Review Essay

UNCOVERING THE SECRETS OF THE COMMON LAW

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Kim Lane Scheppele. *Legal Secrets: Equality and Efficiency in the Common Law*. Chicago: University of Chicago Press, 1988. xiii + 363 pp. Appendix, references, table of cases, name and subject indexes. $54.00 (cloth); $17.95 (paper).

"Legal secrets" are secrets that the law of torts or contracts either require to be—or protect from being—divulged. The secrets themselves are without limit: a professor's past as a former priest, things learned while in a previous job, that a house has running water only twelve hours each day, that land was worth more than its owner realized, that a patient told his psychotherapist that he planned to kill his girlfriend, that the Treaty of Ghent was signed ending the War of 1812, and on and on. The legal flags under which these battles for the control of secret information are fought reduce to the law of fraud, privacy, trade secrets, and implied warranties. And the underlying economic or other principles that are proposed to explain the decisions in these areas of law are even fewer.

Legal Secrets is an exceedingly important book for law and social science. Scheppele has "written a book about jurisprudence and social theory, about law and economics, about moral philosophy and legal interpretation, about the sociology of knowledge" (p. ix)—and more. The work's value derives at least as much from its helping to pioneer an important and still new genre of law and social science scholarship (the development and testing of positive theory to explain substantive law) and from its methodology (using more systematically sampled judicial opinions as the data for theory testing) as it does from its principal inquiry. Scheppele's principal inquiry is to try to figure out what explains the law of legal secrets, which she does by developing a "contractarian" theory to account for legal secrets and then pitting the new theory against its major alternative, law and economics, to see which provides a better explanation of the decisions reached by common law judges.

Most of my review will be organized within a philosophy-of-

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science framework, because I think that will best illuminate the approach and contribution of *Legal Secrets*. But before moving into that framework, I want to provide an overview of the book and its main ideas.

The book is composed of six sections. The first introduces us to the problem of legal secrets from a number of angles. First, several cases are presented which provide concrete illustrations of the nature and range of the problem of secrecy as it is confronted by courts. The reader gets to marvel at the importance of secrecy in life and litigation, to wonder about how such cases ought to be decided, and to wrestle with why the decision ought to be to permit a secret in one case and to require its disclosure in another. Scheppele makes further use of these cases (and many others) as the book unfolds to raise and work through a variety of issues. The next angle is the development of a sociology of secrecy: the form and structure of secrecy, a typology of kinds of secrets and the relationships of the parties keeping or sharing them, and a description of the explanations that might be offered for these types of secrets. The next chapter contains an overview of the explanations of legal secrets that law and economics theorists have proposed. And the final chapter of the first section discusses the strategic nature of secrets and the special problems this creates for any theory that would seek to account for the decisions of judges in cases involving legal secrets.

The second section of the book presents the substantive heart of Scheppele's contribution—a new theory to explain legal secrets. The theory is in essence a moral theory that explains and predicts the circumstances under which the law will shield secrets or unmask them. In developing the theory, Scheppele wrestles with several tensions between even a modern, nontheocratic, natural law, and several apparent realities of law: it varies across societies and over time within societies; many things that we might agree are immoral are not unlawful; and the law is more responsive to local short-term social pressures and interests than to moral imperatives. The tensions between Scheppele's goal of fashioning a moral theory of law and the cultural and temporal limitations on such a theory are evident throughout the chapter. The compromise, or integration, is that although Scheppele's theory is built largely of moral philosophical timbers, she chooses grains that match the cultural particulars of the society in which the law under study resides (namely, ours). This introduces concepts thought to be ingrained in Western democratic society, such as consent and fairness (symmetry), and follows other contractarian thinkers, notably Rawls. Unsurprisingly, perhaps, by the end of the book Scheppele concludes that normative and positive ideas about the law need not be separated, nor can they be successfully.[1]

