



1-10-2021

## The Getaway Driver Behind the Screen: How Accomplice Liability Should Extend to Dissemination of Violent Videos After Mass Shootings

Emma D. Woidtke

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# The Getaway Driver Behind the Screen: How Accomplice Liability Should Extend to Dissemination of Violent Videos After Mass Shootings

Emma D. Woitke\*

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## I. INTRODUCTION

On March 15, 2019, a shooter opened fire on two mosques in Christchurch, New Zealand.<sup>1</sup> As explained in his manifesto, the shooter specifically intended to

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\* J.D., University of the Pacific, McGeorge School of Law, 2020; B.A. Political Science, Loyola University New Orleans, 2018. Thank you to Professor Leslie Gielow Jacobs, Justice Anthony M. Kennedy Professor of Law, for the inspiration, support, and guidance that was necessary for me to complete this comment. Further thanks to Professor Michael Vitello, Distinguished Professor of Law, for supplemental support on the criminal law issues that are raised in this Comment. And as always, thank you to my Village, that has been there for me through every academic and personal endeavor that I have undertaken in my life.

1. *Christchurch Attack: Brenton Tarrant Pleads Not Guilty to All Charges*, BBC (June 14, 2019), [https://www.bbc.com/news/world-asia-48631488?intlink\\_from\\_url=https://www.bbc.com/news/topics/c966094wvymqt/christchurch-mosque-shootings&link\\_location=live-reporting-story](https://www.bbc.com/news/world-asia-48631488?intlink_from_url=https://www.bbc.com/news/topics/c966094wvymqt/christchurch-mosque-shootings&link_location=live-reporting-story) (on file with the *University of the Pacific Law Review*).

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target the Muslim community.<sup>2</sup> The gunman now faces fifty-one counts of murder and forty counts of attempted murder for the carnage he caused.<sup>3</sup>

His campaign of terror did not stop inside the mosques.<sup>4</sup> Footage of the attack instantaneously radiated far beyond Christchurch due to the shooter's contemporaneous livestreaming of the attack to Facebook from a camera mounted on his head.<sup>5</sup> Reproduction and dissemination of the horrifying video continued on the Internet, even after the livestream ended.<sup>6</sup>

The attack in New Zealand and the associated livestream are not isolated instances.<sup>7</sup> On October 9, 2019, a gunman attacking a synagogue in Germany streamed a similar video of his attack online.<sup>8</sup> Within thirty minutes of posting the video, approximately 2,200 people streamed the footage before the website host removed it.<sup>9</sup> Initial investigations found that viewers of the German video sent messages encouraging others to watch the video and share it.<sup>10</sup> The footage online from Christchurch and Germany continued on with a life of its own, long after the terror attacks subsided.<sup>11</sup>

Following violent attacks, victims and their families face exposure to and may relive these horrific events through traumatizing online footage.<sup>12</sup> Not only do

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2. Max Walden, *New Zealand Mosque Attacks: Who Is Brenton Tarrant?*, AL JAZEERA (Mar. 17, 2019), <https://www.aljazeera.com/news/2019/03/zealand-mosque-attacks-brenton-tarrant-190316093149803.html> (on file with the *University of the Pacific Law Review*).

3. *Christchurch Attack: Brenton Tarrant Pleads Not Guilty to All Charges*, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*; *New Zealander Jailed for Sharing Christchurch Mass Shooting Video*, AL JAZEERA (June 18, 2019), <https://www.aljazeera.com/news/2019/06/zealander-jailed-sharing-christchurch-mass-shooting-video-190618063252482.html> (on file with the *University of the Pacific Law Review*) [hereinafter *New Zealander Jailed*].

7. *See Germany Shooting: 2,200 People Watched on Twitch*, BBC NEWS (Oct. 10, 2019), <https://www.bbc.com/news/technology-49998284> (on file with the *University of the Pacific Law Review*) (describing a similar situation in Germany where an attacker at a synagogue live-streamed his attack to online website Twitch).

8. *Id.*

9. *Id.*

10. *Id.*

11. *See, e.g., Video Showing Deadly Shooting Near Synagogue on Yom Kippur was Livestreamed*, CBS NEWS (Oct. 9, 2019, 7:51 PM), <https://www.cbsnews.com/news/germany-synagogue-shooting-halle-grenade-reportedly-thrown-jewish-cemetery-today-2019-10-09/> (on file with the *University of the Pacific Law Review*) (illustrating the widespread sharing of the video of an attack against a German mosque and that “the video was viewed by about 2200 people in the halfhour before it was flagged and removed . . . and [d]ownloaded versions, however, were circulated in far-right online groups”); Olivia Solon, *Six Months after Christchurch Shootings, Videos of Attack Are Still on Facebook*, NBC (Sept. 20, 2019), <https://www.nbcnews.com/tech/tech-news/six-months-after-christchurch-shootings-videos-attack-are-still-facebook-n1056691> (on file with the *University of the Pacific Law Review*) (reporting that the video from the Christchurch livestream was still on Facebook six months after the attack happened).

12. Amy Wiggins, *Christchurch Mosque Shooting: Livestream Viewing Traumatic for Many*, NZ HERALD (Mar. 20, 2019), [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=12214696](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12214696) (on file with the *University of the Pacific Law Review*).

victims and their families face an emotional—and potentially physical—uphill battle of trying to comprehend and heal from their firsthand accounts, but they must also live in a world where what is likely to be the darkest day of their lives has found a new life online.<sup>13</sup> The footage from the terror livestreams often depicts wounded or dead bodies and other reminders of the carnage.<sup>14</sup>

In New Zealand, one of the sharers of the footage faces a jail sentence of twenty-one months under a New Zealand law prohibiting the distribution of objectionable content.<sup>15</sup> Globally, other countries have laws that similarly punish the glorification of terror.<sup>16</sup> However, it is unlikely that regulation of violent footage in the United States, under similar legislation, is possible due to the strong speech protections the United States Constitution provides.<sup>17</sup>

First Amendment jurisprudence in the United States protects speech that is unpopular and upsetting.<sup>18</sup> Rationalization of the strength of the First Amendment, in part, is founded on the idea that freedom of speech concerning public issues lies at the heart of self-governance.<sup>19</sup> First Amendment protections make regulation of speech impossible unless such regulation can pass heightened scrutiny or satisfy one of the “categories” the Supreme Court determined to be unworthy of protection.<sup>20</sup>

A distinction between speaking and expressing exists from a theoretical

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13. See Katy McLaughlin & Jeena A. Kar, *Aftermath of the Parkland Shooting: A Case Report of Post-Traumatic Stress Disorder in an Adolescent Survivor*, CUREUS (Nov. 11, 2019), [https://assets.cureus.com/uploads/case\\_report/pdf/24706/1576171026-20191212-29551-rq4x53.pdf](https://assets.cureus.com/uploads/case_report/pdf/24706/1576171026-20191212-29551-rq4x53.pdf) (on file with the *University of the Pacific Law Review*) (describing the impact of post-traumatic stress disorder in a student who survived a mass shooting at her school); Wiggins, *supra* note 12 (describing the potential psychological impacts that may result after viewing violent footage); see also Graham Macklin, *The Christchurch Attacks: Livestream Terror in the Viral Video Age*, CTC SENTINEL, July 2019, at 18 <https://ctc.usma.edu/app/uploads/2019/07/CTC-SENTINEL-062019.pdf> (on file with the *University of the Pacific Law Review*) (describing the threat of terrorism in New Zealand to be “a ‘latent’ threat rather than a ‘lived reality,’ [where the country] suffered the single largest loss of life to terrorism in its history”).

