Transparency and Opacity in the Law: An Introduction

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The website of WikiLeaks.org, the international organization that publishes data and diplomatic cables closely guarded by various governments and corporations, has described its project as follows:

> WikiLeaks is a multi-jurisdictional public service designed to protect whistleblowers, journalists and activists who have sensitive materials to communicate to the public. . . .
>
> We believe that transparency in government activities leads to reduced corruption, better government and stronger democracies. All governments can benefit from increased scrutiny by the world community, as well as their own people. . . .
>
> The power of principled leaking to embarrass governments, corporations and institutions is amply demonstrated through recent history. The public scrutiny of otherwise unaccountable and secretive institutions forces them to consider the ethical implications of their actions. Which official will chance a secret, corrupt transaction when the public is likely to find out? What repressive plan will be carried out when it is revealed to the citizenry, not just of its own country, but the world? When the risks of embarrassment and discovery increase, the tables are turned against conspiracy, corruption, exploitation and oppression. Open government answers injustice rather than causing it. Open government exposes and undoes corruption. Open governance is the most effective method of promoting good governance . . .
>
> What conscience cannot contain, and institutional secrecy unjustly conceals, WikiLeaks can broadcast to the world.[1]

This manifesto contains several themes and lines of argument apposite to a consideration of law and secrets. Most prominent among them is a valorization of transparency in governance. In "datadumping" tens of thousands of secret military documents concerning the Afghanistan war and hundreds of thousands of U.S. embassy cables,[2] WikiLeaks' founder Julian Assange asserted his

place in the annals of journalism alongside Daniel Ellsberg (of *Pentagon Papers* fame) as an heroic defender of democratic values.[3] Those values, WikiLeaks asserts, depend upon clear and honest communication between governing social and political institutions and the wider public, both to protect against corruption and to ensure that the consent of the governed is meaningful and effective.[4] By contrast, WikiLeaks equates "secrecy" with oppression, unaccountable authoritarianism, and (more generally) injustice. The revelation of secret information is, from this point of view, an unarguable good, as it punishes corruption and deters those who might otherwise act for their own good at the public's expense.

Such a position presupposes that one can clearly distinguish justice from injustice on the basis of a moral distinction between the "principled" leaking of secrets and their "unjust" concealment. The "principle" in principled leaking may be difficult to articulate fully,[5] but it seems to resonate on at least two levels of meaning. It may, on the one hand, emerge out of the idea that there will be agreement, in at least some instances, that certain substantive acts or practices are corrupt or unjust (fraud, coercion, illegitimate violence). On the other hand, the justification and justice of leaking may follow more generally from a theory of governance that equates official secrecy with antidemocratic practices, regardless of the content of the secret (whether immoral or not). Either way, one can read in the assertion of principle an implicit acknowledgment that the revelation of secrets requires justification—that "leaking" secrets—particularly if they are damaging to the institutions holding them—might be immoral.

The third theme in WikiLeaks self-description is, perhaps paradoxically, that those individuals airing secrets through WikiLeaks who wish to remain—or who must remain—cloaked in anonymity ought to be accorded the most stringent protections available, even from WikiLeaks itself (through its "cutting-edge cryptographic technologies"):

> Our servers are distributed over multiple international jurisdictions and do not keep logs. Hence these logs cannot be seized. Anonymization occurs early in the WikiLeaks network, long before information passes to our web servers. Without specialized global internet traffic analysis, multiple parts of our organization and volunteers must conspire with each other to strip submitters of their anonymity.

Critics might suggest that what is good for the goose ought to be good for the gander: that if WikiLeaks values transparency as a general matter, it can-

not embrace secrecy at its very core.[6] Even under the more limited claim that WikiLeaks values the revelation of secrets whose substance is immoral, relying on anonymous sources whose integrity is impossible to gauge can fatally compromise the organization's legitimacy.[7] Yet for our purposes the more interesting implication arising from this conundrum is that it suggests that transparency relies on a prior opacity: that sources will not expose corruption without protection, and that secrecy necessarily lies at the heart of WikiLeaks' production of truth.[8] In other words, secrecy and transparency are not opposites, but rather stand in a fraught but inescapable relationship with one another.