[1] Whether this claim, if true, will come as more of a challenge to social

The contractarian theory says basically this. In contrast to economic theories of law, people are not motivated to achieve the maximum average utility. They are motivated instead to seek a great deal of individual utility while trying to avoid the risk of individual catastrophe. Courts behaving in accord with this theory would create rules that enable people to avoid the extreme outcome of personal disaster. Applied to the problem of legal secrets, this means that secrets that could lead to catastrophe would be ordered disclosed and those that would lead to small harms would not. Catastrophe, having been prevented the next issue is how people would wish to confront their probabilities for success. Scheppele suggests that people avoid gambles when the stakes are nontrivial, and therefore would not wish to be at the mercy of a secret keeper when a lot is at risk. This problem does not exist with shallow secrets (secrets that the target of the secret would suspect are being kept), so individuals would be left to take their chances. But it is a serious problem with deep secrets (secrets that are not even known by the target of a secret to be secrets). Thus, courts would be expected to allow shallow secrets to be kept but not deep secrets. Even shallow secrets would have to be disclosed, however, if the target of the secret started out with such a disadvantage that little possibility existed of ever discovering the secret. Consideration of "serial" and "shared" secrets leads to additional permutations of rules.

As Scheppele summarizes:

> The contractarian theory predicts that judges in common-law cases will use rules that would have been chosen by rational individuals who do not know their own narrow self-interest in the particular case but who are deciding in advance the rules under which they would consent to be governed. All parties will be protected against catastrophic losses caused by secrets. Courts will require disclosure of deep secrets, but not of shallow ones, unless the two parties to the transaction have such different starting points in acquiring the information that they cannot be said to have equal chances of discovering it. Confidential relationships will be protected, as will individuals who are not capable of assessing what knowledge a situation requires. (P. 84)

An additional chapter presents a discussion of legal interpretation and the mutual construction of facts and rules. Although much of this chapter seems to me to be a digression (one that would be helpful in teaching legal reasoning), it makes the point that any test of economic theory against contractarian theory must

scientists, who often try to limit themselves to asking empirical questions implicated by the normative law, or to legal thinkers and moral philosophers, who tend to focus on the normative and to finesse the empirical, we cannot say. Perhaps Scheppele is subtly chastising both the rigorless philosophical assumptions of social science and the rigorless empirical assumptions of moral philosophy and legal scholarship.

cope with the complication that the judge (and the researcher) must "see" the elements that each theory says are important in deciding the cases, and that vision is in large part a matter of the perceiver's construction.[2]

The next three sections of the book, consisting of nine chapters, are the tests of the two theories using three areas of what we may now call legal secrets law: the law of fraud, the law of privacy, and the law of implied warranties. Each section in its own way introduces the reader to the area of law, the explanatory puzzle it presents, a fairly large number of cases representative of that category of law, and concludes by comparing the ability of law and economics theory and contractarian theory to account for the judicial decisions in the cases presented.

The final section, one chapter, further develops three themes that threaded their way through the bulk of the work: a social theory of secrecy, a contractarian theory of law, and the working out of a constitutional jurisprudence ("constitutional" in the sense of shared bedrock attitudes which underlie a society's laws).

Scheppele's work obviously has an ambition and a range that are unusual—more concern with legal doctrine and philosophical principles than is usual in a work of social science, and more concern with empirical confirmation than one sees in legal or philosophical scholarship.

But beyond even that, however, *Legal Secrets* serves as a model for a neglected genre of scholarship about the law, and for that discussion I will turn to a philosophy of science framework. Each of the following headings may be thought of as one of the lessons taught by *Legal Secrets* about doing an important kind of social science and law that rarely is done.

DEVELOPING AND TESTING POSITIVE THEORIES OF LAW

Both legal scholarship and social science research contain large amounts of description. For the law this usually has meant descriptions of the contents of the law itself (of which restatements are prominent examples). Much of the legal scholarship that lies beyond description is normative: argument about what a

[2] This problem differs little, if at all, from that of any other scientific theory testing, and has been one of the mainstay issues of philosophy of science for a century. Wittgenstein (1922) developed a philosophical theory of language as a necessary tool for the representation of facts. The invention of the now familiar "operational definition" was one solution offered to solve the problem of interpretation—and that was in physics. If anything, the problem is simply more obvious in theories about law, because it is so obvious that interpretation is a large part of the legal enterprise. Indeed, many lawyers and judges, and their greatest critics as well, think that the law essentially *is* semantic manipulation. Scheppele clearly does not accept the extreme version of this otherwise widely shared notion, namely, extreme indeterminacy. She notes that the law's ambiguity has never resulted in anyone reading so far wide of the mark as, say, to mistake the Constitution for a recipe for Key lime pie.

legal rule ought to be. By contrast, most social science scholarship aims to be positive: explanation of that which has been described. In its classic form, the explanations consist of theories which purport to account for the observations; those theories then are tested against each other to see which provides the best account.

