Overview

*Civil Discourse: Social Media and Cyberbullying*This cultivates legal skills as life skills in high school and college students.

Civil Discourse: Social Media and Cyberbullying is a distance-learning version of the Civil Discourse and Difficult Decisions federal courts’ national initiative. The virtual program – like the courtroom program – cultivates legal skills as life skills in high school and college students. Federal judges preside over these simulated court hearings. They are not mock trials, but realistic approximations of court hearings. All learning styles are involved, and all students participate as attorneys, then as jurors who grapple with teen-relevant legal issues.

The fictional scenario in this virtual activity is based on the Supreme Court’s 2015 decision in Elonis v. U.S. It was the court’s first social media cyberbullying case.

## About These Resources

Start with the Activity Download to find the agenda and all of the resources needed to prepare for and conduct the virtual hearing.

### Roles and Resources

This activity requires a federal judge presiding and no fewer than 25 high school or college students. The virtual program can accommodate up to 100 students.

* **Federal Judge:** Manages the program, presides over the simulation, and converses with the students at the end of the event.
* **Students and Teacher in Advance:** Read the designated materials on their own (about 10 minutes). The teacher assigns students to two groups – Group #1 represents Andy Jackson and Group #2 represents the government. In their respective groups they identify the arguments on the Arguments Worksheet that favor their position. They make their arguments to the judge in the virtual hearing.
* **Student Attorneys:** During the virtual experience, all students serve as attorneys who argue before the judge on behalf of their client – either Andy Jackson or the government – using the microphone function and the chat box.
* **Student Jurors:** After the arguments, all students become jurors who deliberate on the issues, and come to a decision. Due to time constraints, the verdict does not have to be unanimous, but jurors should be prepared to explain the rationale for their decisions.

*Agenda for 1 Judge and 4 Attorney Coaches*

**Civil Discourse: Social Media and Cyberbullying**

Legal Skills as Life Skills

*90-Minute Distance-Learning Module*

**Advance Work for Students** *(~15 minutes)*

1. **Students Complete Two Quizzes and Share Them with an Adult**

* 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 Group Activity

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 and Explains the Program**

Four Attorney CoachesIntroduce Themselves: *Why I Chose the Law*

**9:10 –9:30 Group #1 Atty Coaches Lead Discussion and Activity with All Students**

*(20 minutes)* **Discussion:** Civility Self-Reflection Quiz

Atty Coach Draws Out Students to Discuss Self Awareness

**Activity:** Setting Civil Discourse Ground Rules

Atty Coach Draws Out Students to Get Consensus on Several Rules

**Atty Coach Briefly Reviews with All Students**

* The Fictional Scenario

**First-Impression Poll**

**Question and poll on the Screen: Students Take Poll Prior to Arguments.**

**Judge:** This is not a commitment to a position. It is a gauge of your first impressions. Based on the information you now have, which side do you initially favor? Andy or the Government?

**PART II: ALL STUDENTS SERVE AS ATTORNEYS**

**9:30 – 9:45 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**

**They Prepare for Only One Issue/Question. The Judge Will Ask Follow Ups.**

**Objective:**  Students are introduced to issue spotting.

With their pair of attorney coaches, each group fills out and discusses the **Arguments Worksheet.** Identify arguments on both sides. *(~5 minutes)*

Each group discusses: What are their best arguments. *(~10 minutes);* If there is time, how they will refute anticipated arguments. *(~5 minutes)*

**Important Instructions for All Coaches:** **A coach for Group #1** asks for a volunteer to make the group’s best argument *(1 or 2 minutes)* for Andy Jackson in the hearing. **What is your key message to the Judge and the jury?**

**A coach for Group #2** asks for a volunteer to make the group’s best argument *(1 or 2 minutes)* for the Government. **What is your key message to the Judge and the jury?** These are the only pre-designated speakers. **The Judge’s follow- up questions are open to all students.**

**9:45 – 10:00 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 threatening 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 one- or two-minute summary of the group’s argument.

