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It Is Just a Game (of Jews vs. Nazi Beer Pong): A Case Study on Law, Ethics, and Social Media

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I. INTRODUCTION

The Association to Advance Collegiate Schools of Business (AACSB) accreditation standards on learning and teaching, adopted in 2013, require students to "engage in experiential and active learning designed to improve skills and the application of knowledge in practice."[1] The discussion of the facts of real-life case studies is a great way to help students engage in this kind of practical knowledge application. Since many, if not most, undergraduates have little familiarity with the law and legal concepts that arise in business situations and most have not yet started their careers, it is sometimes helpful to use a case study about a topic or situation they already know something about. The following case is about what happened when a high school student republished on her blog a picture of other high school students playing a drinking game. The students had posted the picture of themselves playing the game to Snapchat. (Snapchat is designed so that photos on it disappear after they are viewed).[2] It showed the students involved in an activity that raised ethical concerns.

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[1] *Eligibility Procedures and Accreditation Standards for Business Accreditation,* AACSB INTERNATIONAL—THE ASSOC. TO ADVANCE COLLEGIATE SCHOOLS OF BUSINESS, http://www.aacsb.edu/~/media/AACSB/Docs/Accreditation/Standards/2013-bus-standards-update.ashx (last visited Sept. 21, 2016).

[2] Snapchat's privacy policy states that "Snapchat automatically deletes the content of your Snaps . . . after we detect that a Snap has been opened by all recipients or has expired." Snap, Inc., Privacy Policy, https://www.snap.com/en-US/privacy/privacy-policy/ (last modified Jan. 10, 2017).

Part II provides a synopsis of the incident, which courses will benefit from use of the case, and teaching objectives. Part III provides the facts of the case in detail. Part IV provides background information on the areas of law raised by the case. Questions and suggestions for discussion, including freedom of speech in the public high school setting, privacy, and the unique challenges presented by social media use, are presented in Part V. Part VI concludes.

II. Overview and Teaching Objectives

A. Synopsis of the Case

Students at a high school in a wealthy university town engaged in an offensive drinking game called Jews vs. Nazis beer pong at an off-campus party.[3] They posted a photo to social media site, Snapchat, that showed them engaged in underage drinking and setting up the game. Many teens use Snapchat because photos (or snaps) disappear from the site, depending on the Snapchat service used, either a few seconds after the photo is opened by its recipients, or if unopened, between twenty-four hours to thirty days later.[4] A classmate of the students playing the game saw the "snap" and took a screenshot of it, which she uploaded to her blog.[5] In her blog post she was highly critical of the players for their insensitivity and immaturity, first in playing the offensive game and, even more, in publicizing it. The blog post went viral and soon the national media showed up at the school to cover the story. School officials had to address calls for them to discipline the students, and the local police started an investigation into how the players had procured the alcohol for their game. Most of the students involved in the drinking game were popular student leaders and athletes. The case asks students to consider the actions

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[3]In its simplest form, beer pong requires a member of one team to "toss a ping-pong ball from one side of the table into an opponent's cup, which forces your opponent to drink its contents." Eva Tam, *Wall Street Journal, Beer Pong in Hong Kong Has Its Own Kooky Rules—And Purists Hate Them*, Wall St. J. (Mar. 1, 2017), https://www.wsj.com/articles/beer-pong-in-hong-kong-has-its-own-kooky-rulesand-purists-hate-them-1488391385.

[4]Snapchat Support, *When Does Snapchat Delete Snaps and Chats?,* https://support.snapchat.com/en-US/article/when-are-snaps-chats-deleted (last visited Mar. 28, 2017).

[5]Snapchat acknowledges that viewers can take screenshots. *See* Snapchat Support, https://support.snapchat.com/en-US/article/guidelines (last visited Mar. 28, 2017).

of all three parties, the game players, the blogging student, and the school, in terms of the legal and ethical issues.

B. Intended Courses

This case is intended for use in graduate and undergraduate sessions of legal environment of business, business ethics, or elective courses more specifically devoted to the study of the legal issues surrounding the Internet and social media. The facts of the case are short and simple, and the subject matter and setting are familiar, relevant, and of great interest to students. Since the case discusses software that students use (or at least are familiar with), the students become immediately engaged. Despite its simplicity and accessibility, the case raises several important legal and ethical issues that generate a lot of discussion. Depending on the course and how long instructors wish to spend on this material, instructors can give out only the Case Facts, or, after covering the First and Fourth Amendment, instructors can give out the Case Facts and the section presented in Part IV, "Legal and Ethical Issues Raised by the Beer Pong Case." The amount of information that instructors provide to students will determine whether discussion is on spotting the legal and ethical issues, or is a more in-depth discussion of case law.

C. Teaching Objectives

This case offers an opportunity to canvas a variety of legal issues or to delve deeply into legal issues involved in social media use. The case is presented with the following objectives in mind:

1. To introduce students to the various legal issues related to the use of social media, including online speech rights, defamation law, privacy, school discipline for off-campus activity, and the contractual terms of social media services;
2. To have students explore ethical issues related to social media use, especially in the school or workplace setting;
3. To have students consider the impact of social media use on their reputations, college admission and scholarship status, and future employment;
4. To enable students to consider the balance between speech and privacy online by focusing on the arguments for and against a "right to be forgotten."

III. Case Facts

On April 6, 2016, JP, a junior at Princeton High School, in Princeton, New Jersey, posted a story on a personal blog she had been keeping for about six months that got international attention. JP generally posted about fairly typical teenage concerns—navigating high school friendships, homework, and going to parties. She had already posted about several controversial topics, including homosexuality and race, but her posts had not been publicized beyond her core readership—other teens, mostly her friends. The tagline to JP's blog is " . . . only a little bit famous." In her first post she said "I am not holding back. Toes will be stepped on, secrets spilled and plots revealed."[6] Her small following expanded dramatically with the post on April 6, which quickly went viral and became, for a few days, an international news story. JP expressed some surprise about the news coverage, saying in a later post that she was "amazed at how big the story became."[7]

The post that garnered so much attention was titled, "Drinking Games"[8] and described how some of JP's classmates, juniors and seniors at Princeton High School, had played a game called Jews vs. Nazi beer pong. In the post, JP wrote,

> Yes, that's a swastika.[9] Double yes—they're playing Jews vs Nazis beer pong. No again, this isn't a joke. Well, perhaps it is a joke. But then I guess the punchline would be: genocide. Pardon me if I don't find that to be hilarious. The real joke here is that these kids weren't only insensitive enough to play the game, but also silly enough to post it on Snapchat and leave it there long enough for me, and several others, to take a screenshot.[10]

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[6]Jamaica Ponder, *It's Me* (Nov. 11, 2015), https://jamaicaponder.com/2015/11/11/its-me.

[7]Jamaica Ponder, *Drinking Games* (Apr. 6, 2016), https://jamaicaponder.com/2016/04/06/drinking-games.

[8] *Id.*

[9]According to the Anti-Defamation League, the Jews vs. Nazis version of beer pong involves setting up one team's cups in a Star of David formation and the other team's cups as a swastika. *Jews vs. Nazis Drinking Game Controversy*, ANTI-DEFAMATION LEAGUE (Apr. 8, 2016), http://newjersey.adl.org/jews-vs-nazis-drinking-game-controversy/. The Anti-Defamation League notes, "This profoundly offensive game's over-the-top insensitivities include giving the 'Jews' the ability to hide one of their cups as the 'Anne Frank' cup and the 'Nazis' the ability to 'Auschwitz' their opponents, meaning that one of their players must temporarily sit out." *Id.*

[10] *See* Ponder, *supra* note 7.