Given this background, it is odd that social scientists interested in the law have not paid far more attention to the substantive rules of law. After all, that is what "the law" is. What could be more natural for a social scientist than to take judge-made law (the common law), treat it as the product of human behavior that it is, and try to explain why it is what it is rather than something else? This has been a large and important gap in law and social science scholarship. Scheppele has given us an excellent model of how to fill it.

Scheppele has, of course, been preceded in this effort, notably by the current[3] law and economics movement. Law and economics theorists have made the most serious effort, until now, to explain the common law as a social scientist might be expected to, to develop theories to account for observable behavior and test them. And yet, surprisingly, that effort has been carried on by legal scholars, not by economists or other social scientists.

The two derivations from law and economics that Scheppele takes on are Anthony Kronman's (1978) theory of nondisclosure (fraud) and Richard Posner's (1981) theory of privacy.

Kronman posits that courts, following an economic logic, fashion rules that do not destroy incentives for the acquisition of valuable information. Deliberately acquired information requires investment of money or energy. If information so acquired had to be revealed whenever the acquirer used it to advantage, then the search for economically useful information would serve no purpose and people would stop seeking it. Thus, courts would permit secrets that consist of knowledge typically acquired through deliberate effort or expense. On the other hand, casually acquired information needs no such incentive, for the very reason that it was acquired without deliberate effort. That kind of information would continue to fall into people's laps in the same way that it always did. And thus, because there is no investment or effort to protect, courts would not protect the secrecy of casually acquired information. The one exception to this rule is that if the casually acquired information is of a kind obvious to both buyers and sellers, then it need not be divulged to the other party to a transaction. Without this exception, every transaction would be preceded by prospective buyers and sellers engaging in a costly and wasteful exchange of information about their deal, much of it information each already had. If the law followed this underlying economic

[3] "Current," I say, because there was an earlier one that until recently had been overlooked (Hovenkamp, 1990).

imperative, its rules would provide efficient incentives for the acquisition of valuable information.

An interesting illustration is *Laidlaw v. Organ* (1817). Laidlaw's company had a warehouse full of tobacco and other goods they could not sell due to the British blockade of the port of New Orleans during the War of 1812. Organ learned that the Treaty of Ghent had been signed, ending the war, but the news had not reached the general population of New Orleans. Organ used the information to purchase Laidlaw's goods at a price that would rise 30–50 percent a day later. When Laidlaw learned of the treaty, he tried to cancel the sale, claiming that Organ had defrauded him by withholding the information. The U.S. Supreme Court ruled that Organ was not obligated to share his information with Laidlaw. Kronman explains the case in terms of his economic theory of nondisclosure. Had Organ invested special effort to acquire the information, requiring it to be revealed in order for the sale to be valid would create a disincentive to acquiring such information.

In the privacy area, Posner theorizes that there is an economic disadvantage to granting a general property right in information about oneself, that is, a general right to privacy. Individuals know a great deal about themselves, little of which they deliberately invested in. They put forward favorable information about themselves and withhold discreditable information. In dealing with each other, people who could conceal discreditable information could exploit those they are allowed to keep ignorant. If the law were acting efficiently, it would assign a right to discreditable information away from the person the information is about. But when the information is not discreditable, no economic harm would result from assigning ownership of the information to the person it is about, and the law then will do so. In contrast to individuals, corporations tend to invest in information about themselves. An economically sensitive law would encourage such investment and, accordingly, would grant a property right in information of that sort (e.g., a trade secret). When the information is of a type in which investment is not made (e.g., a corporation's knowledge that it pollutes), then no ownership of the information is assigned.

These are, to be sure, clever ideas. The question is whether they accurately explain the mass of relevant decisions of common law judges.

Scheppele's work honors the current law and economics movement by focusing on its efforts to provide a positive account of the law and by challenging them. I often have wondered when theories derived from other areas of social science (not just from one—indeed, not just from one corner of one) would be developed to challenge law and economics theory. *Legal Secrets* presents one

such important challenge, done in much the terms that law and economics theory seeks to be challenged.

