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LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW. BY *Kim Lane Scheppele.* Chicago: University of Chicago Press. 1988. Pp. xiii, 363. Cloth, $54; paper $17.95.

Does a psychologist have a duty to disclose his patient's threat to kill a former girlfriend? (Yes.) Can an apostate priest who fakes his own death and then seeks employment as a professor at a Catholic college using another name be barred from such employment? (Yes.) Has the seller of a house who fails to inform the buyer that there is no water between 7 p.m. and 7 a.m. defrauded the buyer? (Yes.) Could a buyer of tobacco in New Orleans in 1812 withhold his knowledge that a peace treaty had been signed (a fact greatly increasing the price he would otherwise have had to pay) from a seller uninformed of the treaty? (Yes.) Eight years after treatment, can a psychiatrist publish a book that details a patient's thoughts, feelings, and fantasies, if during the therapy the patient consented? (No.)

In this thoughtful book based on her dissertation in sociology at the University of Chicago, Kim Lane Scheppele[1] helps us understand why the courts allow some secrets to be kept while requiring or at least not punishing the revelation of others.

Given the centrality of information control to social life, it is amazing that so few sociologists have studied the topic in depth. Georg Simmel and Erving Goffman stand almost alone in devoting significant attention to the study of secrecy.[2] Scheppele's logically and empirically persuasive study is thus very welcome. She moves the current debate about secrets and the law beyond the realm of rhetoric and avoids confusing what the scholar believes judges should do with what they actually do (although in a happy coincidence it turns out that Scheppele's morally preferred position is also best at ordering the empirical data). While bringing conceptual order and depth to a tangled web, she shows the limited applicability of the law-and-economics approach for understanding the full range of common law secrecy cases.

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2. E. GOFFMAN, STRATEGIC INTERACTION (1969); THE SOCIOLOGY OF GEORG SIMMEL (K. Wolff ed. 1950); *see also* G. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA (1988); SECRECY (S. Tefft ed. 1980); URBAN LIFE, Jan. 1980 (special issue devoted to secrecy).

Writing with clarity and economy of expression, she offers a model that will certainly inspire other social researchers.

Scheppele restricts her attention to legal secrets involving contending parties whose cases come before a judge. How does Anglo-American legal culture treat such secrets? What counts as a legally protected secret among conflicting parties? When should individuals be compelled to reveal information to those with whom they deal? Is there a logical order to judicial action in such cases? If so, is it best captured by an economic view that argues that judges act to maximize efficiency through the creation of wealth, or by a contractarian view that stresses that judges act to create equality among contending parties? Are legal secrets also efficient secrets, as claimed by those holding the law-and-economics view?[3] She bases her answers not on deductions from first principles, or selective empirical illustration, but on a systematic sample of nineteenth- and twentieth-century legal doctrine as expressed in common law cases. Her convincing empirical conclusion is that "whatever else law and economics may be, it is not a descriptively accurate positive account of law" (p. 3).

The economic theory suggests that judges will use rules to maximize efficiency. Information will be treated as private property and secrecy viewed as a legitimate means of protecting it when such protection is believed necessary for the information to be created. However, property rights will not be extended and disclosure will be required in those cases in which information would be produced regardless of whether or not it is protected.

The economic theory makes a distinction between casually and deliberately acquired information. For the latter, no disclosure is required. But efficiency is seen to require that information which is casually acquired should be passed along, in spite of any other objections of its subject or the potential discloser, unless such disclosure would make transaction costs too high. Conversational privacy should be protected since it will increase the flow of information, while personal privacy involving the protection of discreditable information should not be protected, since it is believed to decrease efficiency (pp. 24-42).

In contrast to the economic theory, Scheppele develops a contractarian theory, drawing on the work of Rawls.[4] This approach holds that law must be legitimate, beyond being merely efficient or orderly. It is legitimate when it is able to incorporate "those values and arguments that the losing side in a legal case would recognize as appropriate, even when the person finds herself losing as a result of their application" (p. 61).

3. R. POSNER, THE ECONOMICS OF JUSTICE (1981); Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978).

4. J. RAWLS, A THEORY OF JUSTICE (1971).

Contractarianism receives its moral power from giving individuals choices about how to live. Scheppele asks what sort of rules individuals would likely consent to live by with respect to strategic secrets. She suggests that the rational individual will separate secrets which cause extensive harm from those that cause little harm (to the unknowing party) and that only the former would have to be disclosed. In extreme cases, the "law ought to guarantee that people will not fall below a tolerable level as a result of harm caused by secrets" (p. 74). Individuals also will require protection from deeply held secrets which are unresponsive to discovery efforts, since their existence is unknown.