These three themes—the importance of transparency to democratic governance, the moral ambiguity of both guarding and revealing secrets, and the opacity that may be a precondition for transparency—highlight the allures as well as the dangers of keeping and exposing secrets. As humans we seem haunted by a desire—not always insatiable, but often compelling—to know and uncover knowledge kept from us,[9] and law is one of the signal terrains upon which clashes over secrets play out.[10] Moreover, if law is, as Marianne Valverde has suggested, "a privileged site in which people either seek the truth themselves or comment on the truth-seeking efforts of others,"[11] it also depends upon and incorporates certain kinds of secrecy into its workings even as it acts as a lever to uncover the secrets of others.

The essays in this interdisciplinary volume explore the ways law both traffics in and regulates secrecy and describe its place in both the workings of law and in our imaginings of it. Our contributors pose questions about the ways law overtly and covertly produces zones of secrecy, about the relation between secrecy and justice, and about how we represent and read the opacity of law's interpretive and representational processes. If the denizens of WikiLeaks struck a nerve in releasing such vast amounts of information,[12] it is because they laid bare our deep ambivalence—our longing and our fear—over the revelation of secrets at a highly charged legal and political moment.

What Is a Secret?

Both alluring and forbidding, secrets are set apart from the world of the everyday;[13] and, like other things we hold sacred, are ambiguous in the sense that they consist of an unknown onto which we project both our desires and

our fears.[14] As Sissela Bok puts it, "[A]midst the vastness of all that we are conscious of not knowing, or of trying to ascertain, we experience as secret the spaces from which we feel shut out."[15] Secrecy is at once necessary for human flourishing and yet may also threaten it. "Secrecy," Bok writes, "is as indispensable to human beings as fire, and as greatly feared. Both enhance and protect life, yet both can stifle, lay waste, spread out of all control. Both may be used to guard intimacy or to invade it, to nurture or to consume. And each can be turned against itself; barriers of secrecy are set up to guard against secret plots and surreptitious prying, just as fire is used to fight fire."[16]

As several of the chapters below suggest, our ambivalence about intentional secrecy in particular is profound. While secrets are not necessarily "ethically negative,"[17] their set-apartness provokes suspicion and a tendency to magnify their significance.[18] As we imagine them, "secrets provide the unobservable weapons of the devious."[19] Sometimes we think of secrecy as a kind of poison or infection whose risks multiply because of its tendency to spread.[20] At the same time, we defend our own capacity for secrecy passionately in arguing that a world without secrets is a world deeply destructive of the human. Imaginative culture provides parable after parable detailing the soul-destroying effects of complete transparency.[21]

Intentional secrecy is often distinguished from the more diffuse concept of privacy, notoriously defined by Samuel Warren and Louis Brandeis in its most general sense as "right to be let alone."[22] Bok argues that the defining trait of secrecy is precisely this effort to conceal. "To keep a secret from someone . . . ," she writes, "is to block information about it or evidence of it from reaching that person, and to do so intentionally: to prevent him from learning it, and thus from possessing it, making use of it, or revealing it."[23] Secrecy is, in her view, different from privacy, which she defines as "the condition of being protected from unwanted access by others—either physical access, personal information, or attention."[24] Liberal societies are deeply invested in the idea that individuals need secrecy for "protection of what we are, what we plan, what we do, and what we own"—particularly vis-à-vis the intrusions of the state.[25] Edward Shils even more emphatically distinguishes the two concepts. "Privacy," he argues, "is the voluntary withholding of information reinforced by a willing indifference. Secrecy is the compulsory withholding of knowledge, reinforced by the prospect of sanctions for disclosure."[26]

And yet if one defines secrecy not with reference to the intentional acts of individuals but from the point of view of the audience from whom knowledge is concealed, one can coherently link secrecy with opacity—with the obscure, impenetrable, or ineffable rather than the concealed. This broader conceptualization of secrecy raises a set of epistemological issues that complicate an easy embrace of transparency in governance and law—issues arising from, for example, the complexity of the human psyche,[27] or the slippery nature of language and representation itself.[28] As a number of our contributors suggest, words on a page or images in a text alone cannot guarantee access to meaning; often to decipher law's secrets one must read between the lines of a report or search further in the historical record; and even then, one can find no guarantee of clarity or transparency.

