*Elonis v. U.S.* Applied to Teen Social Media Posts

**Memes as Artistic Expression or True Threats?**

*This First Amendment activity applies the landmark Supreme Court case Elonis v. U.S. to a teen conflict posted on Facebook.*

The First Amendment Provides That

“Congress shall make no law . . . abridging the freedom of speech [.]”

*Elonis v. U.S.* is the first time that the Supreme Court of the United States has agreed to hear a case involving the constitutionality of prosecuting potential threats in a Facebook context. This is a relatively new and rapidly developing area of law. The Court’s decision may have far-reaching consequences for the development of First Amendment law, in general, and for students and others who use social media, in particular.

Most students and a majority of adults use some form of social media, including Facebook, Twitter, LinkedIn, etc. The growth of social media has often blurred the lines between professional and personal conduct.

Issues also have developed as statements made on Facebook are taken out of context. This is especially true when the individual who makes a statement cannot control who else views the statement and/or how others interpret it. For instance, several court cases have arisen over the authority of schools to discipline students for comments about teachers and school administrators that the students made outside of school on their own personal Facebook sites.

There is common concern that comments made on Facebook sites may be misconstrued if they are taken out of context. On the other hand, there are legitimate concerns that authorities must protect against cyberbullying, harassment, and threats that are made on social media. As a result, when they are drafting laws, state and the federal lawmakers struggle with how to balance First Amendment free speech rights with the interests of individuals who want to be free from harassment, fear, and intimidation on the Internet.

*Agenda*

*Elonis v. U.S.* Applied to Teen Social Media Posts

**Memes as Artistic Expression or True Threats?**

**Virtual Program Ground Rules**

* All participants’ cameras are on throughout the program.
* Access to chat box for student-to-student communication is turned off.
* Student access to large-group chat moderated by the teacher is turned on.
* Students may raise questions in the chat box, but also verbalize them using their camera and microphone when addressing the judge and attorneys.

**Advance Work for Students** *(less than 30 minutes, plus discussion with an adult)*

1. **Students Complete Two Quizzes and Discuss Them with an Adult at Home or School**
* Civility Self-Reflection Quiz: To be discussed at the beginning of the program.
* Pre-Test Reality Check Quiz: To be discussed with the Judge at the end of the program.
1. **Students Review One Handout to Prepare for the Civil Discourse Activity**
* How to Set Ground Rules for a Civil Discussion: Guidance for Setting Civility Rules
1. **Students Read One Handout to Prepare for the Simulation**
* One-Page Fictional Scenario: Andy Jackson v. Government-- Meme Version

**Advance Request for Teachers – Please Assign Students to Two Groups – Group #1 and Group #2 of Approximately Equal Numbers. They will receive their group assignments during the program.**

**Two Attorneys are Assigned to Group #1 Throughout. They are Group #1 Atty Coaches.**

**Two Attorneys are Assigned to Group #2 Throughout. They are Group #2 Atty Coaches.**

**The Online Program Begins**

**PART I: INTRODUCTIONS AND OVERVIEW**

**9:00—9:10 a.m. Introductions, Civil Discourse Discussion and Activity, and Scenario Review**

*(10 minutes***) The Judge Welcomes Everyone, Explains Role of a Judge, and the Program**

Four Attorney CoachesIntroductions: *Heart Reason --* *Why I Chose the Law*

**9:10 –9:20 Group #1 Atty Coaches (2) Lead Discussion and Activity with All Students**

*(10 minutes) Students have already gone over these two handouts, so will be ready to briefly discuss.*

**Discussion:** Civility Self-Reflection Quiz

Attorney Coach Draws Out Students to Discuss Three Self-Awareness Questions Selected by the Attorney Coach.

**Activity: Setting Civil Discourse Ground Rules**

Attorney Coach Calls on Students to Briefly Name Three Basic Rules the Group will Abide By.

 **Presentation of the Fictional Scenario**

 Two Attorney Coaches briefly review the fictional scenario with all students before they get into their two small groups. One attorney points out facts relevant to Andy Jackson’s position. The other attorney points out facts relevant to the Government’s position.

**PART II: ALL STUDENTS SERVE AS ATTORNEYS: PREPARATION FOR ARGUMENTS**

**9:20 – 9:35 Small Group Preparation. All Students are Attorneys.**

*(15 minutes)* **Group 1 –** Represents the Government Coached by **Group #1 Atty Coaches**

**Group 2 –** Represents Andy Jackson Coached by **Group #2 Atty Coaches**

 **Objective:**  Students are introduced to issue spotting and prepare for arguments.

 With their pair of attorney coaches, each group fills out and discusses the **Arguments Worksheet.** Each group:

* Identifies: Arguments on both sides. *(~5 minutes)*
* Discusses: Their best arguments. *(~5 minutes)*
* Discusses: The best argument the other side is likely to present and how they will refute it. *(~5 minutes)*

 **Instructions for All Coaches During Small Groups:** **A coach for Group #1** asks for a volunteer to make the group’s best argument *(~2 minutes)* for Andy Jackson in the hearing. **What is your key message to the Judge and the jury? All students are expected to help that student.**

 **A coach for Group #2** asks for a volunteer to make the group’s best argument *(~2 minutes)* for the Government. **What is your key message to the Judge and the jury? All students are expected to help that student.**

 **The first student speakers are the only pre-designated speakers.**  **Important:** **The Judge’s follow-up questions are for all students.**

**9:35 – 9:50 Return to the Large Group. All Students are Attorneys.**

*(15 minutes)* **The Judge Guides the Presentation of Arguments.** *(~7 minutes each side)*

 The Judge starts by raising the overarching issue in the form of a question:

 **The Issue Before the Court Is: Does the First Amendment require proof that a defendant is serious about following through on a statement before the defendant may be convicted of making a true threat against another person?**

1. **The Judge asks for Andy Jackson’s counsel to make the group’s best argument on his behalf.** The student who volunteered in the small-group to speak first at the hearing answers the question with a two-minute (approximately) summary of the group’s best argument.

