

# The Argumentative Creation of Individual Liberty

By WARREN SANDMANN\*

What is the meaning of the term “liberty”? Michael McGee recounts an anecdote that provides one opening to this question.<sup>1</sup> McGee retells the story of Antun Robecick, a retired steelworker from Gary, Indiana, who returned to his native Yugoslavia in the late 1970’s. Robecick compares the “freedom” of Yugoslavia, a totalitarian regime controlled by one man (but where he feels safe to walk the streets at night), with the “freedom” of the United States (where he could say and think what he desired, but felt like a prisoner in his own house). Robecick is hard pressed to decide which country is more free, or which country, in other words, has more “liberty.”<sup>2</sup> As McGee notes, such a comparison seems nonsensical at first. However, upon closer examination, it illustrates McGee’s conception of liberty: “We are not ‘free’ by fiat of definition or declaration, but by virtue of our feeling in the presence of the life conditions we must face daily.”<sup>3</sup>

McGee is talking about a particular discursive and material conception of the idea of “liberty,” a word/symbol and a material condition. From where does this symbol/material condition arise? McGee argues that the origin of the “idea” of “liberty” came not from the minds and pens of an intellectual elite (social idealism), but from the real material experiences (social materialism) of the people of a society. This is a grounded liberty, an idea and material practice that is derived from the commonly felt and shared experiences of a people at a particular time and place. McGee describes liberty as “neither invention, form, nor fact. It is, as Edmund Burke suggested two centuries ago, precisely a ‘spirit’ which resides in the collective consciousness of ordinary citizens.”<sup>4</sup> In other words, “liberty” is a collective sense or feeling which resides in individuals who share com-

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1. Michael C. McGee, *The Origins of ‘Liberty’: A Feminization of Power*, 47 COMM. MONOGRAPHS 23 (1980) [hereinafter *Origins*].

2. *Id.* at 24.

3. *Id.* at 28.

4. *Id.* at 25.

mon experiences of a society. More precisely, we derive a "liberty" in response to facing a particular manifestation of a common societal experience, such as the expression of governmental power. Liberty, McGee argues, is precisely that "feeling" or "spirit" that a people experience when faced with the power of government. We "know" liberty in opposition, or in connection, with power. "Liberty" and "power" are both material and symbolic. They are real effects upon people's lives and represent "ideas" that are experienced by the people.

McGee argues that in Peter Wentworth's 1576 speech to Parliament (which was actually a speech intended for the ears of Queen Elizabeth), we can see an example of this "grounded" liberty. Wentworth could and did assume that the symbols/ideas/text he utilized in his persuasive message would be a part of the collective experience of his audience:

[H]is speech is nothing more nor less than a reflection of the 'consciousness' of his generation. If there is a sophisticated attitude toward Anglo-American notions of 'liberty' in this speech, it derives not from the genius of an individual's mind but from the individual's 'presence' in the collective consciousness of government.<sup>5</sup>

McGee's discussion of the concept of "liberty" is a specific example of his more general discussion of the rhetorical concept of the ideograph.<sup>6</sup> McGee argues that ideographs are collections of "political language" which manifest ideology in their "capacity to dictate decision and control public belief and behavior."<sup>7</sup> As such, the ideograph encompasses both the materialist concept of ideology and the symbolist conception of myth. Ideographs, which are prevalent in our political language, function both to support material power and to alter social reality through linguistic practices. Ideology as manifested in the ideograph is, in essence, a symbolic enthymeme. Given our existence and participation in a mass consciousness, the use of a term such as "liberty" to justify behavior such as war makes the ideograph "liberty" an enthymeme calling up an appropriate response on the part of the members of the mass consciousness and mass audience.

What is important in understanding the concept of the ideograph is that it is more than a term or collection of terms that is used to create a "poetic myth": ideographs call forth specific behaviors from

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5. *Id.* at 30.

6. Michael C. McGee, *The 'Ideograph': A Link Between Rhetoric and Ideology*, 66 QUARTERLY J. OF SPEECH 1 (1980) [hereinafter *Ideograph*].

7. *Id.* at 5.

individuals and groups, and manifest themselves in material actions. As McGee puts it, “[t]he important fact about ideographs is that they exist in real discourse, functioning clearly and evidently as agents of political consciousness.”<sup>8</sup> Ideographs, in other words, offer justifications for behavior, and help us to answer the question, Why did they (we) do that? Ideographs are the symbols that we use (and that use us) to create our world. And that created world is the only world we have, since our only way of making sense of the world is through symbols.

What is most interesting in this discussion of the ideograph and the specific case of “liberty” for the purposes of this Essay is McGee’s claim that the “idea” of liberty arose from the material practices and experiences of the common people. As such, these practices and experiences would have been part of the “public sphere” of discourse.<sup>9</sup> Interactions between the people and their government are, by definition in a democracy, a “public” matter. But what about interactions that occur within the government itself, especially a branch of the government that, in democracies, is designed to be “above” the politics of the interaction between the government and the people?

The arguments and decisions of the judiciary in a democracy, especially once a case has risen to the appellate level, are generally ones that do not involve the public. These arguments and decisions, of course, affect the public, but they are, in theory, designed to be apart from the public. The judiciary, it is generally argued, functions not according to the whims of the public, but according to the dictates of the law. And the law, it is also generally argued (though, of course, not universally believed), is a constant, a guidepost by which decisions are made.