Apparently, JP was not at the party where the game was played, but she was told about it by a friend and was able to illustrate her post with a screenshot that clearly showed a group of teenage boys drinking and setting up the beer pong game (JP did not name the students in the photo, but she also did not blur their features). JP suggested that the fact the students playing this game had posted their picture to Snapchat meant that they were proud of their behavior:

> Putting the picture on social media means that someone was proud enough of the game to want to show it off. Meaning that they must be trapped in the delusional mindset that making a drinking game based off of the Holocaust is cool. Or funny. Or anything besides insane. Because that's what this is: insanity.[11]

JP's post was publicized on Facebook and was quickly picked up by a local online news site, *Planet Princeton*, which ran a story on April 7 entitled, "Jews vs. Nazi Beer Pong Played by Group of Princeton High School Students."[12] The news story had a link to JP's original blog post. *Planet Princeton* also used the photograph from Snapchat, but blurred the faces of the players, noting that they were minors. The article contained an interview with JP, in which she was quoted as saying, "I thought it was something people should see. People should know what is going on in Princeton."[13]

Planet Princeton asked the Superintendent of Princeton Schools and the School Board President for comment. Before she posted her blog post, JP said she had informed her guidance counselor "as a courtesy."[14] The same day JP's parents also requested a meeting with school officials. By late afternoon on April 7, the Superintendent had issued a statement that read in part, "As an individual and the Superintendent of the Princeton Public Schools, I am deeply upset that some of our students chose to engage in a drinking game

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[11] *Id.*

[12] Krystal Knapp, *Jews vs. Nazis Beer Pong Played by Group of Princeton High Student*, PLANET PRINCETON (Apr. 7, 2016), http://planetprinceton.com/2016/04/07/jews-vs-nazis-beer-pong-played-by-group-of-princeton-high-students.

[13] *Id.*

[14] Keith Brown, *Jews vs. Nazis, It's What Kids at This NJ High School Are Playing*, NJ.COM (Apr. 7, 2016), http://www.nj.com/mercer/index.ssf/2016/04/photo_of_princeton_hs_students_playing_jews_vs_naz.html.

with clearly anti-Semitic overtones and to broadcast their behavior over social media."[15]

His statement continued that the school district was talking to the students in the photos and to their families. He said, "As a community we all have a role in teaching our children to make good decisions, be legally responsible and to be respectful members of a diverse society."[16] The Superintendent said that he hoped the school district could join with parents, others in the community, and "with students themselves to elevate our efforts to prepare our children to be people of character."[17] The Board of Education issued its own statement that read, "Princeton Public Schools does not tolerate prejudices of any kind."[18]

In 2015, Princeton High School (PHS) was rated by *US News and World Reports* 2015 as the tenth best school district out of 422 in New Jersey.[19] Other rankings place it even higher. Niche.com ranks PHS as the thirty-eighth best public high school in the country.[20] The school has approximately 1500 students, 85% of whom went on to a four-year college in 2015. The school district is approximately 61% white, 21% Asian, 8% Hispanic, and 5% black. In 2013–2014, 12.2% of students qualify for the free school lunch program.[21] Almost 25% of the town of Princeton's adult population is foreign born, and 78% have a bachelor's degree or higher (over 51% have graduate degrees). Mean family income in 2010 in Princeton was $231,220.[22]

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[15] Krystal Knapp, *Princeton Superintendent of Schools Issues Statement About Student Beer Pong Game*, PLANET PRINCETON (Apr. 7, 2016), http://planetprinceton.com/2016/04/07/princeton-superintendent-of-schools-issues-statment-about-student-beer-pong-game.

[16] *Id.*

[17] *Id.*

[18] Krystal Knapp, *Princeton Police Investigating High School Students Beer Pong Incident*, PLANET PRINCETON (Apr, 8, 2016), http://planetprinceton.com/2016/04/08/princeton-police-investigating-high-school-beer-pong-incident.

[19] *U.S. News High School Rankings 2016*, US NEWS & WORLD REPORT, http://www.usnews.com/education/best-high-schools/new-jersey/districts/princeton-public-schools/princeton-high-school-12735.

[20] *2017 Best Public High Schools in New Jersey*, https://k12.niche.com/rankings/public-high-schools/best-overall/s/new-jersey.

[21] Richard S. Grip, *Demographic Study for the Princeton Public Schools*, STATISTICS FORECASTING, LLC 17 (July 2014), http://www.princetonk12.org/Board/Board_Studies/Princeton%20Demographic%20Study%202014%20Final%207-22-14.pdf.

[22] *Id.* at 9.

If Superintendent Cochrane and the school board had hoped that the incident could be dealt with "in house," they were mistaken. By midday on April 8, there were seven news crews from various television stations outside the school. A crowd of students gathered on their lunch break in front of the school, clearly enjoying the media storm. Some boys even rode past the news crews on bikes performing Nazi salutes to cheers from the crowd.[23] Several students were willing to be interviewed on camera. Some said they appreciated what JP had done in bringing the incident to light. But there were also several students who accused JP of seeking attention.[24] JP said she was met with profanities from some students at school when she arrived for class but that many people supported her.[25]

Over the next four days more than 115 articles appeared in newspapers across the nation and internationally.[26] The story also aired on television news shows and on NJ 101.5, a New Jersey radio station. The radio station devoted a phone-in show to reactions to the story—51% of callers thought the school should discipline the students.[27] There were in-depth articles in the *New York Times*, *Washington Post*, and several international news outlets in Canada, the United Kingdom, and Australia, among others.[28]

For a few days the student body at Princeton High School became so divided over the issue that it was like a "civil war" at the school.[29] On one

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[23]Nathalie Bussmaker & Winona Guo, *PHS Moves Forward After 'Jews vs. Nazis' Sparks International Outrage, Coverage,* THE TOWER (Apr. 22, 2016), http://thetowerphs.com/2016/04/news/drinking-game-played-by-phs-students-creates-widespread-controversy.

[24] *Id.*

[25]Tobias Salinger, *New Jersey High Schoolers Play Sick Jews vs. Nazis Drinking Game Called "Holocaust Pong" or "Alcholocaust"* NEW YORK DAILY NEWS (Apr. 8, 2016), http://www.nydailynews.com/news/national/new-jersey-high-schoolers-play-jews-nazis-drinking-game-article-1.2592680.

[26]This information is based on a Google News search for "Jews vs. Nazis beer pong and Princeton High School" on April 25, 2016 (hereinafter Google News Search).

[27] *See* Louis C. Hochman, *Should School Penalize Teens for Jews vs. Nazis Beer Pong,* NEW JERSEY 101.5 (Apr. 8, 2016), http://nj1015.com/should-school-penalize-teens-for-jews-vs-nazis-beer-pong-your-replies; Sergio Bichao, *Princeton High Teens Played Jews vs. Nazis Beer Pong and Classmate Put Them on Blast*, NEW JERSEY 101.5 (Apr. 7, 2016), http://nj1015.com/princeton-high-teens-played-jews-vs-nazi-beer-pong-and-classmate-put-them-on-blast/.

[28] *See* Google News Search, *supra* note 26.

