

POS 3626 Honors Privacy

Spring 2023

Professor Mark Tunick

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Meets in person MW 3:30-4:50pm in SR 275. 3 credits

Check Canvas for latest schedule of material

Description: The seminar focuses on U.S. law regarding government and individual invasions of privacy. We explore the value of privacy, the role of technology in shaping societal expectations of privacy, and how we are to weigh the competing interests we have in privacy on the one hand, and in publicity, access to information, crime control, and national security on the other. Our approach is interdisciplinary: readings draw on philosophy, social history, anthropology, literature, films, economics, legal scholarship, and case law. This course has no pre- or co-requisites.

Requirements: Students can earn up to 100 points: online quizzes and discussion boards (35 points), participation in class discussion (10 points), a class debate (10 points), and 3 short papers, averaging 5 pages each (45 points total). Because this is a discussion-based class, attendance is particularly important: each unexcused absence beyond 2 will result in a loss of 1.5 points. 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 you would earn using the default scale.

To facilitate discussion, students are strongly advised to take notes on the readings and class discussions, and to 'brief' the assigned court opinions. A sample brief is online. *Be sure to bring to each class the reading for that day's class and your notes.*

Students agree to adhere to the [honorcode](http://www.fau.edu/honors/academics/honorcode.php) (<http://www.fau.edu/honors/academics/honorcode.php>). You are encouraged to discuss course material with each other, except that you may not discuss the quizzes or your papers/drafts with anyone but the instructor until after their due date has passed. All assignments must be entirely your own work. If you have any doubts about what constitutes plagiarism or a violation of the honor code, consult with the professor beforehand.

Office Hours: MW 11-12, 2-3:00. To arrange to meet at another time either in person or by zoom, phone 6-8670 or email me at tunick@fau.edu

Readings: Böll, *The Lost Honor of Katharina Blum* (Penguin, 9780140187281) and Glenn Greenwald, *No Place to Hide: Edward Snowden, the NSA, and the U.S. Surveillance State* (McClelland and Stewart, 9780771036835, 2015) are available at the bookstore or can be purchased at amazon or elsewhere. All other readings are available in [Canvas](#). Complete text of cases is also available at **Westlaw** via the [FAU library database](#), where you can also find recommended cases or law review articles. Some recommended readings are available in Canvas.

Schedule of Topics. Check [Canvas](#) for updates.

Note: in Canvas there is a module entitled 'Preliminaries' with several pages and a practice quiz that you should complete by Jan. 18 after reading all the material in this section

Cases in bold are subjects of class debates.

I. Introduction

1/9. Can we expect privacy anymore?

Rdg: Sweenek v Pathe News, 16 F Supp 746 (1936); NYT, 'A stranger filmed her on the train. TikTok users decided she had Monkeypox', 8/4/2022

1/11. Defining privacy

Rdg: Mark Tunick, *Balancing Privacy and Free Speech: Unwanted Attention in the age of social media* (Routledge: 2016), pp. 1-7, 24-30; Sipple v. Chronicle Publishing Company, 154 Cal. App. 3d 1040 (1984)

1/16 No class (MLKing day)

1/18. Can there be privacy in public places?

Rdg: McNamara v. Freedom Newspapers, Inc., 802 SW 2d 901 (1991); Shulman v. Group W Productions, Inc., 18 Cal.4th 200 (1998); Aubry v. Editions Vice-Versa [1998] S.C.J. No. 30 (Canada); Peck v. U.K., [2003] 36 EHRR 4.

For those interested: U.S. v. Vazquez, 31 F. Supp. 2d 85 (1998)

II. Historical and anthropological perspectives on privacy: How do we decide whether someone's expectation of privacy is objectively reasonable? Are there universal standards or principles to decide this, or is what counts as reasonable relative to one's culture or sub-culture? This section's readings lead us to think about whether the value of privacy is historically and culturally relative.

