



Prof. Mark Tunick
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POS 3691 HONORS LAW AND AMERICAN SOCIETY
PROF. MARK TUNICK
3 credits
Spring 2021, TR 4-5:20

Description: This is an introductory course examining the foundations of law in American society, historical and contemporary uses of law, and the conflict between individual freedom and government power. We will explore the nature of law and rules and the extent to which judges should have discretion to bend the rules for the sake of justice; whether the law should be used to enforce morality; and whether courts are an effective means for implementing social change. Additional topics include the jury system, gun control, police powers during a pandemic, contracts, and torts. Students will also learn how to do legal research. We draw on a variety of sources including film and literature, court cases, and historical and social science research.

Requirements: Grades will be based on: midterm (25 points), final (25 points), quizzes and short assignments (25 points), a legal research group project (15 points) and class participation (10 points), which will be based on contributions to class discussion. Students are expected to come to class prepared to discuss the reading listed for that class. For every unexcused absence beyond 2, your grade will be reduced by 2 points. You should take notes of all the readings and class discussions. As an incentive to take good notes, for the exams you will be permitted to use any notes you authored, but you will not be permitted to have access to the readings or to notes not authored by you. You should brief cases.

The default grading scale is 94-100 (A), 90<94 (A-), 87<90 (B+), 84<87 (B), 80<84 (B-), 77<80 (C+), 74<77 (C), 70<74 (C-), 67<70 (D+), 64<67 (D), 61<64 (D-), <61 (F). I may utilize a curve but only if doing so would yield a higher rather than a lower grade than what the student would earn using the default scale.

Honor Code: Students agree to adhere to the **honor code**, see <http://www.fau.edu/honors/academics/honor-code/>. If you have any doubts about what constitutes plagiarism or a violation of the honor code, consult with the professor beforehand.

Office Hours: TBA, or phone (799-8670) or email (**tunick@fau.edu**). Office location is HC 104.

Reading: The following 3 books have been ordered: Herman Melville, *Billy Budd*; Lynne Curry, *The DeShaney Case: Child Abuse, Family Rights, and the Dilemma of State Intervention (2007)*; and Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck (2017)*. Other readings are in Canvas. Be sure to bring to each class the reading for that day's class as you will need to refer to it in class discussion.

Schedule: Specific topics and readings are listed in Canvas. Be sure to check Canvas regularly for updates.

Introduction: Types of law, sources of law, researching the law

1/12. Introduction: Public vs Private law; reading the law; researching the law
Rdg: *Fountainebleau Hotel v. Forty-Five Twenty-Five, Inc.*

I. Public Law

A. The U.S. Constitution

1/14. The U.S. legal system and U.S. Constitution

Rdg: **U.S. Constitution**; DOJ, "Introduction to the Federal Court System"; Winkler, *We the Corporations*, ch. 1

B. 2nd Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed"

1/19. Pre-Heller: the 'collectivist' reading of the 2nd Amendment

Rdg: *U.S. v. Miller* (307 U.S. 174, 1939); *Silveira v. Lockyer*, 312 F. 3d 1052 (2003); *District of Columbia v. Heller*, 554 US 570 (2008)

Video excerpt of Black Panthers on gun regulation, from 'Berkeley in the 60s'

1/21. The policy debate: what is the effect of gun control on crime?

Rdg: Lott, *More Guns, Less Crime*, excerpts; Melinda Moyer, ['More Guns do not stop more crimes', Scientific American Oct. 1, 2017](#); and other excerpts.

C. Police Powers

Origins and limits

1/26. Rdg; *Comm v. Tewkesbury*, 52 Mass. 55 (1846); *In re Goddard*, 33 Mass. 504 (1835); *Tanner v. Albion*, 5 Hill 121 (1843); *Munn v. Illinois*, 94 US 113 (1876); *Jacobson v.*

Commonwealth of Massachusetts, 197 US 11 (1905); *West Coast Hotel Co. v. Parrish*, 300 US 379 (1937); *Williamson v. Lee Optical*, 348 US 483 (1955)

Police powers during a pandemic

1/28. *Hickox v. Christie*, 205 F. Supp. 3d 579 (2016); *XPotential Fitness v Arizona*, 2020 WL 3971908 (2020), *Henry v Desantis* (2020); *County of Butler v. Wolf* (2020); *Antietam Battlefield KOA v Hogan* (2020)

Does the state have the power to sterilize some citizens?