1. The Judge’s follow-up questions are for all students representing Andy Jackson. The Judge calls on students who use the raise-hand function. This gives all interested students the opportunity to participate.

 **The Judge turns to counsel for the Government** and raises the same overarching issue in the form of a question.

 **The Issue Before the Court Is: Does the First Amendment require proof that a defendant is serious about following through on a statement before the defendant may be convicted of making a true threat against another person?**

* + - 1. **The Judge asks the Government’s counsel to make the group’s best argument on its behalf.** The student who volunteered in the small-group to speak first at the hearing answers the question with a two-minute (approximately) summary of the group’s best argument.
			2. **The Judge’s follow-up questions are open to any student** representing the Government. The judge calls on students who use the raise-hand icon.

**PART III: ALL STUDENTS SERVE AS JURORS**

**9:50—10:05** **All Students Return to the Main, Large Group as Impartial Jurors.**

*(15 minutes)* The Judge releases students from their small groups and the positions taken by their groups. The Judge administers the jurors’ oath.

 **The Judge tells students that they now are impartial jurors and explains the different roles and obligations of advocates and jurors.**

 **JURY DELIBERATIONS**

 **Group #2 Atty Coaches (2) Facilitate the Deliberations to Ensure that Everyone Who Wishes to Speak Has an Opportunity. They draw out the students to participate. When deliberations wind down:**

 **Verdict Poll is Put on Screen:** **Results are the Verdict.**

 The Judge announces the verdict. The Judge asks students who have not yet spoken to explain their rationale.

 **Landmark Case:** An Attorney Coachbriefly reports onthe decision and rationale in Elonis v. U.S. as a landmark Supreme Court case that dealt with a similar issue and summarizes the decision.

**PART IV: REALITY CHECK QUIZ DISCUSSION AND GENERAL Q/A**

**10:05 – 10:25 The Judge Goes Over the Answers to the Reality Check Quiz**

*(20 minutes)* **Based on Advance Input from the Teacher, the Judge Pinpoints Two Anecdotes to Discuss with Students.**

 The Judge Opens the Floor to Questions on any Topic.

**10:25 -- 10:30 The Judge Makes Concluding Remarks**

*(5 minutes)* **Students Complete Feedback Form**

***Context for Volunteer Attorney Coaches Prior to the Program – Not for Presentation***

**Applicable Supreme Court Precedent**

***Watt v. United States,* 394 U.S. 705 (1969)**

**Key Point:** **True threats are not protected speech under the First Amendment.**

In this case, the petitioner was convicted under a federal statute that made it a criminal offense to knowingly and willfully threaten the President of the United States.

During the Vietnam War, Robert Watts made a political speech protesting the war and the draft. In this speech, he informed the crowd that if he were ever drafted and made to carry a weapon, the first person that he would aim his gun at would be the President. The crowd responded to his statement with laughter.

In reversing his conviction, the Supreme Court noted that true threats are not protected by the First Amendment and could be prosecuted. However, the Court also noted that Watts’ statements were “political hyperbole” and not a true threat. As such, they were protected speech under the First Amendment.

In reaching this conclusion, the court noted that Watts had not been inducted into the Army and likely would not be inducted. His comments were made in a political context at an anti-war speech, and his comments evoked laughter. Thus, they could not be construed as a true threat. The Court did not specify whether an objective or subjective standard would be used to determine if speech is constitutionally protected by the First Amendment, or if such speech constitutes a true threat that can be prosecuted.

**Applicable Supreme Court Precedent**

***Virginia v. Black,* 538 U.S. 343 (2003)**

**Key Point: Speech may or may not be a true threat, depending on the situation.**

It was a crime in Virginia to burn a cross with the intent to intimidate. The law also stated that the burning of a cross was enough proof on its face that a person intended to intimidate another. The Supreme Court struck down the statute.

The Court noted that burning a cross could constitute a threat if it were done with the intention of intimidating another. However, the Court also noted that, even if offensive, cross-burning could also be a form of constitutionally protected speech. An example of this would be a cross-burning to express a racist belief. The Court struck down the statute as overbroad because it prohibited both protected and unprotected speech.

As in *Watts*, the Court did not specify whether an objective or subjective standard would be used to determine if such speech was constitutionally protected by the First Amendment, or if it constituted a true threat that could be prosecuted. As a result, in the wake of *Virginia v. Black* lower federal and state courts came to different conclusions when evaluating true threat cases. Some adopted an objective standard, while others adopted a subjective standard. It is widely thought that the U.S. Supreme Court accepted the *Elonis* case to resolve this issue.