If decisions by the judiciary utilize, interpret, and then dictate a specific meaning for an idea such as “liberty,” from where does this final meaning arise? This question will be the major focus of this Essay. To attempt to answer this question, Part I will first review some of the work on the notion of spheres or places of argument. Part II will look at legal decisionmaking as argument, and discuss theories of legal decisionmaking. Finally, Part III will examine the specific legal arguments concerning the idea of “liberty” in *Lochner v. New York*.<sup>10</sup>

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8. *Id.* at 7.

9. G. Thomas Goodnight, *The Personal, Technical, and Public Spheres of Argument: A Speculative Inquiry into the Art of Public Deliberation*, 18 JOURNAL OF THE AM. FORENSIC ASS’N 214 (1982).

10. 198 U.S. 45 (1905).

Part III will also attempt to answer these questions: what does "liberty" mean? How was this decision made? From where did this "liberty" arise? What effect did it have on the public? In conclusion, I hope to discover whether McGee's concept of the ideograph functions within legal argument, or if legal argument is indeed generally the writings of the intellectual few.

In this Essay, when I discuss argument, I do not generally distinguish it from other forms of rhetoric. There are many scholars of communication who draw clear distinctions between what is argument and what is rhetoric, or what is argument and what is persuasion. I have never personally been able to discover such clear distinctions. I find myself more in agreement with Chaim Perelman, who linked argument and rhetoric in stating that "[t]he aim of argumentation is not to deduce consequences from given premises; it is rather to elicit or increase the adherence of the members of an audience to theses that are presented for their consent."<sup>11</sup> In other words, argument requires both persuasion and rhetoric. Therefore, in this Essay, the terms argument, persuasion, and rhetoric will be used interchangeably.

## I. Spheres of Argument

The concept of "spheres" of argument is an idea that has been around for thousands of years. Aristotle and Cicero, among others, wrote of common places that were the site of reasons and claims to be used in arguments. However, the term "sphere" is generally most associated with Thomas Goodnight's 1982 Essay.<sup>12</sup> This review will begin earlier, by looking at Stephen Toulmin's work on argument fields.<sup>13</sup>

In his book *The Uses of Argument*, Toulmin advanced a new approach for both conceiving and justifying arguments. He posited the idea of "fields" of argument where each field was determined by the type of backing or conclusion used in each argument.<sup>14</sup> Though Toulmin used the term "logic" to describe these types, he went to great pains to distinguish this use of the term "logic" from its historical roots concerning deductive arguments and the syllogistic and analytic forms. The concept of fields of arguments proved useful to Toulmin in assessing different arguments and their conclusions. He first argued that because arguments fall into different fields, the backings used to

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11. CHAIM PERELMAN, *THE REALM OF RHETORIC* 9 (William Kluback, trans. 1982).

12. See Goodnight, *supra* note 9.

13. See generally STEPHEN E. TOULMIN, *THE USES OF ARGUMENT* (1958).

14. *Id.* at 14.

substantiate these arguments also come from different fields. Necessarily, then, the method to assess these arguments must vary from field to field. He also argued against any sort of absolute standard for an assessment of arguments, stating that knowledge simply cannot be reduced to an absolute standard that exists outside of a contextual field.<sup>15</sup>

In describing argument fields, Toulmin created very specific places for examining arguments. An argument field was best understood by looking at the argument, at how it was created, what was acceptable for supporting evidence, how conclusions were drawn, and how arguments were judged as acceptable or not. In adapting Toulmin's formulation, many argument scholars of the 1980's expanded the size of the fields and decreased the number of the fields. Instead of closely aligning an argument type to a specific field, scholars such as Goodnight offered the concept of spheres of argument. As Goodnight explained it, spheres were similar to Toulmin's notion of fields of argument, in that spheres too were denoted by "the grounds upon which arguments are built and the authorities to which arguers appeal."<sup>16</sup> Instead of specific argument fields, however, Goodnight proposed three spheres of argument: the personal, public, and technical.

Goodnight's major concern was with the public sphere, the place where arguments that could not be solved in the personal and technical spheres are resolved, and the place that is open to the most active participation by the most people. Goodnight feared that the public sphere was being "steadily eroded by the elevation of the personal and technical groundings of argument."<sup>17</sup> The public sphere should be a place where people engage in deliberative rhetoric, generating discourse that is capable of creating discussion and consensus. In this public sphere, the conditions for the creation and adjudication of arguments would not be as stringent as in the technical sphere, nor as singular as in the personal sphere. Goodnight also argued that one of the functions of argument scholars and critics should be to uncover and critique instances where alternatives to deliberative rhetoric were being practiced in place of deliberative rhetoric, so as to make more possible true public argument.<sup>18</sup>

Of course, Goodnight's approach was not without its critics. Some writers questioned his concern with the erosion of the public

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15. TOULMIN, *supra* note 13, at 240.