14. Wiggins, *supra* note 12.

15. Charlotte Graham-McLay, *New Zealand Man Gets 21 Months for Sharing Video of Christchurch Attacks*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/world/asia/new-zealand-video.html> (on file with the *University of the Pacific Law Review*).

16. See *infra* Part III (detailing some of the approaches taken by other countries); see also *Australia Blocks Access to Eight Websites Showing Video of New Zealand Mosque Attacks*, REUTERS (Sept. 8, 2019), <https://www.reuters.com/article/us-newzealand-shooting-australia/australia-blocks-access-to-eight-websites-showing-video-of-new-zealand-mosque-attacks-idUSKCN1VU034> (on file with the *University of the Pacific Law Review*) (describing new legislation in Australia that permits penalization of social media companies for failing to expeditiously remove violent content from their platforms).

17. See *infra* Part IV (summarizing the various complexities of the First Amendment and the strength of the right to freedom of speech).

18. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (arguing that the remedy to bad speech is “more speech” and Americans should challenge laws that abridge free speech).

19. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

20. See Robert A. Sedler, *The “Law of the First Amendment” Revisited*, 58 WAYNE L. REV. 1003, 1030 (2013) (describing that First Amendment litigation requires “‘heightened scrutiny,’ which requires that the restriction be justified by a compelling governmental interest and narrowly drawn to serve that interest”); see also *id.* at 1009–10 (describing that the Court has not found freedom of expression to be protected in instances where there are “(1) unlawful verbal acts, (2) obscenity, (3) child pornography, and (4) government speech”).

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standpoint.<sup>21</sup> Within this dichotomy, speech is a “contemplation of engaging in some action” and expression amounts to actual engagement in that action.<sup>22</sup> Under this structure, the contemplation stage receives First Amendment protections, whereas the conduct does not.<sup>23</sup> The law considers conduct as fundamentally different than speech and does not automatically provide the same protections it does to speech.<sup>24</sup>

In the context of sharing footage of mass shootings, the “sharer” of footage online intends to aid the shooter’s violent tirade.<sup>25</sup> The sharer’s actions are analogous to aiding the actions of the shooter, likely breaching the line of speech and becoming conduct.<sup>26</sup> In actively reproducing the footage online, the sharer’s conduct extends beyond typical First Amendment protection.<sup>27</sup> Instead, this conduct amounts to an affirmative intent to help the shooter carry out his act of terror and justifies the extension of accomplice liability.<sup>28</sup> This Comment argues that accomplice liability should extend to individuals who disseminate violent footage a principal attacker initially publishes because the sharer is helping the principal attacker complete their crime and not simply engaging in protected speech.<sup>29</sup>

Part II describes the Christchurch attack and the actions of the sharers that led to criminal charges.<sup>30</sup> Part III examines international approaches to the regulation of speech that depict violence and terror.<sup>31</sup> Part IV presents the limitations set by First Amendment jurisprudence.<sup>32</sup> Part V provides a brief introduction to the theory of accomplice liability in the United States.<sup>33</sup> Part VI argues that a theory of aiding and abetting is a preferable way to hold online sharers accountable for their actions.<sup>34</sup>

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21. Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427, 439 (2015).

22. *Id.*

23. *Id.*

24. *Id.*

25. See *infra* Section VI.A (discussing what sharers are doing to promote the offense of terror).

26. See Schauer, *supra* note 21, at 439 (describing the distinction between thinking about conduct and actually engaging in the conduct).

27. See *infra* Part VI (illustrating the difference between freedom of speech and where the threshold for accomplice liability may lie for those who disseminate footage online).

28. See *United States v. Jaramillo*, 42 F.3d 920, 923 (5th Cir. 1992) (describing the requirements to find an accomplice liable for aiding the principal actor); see also *United States v. Williams*, 985 F.2d 749, 753 (5th Cir. 1993) (“[a] conviction [for aiding and abetting] ‘merely requires that [defendants’] association and participation with the venture were in a way calculated to bring about that venture’s success.’”) (quoting *United States v. Salazar*, 958 F.2d 1285, 1292 (5th Cir. 1992)).

29. See *infra* Part IV (describing the current strength and narrow ability for the government to regulated speech in the United States).

30. *Infra* Part II.

31. *Infra* Part III.

32. *Infra* Part IV.

33. *Infra* Part V.

34. *Infra* Part VI.

## II. THE NEW ZEALAND ATTACK

New Zealand Prime Minister, Jacinda Ardern, declared the March 15, 2019 events in Christchurch to be “one of New Zealand’s darkest days.”<sup>35</sup> Exemplifying Prime Minister Ardern’s declaration are narrative accounts from the survivors of the attack.<sup>36</sup> One survivor of the attack attributed his survival to hiding under the bodies of those already killed.<sup>37</sup> Other victims witnessed the shooting of a father and his daughter while sustaining bullet wounds themselves.<sup>38</sup> Undoubtedly, the events of March 15, 2019, will remain in the minds of New Zealanders indefinitely.<sup>39</sup> Section A provides an overview of the moments leading up to and during the Christchurch shooting.<sup>40</sup> Section B summarizes the responses taken online after the livestream ended.<sup>41</sup>

### A. The Attack

Shortly before the carnage on the Muslim community in Christchurch began, a twenty-eight-year-old Australian man posted on the Internet.<sup>42</sup> Brenton Tarrant’s 8chan post declared that he believed it was time to carry out an attack.<sup>43</sup> Tarrant’s choice to post to 8chan was likely not a random choice.<sup>44</sup> 8chan is an online forum tied to racially fueled mass violence.<sup>45</sup> In 2019 alone, three mass shootings occurred after posts filled with hate poured onto 8chan.<sup>46</sup>

On Tarrant’s 8chan posting, he provided a link to his manifesto and directions

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35. *Jacinda Ardern on the Christchurch Shooting: ‘One of New Zealand’s Darkest Days,’* THE GUARDIAN (Mar. 15, 2019), <https://www.theguardian.com/world/2019/mar/15/one-of-new-zealands-darkest-days-jacinda-ardern-responds-to-christchurch-shooting> (on file with the *University of the Pacific Law Review*).

36. *Id.*; see Sean Flynn, *The Harrowing Hours and Defiant Aftermath of the New Zealand Mosque Shootings*, GQ (Oct. 10, 2019), <https://www.gq.com/story/new-zealand-mosque-shooting-christchurch> (on file with the *University of the Pacific Law Review*) (providing a narrative of the events of the attack and the aftermath in the days following).

37. Mohamad Abdalla, *Finding Dignity and Grace in the Aftermath of the Christchurch Attack*, THE CONVERSATION (Mar. 22, 2019), <https://theconversation.com/finding-dignity-and-grace-in-the-aftermath-of-the-christchurch-attack-114072> (on file with the *University of the Pacific Law Review*).

38. *Id.*

39. See *Jacinda Ardern on the Christchurch Shooting: ‘One of New Zealand’s Darkest Days,’* *supra* note 35 (providing the Prime Minister’s response and description of the Christchurch attack).

40. *Infra* Section II.A.

41. *Infra* Section II.B.

