***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? If so, why? If not, why?
* 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?
 | **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 will disappear into “thin air” – a reference to the afterlife.
* 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 saying “I didn’t mean it.”

**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. 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 computer skills? 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 and winking smiley face. 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 newspaper and broadcast 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 a statement as a threat, then it may be prosecuted as a threat. 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 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.**