible for manslaughter on the high sea in one of the above formal, positive forms in spite of the circumstances, Holmes would be criminally responsible, convicted, and punished. Some of the substance and reasons for this conclusion would be: (1) The will of the sovereign (United States Government) is supreme even in harsh circumstances and the law must be mechanically applied to Holmes. He was properly indicted and convicted under valid federal legislation. Established legal principles show he owed a legal duty to the passengers, because of the seamen-passenger relationship. The jury heard the law and facts and returned a verdict of guilty. Any mitigation of responsibility and sentence now rest, under the positive law, with the executive branch; (2) the positive law commands conviction in these circumstances, so Holmes is criminally responsible even if this law conflicts with private, public and common morality; and (3) the law must be

applied consistently within the existing legal system, because men predicate their behavior on the existing system. Application of law relative to the circumstance would be inconsistent with the existing law and invalid as an ex post facto law.

The third school, the historical school, gets its base in the nineteenth century, as especially seen in the writings of Hegel, Marx, Burke, and Savigny.[111]

Some dominant characteristics of this school are as follows:

1. A concern for the past and the unconscious development and evolution of the human experience. Social control (law) is inevitable in the evolution and beyond analytically politically organized society.[112]
2. Law is discovered or found, not made consciously.[113]
3. Sanction is found in social pressure and habit.
4. The case law form is preferred, i.e. customary modes of common law in a precedential schema.[114]
5. Rules evolve spontaneously from the life of the people and hence must work.[115]
6. As the analytical school, maintenance of the status quo is the end of law.

The strength of the historical school is that it provides a method whereby the law can be guided by the

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[111] Ibid., Bodenheimer at 70-81.

[112] Ibid., Pound at 83.

[113] Ibid., at 85.

[114] Ibid., at 87.

[115] Cf. Ibid.

tested principles of the past. Its weaknesses are that it sometimes opposes needed law reforms and jurists sometimes take accidents of legal history for necessary principles of universal law.

The historical school would want the law principle which had historically evolved applied in the Holmes case. If the seamen's unqualified duty to the passengers had evolved in the judicial precedents or common law, then the court would be bound to apply this law, even if contrary to philosophic ideals and statutory law. This school would reason that: (1) the historical practices of the people determine the law, not legal institutions or speculative reason; (2) the court must "discover" the law which has evolved from the practices and customs of men; and (3) unlike the analytical and sociological schools, law is not consciously made.

Under the historical school, Holmes most likely would be convicted. The customs of men would prohibit seamen from arbitrarily sacrificing passengers, even under orders and in apparent times of peril. Under the customary law, some notice of the need to lighten the boat's load should have been given and a fair method of selection established by all the people in the long-boat.

Lastly, around 1960 and growing out of a social-philosophical base, came the fourth school, the

sociological school.[116] The pertinent characteristics here are:

1. A concern with the functional aspects of law on concrete social problems, not the abstract content.[117]
2. Law is gleaned from empiric experience and consciously made and thereafter tested by experience.[118]
3. A regard for social purpose rather than sanction.[119]
4. Pragmatic social concern rather than philosophic speculation, unconscious evolution, or analytical consistency.[120]
5. Technically law is looked on as more of a social than moral duty, although some in this school consider law a social and moral duty.
6. A concern for individual justice in the concrete case notwithstanding inconsistency with moral, theological, historical or analytical premises.

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[116] A major catalyst of the sociological school and a radical wing thereof may be characterized the legal realist. Since this group, or better, "attitude" will not be discussed as a school herein some brief discussion is in order, because of its influence on the modern sociological approach. Ibid., Bodenheimer, Jurisprudence at 116. This peculiar approach to law, not a "school" per se, has the chief characteristic of tending to minimize the normative (ethically--good or bad) or prescriptive (commanding) element in law. Id. This tendency carries over into the sociological school. Law appears to the realist as a body of facts rather than a system of rules, a going institution rather than a set of norms. Id. See Llewellyn, The Bramble Bush (1930); Llewellyn, A realistic Jurisprudence--The Next Step, 30 Col.L.Rev. 431, at 442-443, 464 (1930); Llewellyn, Some realism About Realism, 44 Harv.L.Rev. 1222 (1931); Frank, Law and the Modern Mind (1930); Fuller, American Legal Realism, 82 U.Pa.L.Rev. 429 (1934); and Rumble, American Legal Realism (1968).