[29]Charles V. Bagli, '*Racist' Drinking Game Causes Uproar at High School in New Jersey,* N. Y. TIMES (Apr. 10, 2016), http://www.nytimes.com/2016/04/11/nyregion/racist-drinking-game-causes-uproar-at-high-school-in-new-jersey.html.

side, many students felt JP should have tried to handle the incident within the school, and at least blurred the players' faces in her post. Some students were concerned that the publicity might hurt the players' standing with their sports teams, or worse, hurt their chances of getting into college, while others felt that that the students should lose scholarships.[30] A lot of students were also upset because they believed the publicity gave the whole school a bad name. Over five hundred students were invited to a Facebook event titled "Fighting for the Good at PHS!"[31] which sought to demonstrate that the school should not be defined by the negative press attention. On social media many students questioned whether the game was played with malicious or anti-Semitic intent. A few students used the hashtag #freetheboys to argue that any potential consequences for the players should be minimal.[32] On the other side, some students spoke out thanking JP for her bravery. JP herself said "I completely reject the notion that this should be excused by the notion 'Boys will be boys,' or 'This is teenagers being stupid.'" She also stated, "This didn't pop up overnight" noting that the privileged background of the game players blinded them to the problems with their behavior.[33]

In the community too, although most people acknowledged that what the players did was immature and stupid, quite a large number indicated that the story was getting too much attention.[34] Members of the community also indicated that there was no evidence the students' intent was anti-Semitic and that the incident should be dealt with by the boys' parents. "No one dies from beer pong," wrote one.[35] Another common refrain was, as JP had anticipated, simply, "boys will be boys." A comment on NJ.com read: "I actually feel bad for kids today. Take normal youthful stupidity, add in today's culture of excessive sensitivity (i.e. 'progressive intolerance') and record it on cell phone cameras and post it on social media, where it will haunt you forever."[36]

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[30] See comments by TRUTH and NUBIAN to Ponder, *supra* note 7.

[31] *See* Bussmaker & Guo, *supra* note 23.

[32] *Id.*

[33] *See* Bagli, *supra* note 29.

[34] *See* Knapp, *supra* note 12 in comments section.

[35] *Id.*

[36] *See* Brown, *supra* note 14 in comments section.

By the weekend, the Superintendent issued a second statement saying that any disciplinary action against the student players of the game would remain confidential.[37] The school district said it was addressing the issue on multiple fronts. Some teachers held class discussions on the issue, allowing students to voice their opinions and concerns in person rather than over the Internet. One teacher, Malachai Wood, said, "The school teaches about the Holocaust, we teach about tolerance, we teach about underage drinking, appropriate use of social media, digital citizenship . . . we need to evaluate how well students are really getting the message and how they are applying this message, and we need to do some introspection to see how we can do things better.[38] A few weeks after the incident the school brought a local rabbi to the school for a Holocaust Memorial event. All juniors and seniors were required to attend.

The local police force started its own investigation on April 9. Princeton Police Lt., John Bucchere, noted that "In New Jersey it is not illegal for minors to possess and consume alcohol on private property such as a residence. However, it is illegal for anyone to serve alcohol to minors or to make a place available for minors to consume alcohol."[39] According to the police report, the father of the boy who hosted the party denied knowing anything about it. He said he had punished his son by taking away phone privileges, and requiring him to read a book and write an essay about the Holocaust.[40] By April 22, a local paper reported that no charges had been filed against the parents or anyone else in connection with the beer pong party. The police had decided that there was "not sufficient evidence to prove that alcohol

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[37]Emma Brown, *Students Play Jews vs. Nazis Beer Pong, One Side Has a Swastika, the Other a Star of David*, WASHINGTON POST (Apr. 8, 2016), https://www.washingtonpost.com/news/education/wp/2016/04/08/students-play-jews-vs-nazis-beer-pong-one-side-has-a-swastika-the-other-a-star-of-david.

[38] *See* Bussmaker and Guo, *supra* note 23. Since the 1994–95 school year, New Jersey has mandated that elementary and secondary schools "include instruction on the Holocaust and genocides in an appropriate place in the curriculum." *See* N.J. STAT. ANN. §1 8A:35-28 (West 2013).

[39]Philip Sean Curran, *Princeton: Police Probing High School Beer Game; Social Media Posting Show Jews vs. Nazis*, CENTRALJERSEY.COM, (Apr. 14, 2016), http://www.centraljersey.com/news/princeton-police-probing-high-school-beer-game-social-media-posting/article_c1c3273c-0282-11e6-8002-63e86a39102e.html.

[40] *See* Bussmaker and Guo, *supra* note 23.

was illegally served to minors" and determined that it was not clear how the teenagers had obtained the alcohol for the game.[41]

The game players waited to hear if they had lost college scholarships or would be kicked off their sports teams or subject to other disciplinary action. School officials continued to consider how they should address the incident.[42] Like many social media storms, however, interest in the beer pong incident dissipated, and life seemed to go back to normal for the town, the school, and most of the students.[43]

IV. Legal and Ethical Issues Raised by the Beer Pong Case

Even though one may not stop to think about it when posting content online, navigating the world of social media brings with it many legal issues. The following three sections describe the current state of the law on students' freedom of speech rights in public schools, privacy and social media, and the consequences of posting content on social media.

A. Students' Rights in the Public School Setting

One of the major benefits of the Internet, and especially social media, is that it enables individuals to broadcast information easily without the assistance of the traditional intermediaries like newspapers and television. Anyone can post material to a blog or social media platform like Facebook, YouTube, or Instagram to disseminate their views quickly to a potentially wide audience.

When people express themselves online using text, photos, videos or other types of content, the First Amendment applies and can protect their speech just as it would in more traditional media outlets.[44] The online nature of speech has not greatly changed the legal principles involved. Anonymous

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[41] Anthony Bellano, *No Charges Expected in 'Nazi vs. Jews' Beer Pong Game: Princeton Police,* Princeton Patch (Apr. 22, 2016), http://patch.com/new-jersey/princeton/no-charges-expected-nazi-vs-jews-beer-pong-game-princeton-police-0.

[42] *See* Brown. *supra* note 35.

[43] *See* Google News Search, *supra* note 26. Press coverage peaked in mid-April 2016.

[44] *Cf In re* O'Brien 2013 WL 132508 (N.J. Super. App. Div. Jan. 11, 2013).

speech is protected online as well as offline.[45] Online bloggers have the same rights to post stories as old media journalists do, and posts to social media platforms are protected speech.[46]

1. First Amendment Rights

At school, students' speech rights are more limited than those of the general public because schools have to balance their interests in maintaining discipline and educating students with the students' rights to free speech.[47] The state of the law with regard to students' freedom of speech rights outside the school gates is currently confused by several recent contradictory appeals court decisions, most of which involve online speech.[48] The law is in great need of clarification in an age of social media.

The seminal case on student speech, *Tinker v. Des Moines Independent Community School District*,[49] was decided in 1969 at the height of tension about the Vietnam War. The case involved students who wore black armbands to school to communicate their opposition to the war. This practice violated a school policy. When the school principal asked the students to remove their armbands, they refused and were suspended. The U.S. Supreme Court held that the school was wrong to suspend the students because students have free speech rights at school, and their exercise of these rights created no actual or foreseeable disturbance to the school.[50] However, the Court created a framework to balance student freedom of speech with the need for schools to educate students and maintain discipline. The Court said that schools could regulate student speech when it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school" or when it infringes on the rights of others.[51] In *Tinker*, the

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[45] *See, e.g.*, Laura Rogal, *Anonymity in Social Media*, 7 PHOENIX L. REV. 61, 65 (2013).

[46] Reno v. ACLU, 521 U.S. 844, 870 (1997).

[47] Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 513 (1969).

[48] *Compare* J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (where the court did not permit the disciplining of a student for social media use outside school) *with* Kowalksi v. Berkeley Cty. Sch., 652 F.3d 565 (4th Cir. 2011) (where the school found that social media use outside school was grounds for disciplinary action).

[49] 393 U.S. 503.

[50] *Id.* at 514.