Secrecy, Transparency, and Governance

However elusive the ideal of transparency may be, it remains central to the project of accountable governance in liberal democracies. Indeed there is a long tradition in political and legal theory extolling the value of transparency. Christopher Kutz has argued that, as far back as ancient Rome,

> as a principle, an ideal, the public nature of law went hand in hand with the nature of the republic itself. Indeed the very idea of a Republic, of *res publicae*, things pertaining to the public—supports the idea of matters of public concern being regulated by public rules, as opposed to the *arbitrario*—the raw will of the ruler . . . . The need to know law is a function of the structure of the state, and its basic purpose in creating coherent social order, in which ruler and subject can locate themselves.[29]

Jeremy Bentham echoes these ideas in utilitarian terms: "Publicity," he argues,

> [is] the very soul of justice. . . . It keeps the judge himself, while trying, under trial. Under the auspices of publicity, the cause in the court of law, and the appeal to the court of public opinion, are going on at the same time. . . . It is through publicity alone that justice becomes the mother of security. By publicity, the temple of justice is converted into a school of the first order, where the most important branches of morality are enforced, by the most impressive means: — into a theatre, where the sports of the imagination give place to the more interesting exhibitions of real life.[30]

For Bentham, publicity is the antidote both to unchecked power and to fantasies of the exercise of power untempered by a connection to the realities of its exercise in the world.

However venerable the pedigree of transparency, Alisdair Roberts argues that in fact democracies achieved a basic level of transparency only in the late nineteenth century.[31] Prior to that, governments operated under a strong presumption of secrecy. Slowly, though, the most advanced democracies began to mandate disclosure, a move toward managing rather than simply asserting the privilege of state secrecy.[32] In the United States, scandals of the 1960s and 1970s associated with the conduct of the Vietnam War[33] spawned legal tools to help citizens break the veil of government secrecy. The best known of these is the Freedom of Information Act, initially enacted in 1966 and subsequently amended, which establishes presumptive access for any person to existing, unpublished federal agency records on any topic.[34] FOIA contains, however, certain exemptions, the most significant of which preserves a zone of secrecy around national security information.[35] Particularly after the 9/11 attack, Roberts argues, "security organizations continued to exist in enclaves where the logic of transparency did not apply."[36]

Nonetheless, Amy Gutmann and Dennis Thompson argue that "the reasons officials and citizens give to justify political actions, and the information necessary to assess those reasons, should be public. This principle of publicity is a fundamental requirement of deliberative democracy."[37] They agree with Bentham that publicity both "motivates public officials to do their duty . . . [and] encourages citizens to deliberate about public policy and enables officials to learn about and from public opinion."[38] Moreover, they also endorse Kant's view that a policy is unjust if making it public would defeat its purpose. It loses moral legitimacy if it cannot be disclosed to those who are affected and bound by it, and on whose behalf it is enacted.[39] Building on that foundation, Gutmann and Thompson argue that in a deliberative democracy, there are four central reasons favoring publicity over secrecy: first, only public justifications can secure the consent of citizens, whether it be tacit or explicit; second, making reasons public contributes to the broadening of moral and political perspectives that deliberation ought to encourage; third, making reasons public fulfills the potential for mutual respect that deliberation seeks by clarifying the nature of moral disagreement; and fourth, secrecy undermines the self-correcting character of deliberation.[40]

While Gutmann and Thompson acknowledge that sometimes under narrow circumstances secrecy is necessary,[41] drawing on a distinction Kim Lane Scheppele first proposes, they suggest that certain kinds of secrets particularly damage deliberative democracy. Scheppele contrasts "shallow" secrets—those whose existence is suspected but not fully known—with "deep" secrets—those whose very existence is unknown.[42] While harmful, shallow secrets, Gutmann and Thompson suggest, at least afford citizens the chance to take up the challenge proffered by their keepers, and ultimately to decide whether the secret should be kept (at least ideally).[43] Deep secrets, on the other hand, threaten public trust and democratic governance much more significantly insofar as citizens cannot even begin to make inquiries about information because they do not know it exists.[44] As David Pozen puts it, "Deep secrets carry forward the premodern legacy of *arcane imperii*, mysteries of state the sovereign could invoke to justify his absolute authority and 'to secure domination over an immature people.'"[45]