42. Walden, *supra* note 2.

43. Macklin, *supra* note 13, at 18.

44. See Drew Harwell, *Three Mass Shootings This Year Began with a Hateful Scream on 8chan. Its Founder Calls It a Terrorist Refuge in Plain Sight.*, WASH. POST (Aug. 4, 2019, 6:51 PM), <https://www.washingtonpost.com/technology/2019/08/04/three-mass-shootings-this-year-began-with-hateful-scream-its-founder-calls-it-terrorist-refuge-plain-sight/> (on file with the *University of the Pacific Law Review*) (describing 8chan’s prevalence with online extremists).

45. *Id.*

46. *Id.*

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to access his livestream.<sup>47</sup> Tarrant’s post directed readers to “please do your part spreading my message,” especially in the event he did not survive his attack.<sup>48</sup> Tarrant’s seventy-four-page manifesto he linked to the livestream included strong sentiment of neo-fascist ideology and anti-immigration rhetoric.<sup>49</sup>

Shortly after posting, Tarrant began his livestream and entered the first mosque with a semi-automatic rifle where he subsequently opened fire.<sup>50</sup> Upon concluding his attack at the first mosque, Tarrant then drove three miles to a second mosque and continued his massacre.<sup>51</sup> During the shooting, Tarrant’s livestream on Facebook attracted an online audience.<sup>52</sup> Some watched in horror and others in support.<sup>53</sup> One columnist described the attack and livestream “as almost an internet performance.”<sup>54</sup>

The performative nature of Tarrant’s attack posed difficult questions for journalists.<sup>55</sup> Following the shooting, the international editor for the New York Times described the actions of Tarrant as “using all of the power of social media and the internet to spread his vile views.”<sup>56</sup> In weighing how to cover the attack, the editor described the need of the media to “avoid becoming the tools of a terrorist” in light of Tarrant’s apparent coordination of online publications before, during, and after the shooting.<sup>57</sup> The media had to weigh coverage of a news event worthy of global coverage against providing the shooter the platform and attention he desired.<sup>58</sup>

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47. Macklin, *supra* note 13, at 18; *cf. id.* (noting that Tarrant also sent a link to a generic email of the Prime Minister indicating that he was preparing to carry out his attack).

48. *Cf. id.* at 19 (providing an argument that Tarrant’s goal was not to kill people of the Muslim faith, but rather to make a *video* of someone killing Muslims).

49. Walden, *supra* note 2.

50. *Id.*

51. *Id.*

52. Macklin, *supra* note 13, at 20.

53. See *Christchurch Man Jailed for Sharing Video Footage of Massacre*, THE GUARDIAN (June 17, 2019), <https://www.theguardian.com/world/2019/jun/18/christchurch-man-jailed-for-sharing-video-footage-of-massacre> (on file with the *University of the Pacific Law Review*) (reporting that Arps described the live-stream video as “awesome”); Macklin, *supra* note 13, at 20 (noting that Facebook users watching the attack did not report it to Facebook for twenty-nine minutes).

54. Hanna Ingber, *The New Zealand Attack Posed New Challenges for Journalists. Here Are the Decisions the Times Made*, N.Y. TIMES (Mar. 19, 2019), <https://www.nytimes.com/2019/03/19/reader-center/new-zealand-media-coverage.html> (on file with the *University of the Pacific Law Review*); see Macklin, *supra* note 13, at 20 (theorizing that “Tarrant grasped intuitively that digital technology could and would amplify his murderous message, ensuring its projection far beyond the cloistered confines of the 8chan sub-thread on which it originated”).

55. Ingber, *supra* note 54.

56. *Id.*

57. *Id.*; see Frank Shyong, *Column: Mass Shooters Seek Notoriety, and We, the Media, Provide It. Is There Another Way?*, L.A. TIMES (Aug. 12, 2019), <https://www.latimes.com/california/story/2019-08-11/mass-shooters-seek-notoriety-in-media> (on file with the *University of the Pacific Law Review*) (describing the role of the media in mass shootings and how it motivates the shooters to commit the act and the coverage inspires others to carry out similar attacks).

58. Ingber, *supra* note 54; see Shyong, *supra* note 57 (describing the considerations that journalists need

*B. Internet Conduct in Relation to the Christchurch Shooting*

Within a day of the shooting, Facebook removed approximately 1.5 million videos of the Christchurch attack.<sup>59</sup> Of the 1.5 million videos, Facebook blocked 1.2 million videos using automated technology.<sup>60</sup> Elsewhere online, users “repackaged and re-cut” the video to “outsmart the platform’s detection system” and put the video on other websites.<sup>61</sup> Comments users posted to online message boards discussed saving the video to make it available for republication in the event of removal from internet sites.<sup>62</sup> Estimates project that more than 800 “visually distinct” uploaded videos circled the Internet.<sup>63</sup>

One New Zealander now faces charges for his role in disseminating the video online.<sup>64</sup> After the attack, self-proclaimed white supremacist Philip Arps shared the footage.<sup>65</sup> Arps went out of his way to doctor the footage to include crosshairs and a kill count.<sup>66</sup> The footage he manipulated made it look as if the video was from the perspective of a first-person shooter game.<sup>67</sup>

Arps’ purported goal of editing the livestream was to “lighten up the video and make it a bit funny by making it into a meme that would then be shared on social media.”<sup>68</sup> Arps faces two counts of distribution of objectionable publications under New Zealand’s “Films, Videos, and Publications Classification Act” (“Classification Act”).<sup>69</sup> Under the Classification Act, material is objectionable when it includes publications that promote “acts of torture or the infliction of extreme violence or extreme cruelty” among other depictions.<sup>70</sup> The maximum penalty

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to make when deciding how to cover mass shooting events).

59. Macklin, *supra* note 13, at 20.

60. *Id.*; see Issie Lapowsky, *Why Tech Didn’t Stop the New Zealand Attack from Going Viral*, WIRED (Mar. 15, 2019), <https://www.wired.com/story/new-zealand-shooting-video-social-media/> (on file with the *University of the Pacific Law Review*) (discussing how Facebook has been implementing and developing automated tools to remove uploaded content that violates their policies).

61. Macklin, *supra* note 13, at 18.

62. Ingber, *supra* note 54.

63. Macklin, *supra* note 13, at 20.

64. *New Zealander Jailed*, *supra* note 6.

65. *Id.*

66. *Id.*

67. Graham-McLay, *supra* note 15.

68. Jordan Oppert, *Man Sent to Prison for 21 Months for Distributing Footage of Christchurch Terrorist Attack Appealing His Sentence*, 1 NEWS (June 17, 2019), <https://www.tvnz.co.nz/one-news/new-zealand/man-sent-prison-21-months-distributing-footage-christchurch-terrorist-attack-appealing-his-sentence> (on file with the *University of the Pacific Law Review*).

69. David Clarkson & Anne Clarkson, *Philip Arps Charged with Sharing Live Stream of Christchurch Mosque Massacre*, STUFF (Mar. 20, 2019), <https://www.stuff.co.nz/national/christchurch-shooting/111425937/man-charged-with-sharing-live-stream-of-christchurch-mosque-massacre> (on file with the *University of the Pacific Law Review*); *White Supremacist Philip Arps Has Second Appeal for Sharing Mosque Shooting Video*, STUFF (Nov. 18, 2019), <https://www.stuff.co.nz/national/crime/117493354/white-supremacist-philip-arps-has-second-appeal-for-sharing-mosque-shooting-video> [hereinafter *White Supremacist Philip Arps*] (on file with the *University of the Pacific Law Review*).