[51] *Id.*

Court reasoned that if the record demonstrated facts that "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,"[52] the authorities could legally restrict the speech in question.[53]

Over the years, the U.S. Supreme Court has noted three narrow exceptions to the framework enunciated in *Tinker* that allow schools to ban certain speech even without a showing of "substantial disruption." The Court has held that, even absent a likelihood of disruption, schools are permitted to ban (1)offensive and lewd speech;[54] (2) speech in school-sponsored media, such as a school newspaper, or speech that takes place on school property or at a school-sponsored event;[55] and (3) speech that promotes illegal drug use.[56]

Until recently, court decisions made it clear that schools could discipline students only when there was either a risk of substantial disruption to the school environment, or the speech fell into one of the three specified exceptions.[57] However, the Internet, and particularly the use of social media for online bullying, has tested the limits of the Supreme Court's rulings. In *Tinker*, the Court suggested that both students and teachers retained some speech rights when they came through the "schoolhouse gates,"[58] but the school had the right to discipline within the school to maintain order. The Court did not anticipate the discipline of students for speech outside school. In other words, *Tinker* created the "schoolhouse gates" as a bright line beyond which schools cannot regulate speech.[59] However, social media has introduced speech outside of school that can often have a significant disruptive effect in school. Cases from different circuit courts have reached contradictory results on whether schools can discipline off-campus speech, with some focused on where the speech occurs and others on where the

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[52] *Id.*

[53] *Id.*

[54] Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

[55] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[56] Morse v. Frederick, 551 U.S. 393 (2007).

[57] *See* discussion *supra* notes 52–54 and accompanying text.

[58] 393 U.S. 503, 506.

[59] *See Kuhlmeier*, 484 U.S. at 266.

speech has impact.[60] The Supreme Court has yet to consider the issue of speech on social media outside school.[61]

In cases involving speech outside school, several courts pose an initial question: is there a sufficient nexus between the off-campus speech and the school?[62] This question must be answered in the affirmative before the court gets to the *Tinker* analysis of whether it was reasonably foreseeable that the speech would cause "substantial disruption of or material interference with school activities."[63] Other courts simply looked at whether it was foreseeable that the speech would cause disruption.[64] Although there are few cases using social media where courts have decided that the speech is unlikely to reach the school, the nexus test is one way of removing some speech from the school's disciplinary power. In *Layshock*, the Court of Appeals for the Third Circuit explained the nexus test as requiring that the student conduct taking place outside school has to be related to the school "to justify the school's exercise of authority" over the student.[65]

In an early cyber-speech case in 2002, the Supreme Court of Pennsylvania held that the school could expel a student for creating a crude and offensive website about a teacher and the principal outside school.[66] The Pennslyvania court held that the violent nature of the speech about teachers was what created a sufficient nexus with the school, and the speech also disrupted the learning environment at the school (some students saw counselors, and teachers expressed concerns about school safety).[67] Applying both

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[60] Different circuits have come to different conclusions about the impact of off-campus social media profiles. In *J.S. v Blue Mountain School District*, 650 F.3d 915, 933 (3d Cir. 2011), the Third Circuit found that a school could not discipline a student for speech occurring off campus even though it spread to the school. In a Fourth Circuit case, *Kowalksi v. Berkeley County School*, 652 F.3d 565, 573 (4th Cir. 2011) the court found that the school could discipline a student for off-campus speech without infringing on the student's First Amendment rights.

[61] Blue Mountain Sch. Dist. v. J.S., 565 U.S. 1156 (2012) (*cert denied*).

[62] *See* J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. 2002); JC *ex rel.* RC v. Beverley Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1107 (2010); and Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 215 (3d Cir. 2011).

[63] 393 US 503, 514.

[64] J.S. *ex rel.* Snyder v Blue Mountain Sch. Dist., 593 F.3d 286, 301 (3d Cir. 2010); O.Z. v Board of Trs. of Long Beach Unified Sch. Dist., 2008 WL 4396895 *4 (C.D. Cal., Sept. 9, 2008).

[65] 650 F.3d 205, 215.

[66] *Bethlehem Area Sch. Dist.*, 752 A.2d 412.

[67] *Id.*

the nexus (does the speech reach the school) and the "substantial disruption" test (is it likely to cause substantial disruption in school) in 2010, a California district court reached the opposite conclusion to the Pennsylvania court and prohibited the disciplining of a student for a video posted online outside school.[68] The student posted a video of other students calling one girl a slut. The California district court held that the "Plaintiff's geography-based argument—i.e., that the School could not regulate the YouTube video because it originated off campus—unquestionably fails."[69] The court determined that off-campus speech could be disciplined if there was some nexus between the speech and the school,[70] but the court went on to decide that the off-campus speech in this case was not sufficiently disruptive in school to justify the school in disciplining the student.[71]

In 2011, decisions by circuit courts of appeal about online speech outside school came to opposite results on the effect of similar off-campus speech in school. In *J.S. v. Blue Mountain School District*,[72] the Third Circuit held that disciplining a student who created a fake (and defamatory) MySpace profile for the school principal and showed it to several students at school was an infringement of the student's First Amendment rights. The court assumed that the school could discipline students for off-campus speech but held that it was not reasonable for the school to conclude that the MySpace page would substantially disrupt the education environment.[73]

In the same year, the Fourth Circuit addressed a similar issue in *Kowalski v. Berkeley County Schools*.[74] The court held that a MySpace page that mocked a fellow student, calling her a slut and including sexually explicit photographs, was grounds for disciplinary action against the student who created it. The court held that since the student knew her speech could be "published beyond her home," she must have known that it "could reasonably be expected

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[68] JC *ex rel.* RC v. Beverley Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

[69] *Id.* at 1107–08.

[70] *Id.* at 1108.

[71] *Id.* at 1118.

[72] 650 F.3d 915 (3d Cir. 2011).

[73] *Id.* at 928.

[74] 652 F.3d 565 (4th Cir. 2011).

to reach the school or impact the school environment."[75] The reasons for the different results in the similar cases, *Blue Mountain School District* and *Kowalski,* are hard to determine. Both courts held that it was reasonably foreseeable that the speech in question would reach campus, but the court in *Blue Mountain School District* was clear that the learning environment had not been substantially disrupted by the off-campus speech.[76] In *Kowalski*, the court seemed more concerned that Kowaslski's conduct had reached the school, violated the school antibullying policy, and was "particularly mean spirited and hateful."[77]

It is clear from the cases that courts have decided that schools may discipline students for speech that takes place outside the schoolhouse gates.[78] Many courts require some kind of link or nexus between the off-campus speech and the school, a test that potentially puts some limit on the kinds of speech that schools may restrict.[79] However, not all courts apply the nexus requirement as a specific test, and even those that do, have generally decided that online speech always reaches the school.[80] More important is the requirement that the speech makes substantial disruption to the educational environment foreseeable. Widespread use of social media by teenagers makes it almost inevitable that speech will reach school. Consequently, the requirement that the speech must substantially disrupt the educational requirement is the main protection that students have against overbroad powers of schools to discipline students for off-campus speech.[81] In this area, decisions are hard to reconcile. *Kowaslki* suggests that courts may be more likely to recognize a school's right to discipline when speech is violent or involves cyberbullying of another student. Unfortunately, the Supreme Court has so far declined

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[75] *Id.* at 573.

[76] 650 F.3d 915 at 925.

[77] 652 F.3d 565 at 576.

[78] *Id.* at 575–76.

[79] *See, e.g.,* Donninger v. Niehoff, 527 F.3d 41, 47 (2d Cir. 2008); and Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 215 (3d Cir. 2011).

[80] *Kowalksi,* 652 F.3d 565, 576; O.Z. v. Bd. of Trs. of Long Beach Unified Sch. Dist., 2008 WL 4396895 *4 (C.D. Cal., Sept. 9, 2008).

