



SciencesPo.

Sciences Po Law School (SPLS) and Sciences Po PhD Program are pleased to invite you to attend to a seminar by **Prof. Christopher L. Kutz** on :

« The Repugnance of Secret Law »

Christopher L. Kutz is Professor at the Law school of University of California-Berkeley, in the Jurisprudence & Social Policy program, and Director of the attached *Kadish Center for Morality, Law, and Public Affairs*. He is currently Visiting Professor at SPLS.

Specialized in moral, legal, and political philosophy, as well as criminal and international law, he has written extensively on the philosophy of criminal law, the philosophy of action, and ethics, and is now completing a book synthesizing his recent work on the foundations of the laws of war and democratic theory, entitled *At the Margins of Democracy*.

In the course of this seminar, Prof. Kutz will address **the legal and theoretical stakes of secret law**. Though secret law has been a longstanding matter of repugnance for political theorists, being seen as a mark of tyranny, inconsistent with the notion of law itself, the extensive use of techniques of secrecy in governance raises new questions relative to their compatibility with the key functions of law and calls for new distinctions.

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Sciences Po Paris,
13 rue de l'Université, 75007
Room S13

Free entrance

ABSTRACT

« The Presidential administration of George W. Bush was characterized by a belatedly reported proliferation of secret changes to legal regulations, principally concerning a range of contested anti-terrorist policies, including the use of torture and warrantless surveillance. The dangers of secret law from the perspective of democratic accountability are clear, and need no elaboration. But secret law has been a matter of repugnance for political theorists who bore no affection for democracy. Since Plato, and continuing through such non-democratic thinkers as Bodin and Hobbes, secret law has been seen as a mark of tyranny, inconsistent with the notion of law itself.

This essay aims to explore the basis for that longstanding repugnance -- a repugnance made all the more puzzling given the extensive use and importance of techniques of secrecy in governance. The category of secret law also raises a theoretical question, especially pertinent to positivist theories of law, whose conceptions of legal validity would seem potentially independent of such substantive criteria as publicity. In principle, while a legal system as a whole could not be secret, publicity need not be part of the validity criteria for particular laws. The conventional objection to secret law, that it undermines democratic accountability, fails to answer these questions, since objections predate democracy and recognize secret law's efficacy.

I argue that a distinction between two forms of secrecy -- between direct secrecy, where the fact of secrecy is itself known, and meta-secrecy, where the secret itself is unknown -- provides a key to the puzzle. When the state makes clear the bounds of its secrets, it remains committed to a conception of limits to the ruler's power, and hence to one of the central bases of legitimacy. Meta-secrecy obscures the limits of state power, and so undermines the state's claim to legitimacy. Moreover, the category of meta-secrecy also undermines another key function of law: providing a orientation for political actors in normative space. Secret law undermines this orientation function, forcing subjects to reassess their relation to the state, and hence their understandings of their own political identities.

Note for the Science Po audience: The paper includes a brief discussion of secrecy in judicial opinions in the U.S. I would be very interested in expanding this section to discuss secrecy in other legal systems, especially in the French system. I am therefore especially eager to learn from you how the norm of publicity is understood in French law (and other civil systems), given what seems – to an American – like a practice of revealing very little about the basis of legal decision-making. »

Christopher L. Kutz