70. See *Censorship and the Internet*, DEP’T INTERNAL AFF., <https://www.dia.govt.nz/Censorship-and-the->



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under the Classification Act is imprisonment for fourteen years.<sup>71</sup> Arps' sentence for his acts amounted to twenty-one months, including a range of post-release conditions such as no internet access.<sup>72</sup>

### III. GLORIFICATION LAWS: NEW ZEALAND AND BEYOND

Internationally, governments have set guidelines and created laws that regulate speech—specifically speech promoting or spreading messages by terrorists.<sup>73</sup> Section A details New Zealand's Office of Censorship, particularly its response to the Christchurch shooting.<sup>74</sup> Section B discusses the United Kingdom's 2006 Terrorism Act and other specific laws against the glorification of terror.<sup>75</sup> Section C explores a new law Australia passed after the Christchurch shooting that regulates the behavior of online platforms by holding the executives in charge of such sites liable.<sup>76</sup>

#### A. New Zealand

Since 1892, various forms of censorship legislation monitor the conduct of publications within New Zealand.<sup>77</sup> Currently, New Zealand has an office responsible for censoring online content.<sup>78</sup> In 1993, the Classification Act in New Zealand established the Office of Film and Literature Classification (“OFLC”).<sup>79</sup> Today, the OFLC remains the office New Zealand charged with censoring and classifying content.<sup>80</sup> The OFLC's purported purpose “is to prevent harm to the

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Internet (last visited June 6, 2020) (on file with the *University of the Pacific Law Review*) (providing other types of objectionable material to include “exploitation of children or young persons for sexual purposes; use of violence or coercion to compel any person to participate in sexual conduct; sexual conduct upon the body of a dead person; use or urine or excrement in association with degrading or dehumanizing or sexual conduct . . . [and] bestiality”).

71. Clarkson & Clarkson, *supra* note 69.

72. Oppert, *supra* note 68 (providing all of Arps' post-release conditions including “psychiatric assessments, no internet access and drug and alcohol treatment”).

73. See *infra* Sections III.A–C (discussing the laws and regulation by New Zealand, the United Kingdom, and Australia).

74. *Infra* Section III.A.

75. *Infra* Section III.B.

76. *Infra* Section III.C.

77. See *History of Censorship in New Zealand*, OFF. FILM & LITERATURE CLASSIFICATION, <https://www.classificationoffice.govt.nz/about-nz-classification/history-of-censorship-in-new-zealand/> (last visited June 6, 2020) (on file with the *University of the Pacific Law Review*) [hereinafter *History of Censorship*] (describing the history of classification laws in New Zealand from 1892 to present).

78. *New Zealand's Classification Law: The Films, Videos, and Publications Classification Act, 1993*, OFF. OF FILM & LITERATURE CLASSIFICATION, <https://www.classificationoffice.govt.nz/about-nz-classification/new-zealands-classification-law/> (last visited June 6, 2020) (on file with the *University of the Pacific Law Review*) [hereinafter *New Zealand's Classification Law*].

79. *Id.*

80. *History of Censorship*, *supra* note 77.

New Zealand public by restricting the availability of publications containing harmful material.”<sup>81</sup>

Following the Christchurch attack, the OFLC released its decision on the classification of the livestream.<sup>82</sup> The OFLC found that the livestream was objectionable and promoted “the infliction of extreme violence and cruelty.”<sup>83</sup> In justifying the classification decision, the OFLC found that “the right to freedom of expression . . . is subject ‘only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’”<sup>84</sup> After the OFLC released its classification decision, journalists had to determine how to cover the event while also complying with the OFLC’s classification decision.<sup>85</sup> The OFLC’s website attempted to provide guidance to the public on what to do with the livestream footage.<sup>86</sup> Despite the OFLC’s guidelines which provided little direction to journalists, international news organizations began to make their own determinations on what they could publish.<sup>87</sup>

Falling in line with the OFLC decision and the Classification Act, major news outlets signed a pact to limit the coverage of Tarrant’s attack.<sup>88</sup> In this unprecedented action, these outlets cited the desire to limit coverage “that actively champion[s] white supremacist or terrorist ideology.”<sup>89</sup> Concerned about public reaction and the ability of general audiences to process and understand coverage, the news outlets and the OFLC’s Chief Censor further justified restrictions on publications as potentially “instructional” for future attacks.<sup>90</sup>

### B. United Kingdom

Building on previous contemporary terrorism laws, the United Kingdom enacted the Terrorism Act 2006, following the 2005 terrorist bombings in London.<sup>91</sup> The Terrorism Act 2006 created a new offense that prohibits the

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81. *New Zealand’s Classification Law*, *supra* note 78.

82. OFFICE OF FILM & LITERATURE CLASSIFICATION, OFLC REF. NO. 1900148.000, NOTICE OF DECISION UNDER SECTION 38(1): CHRISTCHURCH MOSQUE ATTACK LIVESTREAM 1 (2019), <https://www.classificationoffice.govt.nz/assets/PDFs/Christchurch-Attack-Livestream-Classification-Decision.pdf> (on file with the *University of the Pacific Law Review*).

83. *Id.* at 4.

84. *Id.* at 8.

85. See Ingber, *supra* note 54 (discussing how the “unusual nature of the attack change[d] The Times’s calculations around how to cover it”).

86. *OFLC Responds to Christchurch – What You Can Do*, OFF. FILM & LITERATURE CLASSIFICATION, <https://www.classificationoffice.govt.nz/news/latest-news/oflc-response-to-christchurch-what-you-can-do/> (last visited June 6, 2020) (on file with the *University of the Pacific Law Review*).

87. Ingber, *supra* note 54; Jack Shafer, *Why New Zealand’s Press Just Put on Blinders for Its Biggest Story*, POLITICO (May 1, 2019), <https://www.politico.com/magazine/story/2019/05/01/self-censorship-media-new-zealand-white-supremacist-2019-226766> (on file with the *University of the Pacific Law Review*).

88. Shafer, *supra* note 87.

89. *Id.*

90. *Id.*

91. Clive Walker, *Clamping Down on Terrorism in the United Kingdom*, 4 J. INT’L CRIM. JUST. 1137,

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encouragement of terrorism.<sup>92</sup>

The encouragement offense “applies to a statement that is likely to be understood as a direct or indirect encouragement . . . of acts of terrorism.”<sup>93</sup> The offense requires the actor, at the time of publication of a statement, to either intend to induce terror or be reckless in “directly or indirectly encourag[ing] . . . [members of the public] to commit, prepare or instigate” terror.<sup>94</sup> Statements glorifying terror or appearing to glorify terror are punishable under the encouragement offense.<sup>95</sup> Individuals found guilty of this charge face up to fifteen years in prison.<sup>96</sup>

In discussions leading up to a vote on the law, concerns existed that the law would be overly broad in its criminalization of speech.<sup>97</sup> For example, opponents raised concerns regarding the criminalization of speech “glorif[ying] the armed opposition to the Apartheid regime in South Africa” or speech against Israel in favor of Palestinians regarding the Israeli–Palestinian conflict.<sup>98</sup> Despite such concerns, the law ultimately passed and remains in effect as a part of the United Kingdom’s terror legislation.<sup>99</sup>

C. *Australia*

In the wake of the Christchurch aftermath, Australian lawmakers began taking swift actions to stop the publication of the livestream footage on social media sites.<sup>100</sup> Armed with the threat of fines and jail time, the goal of Australia’s new law is to hold the online website *hosts* liable for violent content posted online.<sup>101</sup>

The amendment to the Australian Criminal Code titled “Sharing of Abhorrent Violent Material” works to “ensure that online platforms cannot be exploited and weaponised by perpetrators of violence.”<sup>102</sup> The new law defines “abhorrent violent conduct” to include acts of terror, murder, attempted murder, torture, rape,

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1137, 1141 (2006).