In some instances, though—particularly when deep secrets concerning national security, having morphed into shallow secrets, are protected by courts—citizens do not have the capability to investigate and remediate even shallow secrets in the ways Gutmann and Thompson suggest. Take, for example, the recent case of *Wilner v. NSA*.[46] Attorneys for detainees held at Guantanamo Bay had submitted Freedom of Information Act requests to the National Security Agency and the Department of Justice seeking records showing whether the government had intercepted, under the Terrorist Surveillance Program (TSP), communications with their clients.[47] The TSP, once a deep secret, had been publicly acknowledged in December 2005 by President George W. Bush. When the agencies refused their requests, the attorneys sued.

The agencies, invoking the so-called *Glomar* doctrine (which created an exception to the FOIA when an agency asserts that exposing the very existence of certain classified records, if revealed, would endanger national security),[48] neither confirmed nor denied the existence of the requested records. The Second Circuit Court of Appeals upheld the validity of the government's actions, ruling that "[t]he fact that the public is aware of the program's existence does not mean that the public is entitled to have information regarding the operation of the program, its targets, the information it has yielded, or other highly sensitive national security information that the government has continued to classify." In other words, because of the FOIA's national security exception, the courts

turned a shallow secret into a deep secret and produced rulings that denied the very possibility of litigation concerning TSP.

That logic has traveled well beyond FOIA. Indeed, under the ever-expanding "state secrets" doctrine, national security considerations have more and more frequently become a free-floating exemption that allows the government to frustrate access to courts themselves. The origins of the doctrine date to the 1953 case of *United States v. Reynolds*.[49] In *Reynolds*, the widows of three civilian crewmembers killed in a military airplane crash sued the government for negligence. The Air Force withheld its official accident report, claiming (falsely, as it later emerged) that releasing those reports would harm national security. The Supreme Court agreed, giving birth to the "state secrets doctrine." Under that doctrine, disclosures of information in a judicial proceeding may be prevented if there is a "reasonable danger" that such disclosure will "expose military matters which, in the interest of national security, should not be divulged."[50]

At the start, state secrets doctrine was understood to be limited, exempting from courtroom scrutiny specific items of evidence. Today it has expanded to end some cases altogether, without a trial.[51] Recently, for example, Khalid el-Masri, a German citizen, sued the United States, alleging that U.S. law had been violated when, under the mistaken belief that he was associated with Al Qaeda, the government arrested him as he traveled through Macedonia and authorized his "extraordinary rendition" to Afghanistan, where he was held for almost seven months and tortured. Once the U.S. government realized its mistake, it released him on a road in a remote area of Albania, from where he made his way back to Germany.

Although the CIA rendition program was widely known, even publicly acknowledged by the President, the Bush administration successfully asserted its privilege under the state secrets doctrine, securing the dismissal of el-Masri's suit in its entirety.[52] The general information available to the public, the Court reasoned, did not include the specific facts necessary to litigate the case; and while the courts, not the Executive Branch, determine whether the state secrets doctrine has been invoked properly, the judiciary does not "possess . . . a roving writ to ferret out and strike down executive excess. [Under Article III] we simply decide cases and controversies."[53] If the government presents a credible argument that litigation would imperil state security, then whatever the hardship on the plaintiff and whatever the injustice done, the case cannot proceed.

And yet those who secure and *publish* government secrets have not generally been prosecuted for doing so.[54] When the *New York Times* printed a story on illegal NSA surveillance in December 2005,[55] the Bush administration fulminated but ultimately did nothing. Why? According to Eric Posner, pragmatism and politics, rather than law, mandates a nonresponse. Prosecution would provide a forum for journalists to reveal information and to demand disclosure of further secrets to mount an adequate defense. Indeed, the very fact of prosecution suggests to enemies that the facts disclosed are significant, not trivial. In addition, prosecuting journalists can appear to the public to be a way of silencing critics. The result is, as Posner writes, that "statutes and constitutional precedent permit the government to prosecute journalists for publishing secrets, but politics and prudence ensure that it never does."[56] While the WikiLeaks case may prove to be a turning point,[57] it appears that in the area of national security, norms rather than law have been the most consistent and reliable guarantor of whatever transparency is achieved in governance.