In contrast to the law-and-economics approach, the contractarian approach makes a central distinction between deep and shallow secrets, a concern for equal opportunity to obtain information, and the need to preserve trust and confidence in relationships. When the presence of a secret is not suspected, or when information can more easily be obtained by one party than by another, disclosure should prevail. Where secrets are known to be present, or where information can be equally and easily acquired by either party or is closely connected to relations of trust, disclosure will not be required. However, contractarian theory holds that if great harm would result from applying these rules too strictly, they should be modified.

Scheppele examines the facts considered to be legally relevant in the areas of fraud, privacy, trade secrets, and implied-warranty cases. In developing an interpretive approach that stresses the mutually constraining impact of facts and rules, she argues that the superiority of the economic theory of law or the contractarian theory will be determined by "which can account for the facts that are selected to be sculpted and polished by judges" (p. 104). Scheppele argues that judges are much more likely to notice the facts emphasized by contractarian than by economic theorists.

The book has six sections. "Framing Secrecy" (pp. 1-53) considers the nature of secrecy and the law-and-economics view of it. "Developing a New Jurisprudence" (pp. 55-108) offers a contractarian theory of law in which consent serves as the basis for legal morality. The next three empirical sections seek to determine whether economic or contractarian theories best fit the data from cases involving fraud, privacy, and implied warranty. The final section (pp. 299-320) suggests a social theory of secrecy and further develops the contractarian theory of law.

Scheppele begins with some conceptual distinctions. Her interest is with strategic secrets — the withholding of information to influence the actions or feelings of others. Such secrets are differentiated from "private secrets" withheld simply out of a desire for personal privacy. Scheppele views privacy as a condition of the autonomy individuals seek and secrecy as one of several means of obtaining it. Much information withheld on privacy grounds does not have strategic purposes.

It helps to anchor an individual's sense of identity but does not seek to manipulate others. Conflicting interests are more clearly at stake where strategic secrets are concerned and the courts are an arena for resolving them.

There are three major forms of secrets — direct, serial, and collective. In the direct secret, *A* withholds something from *B* that *B* wants to know. In the serial secret, *A* shares something with *B* and then a third person *C* seeks to learn *A*'s secret from *B*. In the collective or shared secret, *A* and *B* create a secret and *C* seeks to learn the secret from either party.

For these three instances there are two choices — to tell or not to tell (the middle ground offered by the hint is ignored). This leads Scheppele to identify six types of secrets based on the parties involved and whether the information is revealed or concealed.

If *A* tells *B* a direct secret we have *disclosure*. If *B* tells *C* the serial secret we have *betrayal*. If *A* or *B* reveal their shared secret to *C* we have a *leak*. But what if the secret-keeper decides to hide the information instead? This suggests three additional types. When *A* hides a direct secret from *B* we have a *simple secret*. If *B* withholds the serial secret from *C* we have a *secondhand secret*. If *A* or *B* keep a collective secret from *C* we have a *conspiracy*.

A further distinction involves whether or not the target of the secret suspects that there might be a secret. In that case we find *shallow secrets*. *Deep secrets* refer to cases where the subject does not imagine that relevant information might be had. The simple secret, secondhand secret, and the conspiracy have deep and shallow forms. The depth of the secret is related to the kinds of claims which can be made by those left out of the secret, should they ever learn of its existence.

These abstract categories help to frame the normative issues with respect to the party's obligations to each other. There are moral and legal justifications for and against each of the six types of secrets (disclosure, betrayal, leaks, simple secrets, secondhand secrets, and conspiracy). Scheppele's book is about how courts choose among the conflicting justifications individuals offer for keeping or disclosing secrets. Scheppele seeks the rules which best predict judicial behavior.

The analysis is based on two samples. The first is a representative sample of cases still considered good law in the areas of fraud, privacy, and trade secrets. Rather than a random sample she sought a sample by rules. From two large legal encyclopedias which summarize American law — *American Jurisprudence 2d* and *Corpus Juris Secundum* — she obtained citations for leading cases. In implied-warranty cases, in which she sought to catch movement over time, the sample is restricted to one jurisdiction, New York, from 1796 to 1900. She laboriously went through every volume and selected all implied-warranty cases decided by New York's highest courts.