1. The Judge’s follow-up questions are open to any student representing Andy Jackson. The students speak up spontaneously, using their microphone function. When more than one student starts speaking at the same time, they work it out among themselves as to who will go first. If this happens more than once, the Judge may choose to have students use the raised hand function on the screen to call on student attorneys.

**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 threatening 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 one- or two-minute summary of the group’s argument.
      2. **The Judge’s follow-up questions are open to any student** representing the Government. The students speak up spontaneously, using their microphone function. When more than one student starts speaking at the same time, they work it out among themselves as to who will go first. If this happens more than once, the Judge may choose to have students use the raised hand function on the screen to call on student attorneys.

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

**10:00—10:10** **All Students are Now in One, Large Group as Impartial Jurors.**

*(10 minutes)* The Judge Releases Students from Their Small Groups and Positions Taken by Their Groups.

**The Judge Students That They Now are Impartial Jurors.**

**JURY DELIBERATIONS**

**Group #2 Atty Coaches Facilitate the Deliberations to Ensure that Everyone Who Wishes to Speak Has an Opportunity.**

**When deliberations wind down,**

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

The Judge announces the verdict. The Judge compares the verdict results to the first impression poll results. If there is time, the Judge might ask students who changed their mind why they did so.

**Landmark Case:** An Attorney Coachreferences the decision 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**

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

*(15 minutes)* **Pinpoints Two to Discuss with Students,**

Then Opens the Floor to Questions on any Topic.

**10:25 – 10:30 Judge Makes Concluding Remarks**

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

*Agenda for Students*

**Civil Discourse: Social Media and Cyberbullying**Legal Skills as Life Skills

*90-Minute Distance-Learning Module*

**Advance Work for Students at Home** *(~15 minutes)*

**Students Complete Two Quizzes and Share Them with an Adult or Older Sibling at Home**

* 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.

**Students Review One Handout to Prepare for the Civil Discourse Activity**

* How to Set Ground Rules for a Civil Discussion: Guidance for Group Activity

**Students Read Two Handouts to Prepare for the Simulation**

* One-Page Landmark Supreme Court Case: Elonis v. U.S. Facts and Case Summary
* One-Page Fictional Scenario: Government v. Andy Jackson *Meme Version*

**PART I: INTRODUCTIONS AND OVERVIEW**

**9:00—9:20 a.m. Introductions, Civil Discourse Activity, and Case Review**

*(20**minutes)*Judges Welcome the Group and Explain the Program

Four Attorney CoachesIntroduce Themselves: *Why I Chose the Law*

**Group #1 Atty Coaches Lead Discussion and Activity with All Students**

* **Discussion:** Civility Self-Reflection Quiz
* **Activity:** Setting Civil Discourse Ground Rules

**Group #2 Atty Coaches Briefly Review with All Students**

* The Landmark Case: Facts and Case Summary
* The Fictional Scenario

**First-Impression Poll**

**Question: Based on The Readings and the In-Court Review, Students**

**Participate in a Poll Prior to the Arguments.**

*This is not a commitment to a position. It is a gauge of your first impressions. Based on the information you now have, which side do you initially favor? Andy or the Government*

**PART II: ALL STUDENTS SERVE AS ATTORNEYS**

**9:20 – 9:40 Small Group Preparation. All Students are Attorneys.**

*(20 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 learn about advocacy and the role of lawyers.

With their pair of attorney coaches, each group fills out and discusses the **Arguments Worksheet.** Identify arguments on both sides. *(~5 minutes)*

Each group discusses 1) How they will present their arguments *(~10 minutes);* and 2) how they will refute the other side’s anticipated arguments. *(~5 minutes)*

**9:40 – 10:00 a.m. Return to the Large Group. All Students are Attorneys.**

*(20 minutes)*Judges Explain the Role of the Attorneys Representing Each Side **Judges Guide the Presentation of Arguments.** *(~10 minutes each side)*

All students have the opportunity to make arguments live and in the chat box.