**Facts & Case Summary - *Elonis v. U.S.* - No. 13-983**

Anthony Elonis was arrested on December 8, 2010 and charged with five counts of violating a federal anti-threat statute, 18 U.S.C. § 875(c).  Specifically, he was charged with threatening his ex-wife, co-workers, a kindergarten class, the local police, and an FBI agent.

Elonis had posted statements on his Facebook page that appeared to threaten his ex-wife and other people in his life.  Prior to the postings, his wife and family had left him and he had lost his job at an amusement park. Shortly after this chain of events, Elonis posted several statements on his Facebook page that were interpreted as threats.

At his trial, Elonis asked the court to dismiss the charges, stating that his Facebook comments were not true threats.  He argued that he was an aspiring rap artist and that his comments were merely a form of artistic expression and a therapeutic release to help him deal with the events in his life.

In an apparent attempt to underscore that his comments should not be taken seriously, he posted links to YouTube videos that he parodied, and noted that a popular rap artist often uses similar language in his lyrics.  For several of his comments, he also posted a disclaimer stating: “This is not a threat.”

Despite the fact that his ex-wife, an FBI agent, and others viewing his comments might have perceived his statements as threats, Elonis argued that he could not be convicted of making a threat because he did not intend to threaten anyone with his postings. In other words, he claimed that he didn’t mean what he said in a literal sense. In legal terms, he said that he did not have a subjective intent to threaten anyone.

The trial court denied his motion to dismiss the case.  The court held that the proper legal test for determining whether someone made a threat is an objective one:  whether reasonable people hearing the comment would perceive it to be a threat.  Elonis was convicted of four of the five counts.  He was sentenced to 44 months imprisonment, and three years of supervised release.[1]  He appealed to the U.S. Court of Appeals for the Third Circuit, which affirmed his conviction.  The U.S. Supreme Court, granted certiorari (agreed to hear the case).  Oral arguments were heard on Monday, December 1, 2014.  A decision is expected by June 2015.

*[1]Please Note:  After the trial, Elonis, through his lawyers, filed post-trial motions with the trial court in an attempt to overturn the conviction.  These attempts also were unsuccessful.*

**THE FIRST AMENDMENT PROVIDES THAT**

“Congress shall make no law . . . abridging the freedom of speech [.]”

**APPLICABLE LAW**

It is a federal crime to “transmit [ ] in interstate or foreign commerce any communication containing…any threat to injure the person of another, 18 U.S.C. § 875(c). Numerous states have adopted similar statutes.

**PROCEDURE**

**Lower Court 1:** U.S. District Court for the Eastern District of Pennsylvania

**Lower Court Ruling 1:** The U.S. District Court rejected Elonis’ argument that a subjective (i.e., individual) intent to threaten is required to secure a conviction under the federal anti-threat statute.

**Lower Court 2:** U.S. Court of Appeals for the Third Circuit

**Lower Court Ruling 2:** The Court of Appeals affirmed the U.S. District Court. It held that a reasonable person (i.e., objective) standard is the correct legal test for determining whether Elonis could be convicted of communicating a threat under federal law.

**ISSUE BEFORE THE SUPREME COURT OF THE UNITED STATES**

Does a conviction of threatening another person under federal anti-threat statute18 U.S.C. § 875(c) require proof that the defendant meant what he said in a literal sense?

**STATUS**

**Oral Arguments:** Heard at the Supreme Court of the United States on Monday, December 1, 2014.

**Judgment**: [Reversed and remanded](http://www.supremecourt.gov/opinions/14pdf/13-983_7l48.pdf), 8-1, in an opinion by Chief Justice Roberts on June 1, 2015. Justice Alito filed an opinion concurring in part and dissenting in part. Justice Thomas filed a dissenting opinion.

**Student Packet:** *Students Read This Fictional Scenario in Advance and Bring It to the Program*

**Fictional Scenario: Memes as Artistic Expression or True Threats?***Elonis v. U.S.* Applied to Teen Social Media Posts

Andy Jackson is an 18-year-old junior at Bay State High School where he is on the championship basketball team and is gearing up to be scouted by colleges. He and Sarah Somers are debate partners who have gone to the state finals every year. Being on a winning debate team is important for Sarah’s scholarship chances. Due to the demands of his training schedule, Andy decides to break up the partnership, after which he says Sarah started rumors that he cheated on a test.

If true, Andy could lose opportunities for an athletic scholarship. Even rumors could hurt his chances. Andy becomes enraged at the possibility that he might lose an opportunity to play college basketball. He vents to his friends, who tell him to simmer down as they drive him to his job as an after-school DJ at the Boys & Girls Club where he volunteers.

Andy is a popular DJ and rapper at these and other events. He is known for lyrics that have clever, PG-rated messages with controversial double meanings. That night, he posts a meme of himself performing a parody of some well-known rap lyrics saying that “When players get slimed, they know how to even the score. When liars talk trash, I just show them the door.” Andy includes in the meme a skull emoji and a wink emoji superimposed on a basketball.

When Sarah sees the meme, she feels threatened in light of the fact that friends have told her how angry Andy is with her. She is concerned enough about the posts that she goes to the school police safety officer and asks how to get a restraining order against Andy. She also reports the post to the basketball coach and the assistant principal. Andy says Sarah is just playing dumb if she claims she doesn’t know what he means by “players know how to even the score.” It’s an obvious basketball reference.

