***Elonis v. U.S.* Activity Package –** [**www.uscourts.gov**](http://www.uscourts.gov)

*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 social media 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 social media 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 social media sites.

There is common concern that comments made on social media 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.

**How to Use These Resources**

**This activity is a modified Oxford style debate (**[**http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/oxford**](http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/oxford)**)**

1. While waiting for the program to start, participants review the agenda and read the *Elonis v. U.S.* facts and case summary and fictional scenario.
2. Students volunteer to be attorneys for each side – four student attorneys for Elonis and four student attorneys for the U.S. They will work with attorney coaches to review the talking points they will present to the host Judge. These are suggested points -- not a script–for the debate. Student attorneys are encouraged to add their own arguments.
3. After the closing arguments are presented for both sides, all other students are jurors who deliberate during the open floor debate. They use the worksheets they have prepared to present their arguments.

 The host Judge, attorney coaches, and student attorneys watch as the jurors debate in open court. The program moderator facilitates the arguments and makes sure that everyone has the opportunity to speak. As the debate comes to a close, the moderator asks for a show-of-hands vote. Because of time constraints, the verdict does not have to be unanimous.

***Elonis v. U.S.* – Agenda**

**Facebook Posts: Harmless Sarcasm or True Threats?**

**Location:**

**Time:**

**Host Judge:**

**Facilitator:**

**Attorney Coaches:** **Two Volunteer Attorneys Coach the Participant Attorneys**

* One Coach Helps Four Participant Attorneys for Elonis
* One Coach Helps Four Participant Attorneys for the U.S.

**1:45 – 2:15 pm Visitors go through courthouse security.**

*(30 minutes)*

**2:15—2:30 pm Welcome and Introductions -- Facilitator**

*(15 minutes)* **Attorney Coaches Introduce Themselves by Telling Why They Chose a Career in the Law**

 **Attorney Coaches Present**

* Facts and Case Summary *Elonis v. U.S.*
* Fictional Scenario

**2:30 – 2:45 pm** **Attorney Preparation and Jury Exercise**

*(15 minutes) Attorney coaches take the participant attorneys to two, nearby rooms.*

 *All other participants are jurors. The Facilitator and Law Clerk use the worksheet and answer key to prepare them for their jury deliberations.*

**2:45 – 4:00 pm *Elonis v. U.S*. Simulation.**

*(1 hr. 15 minutes)**Host Judge Takes the Bench*

**4:00 – 4:30 pm Q/A Session on Any Topics with the Host Judge**

*(30 minutes)*

**4:30 – 5:00 pm For Teacher Groups: How to Arrange a Program at Your Federal** *(30 minutes)* **Courthouse**

*Facilitator*

 **For Teacher Groups: How to Adapt the Program for Classroom Use** *Group Discussion*

**5:00 pm Adjournment**

***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.

***Fictional Scenario***

***Elonis v. U.S.* Applied to Teen Facebook Postings**

Fictional Scenario: Facebook Postings – Artistic Expression or True Threats?

Andy Jackson is a 19-year-old sophomore at Bay State College. He and Sarah Somers have gone through a difficult breakup, after which he says she started rumors alleging inappropriate behavior that could jeopardize his basketball scholarship. Friends tell Andy what she is saying, and he sees on the Whisper app a series of damaging photos and videos that only Sarah could have posted. Andy is afraid that the allegations could cost him his place on the basketball team, which has a zero-tolerance policy regarding academic ethics, sexual misconduct, and illegal behavior.

Andy, who is known as “The Gunner” for his ripped biceps and aggressive style of play, also is a DJ and rapper whose lyrics get attention for their controversial double meanings. He posts on Facebook a creative parody of some well-known rap lyrics implying that Sarah is a pathological liar who has gotten so wasted at parties that she has passed out.

In the meantime, Sarah starts dating Sam Bennett, a high-profile point guard on a rival basketball team. In another post, Andy’s lyrics claim that if Sarah keeps up the attacks on his reputation, she’ll “regret this day” because the next time she drinks too much at a party, she’ll learn a “new meaning of unconscious.” He also says that Sam should watch himself on the court because “The Gunner is locked and loaded.” Andy ends the post with a series of skull emojis and wink emojis.

Sarah feels threatened and is concerned enough about the posts that she goes to the campus police and asks how to get a restraining order against Andy. She also reports the posts to the director of campus life.

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

**Whisper** is a free mobile app. It is a form of [anonymous social media](https://en.wikipedia.org/wiki/Anonymous_social_media), allowing users to post and share photo and video messages [anonymously](https://en.wikipedia.org/wiki/Anonymously). The postings, called "whispers,” consist of text superimposed over an image.

***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 Facebook 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?**

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| **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 s statement is a true threat.

**The Judge asks follow-up questions:** |
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| --- | --- |
| **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 Facebook Postings

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 Facebook Postings***

*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**