**Group #2 Atty Coaches monitor and report on arguments in the chat box.**

*Brief Stretch Break in Place*

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

**10:00—10:15 a.m.** **All Students are Now in One, Large Group as Impartial Jurors.**

*(15 minutes)* Students are Released from Small Groups and Positions Taken by Their Groups.

**Judges Administer the Oath and Give Generic Jury Instructions.**

**JURY DELIBERATIONS**

* **Group #2 Atty Coaches Facilitate the Deliberations to Ensure that Everyone Who Wishes to Speak Has an Opportunity.**
* **Group #1 Atty Coaches monitor/report on chat box statements.**

**Verdict Poll:** **Online Poll is Conducted to Come to a Verdict.**

The Judges announce the verdict. Attorney coaches from both sides compare Verdict Poll to First-Impression Poll.

**If there is time,** the Judges might ask for students who changed their mind

from the first-impression poll to explain what persuaded them.

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

**10:15 – 10:30 a.m. Judges Lead a Discussion on the Reality Check Quiz**

*(15 minutes)*then Opens the Floor to Questions on any Topic.

**10:30 a.m. Adjournment and Students Complete Feedback Form**

***Student and Coach Packet:*** *Summary of Landmark Case*

**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.

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

Fictional Scenario: Memes as Artistic Expression or True Threats?

Andy Jackson is a 19-year-old sophomore at Bay State College where he has a basketball scholarship. He and Sarah Somers have gone through a difficult breakup, after which he says she started rumors alleging that he tested positive for the coronavirus but didn’t report his status to his basketball coach.

If true, Andy could lose his scholarship for violating the team’s zero-tolerance COVID-19 health and safety regulations. His friends show him Sarah’s Instagram video of him having a coughing spell while dribbling a basketball in her driveway. Andy, who has severe allergies, becomes enraged at the possibility that he might lose his place on the basketball team, but he has to go to his DJ job that night and act as if everything is okay.

Andy is a popular campus DJ and rapper known for lyrics that have controversial double meanings. That night, he posts a meme of himself performing a parody of some well-known rap lyrics saying that “players know how to weaponize Corona” against liars making false accusations against them. Andy includes in the meme a series of skull emojis, a wink emoji with a beer emoji.

When Sarah sees the memes, she 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 basketball coach and the director of campus life. Andy says Sarah is just playing dumb if she claims she doesn’t know what he means by “players” and “Corona.” Obviously, he is referring to guys who date a lot and drink beer.

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 whether the lyrics were referring to the coronavirus or Corona beer, either could be weaponized to injure or kill Sarah. The skull emojis confirm 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 with your peers.

**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

*Civility Self-Reflection Tool -- Discussion Prompts for Attorney Coaches*

**Civil Discourse and Difficult Decisions Self-Reflection Tool: Discussion Starter**

**Instructions:** Students circle the option that best applies to them when they are with peers. Attorney coaches choose several points from the following to stimulate conversation.

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

• Very Frequently • Frequently • Occasionally • Rarely • Never

***Would people say you, typically, are an inflamer, an informer, an inquirer, an influencer, a good listener, a comedian? What other roles do people take in heated conversations?***

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

• Very Frequently • Frequently • Occasionally • Rarely • Never

***Why do you tend to remain silent? Can that be a good thing? What makes you comfortable enough to speak?***

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

• Very Frequently • Frequently • Occasionally • Rarely • Never

***What do you say and do?***

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

• Very Frequently • Frequently • Occasionally • Rarely • Never

***When people are really listening to you, what difference does that behavior make to you? What difference does it make in the conversation?***

**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

***What do you say to yourself so that you really listen, not just wait for your turn to speak?***

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

• Very Frequently • Frequently • Occasionally • Rarely • Never

***What does that mean? How does it work?***

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

• Very Frequently • Frequently • Occasionally • Rarely • Never

***How do you use silence? How effective is it?***

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

• Very Frequently • Frequently • Occasionally • Rarely • Never  
***Why? Give an example of what you can say or do/not do when someone is disrespectful to you.***