[81] The Court rejected a broad argument that schools may censor "any student speech that interferes with a school's 'educational mission'" in *Morse.v. Frederick*, 551 U.S. 353, 423 (2007).

to review any of the decisions including the conflicting Third and Fourth Circuit cases, *Blue Mountain School District* and *Kowalski*.[82]

2. The Fourth Amendment

There is some authority that students who are involved in extracurricular activities, such as athletics, can be subject to removal from these activities for conduct outside school, since participation in such an activity is a privilege rather than a right. In *Vernonia School District 47J v. Acton*,[83] the Supreme Court determined that student athletes could be required to submit to random drug searches.[84] According to the Court, the student athletes had significantly diminished rights of privacy under the Fourth Amendment, lower than ordinary students, because they participated in a voluntary activity and were to be considered role models.[85] The Court reasoned that students do not have property rights to participate in extracurricular activities. Consequently, their due process rights are not triggered if they are prevented from engaging in these activities as a punishment for their behavior outside school.[86]

In *Piekosz-Murphy v. Board of Education of Community High School District No. 230,* a case decided by the Northern District of Illinois in 2012, the school expelled a student, NM, from the National Honor Society because he attended a party at which alcohol was served and did not self-report the incident.[87] The school had a cocurricular code of conduct stating that students must conduct themselves at all times "as good citizens and exemplars of their school."[88] The court held that although the punishment was harsh, the school had a legitimate interest in preventing athletes and leaders from engaging in underage drinking or drug use, and the school's decision to expel the student from his extracurricular activity was not arbitrary, conscious-shocking,

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[82]Both decisions were denied *certiorari* on the same day (January 17): J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 565 U.S. 1156 (2012); and Kowalksi v. Berkeley Cty. Sch. 652 F.3d 565 (4th Cir. 2011), *cert. denied,* 565 U.S. 1173 (2012).

[83]515 U.S. 646 (1995).

[84]*Id.* at 658.

[85]*Id.* at 657.

[86]*Id.* at 655.

[87]858 F. Supp. 2d 952 (N.D. Ill. 2012).

[88]*Id.* at 955.

or unrelated to its government interest in discouraging underage drinking and drug use.[89]

A New Jersey court, however, held that a school cannot require students to agree to a code of conduct that prevents them from engaging in drinking and drug taking behavior at school and off-campus as a prerequisite to taking part in extracurricular activities.[90] The Ramapo Indian Hills School District passed a regulation governing participation in extra curricular activities that required students to refrain from using, possessing, or distributing alcoholic beverages and drugs both on and off school property.[91] The code allowed the school to remove a student from extracurricular activities for any "alleged violation of a criminal statute or municipal ordinance." It did not require "a nexus between the alleged violation and school order or safety."[92] The code had been discussed at several school board meetings before it was adopted. It was publicized to students in the student handbook and at school assemblies. Students were required to sign a consent form indicating that they were aware that they would be subject to discipline if they violated the code.

A student, BMM, and her parents objected to signing the consent form, and the parents petitioned the New Jersey Board of Education to invalidate the policy. A New Jersey administrative law judge (ALJ) agreed with the parents that the school's authority over student conduct outside school was "carefully circumscribed" by state statute and that the school had to show that the student conduct off campus had an adverse effect on the school before it could discipline the student.[93] The school appealed, arguing that the regulation was designed to deter drug and alcohol use and that participation in extracurricular activities was a privilege, not a right. The appeals court agreed with the ALJ that the school had exceeded its authority. It said that the school could exercise authority over student conduct away from school only when a student's acts resulted in substantial disruption in the school.[94]

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[89] *Id.* at 962.

[90] G.D.M. v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist. 48 A.3d 378, (N.J. Super. Ct. App. Div. 2012).

[91] *Id.* at 252.

[92] *Id.* at 250.

[93] *Id.* at 255–56.

[94] *Id.* at 264–65.

3. Defamation

Online speech, like offline speech, is subject to restriction by defamation and privacy laws. Defamation requires the publication of a false statement of fact that hurts the plaintiff's reputation with her peers.[95] If the plaintiff is a public figure, she must also show that the statement was made with "actual malice"—a higher standard that requires "knowledge that it was false or with reckless disregard of whether it was false or not."[96] It is a generally a complete defense to a defamation claim to show that the fact(s) published were true. Statements of opinion rather than fact are also not actionable on the basis that voicing an opinion is protected by the First Amendment.[97]

B. The Expectation of Privacy in the Age of Social Media

There is no single, clear, agreed-on definition of what privacy means or which important principles are at its core. Despite the lack of clarity on what privacy protects, some legal scholars regard it as one of our most important legal rights.[98] Others argue that it is really another word for secrecy and should receive little legal protection since the ability to conceal information infringes on others' freedom to access information.[99] As online communication has become widespread, many commentators have argued that privacy, whatever its basis, is diminishing, and that it is less relevant as a right in an online world where we have access to so much information: In 1999, CEO of Sun Microsystems Scott McNealy famously stated about the online world, "You've got zero privacy. Get over it!"[100] and Facebook CEO Mark Zuckerberg more

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[95] According to the *Restatement (Second) of Torts* § 559 (1977), "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

[96] New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964).

[97] *Id.* at 270.

[98] *See, e.g.*, DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 2 (2008) ("Privacy is an issue of profound importance around the world . . . In the constitutional law of countries around the globe, privacy is enshrined as a fundamental right.").

[99] RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 234 (1983). *See also* Patricia Sanchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 7 (2007).

[100] *Private Lives? Not Ours!*, PCWORLD (Apr. 18, 2000), http://www.pcworld.com/article/16331/article.html.

recently suggested that privacy is no longer relevant as a "social rule."[101] Thus, it appears that many influential technologists see privacy as an old-fashioned nuisance and believe that in a world of social media, privacy is not something that people should worry about too much. Of course, social media companies benefit from users sharing as much information as possible; thus, they have a vested interest in limiting privacy rights.[102]

A well-known conception of the right to privacy in U.S. law is the "right to be let alone," as described in a seminal legal article in 1890 by Samuel Warren and Louis Brandeis.[103] In the 1960s in a criminal case deciding that the government could not listen to a private telephone conversation without a warrant, the Supreme Court held that the Fourth Amendment protects a person's "reasonable expectation of privacy."[104] In addition to protection from government intrusion, over the years four privacy torts have developed to protect against violations of such a "reasonable expectation of privacy" by private actors. The privacy torts are

1. intrusion into an individual's affairs or seclusion—this tort protects people from activities like eavesdropping, scanning a bank account, and taking pictures through peepholes;
2. false light—this tort involves publishing untrue ideas or incorrect information about a person;
3. public disclosure of personal facts—this tort occurs when someone publishes embarrassing or objectionable facts about an individual. A private citizen can sue for public disclosure of personal facts even if the facts published are true, because they are not a matter of public concern;

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[101]Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, THE GUARDIAN (Jan. 10, 2010), https://www.theguardian.com/technology/2010/jan/11/facebook-privacy.

[102]Selling users' browser history is so lucrative for social media sites that Internet service providers successfully lobbied Congress to overturn a regulation that would have required telecom companies to get permission from selling users' browsing history. *See* Jack Marshall, *With Washington's Blessing, Telecom Giants Can Mine Your Web History*, WALL ST. J. (Mar. 30, 2017), https://www.wsj.com/articles/with-washingtons-blessing-telecom-giants-can-mine-your-web-history-1490869801.

[103]Louis Brandeis & Samuel Warren, *The Right to Privacy*, 4 HARVARD L. REV. 193 (1890).

[104]Katz v. United States, 389 U.S. 347, 360 (1967).

4. appropriation of identity—this tort occurs where someone uses another person's name or likeness for commercial purposes without permission.[105]

Privacy rights on social media are limited because new technologies have made our expectations of privacy less clear[106] and because posting to social media involves disclosure to a third party. The third-party doctrine holds that once a person voluntarily discloses a fact to another, that information may be passed on, processed, used to draw inferences, and so on.[107] In the context of social media, the third-party doctrine means that it is hard to argue there is any right to privacy in information posted to Facebook, Snapchat, or other social media. A case in Georgia demonstrates the difficulties associated with the permanence of social media.[108] The case involved a high school presentation entitled "Once It's There, It's There to Stay." A student posted a picture of herself in a bikini to her own Facebook page. She did not consent to its use by the school. She had set her privacy settings to "friends" and "friends of friends." According to the court, "[the plaintiff] surrendered any reasonable expectation of privacy when she posted a picture to her Facebook profile."[109] The court stated that once an individual shares a picture with a friend on Facebook (or other social network), even with the strongest privacy setting, he or she has no legitimate expectation of privacy in that picture as his friends are free to use the information however they want.[110]

C. The Right to be Forgotten

The European Union has proposed a new data protection regulation, to protect a newly recognized online right in Europe—"the right to be forgotten."[111] The 1995 EU Data Protection Directive contained the right

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[105] *See, e.g.*, ROGER LEROY MILLER, ESSENTIALS OF THE LEGAL ENVIRONMENT TODAY 137–38 (5th ed. 2016).