Legal Secrets

The expansion of the state secrets doctrine provides a trenchant example of nontransparency imposing itself on political and legal processes otherwise committed to the principle of publicity. Criminal prosecutions are, after all, shaped by the Sixth Amendment's guarantee of a "speedy and public trial." Public trials, Thomas Cooley argued, are "for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions."[58] Moreover, while audiences have sometimes been excluded from courtrooms,[59] the Supreme Court has held that under the First and Sixth Amendments, both press and public have a presumptive right to attend criminal trials.[60] As Lindsay Farmer suggests in his critique of secret trials (see below), public trials have a communicative function that promotes critical scrutiny of state officials.

Yet even in trials, arguably among the most public of legal proceedings, law operates with considerable opacity and its own, distinctive understandings of truth. Trials are opaque spaces in which knowledge is masked or excluded for reasons of both policy and efficiency. The guarantee of a public trial does not

amount to a guarantee that trial proceedings transparently publicize either the "truth" of the process or the "truth" of the trial's underlying story. Trials are not mirrors of, or windows into, the social world; they are highly stylized and rule-governed proceedings.[61] Procedural rules of the sort that Edward Stein discusses below regulate what, how, and when evidence can be presented to a decision-maker, often excluding information as irrelevant or prejudicial that we might typically want and use when discussing and evaluating past events and social conflicts—gossip, general personal histories, patterns of behavior within and between social groups, and so forth. The hearsay rule (which excludes potentially unreliable evidence), rules about character evidence (which protect against false inferences), and rules guarding certain kinds of privileges meant to protect particularly important relationships (spousal, attorney-client, doctor-patient) serve to distinguish the narratives in a trial from the narratives in everyday life. They hide things from juries that jurors might want to know.[62]

Procedural rules invoked in the courtroom produce "shallow" secrets that overtly cordon off spaces from public view. For some, this casts doubt on the reliability and referentiality of legal proceedings, mistakenly elevating a cramped conception of fairness over the trial's truth-seeking function.[63] On this view, the opacities intentionally generated by procedural rules delegitimize the trial not by excluding the public but by misleading it; while the public may be allowed to scrutinize the process of judging, it cannot effectively assess the factual accuracy of the verdict. At the very least, as Bernadette Meyler, Melanie Williams, and Richard Burt suggest below, trial reports and other sorts of evidence about crime and the legal process capture only part of the truth underlying a case. Such evidence, if it is at all legible, requires readers educated enough to identify its gaps and elisions.

Perhaps of even greater concern for advocates of transparency in law, legal processes preceding (and often superseding) trials often, for the sake of efficiency, keep the scene of accusation and judgment out of the public eye. Practices such as custodial interrogation and plea bargaining can dramatically affect the way the state carries out criminal justice; yet they occur in the shadows of public adjudication.[64] Plea bargaining, for example, which "consists of the exchange of official concessions for a defendant's act of self-conviction,"[65] is

conducted offstage and out of public view. Critics of the practice worry about its ease, its relaxed evidentiary standards, and its corruptibility, all of which are at least partly enabled by its relative secrecy.[66]

Concerns of this sort also arise in relation to custodial interrogation practices. Indeed the U.S. Supreme Court famously grappled in *Miranda v. Arizona* with the problematics of secrecy in interrogation, confronting and critiquing the interrogation room's power both as a policing tool and as a means of escaping public accountability. "Privacy," the majority noted, "results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation room."[67] The Court could fill that gap only via inference, by turning to instructional manuals intended to train the police in interrogation techniques. It found in them evidence of the ways interrogators use secrecy as a lever in order to gain psychological advantage over suspects.[68] "It is obvious," the majority noted, "that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. . . . The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself."[69] Secrecy itself, it appears, enables the abrogation of fundamental rights. Moreover, as Christopher Kutz argues, it "hurts us existentially, because it deprives us of the way in which, once we are organized as a polity, law tells us who we are, by constituting our *orientation* in moral and political space—what values and acts we project into the world."[70]

And yet, if we worry that secrecy can corrupt the operations of law, it is also true that absolute transparency can disable them. The *Miranda* decision did not, in the final analysis, end the practice of custodial interrogation, let alone require that the police question suspects in public in order to maintain their accountability in a democratic society.[71] It merely interposed a verbal mechanism—a warning concerning the rights of the accused—meant to limit the worst excesses of state power. The police are able to overcome the resistance of uncooperative suspects precisely because questioning takes place in a coercive environment set outside the eyes of onlookers. Similarly, certain critical aspects of national defense—practices such as espionage, for example—succeed only through secrecy. In those contexts, complete transparency would effectively disable the state's capacity for self-preservation.

