



Legal Secrets: Equality and Efficiency in the Common Law

Kim Lane Scheppelle

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Does the seller of a house have to tell the buyer that the water is turned off twelve hours a day? Does the buyer of a great quantity of tobacco have to inform the seller that the military blockade of the local port, which had depressed tobacco sales and lowered prices, is about to end? Courts say yes in the first case, no in the second. How can we understand the difference in judgments? And what does it say about whether the psychiatrist should disclose to his patient's girlfriend that the patient wants to kill her?

Kim Lane Scheppelle answers the question, Which secrets are legal secrets and what makes them so? She challenges the economic theory of law, which argues that judges decide cases in ways that maximize efficiency, and she shows that judges use equality as an important principle in their decisions. In the course of thinking about secrets, Scheppelle also explores broader questions about judicial reasoning—how judges find meaning in legal texts and how they infuse every fact summary with the values of their legal culture. Finally, the specific insights about secrecy are shown to be consistent with a general moral theory of law that indicates what the content of law should be if the law is to be legitimate, a theory that sees legal justification as the opportunity to attract consent.

This is more than a book about secrets. It is also a book about the limits of an economic view of law. Ultimately, it is a work in constructive legal theory, one that draws on moral philosophy, sociology, economics, and political theory to develop a new view of legal interpretation and legal morality.

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