CRITICAL TESTS OF COMPETING THEORIES

Law and economics seeks to be scientific in the classical twentieth-century sense. For example, it seeks to provide an internally coherent set of principles capable of explaining the relevant evidence and to design its theory to be susceptible to disconfirmation. But the only meaningful disconfirmation consists in assessing which of two or more alternative theories provides the best account of the data—the data in this context being the opinions of common law judges. The only real test of a theory's worth cannot be undertaken unless and until there is a competitor. Scheppele has provided a competitor.

Merely by its existence, then, Scheppele's theory makes an important contribution to the enterprise of building and testing positive theories of law. Once an alternative exists, an entirely new level of discourse is possible, namely, testing and debate over which theory does the better job. Thus, the new theory does not merely double the amount of thought that is possible on a question, it more nearly triples it.

In classical twentieth-century science, two theories are tested against each other by deriving hypotheses from each—that is, predictions (or, in the present arena, postdictions) about a set of observations. Where the theories make the same predictions about those facts, there is no way to distinguish which is better. For example, there will be cases whose outcomes are consistent with the principles of both law and economics and contractarian theories. Ideally, however, one may derive different sets of predictions from the two theories and design a "critical test" that produces data that will have been predicted by one theory but not by the other. Scheppele has done the law and social science equivalent of this. She examined several bodies of law to see whether they were explained better by law and economics theory or by contractarian theory. Her test is not neat and clean, but rich and complicated.

Sometimes Scheppele looks at specific cases and explicates the weaknesses of the law and economics account of them and compares that to the stronger fit of contractarian concepts. For example, while Posner's theory of privacy suggests that when the information at issue is personal discreditable information, the courts will not recognize an individual's ownership of it. But Scheppele presents a good many cases that do not conform to Posner's postdiction. In *Melvin v. Reid* (1931) a former prostitute and murder suspect sued the makers of a film about her past for using her real name, and won. Similarly, other exposures of private discreditable information are prohibited by courts: *Barber v. Time* (1942) for a story about a starving glutton; *Virgil v. Time* (1975), a story

exposing a daredevil bodysurfer; *Briscoe v. Reader's Digest* (1971), in which the plaintiff won damages for the publication of information about his earlier life of crime. Indeed, Scheppele demonstrates that it is only when the information is discreditable that recovery can be had. For example, in *Wheeler v. P. Sorensen Manufacturing Co.* (1967), the plaintiff could not recover for her boss's disclosure of her salary history because the information was not discreditable. In short, the cases seem to run precisely opposite to Posner's theory.

For contractarian theory the dimension of creditableness or discreditableness of information is not pivotal, except that where there is no harm (i.e., creditable information) there of course can be no recovery (e.g., the *Wheeler* case). Contractarian theory would have the courts permit the release of personal information when the owner of that information is using it for strategic purpose, that is, trying to use it to influence the behavior of others. When those others have to make a decision they are entitled to make, then they are entitled to equal access to the information in order to make an informed decision. In these situations, the courts will uphold or require release of the information. If the secret information is not relevant to a decision, was not being used strategically, then the secret keeper will prevail in his or her efforts to keep it private or win damages for its release. This is obviously consistent with the cases above, in which news or entertainment media released personal (discreditable) information. Thus, contractarian theory does not expect the courts generally to permit release of personal information, but only when the information is necessary to provide equal access to two parties in a strategic situation.

More often Scheppele examines not a loose bundle of cases but patterns of holdings from many cases,[4] and seeks to demonstrate that these patterns follow more neatly from contractarian theory. Specific cases are used not so much as data points but as illustrations of the more abstract goodness or poorness of fit between legal doctrine and positive theory. For example, in comparing economic to contractarian explanations of fraud cases, Scheppele first identifies determinative fact patterns that occur in a large number of cases. Then she asks how well each theory accounts for the observed patterns. For example, Kronman's (1978) economic theory's focus on deliberately or fortuitously acquired information does not account for such patterns as the special burdens on sellers, the requirement of equal means of knowledge, and special confidential or fiduciary relationships. Contractarian the-

[4] For example, from the fraud cases this would include such doctrines as materiality of the secret information, different burdens of disclosure for sellers compared to buyers, special burdens on those with superior means of knowledge directly misleading another party, and so on.

ory, with its focus on equal access to information[5] and deep versus shallow secrets, accounts for these patterns straightforwardly. The unequal means of knowledge situation *is* a violation of the equal access principle. Confidential relationships often reduce to special cases of unequal access. When attorneys or trustees take advantage of their clients or cestuis, one critical piece of unequal information is that the attorney or trustee is not acting in the interest of the person in whose interest the relationship exists. The courts will void harmful results of this unequal information—no matter how much investment the defendant put into acquiring his or her secrets.