Regardless of their area of interest, social scientists unfamiliar with methods of analyzing legal texts will find a useful model here. Scheppele shows how the wealth of data contained within court records can be systematically gathered, sampled, and analyzed. She treats court texts as narratives which can be studied to determine a normative structure. Her very useful methodological appendix, "Studying the Common Law: An Introduction for Social Scientists," should be widely read by social researchers.

In general, however, the book will be of greater interest to legal scholars concerned with doctrine than to social scientists interested in actual behavior and consequences. This is partly a difference in what one wishes to understand. Scheppele seeks a theory of jurisprudence for legal secrets, while most social researchers are not content with that. For them, the discovery of such a theory would yield a question rather than an answer. Such researchers want to know what the non-ideological causes and correlates of the theory are. Interpretations are seen as data, not as causes, or at least not as sufficient causes. An interpretation is something itself which can be accounted for. Instead of viewing it as a cause, it can be viewed as a mask or as a consequence. Even with careful observation and interviewing of judges, we can't automatically conclude that the written legitimation is in fact the proximate cause. Interpretations may be chosen because they engender a communal gloss which justifies systematically favoring one set of interests against another. The interpretation then is seen as a tool used to obtain an end desired on prior grounds. We also must ask who gains and who loses, and how do varying strategies, structures, contexts, and characteristics of the parties come into play?

In focusing on the substance of legal rules, Scheppele pays little attention to the large body of social research which finds that legal ideas are only one, and often not the most important, factor affecting legal processes. Even when they are relevant (or at least present, as with the cases Scheppele puts forth) their presence may be dependent on factors other than the deductive rationality from first principles which Scheppele assumes to be central.

Early in the book she makes the reader aware of the social construction of legal events: "The process of legal interpretation can be seen as the mutual construction of facts and rules" (p. 4). A card-carrying sociologist of knowledge could not put it better. Scheppele seeks to understand how judges make sense of abstract norms in particular cases. She argues that both the facts of particular disputes and the textual rules used to resolve disputes are mutually constraining. Given this introduction, I was surprised at how little attention she pays to elements beyond facts and rules which can also affect interpretation and outcome, as well as affect what is available to be seen as a fact or rule. Partly this is the issue of fish not worrying much about

the fact that they are in water, but a more macro approach looking at the issue historically and comparatively would yield additional insights.

I found her analysis here too mechanistic and would like to know more about the factors (other than the substance of the doctrine and the "facts") which condition legal behavior. How do the characteristics of the judge, court system, context, parties to the dispute (*e.g.*, class, race, gender, reputation), and their attorneys (including their strategies and tactics) affect decisions? What are the causal factors beyond rational cognition that influence judges? What leads an aggrieved party to mobilize the law? How does the degree of deception and withholding affect perceptions? What are the social correlates of "rationality"? To what extent is it socially constructed as well, such that actors with different characteristics or in different structural settings would see the same things differently? Surely the facts and rules chosen are conditioned by more than the moral philosophy of judges (however useful it may be to identify the most common cultural elements in such philosophies).

It is an interesting sign of the times that a scholar can tell us she is concerned with issues of law and economics, and never once mention Karl Marx (other than to tell us in the preface that he, along with Max Weber, Emile Durkheim, and Georg Simmel, was trained in the law). Surely his law-and-economics approach might also offer some ideas to consider, even if they turn out to be empirically unsupported.

Without disputing the doctrinal coherence that Scheppele reports finding, I would like to know what additional factors might account for this. The relevance of rules and the degree of their applicability is itself a variable with many correlates beyond content. Scheppele, unfortunately, pretty much ignores this. To be sure, the problem she has defined offers much to study. Yet her account would have been much richer had she confronted some of these additional issues as directly as she does the current law-and-economics view. Although concern with equal access to information is considered, a concern with other aspects of power and social status differentials is noticeably absent from her treatment. It would not be difficult to create empirical tests to contrast the importance of other hypothesized causal factors such as social status differences (*e.g.*, of the parties relative to each other), just as she has done for the contractarian and economic views. What happens when class and doctrine pull in opposite directions? How does class affect whether one is more likely to be the complainant or the defendant in the various types of secrecy cases? A more varied and interesting empirical pattern, one making greater demands on theory, might have emerged if additional variables had been considered and if the analysis was more grounded or situated in its social context.