Ultimately, Andy is charged with two counts of violating 18 U.S.C. § 875(c), which makes it a federal crime to “transmit [ ] in interstate or foreign commerce any communication containing…any threat to injure the person of another.”

At today’s hearing in federal court, Sarah’s attorneys will argue that the lyrics reasonably could be understood to be referring to weaponizing a basketball to cause physical injury to Sarah. The skull emoji confirms that the lyrics are death threats. As such, the statements are true threats.

Andy’s attorneys will argue that Andy’s statements were not true threats, but artistic free speech protected by the Constitution.

**Student Packet:** *Students Fill Out Prior to the Program and Bring It with Them*

**Civility Self Reflection Tool***Civility Starts with Self Understanding*

**Instructions:** Circle the option that best applies to you when you are having an intense and difficult conversation.

**1. When a conversation gets heated, I contribute to the conversation.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**2. When peers disagree about an issue, I remain silent.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**3. I take an active role in creating a welcoming environment for differing opinions.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**4. I give my peers eye contact and my full attention when they speak, even when I disagree.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**5. When I disagree with someone, I keep an open mind and, momentarily, put aside what I plan to say next.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**6. I can’t control others’ behavior or opinions, so I focus on my own actions and civility.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**7. When I’m speaking, sometimes, I use silence to get the attention of others.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**8. I speak respectfully to people with whom I disagree, even if they disrespect me.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**9. I ask clarifying questions.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**10. I am careful not to take over a conversation by talking longer than others**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**11. When I get excited, I interrupt the person speaking.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**12. I have side conversations that distract the person I’m talking with – and others -- from the person who has the floor.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**13. I listen for what people mean – not just what they say -- when I disagree with them.** Very Frequently • Frequently • Occasionally • Rarely • Never

**14. When peers disagree, I find common ground and call attention to areas of agreement.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**15. Sometimes I tune out, then realize I’ve repeated something that already has been said.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**16. I roll my eyes or make subtle faces when I disagree with someone’s opinion.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

**Student Packet:**  *Setting Ground Rules - Students Fill Out Prior to the Program and Bring It*

**Civil Discourse and Difficult Decisions: Consensus on Standards of Behavior**

In courtrooms, it’s not the loudest voice that prevails. Opposing arguments are grounded in reason and evidence and they are put forward within strict guidelines for courtroom decorum. The adversarial system is no place for incivility. In fact, court proceedings are set up to promote effective civil discourse.

**Start this activity** by listing your pet peeves regarding the behavior of others when you’re having a difficult, heated conversation on a controversial topic. What do others do that can impede understanding? **Next,** circle the rules below that address those behaviors.

**1. Be mindful of your own behavior**. Notice how you internally are reacting/responding when others speak. Pay attention to how your words and your silence are impacting the experience for others in the group.

**What are you doing to create a welcoming environment for differing** **opinions?** Are you looking at each speaker and giving your full attention? Are you listening with an open mind – momentarily putting aside what you will say next?

Are you asking clarifying questions? Are you being careful not to take over the conversation by talking longer than others? Are you refraining from subtle, but disrespectful behavior or not paying attention when others speak?

**2.**  **Wait** to be recognized by the moderator before speaking. This allows time – before you speak – for reflection on what the previous speaker(s) have said.

**3. Don’t interrupt** or talk over someone else who is speaking, even when you are excited.

**4. No side conversations.** They are disrespectful to the speaker and distract listeners from the person who has the floor.

**5. Listen for content** inthe statements of others, especially when you disagree. Listen for what the speakers are trying to communicate, even if they aren’t expressing their points concisely.

**6. Find common ground.** Identify and call attention to areas of agreement.

**7. Follow the direction** **of the discussion.** Don’t repeat what already has been said. **Relate** your comments to those of previous speakers.

**8. Ask questions.** Don’t assume that you know what someone else means.Ask the speaker to help you understand perspectives different from your own.

**9. Don’t embarrass yourself or disrespect others** by makingdemeaning or inappropriate comments, facial expressions, or gestures. No eye rolling, sighing, or checking out of the conversation.

**10. Differentiate between facts and opinions**. Both are valid when expressed appropriately.

*Quiz Questions for Participants to Fill Out as They Wait for the Program to Start*

**Reality Check Quiz: Sometimes There Are No Do-Overs**

*Today’s Decisions Can Have Legal and Long-Term Consequences*

1. Because I’m 18, if I’m convicted of a federal crime, a lot of factors come into play and it won’t, necessarily, have an impact on the rest of my life. **True False**

1. My parents know that my friends and I are going to drink and they want to keep us off the road, so they buy the beer and we get together at our house, where my parents can keep an eye on us. If the party gets busted, anyone who is underage is breaking the law, but my parents won’t get charged. Of course, they’re over the legal age and they won’t be drinking because they are driving some kids home. **True False**
2. My friends and I have been driving for two years. One of my friends has never been caught speeding and she’s never had an accident. But, she’s got a lot of unpaid parking tickets stuffed in her glove compartment. I keep telling her that if she ever gets stopped, they could take her license. **True False**

1. When I go to a bar, I use the fake I.D. I bought it on the Internet. I’ve heard that the site could be part of a national ring, but I’m not going to get caught. Besides, if I do, the worst that will happen is that they’ll take my I.D. and kick me out of the bar. **True False**
2. If I’m hiking in Colorado, where pot is legal, and my friends bring some back to our home state where it’s not legal, they could end up in federal court, if they’re caught with it. **True False**
3. I order nutritional supplements off the Internet that I get in the mail. I use them to improve my athletic performance. I need every edge I can get to win a college scholarship. These are pharmaceuticals and not illegal drugs that I’m getting from some street dealer, so I’m okay.