Overview of the Chapters

The Secrets of Law takes up the problematics of secrecy, transparency, and opacity from an interdisciplinary perspective. The first three chapters explore ways in which the political and legal ideal transparency is negotiated in various contexts, particularly in public discourse and in trial processes. What advantage does secrecy provide, and to whom, as it emerges in zones of contact and disputation between the state and its citizens? And what values are forwarded by an embrace of the principle of publicity? The answers to such questions are not always as straightforward as one might expect; in some instances the public—or at least parts of it—benefits from the ways the state asserts and confers the privilege of secrecy.

If our first three contributors identify certain conundrums in the *political valuation* of transparency, the second half of this volume raises questions about the very *capacity* of language and image to represent the world in a way that could achieve the ideal of transparency in the first instance. Attending carefully to representational practices in literary and filmic texts, the final three chapters suggest that opacity is an unavoidable and constitutive part of human discourse, one that can be mobilized for political purposes but that cannot be expunged entirely, even with the most radical embrace of openness in governance. Publicity, in other words, is no guarantor of transparency: even if the state were to make every document, ruling, and decision available to the public, the necessary opacity of signification processes would still mediate our relation to their meanings.

Beginning with the question of transparency in democratic processes, Alasdair Roberts argues in "Open Secrets and Dirty Hands" that while the Bush administration was conventionally understood to be the most secretive in decades, in fact such claims both overstate the president's power to maintain secrecy and, more significantly, miss the fact that many of the abuses alleged to have been committed were in fact "open secrets." A number of pressures, Roberts notes, have encouraged and enhanced transparency in governance: laws passed since the Johnson administration era; a growing ethic of dissent rather than deference; and the digitization of media coverage. Why, then, did such "open secrets" about the conduct of the war on terror persist in the face of early and repeated publicity, which Roberts documents in detail, about "secret" prisons, extraordinary rendition, and coercive interrogation?

Roberts de-emphasizes explanations involving, on the one hand, worries about imprecise knowledge and standards of proof, and, on the other, the dynamics of news media coverage and incentives for opponents of secrecy to overemphasize its existence. Rather, he argues, citizens are complicit in maintaining the appearance of secretiveness because it helps us to avoid the problem of dirty hands and the ethical dilemmas that knowledge about unlawful government actions produce. "Open secrets," he writes, "become a convenient way of dissolving our moral problems, or at least of putting them out of sight."

If the embrace of secrets has some allure for democratic subjects ambivalent about the exercise of state power, the political values expressed in already-existing legal practices such as trials can counterbalance that allure and reassert the centrality of transparency in governance. In this vein, Lindsay Farmer's "Secret Trials and Public Justice" considers the principle of public justice in the context of England's response to the war on terror. Arguing that there is an intrinsic connection between fair and public trials, Farmer offers both an historical genealogy of the development and justification for the principle of a public trial and an assessment of normative arguments in support of it.

Early English adversarial trials, Farmer argues, were open to the public for practical reasons related to the operations of juries (who actively participated in proceedings), but by the nineteenth century, the public nature of trials was less an issue of practicality than of ideology. As punishment moved behind closed doors, trials replaced the scaffold as a space for the public staging of innocence and guilt. Farmer examines this shift in the staging of justice by tracing changes in both courtroom practice and architecture. Nineteenth-century courtrooms were built to emphasize the authority of law and the efficiency and competency of the criminal justice system rather than to include the public in any meaningful way; they reduced the scope of physical space that had encouraged sociability and increased the segregation of legal officials from the public. By the early twentieth century, Farmer argues, while publicity in judicial proceedings was acknowledged as necessary (subject to certain exceptions meant to maintain security for witnesses, evidence, and reasons of state), it had no clear rationale.