We are not told much about the origins of these legal ideas, nor of

their correlates. It is assumed that a variety of facts and rules are available; for Scheppele, the intellectual challenge is to see which are chosen by judges. But other analysts would not simply take these as *given,* and would also ask what it is that conditions the range of facts and rules from among which judges choose.

Her theory is clearly stated and easily grasped, and is compelling relative to the more narrow economic view. Yet as with any account based only on one person's analysis, I was left wondering whether someone with a strong commitment to the economic view couldn't in good faith give a different interpretation to the data presented here, or emphasize other, more supportive cases. Since numbers count in both democracy and science, I would have more confidence in Scheppele's findings if they were based on consensus across coders and if she had stated her method more explicitly so that others could go through the process of checking her conclusions. Would "blind" coders, offered the two theories and these cases, reach the same conclusions? Perhaps they would. But the scientific grounds for her conclusions would be stronger if she could present data from several coders, rather than just one. In addition, it should be possible to document empirically whether individuals do in fact subscribe to the contractarian theory in the form that Scheppele argues. Even if judges follow it, her case for the rootedness of this view in the preferences of individuals is based on only one psychological study and her own reflections. There is an interesting set of issues here around the linkage between mass attitudes and those of judicial elites.

One criteria of good scholarship is whether it leaves the reader with questions. By this as well as other criteria this book is certainly a success. Among the questions that this provocative work raised for me: How well does the contractarian theory apply to rules about secrecy in other legal contexts, for example in Supreme Court or administrative decisions and legislative actions? Does it apply to judgments about secrecy beyond the law, as in primary and secondary relationships? How well does it apply to other societies with Anglo traditions, to Western societies and industrial societies more generally, and to preliterate societies? Have contractarian norms become more important as industrial society has evolved and become more complex? Have contractarian principles become more important over time, as the limits of unrestricted capitalism become clearer and nineteenth-century power imbalances somewhat moderated? Is the spread of contractarian principles associated with the rise of democracy? What happens when contractarian principles conflict (*e.g.,* compassion and justice)? What are the implications of the development of ever more powerful technologies for discovering information that others wish to conceal (*e.g.,* computer data bases, biotechnologies for truth determination, etc.)? Are these matched by ever better means of hiding information (*e.g.,* encryption), or as such techniques become more

widespread will legal rulings against wrongful concealment decline (since for a larger proportion of cases it will be assumed that, with diligence, the individual could have known)? How are the six types of secrets that Scheppele identifies distributed across social orders and what are their social consequences?

Scheppele examines the legal description and justification of secrets as this involves the actions of judges in response to parties to a conflict. Many other aspects of secrecy and the law remain to be studied from a social science perspective. Future research work should look at things such as the culture, social structures, functions and dysfunctions, correlates, and processes associated with secrecy such as the fourth and fifth amendments, secret trials, grand jury and *in camera* proceedings, sealed records, and protected witnesses and informers. What theories can help us best understand the logical opposite of secrecy, as with legally supported forms of forced disclosure such as compelled testimony, subpoenas, undercover and electronic surveillance, and laws and policies involving informed consent and freedom of information? Do the contractarian ideas which help us understand judicial decision-making in disputes also apply here, or must they be supplemented or replaced by other approaches?

The two theories Scheppele examines have very different normative implications. The economic analysis is utilitarian. A single-end efficiency is identified and distributive consequences are ignored. All that matters is the total or the average, regardless of the consequences for particular individuals. Scheppele observes:

> Apart from allowing more different things to be independently valued and not requiring the collapse of all potential goods into a single scale of desire, the contractarian theory of law more straightforwardly embodies those ideals that law should embody in a democracy where consent is the basis of legal and political obligation — namely, to be impartial (through the concern with symmetry), compassionate (through the provision of hedges against catastrophic loss), and just (through the triumph of principles that transcend narrow self-interest, whether of individual or classes). In the contractarian view, the fairness of distributive outcomes again becomes an important question for law; and individuals are not trampled, or averaged out, for the common good. [pp. 84-85]

As the ugliness and social fallout of 1980s-style self-interest become clearer, Scheppele's moral preference for a contractarian approach is compelling.