16. Goodnight, *supra* note 9, at 216.

17. Goodnight, *supra* note 9, at 220.

18. Goodnight, *supra* note 9, at 227.

sphere. Thomas Peters argued that the seeming emergence of the technical sphere was an evolution of the public, not an erosion of it.<sup>19</sup> He called for argument theorists to be less concerned with the drawing of distinctions between spheres, and instead to show a "greater appreciation of the similarity of arguments *between* spheres."<sup>20</sup> Further, Cori Dauber seconded Peters's critique, and called on scholars to concern themselves with discovering means of increasing public participation in arguments, regardless of the sphere.<sup>21</sup> Schiappa worried that the emphasis on making distinctions and classifying argument types could lead to a reification and concretization of the spheres, and an increase in the eminence of the technical sphere.<sup>22</sup>

The argument over spheres and fields of arguments has continued. While there are a number of issues of interest to the argument scholar, there are a few important issues for the purpose of this Essay. First, in McGee's formulation of the development of the ideograph, the process seems to be primarily focused in the public sphere. The process also uses the "consubstantiality" appeals of the personal sphere, engaging in a more public voice.<sup>23</sup> If this reading of the development of the ideograph is accurate, arguments that are in a technical and more specialized field may not be a part of the process by which ideographs help to shape the form of the debate and its outcome. Or they may be constituted by an ideograph that is only applicable to that field (which, in essence, would then not meet the definition of an ideograph).

The question about legal argument is whether it is part of a technical and specialized field with argumentative forms, claims, grounds, and judgments in a realm separate from the larger public. This has been the traditional understanding of the process of the law, an understanding that goes largely by the heading of "legal formalism."<sup>24</sup> If this understanding is correct, then ideographs by definition could not be a part of legal argument although they may still influence legal argument. However, other commentators question that traditional

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19. Thomas N. Peters, *On the Natural Development of Public Activity: A Critique of Goodnight's Theory of Argument*, in SPHERES OF ARGUMENT: PROCEEDINGS OF THE SIXTH SCA/AFA CONFERENCE ON ARGUMENTATION 26 (Bruce E. Gronbeck et al., eds. 1989) [hereinafter SPHERES OF ARGUMENT].

20. Peters, in SPHERES OF ARGUMENT, *supra* note 19, at 31.

21. Cori Dauber, *Fusion Criticism: A Call to Criticism*, in SPHERES OF ARGUMENT, *supra* note 19, at 33.

22. Edward Schiappa, 'Spheres of Argument' as Topoi for the Critical Study of Power/Knowledge, in SPHERES OF ARGUMENT, *supra* note 19, at 47-48.

23. Goodnight, *supra* note 9, at 216.

24. ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 1 (1986).

notion of legal argument and legal reasoning. The next section of this Essay will discuss some of the competing theories of legal reasoning and decisionmaking in order to determine the place of ideographs in legal arguments.

### A. Legal Argument

The relationship between legal reasoning and argumentation is a long one. Cicero was both a master rhetorician and one of the most skilled lawyers in ancient Rome. Law has often been cited as the paradigmatic mode of argument,<sup>25</sup> but that relationship has been questioned both by scholars of law<sup>26</sup> and argument.<sup>27</sup> Frederic Gale offers one of the more contemporary and thorough retellings of the relationship between law and argument.

Understanding the relationship between law and argument requires going back to the time of Aristotle when there was a split between rhetoric and truth<sup>28</sup> and an acceptance by most intellectuals of Plato and Aristotle's degradation of rhetoric as a substitute method of inquiry, a method to be used only when the more rigorous methods of dialectic or scientific inquiry were unavailable. This split is between the objectivity of values and ideals and the subjectivity of values and ideals, a split between understanding the world from the standpoint of *physis* (that there exists in the material world ideal forms and values that can be used as means to evaluate decisions) and *nomos* (that ideals and values used to judge humanity are the creation of humanity). Gale links this time of the pre-Sophists to contemporary rhetorical theory, noting how this split is played out over and over again, with one view taking precedence during one era, and the other during another era. Cicero and his intellectual followers are portrayed by Gale as picturing rhetoric as an aid to knowledge. For example, Vico, Hume, Nietzsche, and Perelman take the more sophistic view that rhetoric is a constituent element of knowledge, aligning themselves with "theories that assume language is fused with thought by social practices."<sup>29</sup>

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25. TOULMIN, *supra* note 13, at 8.

26. See generally FREDERIC G. GALE, *POLITICAL LITERACY: RHETORIC, IDEOLOGY, AND THE POSSIBILITY OF JUSTICE* (1994).

27. See generally Geoffrey D. Klinger, *Law as Communicative Praxis: Toward A Rhetorical Jurisprudence*, 30 *ARGUMENTATION AND ADVOC.* 236 (1994).

28. See generally Warren Sandmann, *Logic and Emotion, Persuasion and Argumentation: 'Good Reasons' as an Educational Synthesis*, *BASIC COMM. COURSE ANN.* III 123 (1991).

29. GALE, *supra* note 26, at 23.

Gale notes the prominence of Burke in the struggle to reassert the constitutive power of rhetoric, but also notes that the split remains in the current Cartesian paradox in language and rhetoric, as well as in the current paradox between the epistemic and ontologic qualities of rhetoric. Both of these paradoxes are struggles to understand the role of language and the relationship between language and knowledge: Does language exist as a correlate to an object, as a mirror of that object, or as a socially-agreed upon way to respond to the idea of that object? Gale's discussion of the ideological nature of rhetoric offers the perspective that language is a constitutive element of knowledge. Thus, in discussing the rhetoric of law, Gale reminds us that the critical stance cannot rise above the language or ideology in which it is embedded to discuss and critique from an objective stance, but that the role of the critic is to discover through textual analysis the ideological position of the rhetoric.<sup>30</sup>