**True False**

1. If I ever did get convicted of something in federal court, because of my age, I’d get probation. My older brother says that means I might not be able to travel with my tennis team. **True False**
2. My buddies on the football team were joking around in the locker room after a big win. One of the guys popped open a bottle of sparkling cider that looked like champagne. He dropped his towel while he was guzzling from the bottle on his way into the shower. It was hysterical so, when he turned his back, I captured some video on my phone. I sent it to the other guys on the team who weren't in the showers at the time. I thought it was a harmless moment that we'll laugh about at our high school reunion, some day. The coach says we could be in big trouble. **True False**
3. My classmates and I were sitting in first period when our teacher was called to the office for an emergency. Before he left, we noticed that he was in the middle of posting an announcement on the class website. We thought it would be funny to change the message and post it. I kept watch while my friends posted a music video and a message that our class will be cancelled next week. I figured he’d have a good laugh and just delete it later.

**True False**

1. A friend of mine was a witness to a car wreck and now she has to testify before a grand jury. She’s not sure that she’s willing to tell the whole truth because it implicates her and could jeopardize her scholarship. The details are not that important because she’s not the one on trial. Since the proceedings aren’t in court, the standard of “telling the truth, the whole truth, and nothing but the truth” doesn’t apply. **True False**

*Quiz Answer Key and Discussion Prompts for the Judge or Discussion Leader*

**Reality Check: Sometimes There Are No Do-Overs**

*Today’s Decisions Can Have Legal and Long-Term Consequences*

1. Because I’m 18, if I’m convicted of a federal crime, a lot of factors come into play and it won’t, necessarily, have an impact on the rest of my life.

**FALSE**

A felony conviction affects many important civil rights: You lose the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any type of firearm. In addition, if you are not a U.S. citizen, you may be subject to deportation or exclusion from the United States. A conviction can affect your ability to become a U.S. citizen. There are also collateral consequences that can affect your driving privileges and certain employment and business opportunities. You can be barred from professional licenses in nursing, transportation or teaching. You can be denied access to government benefits, student loans, or public housing.

1. My parents know that my friends and I are going to drink and they want to keep us off the road, so they buy the beer and we get together at our house, where my parents can keep an eye on us. If the party gets busted, anyone who is underage is breaking the law, but my parents won’t get charged. Of course, they’re over the legal age and they won’t be drinking because they are driving some kids home.

**FALSE**

Parents may be charged with a criminal offense, for example, contributing to the delinquency of a minor or hosting an “open house” party.

1. My friends and I have been driving for two years. One of my friends has never been caught speeding and she’s never had an accident. But, she’s got a lot of unpaid parking tickets stuffed in her glove compartment. I keep telling her that if she ever gets stopped, they could take her license.

 **TRUE**

Her license may be suspended until the tickets are paid, and her car may be impounded.

1. When I go to a bar, I use the fake I.D. I bought it on the Internet. I’ve heard that the site could be part of a national ring, but I’m not going to get caught. Besides, if I do, the worst that will happen is that they’ll take my I.D. and kick me out of the bar.

**FALSE**

Possession of a fake ID is a third-degree felony in some states. Use of another person’s identifying information is a federal offense of aggravated identity theft that may carry 24 months in federal prison.

1. If I’m hiking in Colorado, where pot is legal, and my friends bring some back to our home state where it’s not legal, they could end up in federal court, if they’re caught with it.

**TRUE**

The federal government and most states prohibit the possession of marijuana. Transporting marijuana across state lines is a federal offense.

1. I order nutritional supplements off the Internet that I get in the mail. I use them to improve my athletic performance. I need every edge I can get to win a college scholarship. These are pharmaceuticals and not illegal drugs that I’m getting from some street dealer, so I’m okay.

**FALSE**

The distribution and transport of a controlled substance is a serious criminal offense. Depending on the quantity of the controlled substance, there may be mandatory minimum penalties that can be imposed. A controlled substance includes any anabolic steroid, narcotic, hallucinogenic, stimulant or depressant drug.

1. If I ever did get convicted of something in federal court, because of my age, I’d get probation. My older brother says that means I might not be able to travel with my tennis team.

**TRUE**

For most federal offenses, probation or supervised release is mandatory and limits your ability to travel, restricts employment opportunities. Supervision is conducted on a weekly basis and may be conducted over the course of several years.

1. My buddies on the football team were joking around in the locker room after a big win. One of the guys popped open a bottle of sparkling cider that looked like champagne. He dropped his towel while he was guzzling from the bottle on his way into the shower. It was hysterical so, when he turned his back, I captured some video on my phone. I sent it to the other guys on the team who weren't in the showers at the time. I thought it was a harmless moment that we'll laugh about at our high school reunion, some day. The coach says we could be in big trouble.