[106] *See, e.g.*, Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004).

[107] *See* Amitai Etzioni, *A Cyber Age Privacy Doctrine: More Coherent, Less Subjective, and Operational*, 80 BROOKLYN L. REV. 1263 (2015)

[108] Chaney v. Fayette Cty. Public Sch. Dist., 977 F. Supp. 2d 1308 (N.D. Ga. 2013).

[109] *Id.* at 1316.

[110] *Id.* at 1315–16.

[111] Council Regulation 2016/679, (65) O.J. (L 119) 1.

for a data subject to ask a data processor to erase "incomplete or inaccurate" data about him/her.[112] In 2014, the European Court of Justice (ECJ) expanded, or perhaps clarified this right, in a Spanish case where the complainant objected to old information about the repossession of his house that appeared on a Google search of his name.[113] The court held that the activities of search engines in finding and indexing information placed on the Internet made them into "data controllers" processing personal data.[114] The 1995 Directive states that data "controllers" could be required to remove search results, even when publication of the information was lawful, and that "every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified."[115] This case created the so-called right to be forgotten. According to *The Guardian*, in 2016 Google reported it had 380,319 requests to remove about 1.3 million pages and had complied with around 42% of requests.[116] Initially Google delinked information accessed only via its European properties, and only information accessed by a person's name. EU regulators requested in 2015 that Google remove links on all its sites, including American versions, so that EU citizens enjoy protection from the right to be forgotten no matter where they are in the world.[117] Google has recently agreed to edit the results of "anyone conducting name-based searches from the same European country as the original request, regardless of which domain name of the search engine the browser is using."[118] Apparently, Google will remove links to a result from

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[112]Council Directive 95/46 EC O.J. (L 281) on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[113]Google Spain SL, Google, Inc. v. Agencia Espanola de Proteccion de Datos, Mario Costeja Gonzalez C-131/12 ECLI: EU:C:317 (2014).

[114]*Id.*

[115]Council Directive 95/46, art. 6, EC O.J. (L 281).

[116]Jasper Jackson, *PinkNews Publishes Stories Removed from Google Under "Right to be Forgotten"* THE GUARDIAN (Feb. 2, 2016), http://www.theguardian.com/media/2016/feb/02/pinknews-publishes-stories-removed-google-right-to-be-forgotten.

[117]Samuel Gibbs, *EU to Google: Expand 'Right to Be Forgotten' to Google.com,* THE GUARDIAN (Nov. 27, 2015), https://www.theguardian.com/technology/2014/nov/27/eu-to-google-expand-right-to-be-forgotten-to-googlecom.

[118]Samuel Gibbs, *Google to Extend 'Right to be Forgotten' to All Its Domains Accessed in EU,* THE GUARDIAN (Feb. 11, 2016), https://www.theguardian.com/technology/2016/feb/11/google-extend-right-to-be-forgotten-googlecom.

all search engines (including U.S.-based versions of its search engine) when they are accessed from the same European country as the request.

The new EU data protection regulation currently includes a potentially more wide-reaching obligation on any "Internet intermediary" (a term that is not limited to a search engine) "to respond to a request by a person for the removal of their personal information by immediately restricting the content, without notice to the user who uploaded that content."[119] This regulation became law in 2016 and is due to be implemented in 2018.[120] It will apply to all material posted online in Europe. Privacy expert Jeffrey Rosen calls the regulation "the biggest threat to free speech on the internet in the coming decade"[121] because it requires content hosts and search engines to remove any data regardless of whether it is true or who posted it, or face fines of up to 2% of their global income.[122] He suggests this dramatic clash between "European and American conceptions of the proper balance between free speech and privacy, [will lead] to a far less open internet."[123]

Some have argued that the United States should consider a similar right to be forgotten.[124] Once something is on the Internet, it is never erased, and information that is no longer accurate or relevant—misleading financial data, embarrassing deeds committed as a minor—will always remain available online.[125] Some privacy advocates argue that some way to remove this kind of information is necessary to enable people to reclaim their privacy.[126]

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[119]Jeremy Malcolm, *Unintended Consequences, European Style: How the New EU Data Protection Regulation Will Be Misused to Censor Speech,* EFF (Nov. 20, 2015), https://www.eff.org/deeplinks/2015/11/unintended-consequences-european-style-how-new-eu-data-protection-regulation-will.

[120]Council Regulation 2016/679, art. 51, O.J. (L 119) 1.

[121]Jeffrey Rosen, *Response Right to Be Forgotten,* 64 STANFORD L. REV. ONLINE 88 (2012), https://www.stanfordlawreview.org/online/privacy-paradox-the-right-to-be-forgotten/.

[122] *Id.*

[123] *Id.*

[124]Farhad Manjoo, *'Right to be Forgotten' Online Could Spread,* N.Y. TIMES (Aug.5, 2015), http://www.nytimes.com/2015/08/06/technology/personaltech/right-to-be-forgotten-online-is-poised-to-spread.html.

[125]For example, one of the authors of this case had a student tell her that something he posted on MySpace when he was fourteen years old created an issue that had to be investigated when he enlisted in the National Guard several years later.

[126] *See* Manjoo, *supra* note 122.

However, many free speech advocates say this right may be used for censorship and potentially infringes freedom of expression. The Electronic Frontier Foundation (EFF) has argued that the ECJ, although it had the best of intentions, "has created a vague and unappealable model, where Internet intermediaries must censor their own references to publicly available information in the name of privacy, with little guidance or obligation to balance the needs of free expression."[127] The EFF argues that the censorship of publicly available information by online intermediaries will not work in keeping that information private, and will "make matters worse in the global battle against state censorship."[128] According to the EFF, by concentrating on privacy, the proposed regulation has "omitted sufficient safeguards to protect another fundamental right: the right to freedom of expression."[129] However, an analysis by *The Guardian* newspaper of the requests that Google has received since the right became law in Europe revealed that most requests to deactivate links are made by citizens to protect their personal privacy.[130]

D. Online Intermediaries and Contractual Terms of Services

Online speech disseminated through Internet service providers or other online intermediaries like e-mail providers, blog hosts, or social media sites, such as Facebook, YouTube, and Snapchat, is subject to the contractual terms of service of these sites.[131] When a user uploads content to any kind of social media site, he or she is subject to the contractual terms and conditions of using these (private companies') services. Each online intermediary has its own terms and conditions for use of its service. Users agree to (although rarely read) these terms like any other online contract by clicking on "I Agree" when setting up a profile and starting to use the site.

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[127] Danny O'Brien & Jillian C. York, *Rights That Are Being Forgotten: Google, The ECJ and Free Expression*, EFF (July 8, 2014), https://www.eff.org/deeplinks/2014/07/rights-are-being-forgotten-google-ecj-and-free-expression.

[128] *Id.*

[129] *Id.*

[130] Sylvia Tippmann & Julia Powles, *Google Accidently Reveals Data on Right to Be Forgotten Requests,* THE GUARDIAN (July 14, 2015), https://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests. The article says "that less than 5% [of request] relate to "criminals, politicians and high-profile public figures," and "more than 95% of requests [come] from everyday members of the public."