Gale next moves to the debate between the Sophists and the Platonists. He claims that the Sophistic philosophy is far more important to legal interpretation than is Platonic philosophy because the Sophists understood the relativistic nature of truth in law. This battle and understanding has continued in both language theory and law, with legal realists seen as sophists and legal formalists as Platonists, with Richard Rorty as a contemporary sophist, and Jurgen Habermas as a neo-Platonist. In between these two positions lie social constructionists and deconstructionists in language theory. The sophistic notion of the relativity of truth argues that we must utilize this provisional truth as we make decisions both in the larger society and in law.<sup>31</sup>

The medieval period saw the rise of natural law, the Judeo-Christian concept that grounded law and justice in the divine nature of God, and the idea first promoted by Hugh Grotius that natural law was founded on both the social contract and the ability of reason.<sup>32</sup> The role and place of reason is the key here, for it is reason that allows this form of natural law to rise above and transcend "mere" social law or law by agreement. Reason provides this form of natural law an objective detachment that is missing from the social compact, and thus also adds to the legitimacy of law. What this also leads to, however, is what Gale calls the paradox of the aporia. Law must be simultaneously an application of the "correct" law, and also a choice between

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30. GALE, *supra* note 26, at 27.

31. GALE, *supra* note 26, at 29.

32. GALE, *supra* note 26, at 37.



affirming and rejecting that law. But if the law requires choice, then the law is not "correct" or transcendent. And if it is "correct," then no choice should be required. This is still the quintessential paradox facing legal theorists today who search for a metatheory which will justify legal decisionmaking.<sup>33</sup>

Just as in the past, the basic division in contemporary legal theory remains the division between objective and subjective approaches to law, a continuing division between *physis* and *nomos* (a division that is similar to the division in almost all of the humanities and social sciences). The basic approaches to legal theory are representative of this continuing split: some are primarily objective (formalism and positivism), and others are primarily subjective (realism and pragmatism).

Legal formalism, as noted above, is in its many guises one of the more dominant approaches to judicial decisionmaking. In its most basic form, legal formalism is seen as exactly that: "a formula that will yield a 'consistent' line of judicial interpretations."<sup>34</sup> Formalism, Gale argues, claims to be an objective approach to the law, a restatement of Plato's dialectic that is removed from the ideology of interpretation. Objectivism is defined by Gale as any philosophical position that asserts that the truth of a proposition is independent of the particular context in which it is found, and transcends the particular to become a universal proposition. Thus Gale finds legal formalism to be not a distinct theory but rather a type of objectivism.

Legal formalism, however, is distinct from other forms of objectivism in that it does not exclude the moral dimension, but instead requires it. Legal formalism is about the formalistic process of attaining legal and social morality. Gale cites Ronald Dworkin as representative of this way of interpreting the law, as his approach of legal interpretation puts forth the history of past law as the objective foundation of interpretation. Dworkin offers a "chain novel" theory of interpretation, picturing legal interpretation as a series of opinions written by judges who are bound by precedent.<sup>35</sup> It is as if judges are novelists who start writing a novel after another person has created all the characters and scenes and "rules" for the novel. The opinion-writer must fit his opinion in with the already begun novel. This history, Dworkin claims, is above individual interpretations, and therefore is separate from the interpretive process. Gale argues that this approach works well in the "easy" cases where history and precedent

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33. GALE, *supra* note 26, at 39.

34. GALE, *supra* note 26, at 46.

35. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).

is clear, but fails to offer a clear justification in the “hard” cases where many histories are available.

Stanley Fish offers another critique and take on legal formalism.<sup>36</sup> Fish argues, in essence, that a search for history to bind a judge in writing an opinion is both impossible and unnecessary. It is impossible in that the history that a judge uses is still an interpretive history, not an objective foundation; and it is unnecessary in that the legal interpretive community constrains judges in their opinion-writing. The lack of a foundational grounding for legal interpretation will not lead to judicial anarchy, tyranny, or lack of legitimacy because of the hegemonic quality of the legal community.<sup>37</sup>

Legal positivism, Gale argues, is another form of objectivism, but is distinct from formalism in one important way. While legal formalists believe that law is objective and discoverable and that it objectively exists and can be logically deduced and applied, legal positivists believe that law is a choice between competing social values. However, the process of applying these social choices is still an objective process. It is as if the ontology of law is subjective—that is, the competing social choices are political—but the epistemology is objective. This approach is similar to other social sciences in their search for scientific principles by which to make social decisions.

Both legal formalism and legal positivism are on the objective end of the continuum between objectivity in interpretation and subjectivity. Legal realism, however, is on the subjective end. In discussing legal realism, Gale points out that as divine authority as a source of certainty in law decreased, a need for another form of validation arose. Objective standards of science, however, are unable to meet the needs of social issues. The alternative is a more subjective approach, an understanding that knowledge is both created and therefore validated by human experience. Legal realism is a form of subjective validation. Its goal is not the objective discovery and application of law, but the practice of legal interpretation designed to improve the social good. To the legal realist, the subjective values of the judge and society are relevant to the decision. “For realists the object of law is to achieve not consistency but socially desirable consequences.”<sup>38</sup> It is important in understanding legal realism that only extreme adherents believe that the law is completely subjective.

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36. See generally STANLEY FISH, *DOING WHAT COMES NATURALLY* (1989).

37. *Id.* at 93.