**TRUE**It is a serious federal crime to create or distribute child pornography, which would include pictures like this. Even though it was consensual and done as a joke, it’s still a crime.

1. My classmates and I were sitting in first period when our teacher was called to the office for an emergency. Before he left, we noticed that he was in the middle of posting an announcement on the class website. We thought it would be funny to change the message and post it. I kept watch while my friends posted a music video and a message that our class will be cancelled next week. I figured he’d have a good laugh and just delete it later.

**FALSE**

Accessing the computer of a school or a business is illegal hacking. As the lookout, you are still in trouble. Helping someone else commit a crime is called aiding and abetting. Legally, you are considered just as responsible as the person who did it.

1. A friend of mine was a witness to a car wreck and now she has to testify before a grand jury. She’s not sure that she’s willing to tell the whole truth because it implicates her and could jeopardize her scholarship. The details are not that important because she’s not the one on trial. Since the proceedings aren’t in court, the standard of “telling the truth, the whole truth, and nothing but the truth” doesn’t apply.

**FALSE**

Lying while under oath may result in a federal conviction for false declarations before a grand jury, otherwise known as perjury, which carries with it a maximum penalty of up to five years imprisonment.

***Opening Protocol***

***Elonis v. United States***

Applied to Students Facing Off on Facebook

**A Law Clerk announces the Judge.**

**The Judge takes the bench, welcomes the group, and says:** The issue before us today is – Does the First Amendment require proof that a defendant is serious about following through on a threat before the defendant may be convicted of threatening another person?

**Judge: Is Counsel for the Defendant ready?**

**Andy Jackson’s Attorney #1** *(Stands at counsel table)* Yes, Your Honor.

**Judge : Is Counsel for the Defendant ready?**

**Government’s Attorney #1** *(Stands at counsel table)* Yes, Your Honor.

**Judge:**  **Counsel for the Defendant may proceed.**

**Attorneys for Andy Jackson, the Defendant**

**Attorney #1 *(Goes to the lectern)***

"May it please the Court. My name is \_\_\_\_\_\_\_\_\_\_\_\_. I am from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. My colleagues and I are counsel for Mr. Andy Jackson, the Defendant before this Court today. There are three issues before the Court. I will argue the first issue. Seated at the Defendant’s counsel table are my colleagues who will handle the other issues and closing arguments. They will introduce themselves and tell you where they are from. *(Attorney #1 sits down)*

**Attorney #2 *(Stands at counsel table)***

I am \_\_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and I will be handling Issue #2.

*(Sits down)*

**Attorney #3 *(Stands at counsel table)***

I am \_\_\_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and I will be handling Issue #3. *(Sits down)*

**Attorney #4 *(Stands at counsel table)***

I am \_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_ and I will be handling the closing arguments for the Defendant. *(Sits down)*

**Judge: Counsel for the Government may proceed with your introductions.**

**Attorneys for the Government**

**Attorney #1** ***(Goes to the lectern)***

"May it please the Court. My name is \_\_\_\_\_\_\_\_\_\_\_\_. I am from \_\_\_\_\_\_\_\_\_\_\_ and I will be arguing the first issue on behalf of the Government, the United States. Seated at the Government’s counsel table are my colleagues who will handle the other issues and closing arguments. They will introduce themselves and tell you where they are from. *(Sits down)*

**Attorney #2 *(Stands at counsel table)***

I am \_\_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and I will be handling Issue #2. *(Sits down*)

**Attorney #3 *(Stands at counsel table)***

I am \_\_\_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and I will be handling Issue #3. *(Sits down*)

**Attorney #4 *(Stands at counsel table)***

I am \_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_ and I will handle the closing arguments for the Government. *(Sits down)*

**Judge: Now we will turn to the major questions about this issue. The attorneys will make their arguments, then we will open the floor to you, in the audience, to join in the debate as jurors. At the end, we will take a vote to determine the verdict.**

***Activity***

***Elonis v. United States* Applied to Teen Social Media Postings**

*Talking Points*

**Judge: The issue before us today is – Does the First Amendment require proof that a defendant is serious about following through on a threat before the defendant may be convicted of threatening another person?**

|  |  |
| --- | --- |
| **Judge: We will start with Question #1.****Does the First Amendment protect Mr. Andy Jackson’s comments, even though they may be potentially upsetting? Because Mr. Andy Jackson is the Petitioner bringing this case, his attorney will go first.** | **Judge: Now we will hear from the Respondent. Does the First Amendment protect Mr. Andy Jackson’s comments, even though they may be potentially upsetting?** |
| **Andy’s Attorney #1** | **Government’s Attorney #1** |
| **YES*** The First Amendment protects unpopular and offensive speech. A bedrock principle of the First Amendment is that speech cannot be prohibited simply because it is uncomfortable or offensive.
* Andy’s speech is no different from other speech that has been recognized as constitutionally protected. Angry and even offensive lyrics are constitutionally protected artistic expression.
* Andy was simply expressing his anger in an artistic, therapeutic, and constitutionally protected manner. His comments were based on the lyrics of his favorite artist. He also put out a disclaimer that he was not threatening anyone.