Still other times, Scheppele's testing of the theories reveals the vulnerability of one and the robustness of the other. For example, Kronman's (*ibid.*) theory of fraud does not apply to cases in which a direct question by one party to the transaction is answered deceptively by the other. In such cases, the secret holder will lose, regardless of whether the secret information was deliberately or casually acquired. In any of the cases Kronman cites as consistent with his theory, if the plaintiff had asked the defendant, "Do you know something about this deal that makes it more valuable for you than it appears to be?" and the defendant had given a deceptive answer, then the outcome of the case would have been different. Thus, any cases that might have been explainable by Kronman's theory can be transported out of his theory's range by the plaintiff posing a simple and sensible and obvious question. Contractarian theory, by contrast, can account for the courts' reactions to such misdirection through its principle of equal access—even for shallow secrets, because the secret holder creates an inequity by lying in answer to a question.

One comes away from this testing with a strong impression that contractarian theory provides a better account of the cases and the doctrines of legal secrets law. To the degree that Scheppele has shown contractarian theory to be superior to economic theory in this vital respect, she of course has made a valuable theoretical contribution to a positive understanding of the common law of legal secrets.

I wish, however, that the test had left me with more than an impression. Although Scheppele shows a wide array of cases that contractarian theory explains and law and economics cannot, a more clear and complete presentation of the evidence might have been possible. For example, I would like to have known what proportion of the cases sampled were explained equally well by both theories, what proportion were explained by one theory and not the other, and what proportion could not be accounted for by

[5] Or symmetry or fairness or, more precisely, the *relative* levels of investment in information by the two parties.

either theory.[6] I don't recall any discussion of cases that both or neither theory could explain or that law and economics explained better. Surely some cases fall into each of these categories. In other fields this sort of exercise sometimes reveals that one theory accounts better for one domain and the other theory for another domain. Knowing the range of one theory and the shrinking but still useful range of another advances and refines our understanding of the universe of phenomena under study. Both an assessment of the relative power of the two theories and a sense of how close the winner comes to perfection require some such kind of measurement. From the viewpoint of empirical theory testing, either the test or its presentation seems to have omitted some important pieces of the picture.

Having said this, I do not doubt that coming up with a meaningful "count" is no small challenge. Unlike most sampling of objects and events in social science, all cases are not equal. Accordingly, some sort of importance weighting would be appropriate. But the invention of a defensible weighting scheme seems a formidable task, to say the least. And as will be noted in the discussion below on sampling, the closer a case comes to replicating a prior precedent, the less likely that case is to go to trial and be reported. Thus, it might also be reasonable to try to count cases that would have become cases but did not because of the way the law's case creation and selection process operates.

Putting aside this specific test of law and economics theory versus contractarian theory, or its imperfections, what Scheppele's work does for the larger enterprise of law and social science is an even greater contribution. She has helped set into motion the process of theory testing. In positive knowledge building, it is the *process* of theory development and testing that produces knowledge. Any hope of approaching truth asymptotically, of gaining solid understanding, of discovering the underlying workings of the common law, depends on the process of continually inventing new theories that perform demonstrably better than older theories. That is precisely why scientific theories are designed to be disconfirmable. Put crudely, positive theories were born to be killed. The growth of positive knowledge is measured by—indeed, it *is*—the replacement of older and less powerful theories with newer and better ones. Progress in knowledge occurs each time the theory monarch of the knowledge mountain is overthrown and replaced by another that does the job better. It is in this important sense that all knowledge, even empirical knowledge, is a human creation as much as it is a discovery, and it is temporary. In the realm of

[6] I know of at least two studies in which cases were treated in a similar fashion, as empirical data, though with more descriptive and less plainly theoretical purposes (Haar *et al.*, 1977; Whitmore, 1990). These studies provide more of a "measure" of the fit (or lack of fit) between fact patterns and outcomes.

legal secrets, it appears that contractarianism has proved superior to law and economics. Tomorrow contractarianism will be replaced by something still better.

USING CASES AS DATA

Scheppele has turned the *Decennial Digest* into the newest tool of social science research on law. While lawyers will be amused to think that such an old and familiar tool could advance sociolegal scholarship, Scheppele has used it in a new way: as a sampling frame.