[131] *See, e.g.*, Snap Inc. Terms of Service, https://www.snap.com/en-US/terms/ (last updated Jan. 10, 2017).

For example, if you use Gmail as your e-mail program, although you retain any intellectual property rights in your e-mail, you agree that Gmail has a worldwide license "to use, host, store," but also to (italics added) *"reproduce, modify, create derivative works"* from your content (e-mails).[132] This license continues even if you later delete your Gmail account. You also agree that Gmail can "analyze your content (including emails) to provide you personally relevant product features."[133] This broad license allows Gmail to modify or create new work based on your e-mail if it so wishes.

Snapchat is a popular image messaging service (in 2016 the service had ten billion video views per day)[134] that allows users to upload videos or photos and use various filters, captions, and effects. Images can be uploaded to a semipublic "Story" or sent only to specified recipients. The user determines how long the images can be viewed by recipients, with time periods ranging from one to ten seconds. Images remain on the site for only a short period of time before they disappear.[135] Snapchat's terms of service state that by using the site you create a binding contract with Snapchat.[136] Under that contract Snapchat gains rights to any content you upload.[137] Snapchat's rights vary depending on which of its services you are using (semipublic, Story, or more private message sent to specific friends). Snapchat's terms state that its rights to your image include the "grant of a worldwide, royalty-free license to host, store, use, display, reproduce, modify, adapt, edit, publish and distribute that content."[138] If it wishes, Snapchat can also obtain more extensive rights "to create derivative works from, promote, exhibit, broadcast, syndicate, publicly perform of publicly display content" for which the Snapchat user agrees not to be entitled to any compensation from Snapchat. Under a heading, "Respecting Other People's Rights," Snapchat states that you may not copy,

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[132]Google Terms of Service, http://www.google.com/intl/en/policies/terms (last modified Apr. 14, 2014).

[133] *Id.*

[134]Sean O'Kane, *Snapchat Reportedly Generates 10 Billion Daily Video Views,* THEVERGE (Apr. 28, 2016), http://www.theverge.com/2016/4/28/11526294/snapchat-10-billion-daily-video-views-users-stories.

[135] *See* Snapchat Support, *supra,* note 4.

[136]Snap Inc. Terms of Service, https://www.snap.com/en-US/terms/ (last updated Jan. 10, 2017).

[137] *Id.*

[138] *Id.*

archive, download, upload, distribute, syndicate, broadcast . . . or make available . . . any content of the Services or use the Services or any content . . . for any commercial purposes without our consent."[139] Snapchat can also notify the sender if it detects that a snap has been saved by a recipient.[140]

V. Teaching Suggestions and Teaching Plan

The case is short enough that students can read it and the accompanying description of the legal issues before class. The discussion and responses to the questions can take place during one class meeting. A debate is also possible, and one debate proposal is suggested below. The depth of discussion will depend on whether the instructor has discussed First and Fourth Amendment issues and provided detail on the legal issues to the students (using Part IV or a textbook) or whether the instructor wishes to focus on ethics and helping students spot legal and ethical issues in which case he/she does not need to provide background on the legal issues.

A. Discussion Questions and Suggested Answers

The questions focus on the rights, duties, and ethical responsibilities of each of the main characters in the action in turn. The instructor can determine whether he/she wants to go into the details of case law or focus on helping the students spot legal and ethical issues.

1. Should JP have published the photo of the game players on her blog? Does her post raise any legal liability for her? Does it raise any ethical issues? Do her motives in publishing the blog post matter?

A: JP published the photo of the players taken from a photo the players themselves posted to Snapchat. She also added a blog post describing the game and her reaction to it on her blog. JP's post, like other online speech, is protected by the First Amendment, but she may be liable for defamation or invasion of privacy if she posts material that infringes on the rights of others. In this case, the question of legal liability requires an analysis of whether the game players could allege that JP has committed either of these torts. If students review the elements of each of those torts in turn, they should

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[139] *Id.*

[140] *Id.*

conclude that JP is unlikely to be subject to legal liability for posting the photo:

- Defamation requires the publication of a false statement of fact that hurts a person's good reputation;
- Invasion of privacy, in the form of public disclosure of private facts, requires the publication of a private, embarrassing or objectionable fact about a person.

Before debating if the photo or blog post hurts the reputation of the players or invades their privacy, using an embarrassing or objectionable fact, students should note that publication is the first element of both torts. The facts here are that the players published their own picture on Snapchat. A court is therefore extremely unlikely to hold that they retain any rights such as a "reasonable expectation of privacy" in the photo. Even when a person believes he is publishing something to only a few friends online, he loses a "reasonable expectation of privacy" in that information under the third-party doctrine, once he publishes it online.

The players might argue that they retained their "reasonable expectation of privacy" because of the way Snapchat deletes photos after a short period of time. Teens certainly use Snapchat for this reason, and whether or not any greater privacy is retained in "Snaps" posted to the site than in Facebook posts does not yet seem to have been tested in court. Facebook users have certainly had little success with privacy claims for content they have posted.

If the players were somehow able to argue that they retained a "reasonable expectation of privacy" in their photo, students then need to consider the second element of defamation—that JP's further publication of their photo and the blog story would hurt their good reputation or character. In a privacy claim, they need to consider whether JP's post revealed an embarrassing or objectionable fact about the players. Truth is a defense to a defamation claim. JP's blog post just states that the unnamed players engaged in the game, a fact that is backed up by their own photo. JP's commentary is opinion, rather than fact, and opinion does not subject the speaker to legal liability for defamation. In terms of privacy, the players appear to be proud of their behavior rather than hiding it. Consequently, it would be difficult for them to argue that it reveals an embarrassing or objectionable fact about them.

JP's blog post gives rise to the competing ethical concerns of free speech and privacy. On the one hand, one might argue that the players have a right

to privacy with respect to conduct outside school grounds that does not affect the educational environment or the school. On the other hand, JP has a right to exercise freedom of speech about what she believes is a matter of public concern.

It could be argued that the players' right to privacy is diminished when (1) they publish a photo of themselves, (2) they engage in illegal activity (underage drinking), and (3) their behavior is insensitive and offensive to others. In this situation, the right of JP to exercise her freedom of speech and inform others about the players' conduct becomes greater than the players' rights to keep their conduct private. The fact that the players are athletes and student leaders might also be relevant to a discussion of the ethics of publication because student athletes and leaders are often viewed as role models and, are, therefore, held to higher standards than other students. Some courts have endorsed this view; instructors might introduce the *Piekosz-Murphy v. Board of Education of Community High School District No. 230* and *Vernonia School District 47J v. Acton* case for students to consider.[141] And, since the players published their behavior first to social media, not to JP, it would be hard for them to argue that they wished it to remain private. However, some students will argue that while engaging in the game is silly and juvenile, JP's actions in publicizing the players' unwise decisions widely infringed on their privacy.

The question of JP's motive is interesting. Many commentators on the news stories about the event clearly thought that her motive in publishing the picture was to gain publicity for herself and her blog. These people often argued that only the parents and perhaps the school had an interest in knowing about the players' behavior. As JP chose to publish the story on social media, it quickly spread far beyond those, like the parents, who had the most legitimate interest in knowing about the players' bad behavior. The wide social media publicity might well continue to negatively affect the players in the future. Their ill-considered photo will likely remain online even as they (hopefully) come to feel embarrassed by their offensive youthful behavior. JP is fairly clear in her blog and interviews that she wants the community to know about the objectionable behavior of these students, but even if she wrote merely to increase her own fame, does this matter? The effect of her online speech is still the same, whatever JP's motives were. In many ways, it can be argued that JP was courageous in publishing disagreeable information

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[141] *See supra* text accompanying notes 83–89.

about popular students because she began a conversation about the issues, exposing her to judgment and even reprisals from the players, students, and teachers at her school, and others. Taking a stand against offensive conduct, even if only to seek fame, is principled and can be risky for the lone speaker. Some applauded her for coming forward, while others clearly felt that she should have kept quiet. Social media publicity often creates an ethical tension between privacy and freedom of speech.