38. GALE, *supra* note 26, at 58.

Somewhat aligned with the legal realists are the legal pragmatists who argue that legal decisionmaking is justified not by foundational rules nor subjective values alone, but instead by basic utilitarian principles. Law is justified by its usefulness to society and its purpose in increasing the "wealth" of societal members. Gale labels Richard Posner as a legal pragmatist.<sup>39</sup> Posner agrees that precedent is binding, but that the key is how precedent is read.<sup>40</sup> The judge is not free to decide however he wishes: the legal culture restrains the judge in its determination of what counts as a reasonable decision. In essence, Posner's judge uses precedent guided by (1) the arguments of adversaries which present competing versions of the relevant precedents, (2) practical reason which is the accumulated knowledge of a legal education, (3) the culture of law which supports or suppresses certain decisions, and (4) the "usefulness" of the result.<sup>41</sup>

Along with the above interpretive approaches, there are a number of other contemporary approaches to legal decisionmaking that need a brief overview. Despite contradictions and questions within the legal profession, the traditional notion that law is above questions of politics and ideology is still the grounding approach to the practice and theorization of law, with its premise that the function of legal theorizing is mainly to "describe and justify the role of the judiciary in a liberal democracy."<sup>42</sup> It is out of and in response to this tradition that the Critical Legal Studies (CLS) movement arises.

The basic and generally agreed upon premise of CLS is that the main function of the movement is to expose law as a political and ideological agency, a means for supporting the existing (and oppressive) status quo, and a means to reify that status quo as normal or as not being a political or ideological choice. Beyond that premise, there is more difference than agreement among those who see themselves as a part of the CLS movement.

Gale posits two basic groupings within the CLS movement. First, those who are in essence super-realists who want to extend the realist attack upon legal theory, but who still insist that much of the traditional notion of law should remain. They acknowledge the ideological and political nature of law, but point out that lawyers and judges are still bound within the tradition (either procedurally or linguistically), and that the tradition and precedent of law must and should still bind

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39. See generally RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990).

40. *Id.* at 95.

41. *Id.* at 73.

42. GALE, *supra* note 26, at 66.

judges. These include, according to Gale, those like Fish who argue that there is a hegemony of legal training and discourse that binds judges.

The other basic group that Gale posits is a group that he sees as more radical because it calls for a new conception of law and announces a continuous critique of all traditional legal theory. This more Marxian-influenced branch of CLS is more concerned with the program of exposing traditional legal theory as the supporter and reifier of liberalism and its existing oppression which they call “an instrument of social, economic and political domination, both in the sense of furthering the concrete interests of the dominators and in that of legitimating the existing order.”<sup>43</sup>

The CLS movement arises from the understanding that all institutionalized discourses, including the law, inevitably privilege one position or people, and deprive other positions or people. Therefore, there is a need to continually question that discourse. What is missing, of course, is anything other than continual critique. CLS is seen by many (including many of its adherents) as a program of critique which does not offer any programmatic change.<sup>44</sup> The CLS movement, like many other critical approaches to traditional notions of knowledge and society, appears to be caught between rejection of the liberal tradition, with its belief in rule of law and objectivity of reason, and Marxist/Leninist deterministic programs that deny any role for the individual because of their belief in the deterministic power of social structures.

Another contemporary approach to legal decisionmaking is found in the application of the principles of deconstructionism. Deconstructive analyses of legal theory demonstrate the way that legal theories, which are designed to explain and clarify why and how legal decisions, basically take control of the decision they are trying to explain. The theory takes authorial intent away from the opinion-writer, and in essence, recreates or reinterprets the decision so as to align it with the theory. This, in turn, subverts the theory which is assigned to the opinion-writer as intent.

The purpose of this deconstruction is to point out the myths by which we make our decisions and say that they are objective and apolitical. This is designed to lead to a new and better way of seeing how we could make decisions and thereby remake society. However, this is not necessarily what deconstructionists are concerned with. The

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43. GALE, *supra* note 26, at 71.

44. GALE, *supra* note 26, at 72.

problem, of course, is that when you deconstruct a literary text and subvert the meaning of the author, you make little if any material difference. But when you deconstruct a law and subvert its meaning, you may have a very significant and immediate impact on people's lives.

There are, of course, many other approaches to legal interpretation. These interpretations include Marxist,<sup>45</sup> social constructionist,<sup>46</sup> feminist,<sup>47</sup> semiotic,<sup>48</sup> and post-modernistic.<sup>49</sup> However, despite all these theories, it is clear from reading contemporary Supreme Court opinions that legal formalism in some variety is still the dominant mode of reasoning and justification of legal decisions.<sup>50</sup> Nevertheless, even those who acknowledge the dominance of legal formalism argue that it is formalism primarily in name only. Decisions are reached by judges in ways that do not necessarily conform to the formalism of the law, but are then defended by an artificial construction that on the surface appears to be formalism.<sup>51</sup>

Scholars such as Harry Wellington make the argument that legal formalism alone cannot explain many of the decisions made by the judicial system in the United States, especially at the appellate level and most noticeably at the Supreme Court level. Wellington makes the case that legal decisionmaking invariably involves public morality.<sup>52</sup> Wellington argues that it is impossible to understand many of the more controversial decisions made by the court unless the role of public morality is factored into the equation. Despite the assumed deference to the plain meaning or original intent of a law, the Court has many times departed from that deference, and departed from it in a way that shows their awareness of the role of public morality.<sup>53</sup>

What does this mean for the purposes of this study? Given the evidence that legal decisionmaking must involve some conception of

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45. See generally ISAAC BALBUS, *THE DIALECTICS OF LEGAL REPRESSION* (1973).