Older legal theorizing, little more than the description of asserted doctrine, usually operated by drawing general principles from selected cases. Holmes, for example, has been criticized for constructing his common law out of a tiny subset of cases whose fact patterns and outcomes were congenial to his ideas. This "selection of one's evidence" is precisely what scientific method is aimed at eliminating. No wonder the West Publishing Company is sometimes credited with killing legal formalism and giving rise to legal realism. With the advent of the West Reporter System, it is said, the contradictions among similar cases and between cases and asserted doctrine became unavoidable. If true, this suggests that the technologies of data collection— here, access to a wider pool of judicial opinions—can have a profound impact on substantive understanding.

In terms of these sampling issues, much law and economics theorizing looks more like Freudian psychology than like modern social science. One or several especially interesting or important or puzzling cases are selected, and the analyst sets about explaining them by resort to the concepts of his preferred theory. Scheppele has drawn a much larger and more representative sample of cases—by using the *Decennial Digest* and Lexis as well as citations from other cases and secondary sources.

As Scheppele notes in a methodological appendix, what "appears at first glance to be a sampling theorist's paradise" is much trickier. The creation and selection of cases by the litigation process makes the cases nonindependent and does not reflect the distribution of relevant conflicts that occur in the society. Common law cases "are, almost by definition, quirky."

The problem is not simply that of all the disputes of a certain category that occur in the United States, only a small fraction are transformed into lawsuits, and that only a handful of these is not settled and actually goes to trial, or that only a subset of the tried cases are appealed, and not all of those opinions are published. Indeed, the problem is not simply that this relatively tiny sample is going to be unrepresentative—as it will be. The problem lies even deeper in what the legal process is that creates cases out of disputes:

> If an identical case has presented itself to the courts before and a ruling already has been made, cases that all the parties will agree are similar will be settled out of court; they simply do not appear in the reporters. Cases that are litigated at the appellate-court level are almost always cases where the facts are not precisely like those in other cases. If law is, as [Edward] Levi claims, a moving classification system, then we will not find a set of categories in the opinions themselves that lies still long enough for a reasonable number of cases to be coded. (P. 327)

Thus, the closer a case is to existing precedent, the less likely it is to be tried again, at least not in the same jurisdiction. And older cases affect the way later cases are constructed by lawyers and reacted to by judges. Scheppele does not "solve" these sampling problems in any systematic or rigorous way, and perhaps they never can be solved to a sampling theorist's satisfaction. And those who see the legal process as in part a societal problem-sampling system sometimes wonder if the law might have structured itself to prevent the worst consequences (to the law) of this sampling problem (Saks, 1988). Ironically, it may be that with the passage of time the problem Scheppele faced is growing less severe. The advent of state intermediate appellate courts, concerned largely with "mere" error correction, may generate better samples as time goes on. Perhaps sampling will become easier. But these improvements in the possibility of sampling cases lie in the future, and many of Scheppele's cases were decided a century and more ago.

Nevertheless, Scheppele's work is built on a foundation of cases that represent a far larger and wider mix of variants on each type of legal secret than has been true of the theories to which she is comparing contractarian theory. By taking sampling seriously, Scheppele has moved the positive theory enterprise beyond what might be regarded as merely anecdotal. In so doing, she makes more apparent that common law cases are themselves empirical data, not only worthy of explanation but also providing the data needed to test those explanations. Using this larger and more representative body of data cases, Scheppele was able to ask how often and how well the law and economics theory "prediction" worked versus how contractarian theory did.

THEORY ABOUT THEORIES

Once we have more than one positive theory, we have something to compare to something else. And once we are in that position we cannot escape the more purely philosophical problem of the justification of scientific theories—trying to decide by what criteria the theories should be evaluated. In short, we must theorize about theories.[7] Shall we favor theories that have more predictive

[7] This is an area in which other fields are far more advanced than law

success, coherence, parsimony, consistency, range, or mechanical intelligibility over those that have less? Or favor those that generate new research, useful applications, yield more easily tested hypotheses, or connect with other theories to produce more unity of knowledge? Scheppele does not address this problem as thoughtfully as she addresses so much else in *Legal Secrets*. But she does state two criteria on which, she believes, the comparison of contractarian theory and law and economics theory should turn.