Farmer takes up the task of justifying publicity in trials at a particularly critical historical moment, one in which secret tribunals are proliferating. In doing so, he rejects commonplace arguments that support a right to a public trial on grounds of, for example, encouraging the production of truth or hold-

ing judges accountable to public opinion. Instead Farmer offers a "communicative" defense of public trials. If condemnation of wrongdoing is offered in the name of the public, he argues, then surely the public has a right to know that the condemnation is justified by scrutinizing the proceedings. If it is not, then the public (at least in liberal democracies) has a corollary right to distance itself from verdicts. If properly conducted, trials can also educate the public about both right and wrong and the norms of criminal justice. At the heart of a fair trial is publicity that enables communication and scrutiny; and under this principle, secret trials are for Farmer presumptively unfair. As he suggests, "A trial in which justice is not seen to be done cannot properly be said to be just."

Trials are not, as we noted previously, fully transparent legal forms. Edward Stein's "Spousal Secrets: Same-Sex Couples and the Functional Approach to Marital Evidentiary Privileges" explores one telling example of secrecy built into the law itself: spousal evidentiary privileges. The evidentiary law of "spousal secrets" renders inadmissible in court both confidential communications between spouses and adverse testimony against one's spouse. Spousal secret doctrines (the confidential communication privilege and adverse testimonial privilege) reflect a number of policy priorities that value the protection of marriage above the legal search for truth. In most jurisdictions courts use a bright-line rule: if one is married even in ways that indicate the marriage is moribund or a sham, the rules apply; if one is not married, even if completely committed to one's partner, the rules do not apply.

Arguing that evidence law needs to accommodate the increasing legal recognition of spouselike relationships in same-sex couples (domestic partnership, civil union, and marriage), Stein carefully recounts and evaluates the history of the spousal evidentiary privilege and arguments for and against them. He favors what he calls a "sophisticated functionalist approach" over the bright-line rules currently in place. All couples invoking the privilege, whether opposite-sex or same sex, would be evaluated in a process that would take into account emotional commitment and involvement, financial commitment and entanglement, mutual reliance for personal services, the way they have conducted themselves in their personal life and held themselves out publicly, the level of intimacy between them, and the totality of the relationship as it is expressed in mutual dedication, care, and self-sacrifice. Stein argues that this functionalist approach closely hews to the justifications put forward in favor of the privilege

generally—fostering strong marriages, respecting privacy, and so forth—resulting in their fairer and more equal application.

While the first three chapters examine the role of secrecy in contemporary political and legal practices, the three chapters that round out this collection explore legal, literary, and filmic *representations* of secrets in and around law, focusing in particular on the ways in which legal knowledge (knowledge, that is, about particular cases and crimes) is rendered opaque to those attempting to access and decode it. Bernadette Meyler's "Wilkie Collins' Law Books: Law, Literature, and Factual Precedent" approaches the problem of legal transparency through the lens of cultural and literary history. Meyler argues that rhetoric in democracies extolling transparency and public access to knowledge about law ought to be evaluated by examining the ways legal texts are received by readers. She turns to the popular nineteenth-century genre of the trial report, which self-consciously addressed itself to a broad audience, and examines the genre both on its own terms and as it was taken up in the literary works of Wilkie Collins.

Following Bentham, English trial reports emphasized transparency as a check on miscarriages of justice or the distortion of doctrine. These collections aimed to produce a jury pool more capable of exercising legal judgment, teaching jurors how to consider and weigh evidence and emphasizing specifically the difficulties of relying on circumstantial evidence in criminal trials. Meyler explores debates surrounding the use of such evidence in trials as a way to reflect on the problem of interpreting evidence—and particularly textual evidence—more generally. Trial reports purport to relate accurately the trials they represent; but on Meyler's reading the collections do not offer an accurate account so much as one perspective on those trials.

Wilkie Collins comes to the same conclusion in his 1875 novel *The Law and the Lady*, which charts the course of its "naïve" reader Valeria Woodville as she works to exonerate her husband from the charge of murdering his first wife after reading a trial report's rather damning account of his trial. Valeria grows increasingly sophisticated in her capacity to read elisions in legal texts; she is more and more able to reconstruct exculpatory evidence in opposition to the logic of the trial report. At the same time, Meyler suggests, Valeria's own methods of retrospective rearrangement and judgment resemble those of the report. As such, *the Law and the Lady* offers an immanent critique of the belief that law

inevitably will grow more transparent or that writing will render representations of law more accurate.