92. *Id.*

93. Terrorism Act 2006, c. 11, § 1 (UK).

94. *Id.* at § 1(2)(b).

95. *Id.* at § 1(3).

96. *Id.* at § 1(7).

97. Walker, *supra* note 91, at 1141; see *New Terror Law Comes into Force*, BBC NEWS (Apr. 13, 2006), [http://news.bbc.co.uk/2/hi/uk\\_politics/4905304.stm](http://news.bbc.co.uk/2/hi/uk_politics/4905304.stm) (on file with the *University of the Pacific Law Review*) (describing concerns over glorification provision of the law being too broad).

98. Walker, *supra* note 91, at 1141–42; see *New Terror Law Comes into Force*, *supra* note 97 (quoting a member of a human rights group discussing problems with the law that “[a]nyone supporting violence to remove a regime anywhere in the world now or in the past would theoretically get caught up”).

99. Terrorism Act 2006, c. 11, § 1.

100. Damien Cave, *Host Violent Content? In Australia, You Could Go to Jail*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/world/australia/internet-extremist-violence-christchurch.html> (on file with the *University of the Pacific Law Review*).

101. *Id.*

102. Explanatory Memorandum, Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019 (Cth) 3 (Austl.).

and kidnapping.<sup>103</sup> The law is applicable regardless of whether the conduct occurred in Australia or elsewhere.<sup>104</sup> It targets “internet service providers,” providers of a “content service,” or providers of a “hosting service.”<sup>105</sup>

Failure on the part of website hosts to remove and prevent the spread of material can lead to imprisonment of company executives’ for up to three years and fines up to 10% of the platform’s annual revenue.<sup>106</sup> Australian lawmakers believed the inaction of social media companies in the wake of the Christchurch aftermath—citing Facebook in particular—failed to protect users from exposure to dangerous online content.<sup>107</sup>

The Australian law appears to go further than any other countries’, holding major websites accountable for failing to remove content others post online.<sup>108</sup> Representatives of social media companies, including Facebook, feel the government failed to consult relevant players in the digital industry before passing this law.<sup>109</sup> Skepticism shrouds the law, questioning how enforcement would work and whether Australia will be able to hold executives accountable.<sup>110</sup>

#### IV. FIRST AMENDMENT JURISPRUDENCE

Americans consider freedom of speech one of the most important rights the United States Constitution provides.<sup>111</sup> Speech in the United States functions within the paradigm that speech operates in a marketplace of ideas.<sup>112</sup> One scholar succinctly describes this freedom as “what it means to be a person . . . [i]t is what it means to be a member of a functioning democracy . . . [a]nd it is what it means to be an American.”<sup>113</sup>

While freedom of speech is one of the strongest protections the Bill of Rights

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103. *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth) sch 1 s 474.32(1) (Austl.).

104. *Id.* at § 474.33(1).

105. *Id.* at § 474.33(1)(a).

106. James Griffiths, *Australia Passes Law to Stop Spread of Violent Content Online After Christchurch Massacre*, CNN (Apr. 4, 2019), <https://www.cnn.com/2019/04/04/australia/australia-violent-video-social-media-law-intl/index.html> (on file with the *University of the Pacific Law Review*).

107. *Id.*

108. Cave, *supra* note 100.

109. Griffiths, *supra* note 106.

110. See Evelyn Douek, *Australia’s New Social Media Law Is a Mess*, LAWFARE (Apr. 10, 2019, 8:28 AM), <https://www.lawfareblog.com/australias-new-social-media-law-mess> (on file with the *University of the Pacific Law Review*) (listing the concerns and questions about the Australian law including a question regarding the effectiveness of the law).

111. See *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (describing freedom of expression as “the matrix, the indispensable condition, of nearly every other form of freedom”).

112. See Sedler, *supra* note 20, at 1017 (theorizing “the primary function of the First Amendment is to ensure that all ideas enter the marketplace of ideas and compete with one another, seeking to win acceptance by the public as a whole”).

113. Howard M. Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J. 367, 380–82 (2004).

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affords, there are restrictions on this right.<sup>114</sup> The following sections detail three of the primary ways the Supreme Court limits the freedom of speech.<sup>115</sup> Section A discusses the prohibition on content-based regulations of speech.<sup>116</sup> Section B presents the threshold that the Court has set for speech to qualify as inciting violence.<sup>117</sup> Section C examines the Court’s jurisprudence and limitations on hate speech.<sup>118</sup>

### A. Content-Based Regulations

Content-based regulation of speech occurs when the government abridges speech based solely on the content of the speech.<sup>119</sup> The Supreme Court held in *R.A.V. v. City of St. Paul., Minnesota* that content-based regulations of speech are “presumptively invalid.”<sup>120</sup> When a government, including state and local governments, enact content-based regulations, the regulations must survive strict scrutiny.<sup>121</sup> To survive strict scrutiny in this context, the government regulation must: “(1) advance compelling or overriding government ends; (2) be directly and substantially related to advancing those ends; and (3) be the least restrictive, effective means to advance the ends.”<sup>122</sup>

The Court declined to extend First Amendment protections to some types of speech and expressive conduct.<sup>123</sup> The limited areas of communication the First Amendment does not protect include obscene speech, speech that is likely to incite violence, and speech constituting fighting words.<sup>124</sup>

Additionally, the Court has held that to create a category of unprotected

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114. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985) (noting “[e]ven protected speech is not equally permissible in all places and at all times”).

115. *Infra* Sections IV.A–C.

116. *Infra* Section IV.A.

117. *Infra* Section IV.B.

118. *Infra* Section IV.C.

119. Sedler, *supra* note 20, at 1021.

120. 505 U.S. 377, 382 (1992); see Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 596 (2003) (describing the rigid scrutiny that the government must overcome when trying to pass a content-based law as “almost always fatal”).

121. See *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)) (finding “[a] law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech”).

122. R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and “Reasonableness” Balancing*, 8 ELON L. REV. 291, 294 (2016); see generally *id.* at 293 (discussing the different types of scrutiny applicable to different government actions within the context of free speech and the First Amendment including intermediate scrutiny and reasonableness balancing).

123. Sedler, *supra* note 20, at 1009–10.

124. See *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (listing unprotected types of speech categories to include incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, and “speech presenting some grave and imminent threat that the government has the power to prevent”).

speech, a legislature cannot easily change the longstanding judgment of Americans by deciding to not protect speech that has been traditionally deemed as acceptable by society.<sup>125</sup> The Court rejected a simple balancing test that “weigh[s] the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test.”<sup>126</sup> A justification based only on this balancing test is unlikely to outweigh the benefit that free speech provides to society.<sup>127</sup> Absent evidence that a type of speech has a long-standing tradition of a lack of acceptance in society, banishment, or regulation, the creation of new categories of unprotected speech is not justified.<sup>128</sup>

### *B. Incitement to Violence*

The standard set by the Court in *Brandenburg v. Ohio* provides the doctrine under which speech qualifies as incitement to violence.<sup>129</sup> Under the *Brandenburg* standard, speech is inciteful when “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>130</sup> Furthermore, the speaker must intend for such lawless action to result from his or her communication.<sup>131</sup>

*Brandenburg* stands for the proposition that advocacy of illegal activity through speech remains a protected form of speech.<sup>132</sup> However, the law ceases to protect speech when it reaches the point of inciting others to commit the same act.<sup>133</sup> Under *Brandenburg*, advocating for lawless action alone is insufficient to render such speech incitement.<sup>134</sup> Rather, evidence must exist that the speaker “intended to produce imminent lawless action.”<sup>135</sup> So the requirements of *Brandenburg* make it difficult for courts to successfully classify speech as inciteful because it is difficult, and sometimes impossible, to show specific intent in these situations.<sup>136</sup>

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125. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792 (2011).