One is that contractarian theory accounts for more cases of legal secrets and more categories of cases than law and economics does. For example, Kronman's effort (1978) to explain nondisclosure is confined to cases involving superior means of knowledge and different obligations for buyers and sellers. Contractarian theory explains those as well as cases of confidential relations, inherently fiduciary transactions, and active concealment or intentional misrepresentation. Even within the fewer categories, contractarian theory seems to explain a larger portion of the sample of cases than Kronman's theory does. In choosing this criterion, Scheppele joins the empiricist philosophers of science. And I must agree that for a positive theory of law this criterion would seem to be the heart and soul and minimum: that which explains[8] more is better than that which explains less.[9]

Scheppele's second criterion is that a better theory is one that "*both* explains the phenomena *and* corresponds to the way in which the subjects of the theory view the world" (p. 162; emphasis in original). Scheppele does not explain why this should be. Of what relevance is the correspondence between the languages of the theorists and the theorized about? Perhaps correspondence of language aids (or confuses?) description but is irrelevant to explanation. Perhaps under some circumstances they would do better to actively diverge.

Consider some insights from the theory of cultural materialism (Harris, 1979, 1974). Anthropologists of this school of thought seek to explain "riddles of culture" by reference to the survival value of various beliefs and practices in the ecosystem occupied by a culture. Take cattle worship among Hindus. Most Westerners find it baffling that Hindus will go hungry while a small mountain of walking hamburgers is kept in the yard. Hindus themselves will explain the behavior in terms of religious precepts. Disputes over which cows are protected and what treatment of them is per-

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and social science, undoubtedly because they have faced the problem of choosing among competing theories, and it is to those fields that philosophers of science naturally have been drawn. See, for example, Braithwaite (1953), Kaplan (1964), Nagel (1961), Popper (1959).

[8] Predicts, postdicts, accounts for.

[9] Given the centrality of accounting-for-the-cases to deciding the battle, as discussed earlier, one might wish that the presentation had more clearly and completely removed any doubt about the relative success of the two theories in accounting for the evidence.

mitted will be resolved in religious terms. But cultural materialists reason instead that the short-term benefit of killing a cow soon would produce disastrous results for the humans. In the barren Indian ecosystem, cattle often provide the only fuel, fertilizer, transportation, tractor, and milk. Long-term survival depends upon keeping cows alive. Though we might effectively explain the existence of these rules by appreciating that they contribute mightily to survival, they are easier to teach and more likely to be obeyed when presented by the behavers to each other as religious dogma.

We need to ask ourselves what connection, if any, there need be between the creation of a valid underlying explanation for behavior and the language the behavers use to talk about their own behavior. If the cultural materialists have it right, the cow-worship example suggests that the most important rules have elemental utility to people but are explained to and by those who subscribe to them in ways that have more emotionally compelling and symbolic meaning. Thus, law and economics theorists may be on to something when looking for an explanation in the effects of rules on material life (e.g., efficiency) but missing something to the extent that they treat the judge's announced reasons as mere epiphenomena. And Scheppele may be failing to appreciate the different functions of the rules themselves and the reasons given for the rules. In explaining cattle-worship cases, insistence on such a merger of the language of the theorist and the judge might lead to bad social science or bad judging or both. This latter point might be addressed by a theory that seeks to provide a best explanation for the behavior as well as an explanation for the explanations the participants give for their behavior. We might agree that a theory that succeeds in doing both is "better" than a theory that succeeds in doing only one. Neither law and economics nor contractarianism are trying to do the latter, although by merging the two into one, Scheppele may be trying to obviate the latter. She might be trying to say that her explanation *is* the participants' explanation. But that cannot be, or she will not have said anything new.

We probably will come to the conclusion that many philosophers of science have come to, namely, that the criteria by which theories are to be judged ought to vary with the circumstances: the stage of knowledge development in a field, the purposes for which the theory was created, and other considerations. A theory that is superior for one set of purposes may not be for another. In short, the justificatory criteria need to be justified.

We should not lose sight of the larger point, however, that the creation of a second positive theory instantly launches a debate about how to decide which theory is better. That is a debate which could not occur, at least not with any urgency or concreteness, until more than one theory exists. Scheppele's discussion of criteria for comparing contractarianism and law and economics begins this

important debate for law and social science theories of law, although it has much further to go.

THEORY BUILDING AND BORROWING

Law and economics is constructed from some economics concepts. Contractarianism looks elsewhere for the concepts with which it tries to explain the common law.