**The Judge asks follow-up questions.**Examples of the kinds of follow-up questions the Judge may ask:* Should the First Amendment protect all forms of artistic expression? Why/Why not?
* What artistic expression should not be protected?
* Should there be limits on First Amendment protections of emotional expressions?
* What emotional expressions should be limited?
* Should it matter if someone uses a disclaimer saying the expression is not a threat?
* Does it matter that the statement is anonymous?
 | **NO*** Not all speech is protected by the First Amendment. The First Amendment protects political discourse and the free flow of ideas. However, the courts have determined that obscenity, fighting words, and true threats are not protected speech.
* Andy’s online statements are unprotected true threats. Among other things, he tells Sarah that she will “regret this day.” He says Sam should watch himself because “The Gunner is locked and loaded” -- a reference to shooting a firearm.
* Andy cannot avoid criminal liability for his threats simply by imitating the lyrics of a musical artist. He can’t avoid responsibility for threats just by putting a disclaimer on them. Defendants who issue true threats can’t get off the hook by simply by saying they didn’t mean it or by adding ambiguous emojis.

**The Judge asks follow-up questions.**  |
| **Judge: Let’s turn our attention to Question 2****Is it necessary to determine if the speaker means what he says in the threat in order to suppress it?**  | **Judge: Same question for the Government.****Is it necessary to determine if the speaker means what he says in the threat in order to suppress it?** |
| **Andy’s Attorney #2** | **Government’s Attorney #2** |
| **YES*** When a threat is judged by a subjective standard, the idea is to determine if the speaker means what is said. When a threat is judged by an objective standard, the question is asked: “How would a reasonable person interpret it?” That standard is too vague because reasonable people can disagree.
* An objective or “reasonable person” standard allows the majority to silence dissenting or minority views. It also has a chilling effect that might silence offensive, unpopular, or controversial statements to avoid the risk of criminal prosecution. The posts include a skull and winking smiley face emoji. They clearly convey that the sender is just kidding.
* The objective standard, based on what a “reasonable person” would think, is too ambiguous. What is meant by “a reasonable person?” Would the standard be based on a reasonable adult? A reasonable teenager? A reasonable person with average knowledge of pop culture? This standard simply leaves too much ambiguity to adequately protect freedom of speech.

**The Judge asks follow-up questions:**Examples of the kinds of follow-up questions the Judge may ask:* What impact should the skull and winking emojis have on our understanding of Mr. Jackson’s intent?
* How would a “reasonable person” interpret the skull in this post?
* Does it make a difference that the skull is paired with the winking smiley face?
 | **NO*** Laws are frequently passed to prohibit conduct regardless of the intent of the defendant. For instance, a person who calls in a bomb threat may be prosecuted regardless of whether or not he actually intended to carry out the threat.
* Even if the individual makes the threat as some sort of warped joke with no intention of doing damage, he could still be prosecuted. Anti-bomb threat laws are meant, in part, to protect the public from the fear that such threats cause, regardless of whether the threat turns out to be credible. Andy’s posts include a skull emoji and winking smiley face emoji. The skull is a recognized symbol of death. The wink indicates that the sender gets pleasure from issuing the threat.
* When a threatening statement is made, the damage is done when the victim hears the statement and takes it seriously. A perceived threat can be just as emotionally damaging as a real threat. In light of that, the Government may legitimately prohibit such threatening statements.
* Employing an objective standard would not automatically subject every unpopular or offensive utterance to criminal prosecution. The context of the statement would help the finder of fact determine whether or not a statement is a true threat.

**The Judge asks follow-up questions:** |
| **Judge: We turn our attention now to Question #3. Should comments on social media be given any additional protections beyond comments made in person or by other means of communication?** | **Judge: Question #3 for the Government is the same. Should comments on social media be given any additional protections beyond comments made in person or by other means of communication?** |
| **Andy’s Attorney #3** | **Government’s Attorney #3** |
| **YES**• People make all kinds of exaggerated statements that, if taken out of context, can be construed as threats. This is particularly true for statements posted on social media. The person making the statements cannot control who sees them or how they are interpreted. Someone unfamiliar with the context could perceive an innocent statement as a threat. • There are many examples in the law where the legality of an action depends upon context. For instance, the Government may outlaw speech that is intended to incite imminent lawless action. However, the Government may not prohibit offensive speech if it is not a direct incitement to unlawful action. • If the government tries to interpret the intentions behind speech, people will self-censor rather than risk criminal prosecution. In addition, people may be prosecuted for comments that were not intended as threats. **The Judge asks follow-up questions. Examples:**• Should online content have the same protections as news media content?• Should the government try to interpret people’s intentions and decide if the content is meant to threaten or entertain the reader or audience?• How important is context when determining if speech is a threat or not? Could you say the same thing in two different settings and have two different interpretations? | **NO**• There is no reason to give added protection to comments made on social media. Anti-threat laws address statements that arouse fear and intimidation, regardless of the forum in which they appear. Existing laws are adequate. There is no need to carve out an exception for online social media.• Individuals should not be allowed to engage in threatening and/or otherwise illegal behavior simply because it is done online. A threat is a threat no matter how it is communicated. Government has a legitimate right to combat online harassment and bullying.• If reasonable people construe statement s as threats, then they may be prosecuted as threats. Regardless of the intent of the person making them, such statements can cause intimidation and fear. If the possibility of prosecution causes individuals to think twice before making threats online, that is the price to be paid for living in a safe and civilized society.**The Judge asks follow-up questions.** |
| **Judge: And now we will have closing arguments from each side. After closing arguments, I will turn the program over to the moderator who will facilitate the jury deliberations.** |

***For Attorney #4 on Each Side: Fill-In-The-Blank******Closing Arguments***

***Elonis v. U.S.***

**Guidelines for Drafting Closing Arguments**

**Purpose of Closing Arguments:** To persuade the jurors to adopt your view of the significant points favoring your teams position on each issue. Attorneys **argue the merits** of their case.