126. *Id.*

127. *Id.*

128. *Id.*

129. 395 U.S. 444, 447 (1969).

130. *Id.*

131. *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (describing the incitement framework and the requirement that the “words were intended to produce, and likely to produce, imminent disorder” finding the state’s claim that the speech had a “tendency to lead to violence” insufficient).

132. James Hart, *Revisiting Incitement Speech*, 38 QUINNIPIAC L. REV. 111, 111 (2019).

133. *See id.* (arguing that the distinction between inciting and advocating should be abandoned).

134. *See Brandenburg*, 395 U.S. at 449 (overturning the statute at issue because it “purports to punish mere advocacy”); Russell L. Weaver, *Brandenburg and Incitement in a Digital Era*, 80 MISS. L.J. 1263, 1265 (2011) (quoting *Brandenburg*) (describing the rejection of the criminalization of “subversive advocacy” by the Court in *Brandenburg*).

135. Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1643 (2013) (emphasis added).

136. *See* S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1169 (describing meeting the

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The underlying theory in *Brandenburg* is that speech can be persuasive enough to convince another party to act.<sup>137</sup> But to qualify speech as inciteful and impose liability, the speech must be persuasive enough that a listener will hear it and then quickly engage in the described lawless action.<sup>138</sup> If the speech itself is not persuasive, the listener is less likely to follow the speech's directions.<sup>139</sup> This has proven to be a difficult threshold to match.<sup>140</sup>

C. *Hate Speech*

Hate speech exists when expressive content is demeaning “on the basis of race, ethnicity, gender, religion, age [or] disability.”<sup>141</sup> The Court in *Matal v. Tam* described the problem of regulating hate speech within the context of First Amendment protections.<sup>142</sup> In *Matal*, the Court held that the First Amendment primarily protects “the freedom to express ‘the thought that we hate.’”<sup>143</sup> Hate speech remains protected unless it rises beyond abstract advocacy and moves into the realm of incitement.<sup>144</sup> Even speech that society considers hateful has protection and is the “proudest boast of our free speech jurisprudence.”<sup>145</sup>

While hate speech receives First Amendment protections, hate crimes do not.<sup>146</sup> On the Department of Justice’s (“DOJ”) website, the DOJ notes that the government cannot punish ideas and speech that are hateful.<sup>147</sup> The DOJ emphasizes, however, that the protections of the First Amendment stop upon the

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imminence requirement under *Brandenburg* as narrow and “address[ing] speech activity designed to persuade someone to commit an unlawful act, not speech designed to facilitate the commission of an unlawful act by a person who has already decided to act”).

137. Clay Calvert, *First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer*, 51 CONN. L. REV. 117, 134 (2019).

138. Michael Vitiello, *The Nuremberg Files: Testing the Outer Limits of the First Amendment*, 61 OHIO ST. L.J. 1175, 1201 (2000).

139. Calvert, *supra* note 137, at 134.

140. See Chris Montgomery, Note, *Can Brandenburg v. Ohio Survive the Internet and the Age of Terrorism?: The Secret Weakening of a Venerable Doctrine*, 70 OHIO ST. L.J. 141, 144 (2009) (arguing the *Brandenburg* doctrine “is in serious danger of sliding into obsolescence”).

141. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

142. 137 S. Ct. 1744 (2017).

143. *Id.* at 1764 (quoting Holmes, J., dissenting in *United States v. Schwimmer*, 279 U.S. 644, 655 (1929)); see, e.g., *id.* at 1751 (describing the underlying speech in this case which was an “a dance-rock band’s application for federal trademark registration of the band’s name, ‘The Slants’” and Justice Alito’s description of the controversy of the term being the term “slants” as “a derogatory term for persons of Asian descent”).

144. See Vitiello, *supra* note 138, at 1177 (suggesting the societal costs that are a result of the strong First Amendment protection of hate speech).

145. *Matal*, 137 S. Ct. at 1764 (quoting Holmes, J., dissent, *United States v. Schwimmer*, 279 U.S. 644, 655 (1929)).

146. *Learn About Hate Crimes*, DEP’T JUST., <https://www.justice.gov/hatecrimes/learn-about-hate-crimes> (last visited June 6, 2020) (on file with the *University of the Pacific Law Review*) [hereinafter *Learn About Hate Crimes*].

147. *Id.*

commission of an actual crime.<sup>148</sup> When hateful beliefs motivate a crime, the law does not protect those motivations, even if the underlying motive's basis is in "philosophical beliefs."<sup>149</sup> The effects of these crimes drive the justification for having a set of laws that punish hate crimes.<sup>150</sup> A different type of crime, for example, a simple assault, may only impact the individuals directly involved and those close around them.<sup>151</sup> However, hate crimes may impact a broader community, with potential harm even expanding nationally.<sup>152</sup>

## V. AIDING AND ABETTING

Aiding and abetting is a form of derivative liability where a principal actor violates the law, and a secondary actor—an accomplice—contributes to the principal's acts.<sup>153</sup> To find a secondary actor liable, the principal must violate the law, and the secondary actor must engage in an intentional act to help the principal.<sup>154</sup> The intentional act justifies assigning blame to the secondary party.<sup>155</sup> The premise of extending liability to the accomplice from the acts of the principal is the idea "that the accomplice has a stake in the principal's acts," desiring for the underlying crime's completion and aiding the principal to reach that goal.<sup>156</sup> Applying this theory to the New Zealand attack, the shooter would be the principal, and the sharer would be the accomplice.<sup>157</sup>

Created by the American Law Institute, the Model Penal Code ("MPC") "play[s] an important part in the widespread revision and codification of the substantive criminal law of the United States."<sup>158</sup> Serving as a baseline for this Comment, courts across the United States frequently look to the MPC for guidance

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148. *Id.*

149. *Id.*

150. *Id.*

151. Georgina Fuller, *The Serious Impact and Consequences of Physical Assault*, AUSTRALIAN INST. CRIMINOLOGY (Apr. 8, 2020), <https://www.aic.gov.au/publications/tandi/tandi496> (on file with the *University of the Pacific Law Review*).

152. *Learn About Hate Crimes*, *supra* note 146.

153. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 337 (1985).

154. *Id.*

155. *Id.*

156. See Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351, 1351 (1998) (addressing the proper extent of a secondary actor's criminal culpability).

157. See *How Are People Charged as an Accomplice?*, HG.ORG, <https://www.hg.org/legal-articles/how-are-people-charged-as-an-accomplice-35892> (last visited June 6, 2020) (on file with the *University of the Pacific Law Review*) (describing the relationship between the accomplice and the principal as "the main perpetrator of a crime is referred to as a principal while the individuals assisting in the commission of the crime are referred to as accomplices").

158. *Model Penal Code*, A.L.I., <https://www.ali.org/publications/show/model-penal-code/> (last visited June 6, 2020) (on file with the *University of the Pacific Law Review*).