[117] Ibid., at 291.

[118] Ibid., at 292.

[119] Ibid., at 293.

[120] Ibid., at 293-294.

The strength of the sociological school is its tendency not to overgeneralize a situation, thereby avoiding the sometimes abstract generalizations employed by the philosophic, analytic, and historic schools. Its weaknesses are that it reduces law to an amoral situation analysis, without any perspectives and aspirations. Moreover, few limits are placed on its institutional discretionary operation in the narrowed situation.

The sociological school would most likely find Holmes free of criminal responsibility, because of the extreme circumstances under which his acts were committed. This school would not hold Holmes to a duty which was derived from abstract "ideal" principles, the will of the sovereign, or evolving principles of law.

The reasons or substance for this conclusion of non-responsibility would be that: (1) the narrow circumstances here determined Holmes' acts (not his free will); and consequently, his criminal capacity was severely impaired; (2) these circumstances warrant the "making" of a law which operates as an exception to the moral, social and legal duty principle, if the latter conceptual standard is accepted at all; (3) punishment of Holmes would serve no social purpose of deterence, since the novel circumstances would not possibly be repeated; (4) such a holding would not do violence to the law since each case is decided case by case and any inconsistent or illogical conclusions flowing therefrom as to the law as a whole can be

distinguished on the facts; and (5) theological, moral, historical, and analytical premises are inadequate in determining Holmes' criminal responsibility, unless they are consistent with the speculated social welfare as empirically defined in the individual case.

A sociological court would also narrow the facts to show in what particular circumstances Holmes would be guilty of manslaughter. For example, the court would hold criminal responsibility if (1) Holmes was not acting under orders; (2) death was not imminent; and (3) there was no inclement weather. Otherwise, the presence of the above factors would warrant an acquittal.

Before concluding, some speculation on what jurisprudential schools the court and defense may have actually utilized. What jurisprudential implications can be derived from their reasons or substance?

First, a look at the court's position. The court's language cited herein on page 47,[121] strongly implies that the writing judge is of the historical school. He talks of moral and social duty being the basis of the legal duty with this duty evolving from the universal practices of man. Unlike the sociological school or the philosophic Greek Sophist school, adhering to the "compassion" principle, there would not be any vitiation of duty, because of the extreme circumstances. Unlike the analytical school,

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[121] Holmes, infra, at 368.

the legal duty is based on moral and social duty principles and not positive law. Moreover, in 1842, the year of the opinion, the historical school was in vogue.[122] And lastly, although a philosophical school might advance the abstract ideal of "sanctity of human life" which is consistent with the historical school's ideal, the philosophic school would not apply, because the duty principle here was thought to evolve from the customs and practices of man, not speculative reason.

Second, the defense seems to lend itself to classification under the Greek Sophist philosophy school, i.e. the secular "relativistic" humanism and compassion school. This appears to be the case, because the defense based its case on the qualified and relative nature of Holmes' duty. The circumstances, e.g. captain's orders, harsh weather, imminent danger of peril, diminished his criminal capacity, since Holmes' will was determined. Admittedly, the "relativistic determinism" of the Sophist philosophical school seems consistent with the sociological school, and may have later generated the philosophic premise of the sociological school; nevertheless, the latter school did not appear until 1900 and this fact logically and chronologically bars application of the sociological school to the defense's position. Both the analytical and historical schools would not apply, since they would not utilize the

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[122] Ibid., Pound at 51.

"relativistic situation" approach; but would apply the established statutory and case law as made and evolved, respectably. Again, the defense's primary attack was to vitiate Holmes' duty in the light of the extreme circumstances and this relativism implies the Sophist school.

The foregoing was an attempt to demonstrate how the reasons or substance supporting judicial opinion conclusions are derivative from jurisprudential schools and how such a substance or reasons analysis could broaden the jurisprudential perspective. Such a perspective should help the opinion analyzer read opinions with a more critical eye. At the least, the opinion analyzer will appreciate the jurisprudential and legal issues in judicial opinions.