**Each Attorney Addresses the Judge and Jurors, Starting With:**

I would like to review with you the key points presented today.

**Read Aloud: Issue #1** -- **Does the First Amendment protect Mr. Andy Jackson’s comments, even though they may be potentially upsetting**?

*Write the key word from the main point that you want to emphasize.*

*Why should the jury support your position on this point?*

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**Read Aloud: Issue #2—Is it necessary to determine if the speaker means what he says in the threat in order to suppress it?**

*Write a key word from the main point that you want to emphasize.*

Why should the jury support your position on this point?

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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**Read Aloud: Issue #3 -- Should comments on social media be given any additional protections beyond comments made in person or by other means of communication?**

*Write the key word from the point that you want to emphasize.*

Why should the jury support your position on this point?

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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**Summary:** *Of all the points argued, what is the most compelling reason the jury should decide in favor of your client?*

**Judge** *(after the last closing argument):* **Now that you’ve heard the closing arguments, I will turn over the program to the moderator for the jury deliberations.**

Jury Preparation Exercise

Elonis v. United States Applied to Teen Social mediaPostings

Arguments Worksheet – Discussion Starter

Directions: Put an A next to arguments for Andy and a G next to arguments for the government.

1. The First Amendment protects unpopular and even offensive speech. Such protections are necessary to preserve the free flow of ideas in a democracy.
2. The First Amendment does not protect all types of speech. For instance, obscenity, fighting words, and true threats are not protected and may be prosecuted.
3. To be considered a threat, a person must have the internal, subjective intent to make the threat. If threats are judged by an external, objective standard, this could lead to the prosecution of unpopular ideas simply because they offend the majority.
4. Using an objective standard to analyze threats would result in even more vagueness in the law. How is the objective standard to be determined? Is the standard a reasonable adult, or child, or some expert? An objective standard is too ambiguous.
5. Laws are frequently passed to prohibit conduct regardless of the intent of the defendant. For instance, a person who calls in a bomb threat may be prosecuted regardless of whether the caller ever actually intended to follow through with the threat.
6. Defendants should not be permitted to escape criminal responsibility for making threats simply by hiding behind disclaimers or saying that their threats are simply artistic expression or emotional venting.
7. When a threatening statement is made, the damage is done when the intended victim hears the statement. The defendant should still be punished for this type of conduct whether the defendant intends to carry out the threat or not.
8. People make all kinds of exaggerated statements that, if taken out of context, can be construed as threats. This is particularly true for anonymous statements that are made on the Internet and social media. People should not have to choose either to remain silent or run the risk of a criminal conviction.
9. The context of a statement can be used to determine whether or not it is a true threat. When deciding a case, the jury will review all of the facts and put them in the proper context to make this decision.
10. Free expression is about pushing limits. If the majority can determine what speech is a threat and what speech is not, this could have a chilling effect on First Amendment freedoms by leading to self-censorship.

***Jury Preparation Exercise***

***Elonis v. United States Applied to Teen Social mediaPostings***

*Arguments Worksheet – Answer Key for Program Facilitator*

**Directions:** Put an **A** by arguments for Andy and a **G** by arguments for the Government.

1. The First Amendment protects unpopular and even offensive speech. Such protections are necessary to preserve the free flow of ideas in a democracy. **A**
2. The First Amendment does not protect all types of speech. For instance, obscenity, fighting words, and true threats are not protected and may be prosecuted. **G**
3. To be considered a threat, a person must have the internal, subjective intent to make the threat. If threats are judged by an external, objective standard, this could lead to the prosecution of unpopular ideas simply because they offend the majority. **A**
4. Using an objective standard to analyze threats would result in even more vagueness in the law. How is the objective standard to be determined? Is a reasonable adult, or child, or some expert the standard? An objective standard is too ambiguous. **A**
5. Laws are frequently passed to prohibit conduct regardless of the intent of the defendant. For instance, a person who calls in a bomb threat may be prosecuted regardless of whether the caller ever actually intended to follow through with the threat. **G**
6. Defendants should not be permitted to escape criminal responsibility for making threats simply by hiding behind disclaimers or saying that their threats are simply artistic expression or emotional venting. **G**
7. When a threatening statement is made, the damage is done when the intended victim hears the statement. The defendant should still be punished for this type of conduct whether the defendant intends to carry out the threat or not. **G**
8. People make all kinds of exaggerated statements that, if taken out of context, can be construed as threats. This is particularly true for anonymous statements that are made on the Internet and social media. People should not have to choose either to remain silent or run the risk of a criminal conviction. **A**
9. The context of a statement can be used to determine whether or not it is a true threat. When deciding a case, the jury will review all of the facts and put them in the proper context to make this decision. **G**
10. Free expression is about pushing limits. If the majority can determine what speech is a threat and what speech is not, this could have a chilling effect on First Amendment freedoms by leading to self-censorship. **A**