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while making decisions.<sup>159</sup> The MPC defines accomplice liability as having “the purpose of promoting or facilitating the commission of the offense.”<sup>160</sup> An accomplice shows purpose by aiding or agreeing to aid the principal in such acts.<sup>161</sup> The purpose prong of accomplice liability under the MPC requires a higher level of culpability than in other jurisdictions.<sup>162</sup>

Under common law, the threshold for accomplice liability was low.<sup>163</sup> Generally, an actor could face liability for aiding the principal so long as the “accomplice did ‘something’ to aid the crime.”<sup>164</sup> There was no requirement that the accomplice’s liability match the liability of the principal actor.<sup>165</sup>

The MPC recognizes four degrees of culpability.<sup>166</sup> Depending on the offense and the required degree of culpability, the MPC requires that the actor had the requisite culpability concerning a material element of the offense.<sup>167</sup> The highest degree of culpability is when an actor acts purposely with the “conscious object[ive] to engage in conduct of that nature or to cause such a result” with “respect to an element of the offense.”<sup>168</sup> To find an accomplice liable, the MPC typically requires a finding that the accomplice acted with purpose.<sup>169</sup> Alternatively, MPC § 2.06(4) provides that accomplice liability extends where “causing a particular result is an element of an offense.”<sup>170</sup> For example, to find actors guilty of criminal homicide, their conduct must have led to a human’s death.<sup>171</sup>

Some states have specific laws that lower the level of mental culpability required for accomplice liability in the context of certain crimes.<sup>172</sup> For example, New York’s general accomplice liability statute requires the accomplice to have

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159. *Id.*

160. MODEL PENAL CODE § 2.06(3)(a) (AM. LAW INST., Proposed Official Draft 1962).

161. MODEL PENAL CODE § 2.06(3)(a)(ii).

162. Compare MODEL PENAL CODE § 2.06(3)(a)(ii) (describing a purpose requirement), with WASH. REV. CODE § 9A.08.020 (2019) (listing a knowledge requirement for liability for the conduct of another).

163. *Rosemond v. United States*, 572 U.S. 65, 72–73 (2014).

164. *Id.* (emphasis in original) (citing R. DESTY, A COMPENDIUM OF AMERICAN CRIMINAL LAW § 37A, at 106 (1882)).

165. Kadish, *supra* note 153, at 339.

166. MODEL PENAL CODE § 2.02(2) (AM. LAW INST., Proposed Official Draft 1962).

167. MODEL PENAL CODE § 2.02(1).

168. MODEL PENAL CODE § 2.02(1)–(2)(a)(i).

169. See MODEL PENAL CODE § 2.06(3)(a) (AM. LAW INST., Proposed Official Draft 1962) (stating that a person is an accomplice if he or she acts “with the purpose of promoting or facilitating the commission of the offense”).

170. MODEL PENAL CODE § 2.06(4); see Sherif Girgis, Comment, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460, 467 (2013) (describing the requirement of intending a lethal result for an accomplice actor to be liable for first degree murder).

171. See MODEL PENAL CODE § 210.1(1) (AM. LAW INST., Proposed Official Draft 1962) (requiring fatality of a human for criminal homicide to occur).

172. See Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1409–10 (2016) (describing areas of the law where complicity for certain crimes, like dog fighting, drops to a knowing requirement where the general accomplice liability statute requires purpose).

the same degree of mental culpability as the principal actor.<sup>173</sup> However, New York has a specific law addressing prostitution and a specific provision for accomplice liability within the context of prostitution.<sup>174</sup> When an individual works to advance prostitution, the degree of required mental culpability the law requires is only “knowingly.”<sup>175</sup> New York’s laws serve as a helpful illustration to show how states can pair a specific mens rea requirement to a specific crime while maintaining a general accomplice liability statute.<sup>176</sup>

Accomplice liability also requires that the secondary actor act with intent.<sup>177</sup> When the secondary actor provides aid or encouragement to the principal actor to help in the furtherance of a crime, the secondary actor is acting and meets the intent requirement.<sup>178</sup> Common examples of courts extending accomplice liability are when the accomplice acts as a “look-out, or drive[s] the getaway car, or hold[s] a ladder” to help the primary actor in the execution of the crime.<sup>179</sup>

Those opposing imposition of accomplice liability cite the derivative nature of the doctrine.<sup>180</sup> For liability to extend to an accomplice, culpability begins with a primary actor, and the accomplice’s assistance or contribution to the primary actor’s conduct creates the extension.<sup>181</sup> Because the accomplice is liable as a result of the principal’s actions, an argument exists that an element of the overriding criminal law principles is lacking: a requirement of personal wrongdoing.<sup>182</sup> Although the liability is derivative, the law does not impose liability without the secondary actor also acting.<sup>183</sup> Thus, even though the principal and the accomplice have a relationship, accomplice liability is not a form of vicarious liability.<sup>184</sup>

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173. N.Y. PENAL LAW § 20.00 (McKinney 2019).

174. N.Y. PENAL LAW § 230.15 (McKinney 2019).

175. *Id.*

176. *See* PENAL § 20.00 (providing New York’s accomplice liability statute).

177. Kadish, *supra* note 153, at 346.

178. *Id.*

179. *Id.* at 345.

180. Michael Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN’S L. REV. 129, 129 (2013).

181. Kadish, *supra* note 153, at 337.

182. Heyman, *supra* note 180, at 129.

183. Kadish, *supra* note 153, at 345.

184. *See id.* (debunking an argument that accomplice liability is a form of vicarious liability); *see also* STUART M. SPEISER ET AL., AMERICAN LAW OF TORTS § 4:1 (Monique C. M. Leahy ed., 2020) (defining the underpinnings of vicarious liability as a “form of social policy adjustment under which, even though a person to whom wrongdoing of another is imputed is him or herself personally without fault, legal public policy renders that person nevertheless liable (a form of strict liability)”).

VI. AIDING AND ABETTING BY SHARING

Attackers have now streamed their videos twice for the world to see.<sup>185</sup> Hours after the October 9, 2019 attack in Germany, initial investigations found there was a coordinated effort on messaging services to share the video of the attack online.<sup>186</sup> These coordinated attempts to aid the shooter in spreading the shooter’s message crosses the First Amendment threshold of speech and turns into action, sustaining an aiding and abetting charge.<sup>187</sup> Section A presents arguments in support of finding sharers liable under accomplice liability.<sup>188</sup> Section B outlines the restraints that American First Amendment jurisprudence places on courts’ ability to hold sharers liable for their speech.<sup>189</sup> Section C presents an illustration of how sharing a video could amount to accomplice liability.<sup>190</sup>

A. Why Should the United States Punish Republication?

Within United States criminal law, some laws punish criminal actions because of the harm they cause, rather than the message they convey.<sup>191</sup> For example, depictions of children engaged in sexually explicit conduct constitutes “child sexual exploitation.”<sup>192</sup> In explaining the justification for child pornography laws, the DOJ describes the irreparable harm the production of such pornography causes.<sup>193</sup> Further, the DOJ describes how the Internet has exacerbated the problem.<sup>194</sup> First, child pornography is easily accessible and distributable to those seeking to find the content online on various forums.<sup>195</sup> Second, the online communities seeking sexually exploitive content online find solace in one another.<sup>196</sup> And third, this community support desensitizes offenders to the harm they cause and erodes the shame that usually accompanies this behavior.<sup>197</sup>

Congress has also worked to pass laws that make animal cruelty a crime,

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185. See *Germany Shooting: 2,200 People Watched on Twitch*, *supra* note 7 (describing the stream in both Germany and New Zealand).

