*Checklist/Table of Contents: Student Attorneys’ Specialized Folder*

**Civil Discourse and Difficult Decisions**

*Legal Skills as Life Skills*

**Student attorneys get two folders – 1) the folder all students receive; 2) a specialized folder with the following materials:**

1. **Agenda**

**Courtroom Introduction to *Elonis v. U.S.***

1. Elonis Facts and Case Summary
2. Fictional Scenario
3. Emojis for the Fictional Scenario – Skull and Winking Smiley Face

**Courtroom Simulation -- Preparation Materials for Student Attorneys**

1. Opening Protocol
2. Talking Points
3. Closing Arguments Worksheet
4. **Feedback Form**

**Generic Agenda:** *Courtroom Handout for All Participants and Observers*

**Civil Discourse and Difficult Decisions**

Legal Skills as Life Skills

**8:00 – 8:25 a.m**. **Students Arrive and Complete**

*(25 minutes)*  **1) Reality Check Quiz**

 **2) Civility Self-Reflection Sheet**

**8:25 —8:35 a.m.** **Welcome and Interactive Courtroom Tour**

*(10 minutes)*

**8:35—9:05 a.m. Introductions and Civil Discourse Activity**

*(30 minutes)*Attorneys Introduce Themselves: *Why I Chose the Law*

* **Discussion:** *Civility Self Reflection*
* **Handout**: *Setting Civil Discourse Ground Rules*

**9:05 – 9:15 a.m. Attorney Coaches #1 and #2 Present**

*(10 minutes)*  **1)** *Elonis v. U.S.* Facts and Case Summary **2)** Fictional Scenario

 **In Advance**: **Teacher Selects Eight Students to be Attorneys**

**9:15 –9:40 a.m. Student Attorneys and Student Jurors Prepare for the Simulation**

*(25 minutes)* **In two rooms outside the courtroom:** One attorney coach works with Andy Jackson’s lawyers. One attorney coach works with the Government’s lawyers.

 **In the courtroom:** An attorney volunteer works with the student jurors to identify possible arguments for both sides. The volunteer talks about jury service and the importance of civility in jury deliberations.

**9:40 – 9:45 a.m. Stretch Break in the Courtroom**

*(5 minutes) Student attorneys and coaches may continue preparing, if they wish.*

**9:45 – 10:45 amSimulation: *Elonis v. U.S.***

*Total: 60 minutes*

*(~30 minutes)* **Oral Arguments**

Student attorneys present their arguments to the Judge and student jury.

*(~30 minutes)* **Jury Deliberations in the Gallery of the Courtroom**

The facilitator guidesthe deliberations. Only student jurors participate.

 **The Judge Asks for a Show-of -Hands Verdict**

If there is time, the Judge might ask one juror on each side to volunteer to explain their rationale.

**10:45 – 11:30 p.m. The Judge Leads a Discussion on the Reality Check Quiz**

*(45 minutes)*  **Students Complete Feedback Forms**

 **Group Photo and Informal Socializing with the Judge and Attorneys**

 **Adjournment**

**Exhibit E** *Handout: Facts and Case Summary for Everyone (Volunteers and Participants)*

**Facts and Case Summary**

***Anthony Douglas* *Elonis v. United States, 135 S. Ct. 2001 (2015)***

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.

*[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.*

On June 1, 2015, the Supreme Court reversed the lower courts and held that the reasonable person standard is not sufficient for a criminal statute and that for a person to be criminally charged, he or she must be aware of his or her wrongdoing. The case was remanded to the lower court

**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.

**Exhibit F** *Handout: Fictional Scenario for Everyone (Volunteers and Students)*

***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.

**Exhibit G** *Opening Protocol: ONLY for the Judge, Attorney Coaches, and 8 Student Attorneys*

***Elonis v. United States* Applied to Students Facing Off on Facebook**

**Note:** Always stand when addressing the Judge.

**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 Government 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. The moderator will facilitate your deliberations so that everyone has the opportunity to speak. At the end, we will take a vote to determine the verdict.**

**Exhibit H** *Talking Points: ONLY for the Judge, Attorney Coaches, and the Eight Student Attorneys*

***Elonis v. United States* Applied to Teen Facebook Postings** *Talking Points – Can be Modified by Student Attorneys.*

**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.** |

**ATTORNEY #4 FOR EACH SIDE PRESENTS CLOSING ARGUMENTS**

Attorney #4 on each side refers to his/her worksheet and notes to deliver the closing arguments, summarizing the key points for Elonis and for the Government.

**After the Last Closing Argument**

**Judge***:* **Now that you’ve heard the closing arguments, I will turn over the program to the moderator who will facilitate the jury deliberations.**

**Exhibit I** *Closing Arguments Worksheet: ONLY for Judge, Attorney Coaches, and 8 Student Attorneys*

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

Worksheet Specifically for Student Attorney #4

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

**Each Student 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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**Exhibit K** *Feedback Form for Students*

**Civil Discourse and Difficult Decisions**

*Student Feedback*

**Judge’s Name \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date \_\_\_\_\_\_\_\_\_\_\_\_\_**

**Your Name** \_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

*(first) (last)*

**School \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ City \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Your Grade \_\_\_\_\_\_\_**

**\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\***

*Feel free to use the back for additional comments.*

**1. Setting.** What was it like to have the program in a courtroom?

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**2. Judge.** How is this judge different from television/movie judges?

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**3. Volunteer Attorneys.** How were the attorneys different from television/movie lawyers?

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**4. Student Attorneys:** If you were a student attorney, what was the experience like for you?

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**5. Student Jurors:** If you were a student juror, what were the deliberations like for you?

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**6. As a result of this program:**  How do feel about serving on a real jury?

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**7. What will you remember from the Reality Check discussion?**

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**8. What civility skill do you plan to practice in class?**

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**9. Would you recommend the program?** Yes \_ No \_ What will you tell your peers about it?