**9. I ask clarifying questions.**

• Very Frequently • Frequently • Occasionally • Rarely • Never

***Give examples of clarifying questions.***

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

• Very Frequently • Frequently • Occasionally • Rarely • Never

***What limits do you put on yourself to keep from talking too much? On the other hand, what do you do/say when you can’t get a word in edgewise?***

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

• Very Frequently • Frequently • Occasionally • Rarely • Never

***When you feel strongly about a subject, how do you monitor yourself so that you don’t interrupt?***

**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

***How do you feel when someone is whispering while you’re talking, even when they’re trying not to be disruptive?*  
13. I listen for what people mean – not just what they say -- when I disagree with them.** Very Frequently • Frequently • Occasionally • Rarely • Never  
***What do people do/say when they are listening just to the words? What do they do/say when they are listening for what the person means?***   
  
**14. When peers disagree, I find common ground and call attention to areas of agreement.**• Very Frequently • Frequently • Occasionally • Rarely • Never  
***What are some phrases you can use to bridge the gap when you are trying to find common ground?***

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

• Very Frequently • Frequently • Occasionally • Rarely • Never

***How do you feel when someone repeats a point that already has been made?***

**16. I roll my eyes or make subtle faces when I disagree with someone’s opinion.**• Very Frequently • Frequently • Occasionally • Rarely • Never  
***How do nonverbals detract from the civility of the conversation, even when the speaker doesn’t see you rolling your eyes or making faces?***

**Student Packet:**  *Setting Ground Rules - Students Fill This Out Prior to the Program*

**Civil Discourse and Difficult Decisions**

*Setting Ground Rules for a Civil Discussion*

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. Each side tests the arguments of the other side, and a judge holds everyone to the same protocol and standards of appropriate behavior. Asking questions of each side is an integral part of the process. The adversarial system is no place for incivility. In fact, court proceedings are set up to promote effective civil discourse.

**Start** 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 making** demeaning 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.

**Small-Group Preparation with Student Attorneys**

Issue Spotting and Argument Development in Three Steps

**Small-Group Guidance for Attorney Volunteers**

1. **Have different students read aloud each of the issues/questions below. Tell them you will come back to the questions after they do some issue spotting.**

**Issue Spotting**

1. **Walk the students through the arguments worksheet and have them identify which arguments would be made by each side – Andy Jackson or the Government.**

**Argument Development**

1. **Return to the questions below and guide students through possible arguments for each question. Have them:**

* **Develop arguments for the side they are representing.**
* **If there is time, anticipate arguments for the opposing side.**

**---------------------------------------------------------------------------------------------------------------------**

**Practice Questions for the Attorney Volunteers in the Small-Group Preparation**

**These are the Questions the Presiding Judges Use During the Simulation -- with**

**Their Own Follow-Up Questions.**

**Attorney Volunteers During the Prep Session/Judges During the Simulation:**

**The Issue Before Us Today 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 threatening another person?

**Question #1**

Does the First Amendment protect Andy Jackson’s speech, even though it may be potentially upsetting?

**Question #2**

Is it necessary to determine if the speaker means what he says in order to suppress it?

***For Attorney Coaches and Judge:*** *Possible Student Arguments*

***Elonis v. United States* Applied to Memes Scenario**

*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 meme and 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 meme and 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:** |

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

**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**
2. 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**
3. 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**
4. 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 Judges or Discussion Leaders*

**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.

**Student Packet**: *Arguments Worksheet for All Students to Use During the Program*

**Elonis v. United States Applied to Teen Facebook Postings**

Arguments Worksheet – Preparation for Arguments Before the Judge

**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.

***Elonis v. United States***

*Arguments Worksheet – Answer Key for Attorney Coaches*

**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**

**Administrative Office of the U.S. Courts**

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I consent to having photographs/video/audio recordings taken of me for use by the Administrative Office of the U.S. Courts (AO) for educational and informational purposes. I understand that:

* These images and audio recordings, in whole or in part, may be used in or combined with other AO educational and informational programs, and
* These images and audio recordings may be disseminated to the public by various means, including on the Internet.

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**Signature**

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**Print Name**

**Date** \_\_\_\_\_\_\_\_\_\_\_\_