1/23. Flaherty, *Privacy in Colonial New England* (U. Virg, 1967), chapters 1, 2 (pp. 66-84), 3, and 7

1/25. Gregor, "Exposure and Seclusion: A Study of Institutionalized Isolation Among the Mehinaku Indians of Brazil," in Tefft, ed., *Secrecy: A Cross-Cultural Perspective* (1980); 'A Danish Children's TV Show has this message: Normal Bodies Look Like This', NYT Sept 20, 2020.

Film excerpt from Luis Buñuel, *Phantom of Liberty*

For those interested: [Background](#) (with photos) on the Mehinaku; Aries, *Centuries of Childhood: A Social History of Family Life* (1962)

III. The value of privacy: Why is privacy important? Is it good for its own sake, or is it valued because it is a means to some other worthwhile end? Not everyone agrees privacy is so good. David Brin, in *The Transparent Society*, asks: why should we care about privacy if we have nothing to hide? He also argues that anonymity makes it easier to dehumanize and harm others. So, is privacy really such a good thing?

1/30. Privacy and intimacy, autonomy, dignity

Rdg: Fried, "Privacy" (orig. Yale L.J. 77:475-93 (1968); Benn, "Privacy, Freedom, and Respect for Persons," in Schoeman, ed. *Philosophical Dimensions of Privacy* (1984); excerpts from Jeffrey Rosen, *The Unwanted Gaze* (NY: Random House, 2001)

For those interested; Tunick, 'Privacy and Punishment', *Social Theory and Practice* 39(4):643-68

(Oct. 2013); Daniel Solove, *The Future of Reputation*, ch. 1, [online](#); Zuboff, 'Surveillance Capitalism and the Challenge of Collective Action,' *New Labor Forum* 28(1):10-29 (2019); Bell v. Wolfish, 441 US 520 (1979); Keith Bybee, *How Civility Works* (2016), ch. 4; Luciano Floridi, 'On Human Dignity as a Foundation for the Right to Privacy', *Philos. Technol* 29:307-12 (2016); Robert Frost, "Mending Walls," available [online](#); Film: *The Conversation*, dir. Francis Ford Coppola's (1974)(1:53); Theodor Fontane, *Effi Briest*_(and Fassbinder's film version); Ursula K. Le Guin, *The Dispossessed* (1974); David Brin, *The Transparent Society*; Tunick, 'Does Privacy Undermine Community?', *Journal of Value Inquiry* 35:517-34 (December 2001), [online](#)

2/1. Does Privacy have objective value?

Rdg: Adam Moore, *Privacy Rights* (Penn State UP Press, 2010), ch. 3.

Recommended: Tunick, *Balancing Privacy and Free Speech*, pp. 30-61

2/6. Privacy and economic efficiency

Rdg: Richard Posner, "The Economics of Privacy," *Amer Econ Rev* 71(2):405-9 (1981); Joseph Siprut, "Privacy through anonymity: an economic argument for expanding the right of privacy in public places," 33 *Pepp. L. Rev.* 311 (2006)

2/8. The case for free speech.

Rdg: Eugene Volokh, "Freedom of Speech and information Privacy: The Troubling Implications of a right to stop people from speaking about you," 52 *Stanford Law Review* 1049 (2000): excerpts.

IV. Legal protections of privacy: There are a number of ways in which the law may protect against invasions of privacy. The common law and state statutes recognize some invasions as tortious; the U.S. Constitution's 4th Amendment protects individuals from unreasonable searches by state actors. Federal and state laws, state constitutions, and contract and property law also provide some protections. We focus on torts and on the 4th Amendment.