2/2: Rdg: Adam Cohen, *Imbeciles*

Does the state have an affirmative obligation to protect its citizens? The DeShaney Case

2/4: Rdg: *DeShaney v. Winnebago County Social Services*, 489 US 189 (1989), excerpt

2/9: Rdg: Curry, *The DeShaney Case*

II. Law and morality

2/11 Obligation to obey the law: interactive presentation (no required reading)

2/16: Is there a moral or legal duty to help others?

Rdg: A. D. Woosley, "A Duty to Rescue: Some Thoughts on Criminal Liability," *Virginia Law Review* 69 (7):1273-1300 (Oct. 1983); *State v. LaPlante*, 521 N.W. 2d 448 (1994)

For those interested: A.M. Rosenthal, *Thirty-Eight Witnesses: The Kitty Genovese Case*, available electronically through the FAU library.

2/18. The case of Jeremy Strohmeyer

Rdg: Nora Zamichow, "The Fractured Life of Jeremy" (on Jeremy Strohmeyer and David Cash), *L.A. Times*, July 19, 1998; Michael Kelly, 'Expel Murdering punk's apologist', *Palm Beach Post*, Sept. 19, 1998.

2/23. Should we criminalize prostitution?

Rdg: Martha Nussbaum, " 'Whether from Reason or Prejudice': Taking Money for Bodily Services," *Journal of Legal Studies* 27(2):693-724 (1998)

2/25. **Midterm**

III. The philosophy of law: What is law? How are laws different from other sorts of commands? Is discretion in interpreting law desirable or dangerous? Is law autonomous from politics?

3/2. The Speluncean Explorers and the nature of law

Rdg: Fuller, "The Case of the Speluncean Explorers," *Harvard Law Review* 62(4):616-45 (February, 1949), available through **jstor**.

For those interested: Tunick, "Ethics, Morality and Law," in Hall, ed., *Oxford Companion to American Law* (2002); Lawrence Lessig, *Code*, ch. 7.

3/4. Discretion in the law: should we make exceptions to rules, or go beyond statutes to arrive at justice?

Rdg: *People v. Davis*, 286 N.Y.S. 2d 396 (1967); *Riggs v. Palmer*, 115 N.Y. 506 (1889); *Atwater v City of Lago*, 532 U.S. 318 (2001).

3/9 Discretion in the law: Melville's Billy Budd

Rdg: Melville, *Billy Budd*

3/11: Who should have discretion--Juries? The issue of jury nullification

Rdg: Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," 105 *Yale L.J.* 677 (December, 1995), online via jstor; Andrew D. Leipold, "The Dangers of Race-Based Jury Nullification: A Response to Professor Butler," 44 *UCLA L. Rev.* 109 (October, 1996)

For those interested: Heiny, *Jury Nullification: The Current State of the Law*, Univ of Utah College of Law Research paper No. 351 (2020) (online, find via google search)

IV. Private Law

A. Contracts

3/16 *Mills v. Wyman*, 3 *Pick.* 207 (1826); *Webb v. McGowin*, 168 *So.* 196 (1936), *Britton v. Turner*, 6 *N.H.* 481 (1834); *Garcia v. von Micsky*, 602 *F.2d* 51 (1979); *McDevitt v. Stokes*, 192 *S.W.* 681 (1917)

3/18 *Jacob and Youngs, Inc. v. Kent*, 230 *NY* 239 (1921); *Williams v. Walker-Thomas Furniture Co.* (350 *F. 2d* 445, 1965); *American Car Rental, Inc. v. Commissioner of Consumer Protection* (273 *Conn.* 296, 2005); *Henningsen v. Bloomfield Motors, Inc.*(161 *A.2d* 69, 1960)

B. Torts

3/23 Rdg: Zittrain, Torts (Part I):

Leichtman v WLW Jacor Communications, 92 Ohio App. 3d 232 (1994)(assault/batter re cigarette smoke); Hart v. Geysel, 294 P. 570 (1930)(consent as defense in boxing); Hackbart v. Cincinnati Bengals, 601 F. 2d 516 (1979)(consent); Barbara A. v. John G., 193 Cal Rptr 422 (1983)(deceit); Andrew v. United Airlines, 24 F. 3d 39 (1994)(negligence); Akins v Glen Falls City School Dist., 53 NY 2d 325 (1981)(negligence)

3/25 Rdg: Zittrain, Torts (Part II):

Einhorn v Seeby, 525 NYS 2d 212 (1988) (Duty to tenant); Kelly v. Gwinnell, 96 NJ 538 (1984) (Duty of party host); Benn v. Thomas, 512 NW 2d 537 (1994)(proximate cause); Torchia v Fisher, 95 NJ 43 (1983)(strict/absolute liability); Linegar v Armour of America, 909 P 2d 1150 (1990)(Product liability); Medina v. Louisville Ladder and Home Depot, 496 F. Supp. 2d 1324 (2007)(Products liability)

V. Juries

3/30 Are juries equipped to resolve complex disputes?