Melanie Williams's "Historiographic Secrets of the Labour Contract—The Law and Literature of Lewis Jones 'Cwmardy' and 'We Live'" takes up similar questions concerning law's transparency in both legal and literary texts. But while Meyler emphasizes the problematic of reading and interpreting the law in relatively private settings, Williams focuses on the ways in which law is implicated in public struggles over structural imbalances between capital and labor. Juxtaposing legal texts explicating labor and contract law with two novels by the Welsh writer Lewis Jones, she considers the legal effacement of a significant social history arising out of brutal clashes between mine workers and owners in early-twentieth-century south Wales.

Williams argues that Jones's novels depict in rich detail an organic critique of law, the ways legal processes and actors, from the coroner to the police, subtend oppressive working conditions in the mines and the ruthlessness with which mine owners quash miner protests. She places Jones's description of police brutality against strikers, loosely based on a famous 1910–11 strike in south Wales, alongside a leading 1925 case, *Glasbrook Brothers v. Glamorgan City Council*, concerning the contract law doctrine of consideration. The question in *Glasbrook Brothers* was whether the police may demand payment if, at the request of an individual, they provide a special form of protection outside the scope of their public duty.

The House of Lords agreed that payment was due the police without nodding in any way to what she calls a secret subtext in the visible world of law: the political context of the case (owners hiring local police to break strikes) or the larger questions at stake when private individuals commandeer public power to further their own interests and coerce their workers into the effective equivalent of slavery. The secrets law keeps in its contestable accounts of history, and its elision of the lived, subjective experience of the workers, indicate a deep ideological resistance to acknowledging law's complicity with injustice. Jones's literary narrative, she argues, offers a corrective to the legal record's "truth-space," which erases the political and historical context that produces a critique of the rule of law itself.

Finally, Richard Burt's "Duly Noted or Off the Record? Sovereignty and the Secrecy of the Law in Cinema" calls into question a set of common assumptions

about the transparency and legibility of legal records and evidence, and by extension what he calls the "indivisibility" both of the record-as-truth and more generally of sovereign power as it is exercised in law's capacity to know the world through writing. Focusing in particular on the trope of the note—a kind of writing whose status as evidence and/or a legal record is unstable and undecidable—Burt offers nuanced deconstructive readings of a number of films (*All the President's Men*, *JFK*, and in particular two of Fritz Lang's films, *Fury* and *The Testament of Dr. Mabuse*). In those readings he examines the role that notes, note-taking, and note-reading play in, on the one hand, the production of conspiracy theory (the illegibility of the note makes us wonder what secret the state is keeping from us) and, on the other, the failure of law to capture the meaning of notes and fulfill its enforcement role.

These films, Burt argues, offer an allegory of law's secrets, which he equates with the ultimate unreadability of notes and their incapacity to record and reconstruct the past in order to guide investigations toward justice and narrative closure. Through a close and complex reading of the films, he highlights the ways in which notes allegorize the intractable illegibility of seemingly transparent evidence, ultimately raising a larger set of questions about the ways in which secrets disturb the operations of law and signal the limits of its reach. For Burt, the way these films represent language through notes suggests that easy assumptions about transparency in governance (those, for example, underlying FOIA requests: revelation of official records will produce a true story about state actions) are at best naive, disabled by the very operations of representational processes themselves.

Taken together, the chapters in this book suggest that democracy's aspirations to transparency are always vulnerable to, and haunted by the allure of, secrecy. The opacity built into legal and governance processes can permit the unfettered exercise of state power, and can elevate certain values—national preservation, or the protection of certain kinds of relationships, or the suppression of inconvenient failures—over a general interest in publicity. To the extent that secrecy poses dilemmas that are not just political but also epistemological and interpretive, citizens invested in political and legal transparency must cultivate a capacity to read between the lines, to look for shadows cast by the unseen, to decode the illegible and, failing that, to acknowledge both the virtues and the dangers of the unknowable.