Torts

2/13. Introduction to privacy torts

Rdg: Warren and Brandeis, 'The Right to Privacy' (1890); Prosser, "Privacy"; *Froelich v. Adair*, 516 P. 2d 993 (1973); *Binion v. Shaquille O'Neal* (15-60869 S.D. Fla 2016)

2/15. Intrusion upon seclusion

Rdg: *Lake v Wal-Mart Stores*, 582 NW 2d 231 (1998); **Green v Chicago Tribune**, 576 NE 2d 249 (Ill 1996); *Dietemann v Time, Inc.*, 449 F 2d 245 (1971); [original Life article](#) on Dietemann. Recommended Film: "Cape Fear" (1961) (1:44)

Paper One Due

2/20. Public Disclosure of Private Facts: 'The First Amendment vs. Privacy'

Rdg: *Gill v Hearst Pub. Co.*, 253 P 2d 441 (1953); *DeGregario v. CBS*, 473 NYS 2d 922 (1984); *Penwell v Taft Broadcasting*, 469 NE 2d 1025 (1984); **Bonome v. Kaysen**, 32 Media L. Rptr 1520 (2004); *People v. Austin*, 2019 IL 123910 (2019)

2/22. Public Disclosure of Private Facts

Rdg: **Briscoe v. Reader's Digest**, 4 Cal 3d 529 (1971)

2/27. Public Disclosure of Private Facts (continued) and Europe's right to be forgotten
Rdg: Gates v Discovery Communications, 101 P 3d 552 (2005); State v. Dinegar, 2020 WL 3263918 (2020); **Google Spain SL v. Agencia Espanola de Proteccion de Datos** (AEPD) [2014] Case C-131/12

3/1. The First Amendment right to publish newsworthy information vs the right to privacy
Rdg: Best v Berard, 776 F. Supp 2d 752 (N.D. Ill 2011); Billings Gazette v City of Billings, 313 P. 3d 129 (Mont 2013); **Krakauer v. Montana**, 396 Mont 247 (2019); Rodriguez v Fox News, 238 Ariz 36 (2015)

For those interested: Best v. Berard, 837 F. Supp 2d 933 (2011); Film: 'Nobody Speaks: Trials of the Free Press' (2017), on the Hulk Hogan v Gawker Media case: available on Netflix

3/6-8, No class (Spring break)

3/13. Literary interlude

Rdg: Heinrich Böll, *The Lost Honor of Katharina Blum*

For those interested: Film version, Lost Honor of Katharina Blum, directed by Victor Schlöndorff (1975) (1:49), available on [Kanopy](#) app

3/15. CDA Sec. 230 Immunity for U.S. ISP's

Rdg: Hellar v Bianco, 244 P 2d 757 (1952); Zeran v. AOL, 129 F 3d 327 (1997); Doe v. Internet Brands, 824 F.3d 846 (9th Cir 2016)

3/20. CDA Sec. 230 Immunity: Recent cases

Rdg; Lemmon v. Snap, Inc., 995 F.3d 1085 (9th Cir. 2021); A.M. v. Omegle Com., LLC, 2022 WL 2713721 (D. Oregon 2022); Anderson v. Tiktok, Inc., ___ F. Supp. 3d___ (E.D. Penn 2022); Jackson v. Airbnb, Snap, and Does, 2022 WL 16753197 (C. Cal 2022)

3/22 Film interlude: *Rear Window*, dir. Hitchcock, 1954 (1:54)

4th Amendment

3/27. The REOP (Reasonable Expectation of Privacy) test

Rdg: Katz v. U.S., 389 U.S. 347 (1967); U.S. v. Longoria, 177 F. 3d 1179 (10th Cir. 1999); **State v. Duchow**, 310 Wis. 2d 1 (2008)

Recommended: Lasson, *History and Development of the Fourth Amendment* (pp. 13-61, 79-105); Olmstead v. U.S., 277 U.S. 438 (1928)

Paper Two Due

3/29. Theories

Rdg: Loewy, "The Fourth Amendment as a device for Protecting the Innocent," 81 Mich L.R. 1229 (1983), section 2; Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust between Government and Citizen?", 94 Columbia L.R. 1751 (October 1994), pp. 1755-63, 1775-1782, 1787-1793; Slobogin and Schumacher, "Reasonable Expectations of Privacy," 42 Duke L.J. 727 (1993), pp. 727-58, 774-5.