Film: Twelve Angry Men (1957, dir. Lumet) (96 minutes).

4/1 Rdg: Stephen J. Adler, The Jury: Disorder in the Court, excerpts

VI. Law and social change

4/6 Is law an effective tool for social change?

Rdg: Gerald Rosenberg, The Hollow Hope, excerpts

4/8 Law as an instrument of social change (continued)

For those interested: Carl Bogus, Why Lawyers are Good for America; Thomas Burke, Lawyers, Lawsuits, and Legal Rights; Lawrence Friedman, Total Justice; Philip K. Howard, The Death of Common Sense; Robert Kagan, Adversarial Legalism; Walter Olson, The Litigation Explosion

VII. Group research project presentations

4/13 First half of groups

4/15 Second half of groups

Final Exam

Additional notes:

Policy on Accommodations: In compliance with the Americans with Disabilities Act Amendments Act (ADAAA), students who require reasonable accommodations due to a disability to properly execute coursework must register with Student Accessibility Services (SAS) and follow all SAS procedures. SAS has offices across three of FAU's campuses -- Boca Raton, SU 131 (561-297-3880); in Davie, LA 131 (954-236-1222); in Jupiter and all Northern Campuses, SR 111F (561-799-8585). Disability services are available for students on all campuses. For more information, please visit SAS website at www.fau.edu/sas/.

Counseling and Psychological Services (CAPS) Center: Life as a university student can be challenging physically, mentally and emotionally. Students who find stress negatively affecting their ability to achieve academic or personal goals may wish to consider utilizing FAU's Counseling and Psychological Services (CAPS) Center. CAPS provides FAU students a range

of services – individual counseling, support meetings, and psychiatric services, to name a few – offered to help improve and maintain emotional well-being. For more information, go to <http://www.fau.edu/counseling/>

Code of Academic Integrity Policy Statement: Students at Florida Atlantic University are expected to maintain the highest ethical standards. Academic dishonesty is considered a serious breach of these ethical standards, because it interferes with the university mission to provide a high quality education in which no student enjoys an unfair advantage over any other. Academic dishonesty is also destructive of the university community, which is grounded in a system of mutual trust and places high value on personal integrity and individual responsibility. Harsh penalties are associated with academic dishonesty. For more information, see University Regulation 4.001 and the WHC Academic Honor Code at <http://www.fau.edu/honors/academics/honor-code.php>.

Classroom Etiquette Policy: In order to enhance and maintain a productive atmosphere for education, personal communication devices such as smartphones are to be disabled during class.

Attendance Policy: Students are expected to attend all of their scheduled University classes and to satisfy all academic objectives as outlined by the instructor. The effect of absences upon grades is determined by the instructor, and the University reserves the right to deal at any time with individual cases of non-attendance. Students are responsible for arranging to make up work missed because of legitimate class absence, such as illness, family emergencies, military obligation, court-imposed legal obligations or participation in University-approved activities. Examples of University-approved reasons for absences include participating on an athletic or scholastic team, musical and theatrical performances and debate activities. It is the student's responsibility to give the instructor notice prior to any anticipated absences and within a reasonable amount of time after an unanticipated absence, ordinarily by the next scheduled class meeting. Instructors must allow each student who is absent for a University-approved reason the opportunity to make up work missed without any reduction in the student's final course grade as a direct result of such absence.

Florida Atlantic University policies regarding incomplete grades can be found in the University Catalog. Late work is subject to a grade reduction.

Covid 19 Statement: All students in face-to-face classes [which does not apply to this class, which meets online] are required to wear masks during class, and students must sanitize their own workstations upon entering the classroom. Taking these measures supports the safety and protection of the FAU community. Students who do not adhere to these rules will be asked to leave the classroom and/or be removed from the course. Students experiencing flu-like symptoms (fever, cough, shortness of breath), or students who have come in contact with an infected person should immediately contact FAU Student Health Services (561-297-3512).

Updated Nov. 17, 2020