46. See generally RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

47. See generally Carol Smart, *Feminist Jurisprudence in DANGEROUS SUPPLEMENTS: RESISTANCE AND RENEWAL IN JURISPRUDENCE* 133 (Peter Fitzpatrick, ed. 1991) [hereinafter *DANGEROUS SUPPLEMENTS*].

48. See generally Peter Goodrich & Yifat Hachamovitch, *Time out of Mind: An Introduction to the Semiotics of Common Law*, in *DANGEROUS SUPPLEMENTS*, *supra* note 47, at 159.

49. See generally Anthony Carty, *English Constitutional Law from a Postmodernist Perspective in DANGEROUS SUPPLEMENTS*, *supra* note 47, at 182.

50. Klinger, *supra* note 27, at 237.

51. HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* 78-82 (1990).

52. WELLINGTON, *supra* note 51, at 122.

53. WELLINGTON, *supra* note 51, at 121.

the public good, from where does that conception arise? How does the Court determine what it means by the "public good"? If such a decision arises solely within the confines of the cloisters of the Supreme Court, is it truly a "public" decision? Or are there influences from the public that, in a sense, infect the arguments of the court?

Wellington claims that the process of decisionmaking itself creates the room and the need for this "infection" from the public to enter the legal decisionmaking process. First, the interpretation of the Constitution and the making of its meaning by the Supreme Court takes place through a "dynamic, adversarial process" in which many different groups, through their official representatives (the lawyers arguing the case), offer to the Court a variety of often conflicting interpretations of the law.<sup>54</sup> All of these interpretations, because they must pass the muster of the artificiality of legal formalism, are plausible and defensible.<sup>55</sup>

Wellington claims that in making these arguments advocates for the different positions and interpretations couch their appeals in the common language and common understandings of the general public.<sup>56</sup> In essence, therefore, the raw material that the Supreme Court, and other appellate courts, have to work with includes not just the plain meaning of the law, but also the often conflicting interpretations of contemporary public argument. Additionally, Thomas Marshall who systematically studied the relationship between Supreme Court opinions and public opinion, makes the point that while there is no proven, direct causation between public opinion and Supreme Court opinions, those Supreme Court decisions that reflect public opinion are more likely to prevail over longer periods of time than those decisions that ran counter to public opinion.<sup>57</sup> Marshall also shows that members of the Supreme Court are aware of public opinion in the decisionmaking process. While public opinion is increasingly cited in decisions, it is usually used to justify decisions that are a part of the prevailing public opinion. There is as yet no clear evidence that public opinion plays a decisive role in the decisionmaking process.

Despite the lack of causal connections, this knowledge and use of public opinion offers additional support to Wellington's argument that the public is involved in legal decisionmaking, even at the level of the Supreme Court. Given this role for the public, it appears that legal

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54. WELLINGTON, *supra* note 51, at 79.

55. WELLINGTON, *supra* note 51, at 80.

56. WELLINGTON, *supra* note 51, at 80.

57. THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 181 (1989).

decisionmaking shares enough of the characteristics of other contemporary deliberative forums that it should be possible to discover within certain cases where and to what extent the public played a role in the process and outcome. The remainder of this Essay will offer an analysis of the 1905 Supreme Court decision in *Lochner*, and will specifically look at the manner in which the Court arrives at its concept of "liberty."

## II. *Lochner v. New York*

The issue in *Lochner v. New York*<sup>58</sup> involved a New York state law that limited the work hours of bakers to no more than sixty hours a week. Justice Peckham wrote the majority opinion in the five-to-four decision that found the law to be an unconstitutional infringement upon the rights of both employers and employees to engage in contractual labor agreements.

Justice Peckham's decision involved an interpretation of the Fourteenth Amendment as it applied to all individuals in the United States. Justice Peckham argued that the "general right to make a contract in relation to [ ] business is part of the liberty of the individual protected by the Fourteenth Amendment," that "[t]he right to purchase or to sell labor is part of the liberty protected by this amendment," and that therefore states in general have no right to interfere with the rights of either employers or employees in contractual agreements.<sup>59</sup>

There is, of course, an exception to this general principle. This exception is what Justice Peckham referred to as the "vaguely termed police powers."<sup>60</sup> While the state's police powers have no specific and defined meaning, Justice Peckham stated that they are generally held to allow the state to interfere with the liberty of individuals if the interference is clearly connected to the "safety, health, morals, and general welfare of the public."<sup>61</sup> According to Justice Peckham, the basic question was whether "this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unnecessary, and arbitrary interference with the right of the individual to his personal liberty."<sup>62</sup>

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58. 198 U.S. 45 (1905).

59. *Id.* at 53.

60. *Id.*

61. *Id.*

62. *Id.* at 56.