4/3. Aerial surveillance

Rdg: **California v. Ciraolo**, 476 U.S. 207 (1986); Florida v. Riley, 488 U.S. 445 (1989)

4/5. Public restrooms

Rdg: U.S. v. Billings, 858 F. 2d 617 (1988); Smayda v. U.S., 352 F. 2d 251 (1965); Bielicki v. Superior Court of Los Angeles County, 371 P. 2d 288 (1962); Britt v. Superior Court of Santa Clara County, 374 P. 2d 817 (1962)

For those interested: California Penal Code Annotated, Sec. 6471

4/10. Garbage and heat waste

Rdg: **California v. Greenwood**, 486 U.S. 35 (1988); U.S. v. Scott, 975 F. 2d 927 (1992); State v. Hemepele, (576 A. 2d 793 (1990); Kyllo v. United States, 533 U.S. 27 (2001)

4/12. Privacy in one's location

Rdg: **U.S. v. Knotts**, 460 U.S. 276 (1983); U.S. v. Jones, 565 U.S. 400 (2012); Reed v. Toyota Motor Credit Corp., 459 P. 3d 253 (2020)

Recommended: Tunick, "Privacy in Public Places: Do GPS and Video Surveillance Provide a Plain View?", Social Theory and Practice 35(4):597-622 (2009)([online](#))

4/17 CSLI and drones: Carpenter and its recent aftermath

Rdg: Carpenter v. U.S., 585 U.S. ___ (2018); Leaders of a Beautiful Struggle v. BPD, 2 F. 4th 330 (2021); Brennan v. Dickson, 45 F. 4th 48 (D.C. 2022); U.S. v. Bledsoe, 2022 WL 3594628 (D.C. 2022)

For those interested: 3rd party doctrine cases: U.S. v. Miller, 425 US 435 (1976); Smith v. Maryland, 442 US 735 (1979)

V. Privacy vs National Security:

4/19. The Snowden case

Rdg: Greenwald, No Place to Hide, chs. 1-3

4/24. Rdg: Greenwald, chs. 4-5 and Epilogue

For those interested: [Snowden's testimony to the EU](#) (2014); [Pres. Obama's remarks on Review of Signal intelligence](#) (2014)

Paper 3 Due.

Web Resources:

- Mark Tunick, [Balancing Privacy and Free Speech](#) (available free online)
- [EPIC Online Guide to Privacy Resources](#)
- [Privacy forum](#): online journal on privacy issues
- [Anti-Slapp](#) law and cases (Reporters Committee)

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.

Writing Portfolio & Writing Center: In addition to the Forum Paper and as a graduation requirement, Honors college students must submit one essay written during their 1st or 2nd years at the Honors College as part of their Writing Portfolio. Please consider submitting the final paper/essay for this course as your second paper as it meets the Writing Portfolio requirements. Papers for the Writing Portfolio must be submitted through Canvas. When you are eligible for review, you will receive an invitation to join a Canvas course for the writing portfolio review. Accept this invitation and submit your essay as directed. You are strongly encouraged to visit the University Center for Excellence in Writing (UCEW) for assistance with the writing process

Other Note: One of the objectives of this course is to facilitate critical thinking and debate around topics, theories, and concepts where disagreement is not only anticipated, but encouraged. The ability to think critically, express your ideas clearly, and respond to the professor and other students civilly are the keystones of the academic experience. In this course, the professor will provide instruction in an objective manner and will remain open to a wide variety of viewpoints, so long as those viewpoints are evidence-based and presented in a respectful way. During class, the professor may take positions and make statements for the sole purpose of accomplishing an academic objective or enhancing the learning environment. Additionally, the adoption of class materials for this course does not imply an endorsement of the full content of those materials or the positions of the authors of those materials. Often the professor will provide materials as a point of departure for critical thinking and debate. Students should keep in mind that the ideas presented or discussed during class may not necessarily reflect the professor's personal beliefs or opinions on the subject matter.

Updated 12/28/2022