Legal Secrets begins with an interesting discussion of the sociology of secrecy. For example, it makes the point that exchanges of information define relationships and that the distribution of information is largely coextensive with the social structure.[10] But the often fascinating sociology of secrecy developed in chapter 1 was left behind by chapter 4 when it came time to develop the new alternative theory.

Contractarianism is built on a foundation of moral philosophy, and emphasizes liberty, equality, and community. As applied to fraud cases, "the contractarian approach emphasizes equal access to information, with special attention being given to buffering the parties from catastrophic loss and to requiring the disclosure of deep secrets" (p. 167). The contractarian theory of privacy law is similar in its emphasis on equal access but requires disclosure when information is being used strategically. And the same basic concepts again are offered to explain caveat emptor and implied warranties through the nineteenth century: a party to a transaction with superior knowledge must share that knowledge, consistent with underlying contractarian principles of equal access and community (and inconsistent with notions of economic efficiency).

That a work whose roots are otherwise sociological in character should make so sharp a departure to moral philosophy when it looks for its positive theory is, to say the least, surprising. Whether this setting aside of social science reflects the author's failure to find anything promising there, or a desire to be universal and timeless, rather than contingent and culture-specific—and to bet that common law judges were as well—a reader cannot discern. This strikes me, at least, as something of a curiosity, then: a moral theory, tempered with asserted[11] cultural particulars, used as a positive theory evaluated through an empirical-style test.

Moral philosophy may be the place to try to find ideal rules. But by its nature it is not likely to produce a dynamic theory, one

[10] If this sociology of secrecy is descriptive, what can explain that which it describes? Can contractarianism? Better or less well than law and economics?

[11] When in this moral philosophical frame of mind, Scheppele behaves like a philosopher and not a sociologist—positing the existence of certain cultural forms and behavioral generalities on the strength of little more than mere assertion or casual observation, rather than trying to support them with convincing empirical evidence. This is regrettable, because a sociologist practicing moral philosophy might have provided just the sort of rigor missing from the philosophy.

that can explain changes in actual rules over time. Such theories have little interest in adaptations to material and cultural environments, which change over place and time and change the law with them. While law and economics theory is better prepared to see, and sees, change in the law over time, contractarianism sees constancy. Indeed, in explaining the law of caveat emptor and implied warranty of the nineteenth century, contractarian theory sees not the dramatic transformations of the law that others have seen—law and economics theorists as well as liberal and critical theorists—but what Scheppele argues[12] is an underlying constancy.

CONCLUSION

Thus, we now have an economic theory of the common law and a moral-philosophical theory. The invitation is still open for a theory based on the rich body of theory and data of the noneconomic social sciences. Among these and still other theories we will have an expanding opportunity to explain why the law reaches the decisions it does rather than others. An ideal theory might explain present doctrines and their evolution over time and enable prediction of how the law will change as the society changes. And with the model provided by *Legal Secrets* we have a methodology that will help us to figure out which of those theories does its work best, thereby to discover more of the secrets of the common law.

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[12] And argues quite persuasively, I found. The principle of equal or unequal knowledge controlled throughout:

> In each case, judges assessed who had superior access to knowledge about the product and let the loss fall on that party. Caveat emptor prevailed when the seller was a merchant who knew very little about the goods. . . . As sellers began to know more, the courts held them responsible for the quality of their goods and for the losses caused by their defective products. . . . Even at the peak of the application of caveat emptor, however, courts in New York still admitted exceptions for [goods offered by more knowledgeable sellers]. The exceptions to the apparent rule of caveat emptor are the exceptions that demonstrate the more fundamental underlying principle. (Pp. 292–93)

In arguing that the general run of cases do not bear out the familiar idea that the law was working to advance the interests of the growing industrial revolution, Scheppele notes:

> In the early part of the [nineteenth] century, it was precisely the budding manufacturers who suffered the biggest losses under this rule; merchants and farmers went scot-free. Later in the century, manufacturers again bore the brunt of this rule, becoming the knowledgeable sellers of complex products, and responsible for selling defective goods. If anything, caveat emptor was a battleground between merchants and manufacturers in the early part of the century (with merchants winning) and between manufacturers and consumers in the later part of the century (with the consumers winning). The manufacturers were, as a group, consistent losers. It is hard to see how this let loose the entrepreneurial spirit. (P. 293, note 70)

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