If JP and the players were work colleagues, rather than high school students, JP's actions might be perceived unfavorably by her employer. Many companies have social media policies that require employees to refrain from public comment about matters within a company and allow the company to discipline employees who violate these policies. It is more likely in this situation that someone attempting to bring to light the bad behavior of others will be perceived as violating principles of loyalty to the company.

2. Do the game players have any legal or ethical liability for their actions in taking part in the drinking game? Does your answer change if the players were not minors attending high school but older students in a college or professional program? Does it matter if the students did not intend their conduct to be anti-Semitic?

A: Underage consumption of alcohol on private property is not illegal in New Jersey, so the players have no criminal liability for taking part in underage drinking. The answer to this question might be different in other states since state laws regulate the sale and distribution of alcohol under the Twenty-First Amendment to the U.S. Constitution. Under New Jersey law, the parents, or those who procured the alcohol, may be subject to penalties. However, the police report makes clear that the police did not find sufficient information to bring any charges in this regard, so legal sanctions for anyone for this incident seem unlikely.

There are several ethical issues for the players. They published a photo of themselves online engaging in offensive and anti-Semitic behavior. They can argue that they have freedom of expression to do this, but it is hard for them to then argue that their conduct is a private matter, since they published the photo, even if they thought it would disappear quickly on Snapchat. It is relevant that the players were student leaders and athletes who had possibly signed cocurricular codes of conduct agreeing to act as good citizens and model exemplary behavior. Their behavior clearly violates religious ethical principles like the "golden rule" and principles of rights because they demonstrate a lack of respect for the feelings of others. The

players would presumably justify their conduct on the basis of their age, lack of understanding of history, or more likely that it was not their intention for their behavior to offend others. As the teacher Malachai Wood (quoted in the case) makes clear, these students have already been taught about tolerance, underage drinking, the Holocaust, and the appropriate use of social media. The problem is probably not their ignorance of these topics (these are student who are juniors and seniors at high school) but that they have not processed the information they have been taught or thought about how it applies to their own actions. If the players were adults, it would become even more difficult for them to claim that they lacked an appreciation of the offensiveness of their conduct or its impact on others. Of course, if they were older, while their moral culpability would be greater, any legal liability for drinking alcohol would disappear.

While posting the photo certainly violates acceptable ethical norms, this behavior does not constitute a hate crime. A hate crime is defined by the FBI as "a criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity."[142] New Jersey's Bias Crime Unit describes a bias intimidation crime as one in which the perpetrator "commits, attempts to commit, conspires with another to commit, or threatens the immediate commission of an offense with the purpose to intimidate an individual or group of individuals because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity."[143] Additionally, if the victim believes the perpetrator committed the offense "with a purpose to intimidate the victim because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity,"[144] this constitutes a bias intimidation crime in New Jersey. Posting a photo of a Jews vs. Nazis beer pong game is certainly in poor taste, but the act does not seem directed at any particular victim, nor was the act accompanied by vandalism, threats of violence, or other actions that are generally associated with criminal activity.

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[142]FBI, *What We Investigate, Civil Rights*, https://www.fbi.gov/investigate/civil-rights/hate-crimes (last visited Apr. 4, 2017). *See also* 18 U.S.C § 249 (2012), which requires bodily injury or an attempt to cause bodily injury.

[143]*A Guide to Identifying and Understand Bias Crime*, http://www.nj.gov/oag/bias/downloads/OBCCR-guide-022317-pages.pdf (last visited Apr. 4, 2017). *See also* N.J. STAT. ANN. § 2C:16-1 (West 2013).

[144]*Id.*

3. Does the school have the authority to punish the game players? Why or why not? Does it have the authority to punish JP for her blog post?

A: The law on the school's authority to punish the players for off-campus conduct is unclear. The reality is that conduct outside school can, because of social media, lead to a disruption of the educational environment, but courts have split on whether schools can discipline students for off-campus conduct or speech. In some cases, courts have agreed that schools could suspend students for posting information on social media that led to disruption in school (but most of these cases related to cyberbullying a student or speech that threatened violence). In other cases involving mean gossip or defamation of teachers, courts have not permitted schools to discipline students for speech that occurs outside school.

The players in this case publicized their conduct online, although they presumably did not intend to direct the publication at the school or to cause any disruption on campus. These factors might distinguish their case from the cases where students have posted pictures on social media knowing, and intending, that they would have an effect on the school environment. However, the players' behavior became known in school because it was further publicized by JP, and it did lead to disruption in school.

If the school disciplines the students by suspending them from school, the players could object on the basis of cases like *Blue Mountain School District* that they should not be disciplined for conduct outside school because it was not foreseeable that it would disrupt the learning environment.

The school is on clearer legal ground to discipline the players because they are athletes and student leaders. It probably can punish them by excluding them from these activities, which are a privilege and not a right. Several courts have decided that such students can be held to higher standards than regular students, especially with regard to the consumption of alcohol or drugs. If the school seeks to discipline the game players for their activity, they are on safer ground if they remove them from participation in extracurricular activities rather than suspend them from school. Student athletes have diminished Fourth Amendment rights of privacy because they are participating in a voluntary activity. *Tinker* confirms that students continue to have First Amendment rights even on school property. In *Morse* the Supreme Court rejected the argument that schools may censor any student speech that interferes with the school's "educational mission."[145]

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[145]Morse v. Frederick, 551 U.S. 353, 423 (2007).

JP's blog is also off-campus speech that has a substantial effect at school. Although the effect of the blog was not entirely positive, it cannot be said that it disrupted the learning environment, since it encouraged discussion of issues of law and ethics very relevant to the students and school. Several of the teachers used the furor surrounding the publication of the blog to run class discussions about issues like anti-Semitism, social media ethics, and related activities. The school also invited a rabbi to the school to talk about the Holocaust. It seems unlikely that the school would choose to discipline JP for initiating this discussion and even harder to believe that any court would condone punishment for a student who took a stance on an issue of principle.

B. Debate on the Right to Be Forgotten

Almost everyone is guilty of some youthful indiscretions, and nowadays these indiscretions often find their way on to social media, so we should import the European "right to be forgotten" online to enable people to erase damaging information from their past that is no longer relevant.

Pro: Privacy. The permanence of online information means that increasing numbers of people are unable to escape now irrelevant or inaccurate information from their past. It means that misdemeanors committed long ago can prevent people from gaining employment and incorrect financial information can ruin their credit. The Internet is increasingly erasing any meaningful distinction between private and public life. Employers routinely do Google searches about a candidate and online information can enable them to discriminate against candidates on the basis of information, like political affiliation or other private activities, that they would not have known about in the past. It seems fair that individuals should at least be able to remove old and irrelevant information from those searches.

Con: Free speech, access to information, and democracy are weakened by allowing information to be removed from the public record. We risk allowing people to rewrite history. If the powerful, like politicians and celebrities, can remove information, this ability limits public scrutiny and potentially weakens democracy. The right also puts the onus on online intermediaries like Google to act as judge and jury and decide whether a request to remove information should be granted. Leaving these decisions up to private companies is not an adequate way to ensure the correct balance between freedom of speech and privacy online.

VI. Conclusion

As this case demonstrates, the use of social media can amplify the impact of what students might otherwise (although insensitively) think of as a night of harmless fun. The use of Snapchat to advertise the fact that students were playing an anti-Semitic–themed game of beer pong led to international attention when a fellow student saw the photo and published it, with comments, to her blog. There is much to consider about the legal ramifications with regard to discipline of students for off-campus conduct, defamation, underage drinking, and the right to be forgotten. This case provides a real-world example of these important legal concepts.