In *Lochner*, Justice Peckham continued, the answer to this question was fairly obvious. First, he dismissed the claim that the law should be considered valid simply as a labor law. Clearly, Justice Peckham argued, there was “no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.”<sup>63</sup> Bakers, he continued, are perfectly capable of taking care of themselves and of determining the amount of time they can and should be allowed to work.<sup>64</sup> The only way this law could be upheld as a valid application of a state’s police powers, Justice Peckham argued, would be on the grounds of the health of bakers. In this instance as well, Peckham claimed, it was clear that the law was an unnecessary infringement upon the right to contract because there was no direct connection between hours of employment as a baker and health problems of a baker. Furthermore, the police powers of the state, Justice Peckham stated, should be more concerned with the health and welfare of the general public, and not any specific individual or class of individuals.<sup>65</sup> If such a law were allowed to stand, Peckham concluded, then the reach of the state under the guise of police powers would appear to be limitless.<sup>66</sup>

In his concluding comments, Justice Peckham opined that the New York law in question, while publicly proclaiming to be concerned with the health and welfare of the public, was in fact of another nature. Instead of being concerned with “the purpose of protecting the public health or welfare,” laws such as the New York law are really attempts “to regulate the hours of labor between the master and his employ[ee]s,” and are therefore in clear violation of the Fourteenth Amendment.<sup>67</sup>

There were two dissenting opinions in the case, with the Justice Holmes dissent generally considered to be the more important of the two.<sup>68</sup> The first dissent, written by Justice Harlan, presents the standard legal thinking of the time. Justice Harlan argued that the Court was overstepping its authority in overturning the New York law. The Court, Harlan claimed, was operating in opposition to the wishes of the public as expressed by the legislature of New York. Justice Harlan argued that the Court should practice deference to the decisions of the

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63. *Id.* at 57.

64. *Id.*

65. *Id.* at 58.

66. *Id.* at 59.

67. *Id.* at 64.

68. Wellington, *supra* note 51 at 63.



legislature, "for, the rule is universal that a legislative enactment . . . is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of the legislative power."<sup>69</sup> In this case, Justice Harlan concluded, it was clear that the New York law was within the legislative power of the state, and that the Court could not and should not invalidate a legislative enactment unless there was a clear and express infringement of the Constitution.

It is in Justice Holmes' dissent that we find what has historically been the major controversy in the *Lochner* decision. Holmes argued that the majority opinion in *Lochner* was founded not upon a clear reading of the law, but instead upon "an economic theory which a large part of the country does not entertain." It was Holmes' contention that the majority opinion was putting into practice not a legally sound principle, but instead was writing into the law "a particular economic theory," that of laissez faire capitalism.<sup>70</sup>

In looking at the arguments presented in the majority and dissenting opinions, what formulations of the concept "liberty" are present? Justice Peckham's idea of "liberty" is quite apparent. All individuals, regardless of class or occupation possess personal liberty as an innate condition, which translates into the fundamental right to do with their personhood whatsoever they wish, so long as it does not violate the health or welfare of the general public.<sup>71</sup> Harlan's "liberty" is a bit more limited, a "liberty" that requires that the state not limit the rights of the individual "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation."<sup>72</sup> Justice Holmes' "liberty" is less specifically spelled out, and also, apparently, much less expansive. It is not the "liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others," a "liberty" that Justice Holmes decries as a "shibboleth" for many who should know better.<sup>73</sup> "Liberty" for Justice Holmes is a concept that has arisen from "the traditions of our people and our law."<sup>74</sup>

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69. 198 U.S. at 68 (Harlan, J., dissenting).

70. *Id.* at 75 (Holmes, J., dissenting).

71. *Id.* at 59.

72. *Id.* at 65-66 (quoting *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (Harlan, J., dissenting)).

73. *Id.* at 949.

74. *Id.*

### III. Origins of Liberty

From where do these concepts of liberty arise? In the case of Justice Peckham's "liberty," the traditional and still for the most part dominant story<sup>75</sup> explains the creation of "liberty" in basically the manner of which Justice Holmes complains. Justice Peckham's "liberty" is a specifically created liberty that was contrived for the sole purpose of legitimating in law the laissez faire theories and assumptions of the social Darwinists.<sup>76</sup> Because this "liberty," so the story goes, was a specifically contrived concept, it would not be an ideograph, as it would not be a manifestation of the popular "feeling" at the time. In terms of the legal interpretive theories discussed above, Justice Peckham's opinion appears to be clearly one of legal pragmatism, of making the law fit a decision arrived at for reasons other than a legal fit.

Justice Harlan's "liberty," on the surface, would also not appear to be an ideograph because he is very careful to state nothing that has not already been stated in earlier Court opinions. Justice Harlan's "liberty" is constructed purely from the plain intent of the law and the past precedents of the Court. It is true that, at least so far as Justice Harlan's "liberty" does arise from the plain meaning of the law, and that the plain meaning of the law represents the will and "feeling" of the people, Justice Harlan's liberty could be an ideograph. However, he is concerned far more with the process undertaken by the Court than with the concept of "liberty" itself. Justice Harlan's opinion, in the language of legal interpretive theory, is clearly that of the legal formalist: the law is concerned only with the law, and should not concern itself with any questions of substance.

Justice Holmes' "liberty" at first glance appears to be most closely associated with the concept of the ideograph. He defines liberty as part of the "fundamental principles as they have been understood by the traditions of our people and our law."<sup>77</sup> The placement of traditions of "our people" before "our law" does seem to indicate that Justice Holmes is more concerned with what the people think ought to be the case than with what the law says ought to be the case. This is also consistent with the traditional story of *Lochner*, with Justice Holmes as the legal realist arguing for law as it ought to be, rather than law as it is.

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75. HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 19 (1993).

76. 198 U.S. at 75 (Holmes, J., dissenting).

77. *Id.* at 76.

Peering just a bit beneath the surface, it is possible to see more of the origins of these concepts of "liberty." The standard story of Justice Peckham's decision involving the legal legitimation of laissez-faire principles was mythologized by most Constitutional scholars of the early and mid-20th century. Kelly and Harbison saw in Peckham's decision the power of the post-Civil War Republican party and its emphasis on the rights of big business.<sup>78</sup> Swisher described the decision as an instance of the majority reading into the law their personal beliefs in laissez-faire economic theory.<sup>79</sup> Wiecek described the *Lochner* decision as an archetype of the process of judge preference as opposed to judicial deference.<sup>80</sup>

Therefore, this standard story seems to make clear that the majority decision in *Lochner* was not a manifestation of the ideograph. Justice Peckham's decision was made with a preconceived notion of what liberty should mean, a notion that arose not from popular understanding, but from the "pens of an intellectual elite," and as such was a product of what McGee termed "social idealism." Given that the process that Justice Peckham apparently followed in coming to this decision was a process of legal pragmatism, it seems that the process of legal pragmatism does not lead to a popular conception of liberty.

There is, of course, another side to this issue. Many contemporary scholars have questioned the standard story of *Lochner*, and have argued that the case is not an example of legal pragmatism or the reading into the law a personal preference. Instead, these scholars argue that the *Lochner* decision is best understood as an attempt by the Court to come to a decision that was both grounded in precedent (thereby meeting the traditional function of the law as understood in legal formalism), and represented the popular understanding of the people of that time.<sup>81</sup> In other words, in this understanding of *Lochner*, the concept of liberty proposed by Justice Peckham was not simply a preconceived notion created by the pen of Herbert Spencer, but was an actual attempt at rendering an accurate representation of the people.

Very briefly, Gillman summarizes the arguments for this alternative reading of *Lochner* by demonstrating that the decision in *Lochner* was not a case of the Court reading in a specific preference for laissez-

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78. ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* (1948).

79. CARL B. SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* (1943).

80. WILLIAM WIECEK, *LIBERTY UNDER LAW* (1988).

81. GILLMAN, *supra* note 75, at 6-10.

faire capitalism, but was instead an attempt by the Court to preserve both precedent and public opinion. The decision in *Lochner* was not about laissez-faire theory, but was instead a continuation of the Court's work in overturning laws that violated the Jacksonian principle of true equality that there be no discrimination between classes of people.<sup>82</sup>

In this story of *Lochner*, the concept of "liberty" appears to be much more an ideograph. The "liberty" that was used within the *Lochner* case was not a simple creation, but an accumulation of the years of experience and understanding of the people of that time. This idea of "liberty," then, was as much as possible a true representation of the feelings of those people, and their understanding of what it meant to be free and to function in society. This "liberty" expressed both the symbolic and, especially after *Lochner*, the material conception of the term.

#### **IV. Conclusion: Legal Interpretation, The Ideograph, Spheres and Implications**

In the earlier discussion of legal theory, the different theories of interpretation were briefly described. Legal formalism, though never the complete master it was purported to be, is still the dominant mode of interpretation, at least in the eyes of the public. One need only pay some attention to the public hearings for new Supreme Court justices to hear the debate between those who call for the law to be discovered and those who believe that sometimes the law needs to be made.

Legal formalism, as a theory of interpretation, and even if adhered to more in name than in substance, is a theory that places the law above the public. The law is a knowable, or at least discoverable, entity. It grows, but it grows in predictable directions. Additions to the law are not new; they are simply extensions of existing law. In this theory of legal interpretation, the public has little if any role. Specially-educated practitioners, with a base of knowledge that is apart from public opinion, make decisions that affect the public but are not a part of the public. In terms of argument theory, legal decisionmaking in the mode of legal formalism is quite clearly part of the technical sphere.

In the *Lochner* case, however, the evidence seems to indicate that legal formalism is and should be a part of the public sphere. The revisionist history of *Lochner* indicates a case that was decided by the

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82. GILLMAN, *supra* note 75, at 7.

process of legal formalism, but that was inextricably linked to the public understanding of the concept of liberty. Not only did the Justices utilize the understanding of the public, they felt that, to be true to the principles of the law, they were bound by it.

In debates over the appropriate manner in which to interpret the law, the role of the lay public is usually championed only by those who consider the law to be an instrument of social policy, whether they be from the traditional left (realists) or the traditional right (legal economists). Legal formalism, and its many variants, including original intent and plain meaning, are usually depicted as being separate from the public. In the *Lochner* case, however, a new picture of legal formalism emerges.

This legal formalism cannot exist without the public sphere. If you seek the original intent of a law, statute, or constitutional amendment, you seek the public's understanding of that law and not just the legal profession's understanding. Similarly, the plain meaning of a law is plain only to the extent that it represents the popular understanding of the people at the time the law was written. Legal formalism, it appears, is not at all above or separate from the public.

What this can mean for both argument and legal scholars is fairly evident. The time has come to stop the endless and somewhat meaningless debate between legal formalists and legal realists. Even when law is conducted according to the strictest understanding of the most conventional formalist, the public is involved. The formalist never can work with just the law, for the law is always more than the record of past courts.

When we analyze the law as rhetoric, we need to look beyond the personalities of the Justices, and beyond the quasi-logic that appears to support the decisions. We need to look a little deeper and attempt to see the public arguments that created the material for that original and now disputed law, and created the conditions for the judicial decision. We have long known that *stare decisis* is only a part of the process of understanding legal decisionmaking. Going beyond the conventions of labeling a decision or process one of formalism or realism to understanding the process regardless of the label is a formidable task. It is also a more thorough way to understand the relationship between the rhetoric of the law and the rhetoric of the public.