186. *Id.*

187. See *infra* Section VI.A. (arguing that accomplice liability is an appropriate offense to charge the sharer of a video with).

188. *Infra* Section VI.B.

189. *Infra* Section VI.C.

190. *Infra* Section VI.A.

191. Volokh, *supra* note 172, at 1409–12 (noting areas of the law that look to the harms caused by the acts, rather than the speech).

192. *Child Pornography*, DEP’T JUST., <https://www.justice.gov/criminal-ceos/child-pornography> (last visited June 6, 2020) (on file with the *University of the Pacific Law Review*).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

focusing specifically on animal crush videos.<sup>198</sup> In 2010, Congress passed a law that attempted “to criminalize the commercial creation, sale, or possession of certain *depictions* of animal cruelty.”<sup>199</sup> Later, the Court in *United States v. Stevens* declared the law as overly broad as written.<sup>200</sup> However, Justice Samuel Alito’s dissenting opinion signaled what he believed to be the challenged law’s purpose.<sup>201</sup> He stated that the law was “enacted not to suppress speech, but to prevent horrific acts of animal cruelty . . . [and the videos are] a form of depraved entertainment that has no social value.”<sup>202</sup> Further, Justice Alito suggested that someone recording the act is “likely to be criminally culpable, either as aiders and abettors or conspirators.”<sup>203</sup>

In response to the desire for an animal cruelty law, Congress recently passed the Preventing Animal Cruelty Act (“PACT”).<sup>204</sup> Under PACT, the *act* of animal crushing is now illegal.<sup>205</sup> PACT received widespread support on the online petition platform Change.org, where nearly 800,000 people signed the petition in support of the bill.<sup>206</sup> PACT is not concerned with the motivation behind the abuser.<sup>207</sup> Rather, PACT works to hold those abusing animals liable when the “abuse is intentional and unjustified.”<sup>208</sup>

The United States has considered the negative and undesirable results of child pornography and animal cruelty and made the decision to make such conduct illegal.<sup>209</sup> In comparing the content of animal cruelty (i.e., depicting the harming and killing of animals) to depictions of humans killed in a mass shooting, it is likely

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198. Richard Gonzales, *Trump Signs Law Making Cruelty to Animals a Federal Crime*, NPR (Nov. 25, 2019, 11:08 PM), <https://www.npr.org/2019/11/25/782842651/trump-signs-law-making-cruelty-to-animals-a-federal-crime> (on file with the *University of the Pacific Law Review*); see 18 U.S.C.A. § 48 (West 2019) (providing the recently enacted law for animal crush videos); see also *What is “Animal Crushing?”*, COEXISTENCE ANIMAL RTS. ON EARTH (Dec. 30, 2016, 7:02 PM), <https://careanimalrights.org/2016/12/what-is-animal-crushing/> (on file with the *University of the Pacific Law Review*) (defining animal crushing as “the brutal act of torturing animals . . . [v]ideos often feature women in high heels stepping on small animals and crushing them”).

199. *United States v. Stevens*, 559 U.S. 460, 460 (2010) (emphasis added).

200. *Id.*

201. *Id.* at 482 (Alito, J., dissenting).

202. *Id.*

203. *Id.* at 494.

204. Gonzales, *supra* note 198.

205. Bill Chappell, *Animal Cruelty as a Federal Crime: Trump Is Expected to Sign Bill Passed by Congress*, NPR (Nov. 7, 2019), <https://www.npr.org/2019/11/07/777280602/trump-is-expected-to-sign-bill-making-animal-cruelty-a-federal-crime> (on file with the *University of the Pacific Law Review*).

206. *Id.*

207. Courtney G. Lee, *The PACT Act: A Step in the Right Direction on the Path to Animal Welfare*, JURIST (Dec. 1, 2019), <https://www.jurist.org/commentary/2019/12/courtney-lee-pact-act/> (on file with the *University of the Pacific Law Review*).

208. *Id.*

209. See Chappell, *supra* note 205 (describing the bipartisan support of PACT due to the fact that “Americans care about animal welfare”); DEP’T JUST., *supra* note 192 (describing the lasting harms that are the result of sexual exploitation of children).

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that a law regulating the footage of humans being killed would have support.<sup>210</sup> Following the reasoning in Justice Alito’s dissent in *Stevens*, he stated that “[i]t is undisputed that the *conduct* depicted in crush videos may constitutionally be prohibited.”<sup>211</sup> The same logic applies to shooting videos where, undoubtedly, the United States Constitution prohibits the conduct of murdering people.<sup>212</sup>

The law does not regulate depictions of animal cruelty and child pornography because of the *speech*, but rather the underlying *harm* those acts cause.<sup>213</sup> The extension of liability from the shooter to the sharer of the video under a theory of accomplice liability advances similar policies.<sup>214</sup>

In a recent case, the Massachusetts Supreme Court affirmed the imposition of liability on a young woman who encouraged her boyfriend to take his own life.<sup>215</sup> The woman was not physically present at the time the teen committed suicide, but sent dozens of messages encouraging her boyfriend to go through with the act.<sup>216</sup> The defense argued the woman did not commit an affirmative, physical act contributing to the death.<sup>217</sup> The Massachusetts Supreme Court ignored the argument that the girlfriend’s presence—only remote—was insufficient to sustain the charge.<sup>218</sup> The United States Supreme Court denied certiorari regarding the young woman’s appeal, despite the argument that the decision violated her First Amendment rights.<sup>219</sup> She received a fifteen-month prison sentence.<sup>220</sup> This Massachusetts case exemplifies an instance where the speech of an actor amounts

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210. See Chappell, *supra* note 205 (noting broad public support in a law protecting animal welfare).

211. *United States v. Stevens*, 559 U.S. 460, 491 (Alito, J., dissenting) (emphasis in original).

212. See MODEL PENAL CODE § 210.1 (AM. LAW INST., Proposed Official Draft 1962) (describing the crime of criminal homicide).

213. See Lee, *supra* note 207 (describing the PACT Act’s movement towards criminalizing the act of animal cruelty); DEP’T JUST., *supra* note 192 (reporting the lasting harms that impact victims of childhood sexual exploitation).

214. See, e.g., DEP’T INTERNAL AFF., *supra* note 70 (listing the content that is defined as objectionable under New Zealand law to include child pornography, bestiality and acts depicting extreme violence).

215. Eric Levenson, *Michelle Carter, Convicted in Texting Suicide Case, Released from Prison*, CNN (Jan. 23, 2020), <https://www.cnn.com/2020/01/23/us/michelle-carter-text-suicide-release/index.html> (on file with the *University of the Pacific Law Review*); Spencer Buell, *Michelle Carter’s Texting Suicide Case Went All the Way to the Supreme Court. Now It’s Over*, BOS. MAG. (Jan. 13, 2020, 11:26 AM), <https://www.bostonmagazine.com/news/2020/01/13/supreme-court-michelle-carter/> (on file with the *University of the Pacific Law Review*).

216. *All the Texts Between Michelle Carter and Conrad Roy the Day He Died*, BOS. 25 NEWS (July 9, 2019), <https://www.boston25news.com/news/all-the-text-messages-between-michelle-carter-and-conrad-roy-the-day-he-died/532942907/> (on file with the *University of the Pacific Law Review*).

217. Carla Zavala, Comment, *Manslaughter by Text: Is Encouraging Suicide Manslaughter?*, 47 SETON HALL L. REV. 279, 304 (2016).

218. *Commonwealth v. Carter*, 115 N.E.3d 559, 572 (Mass. 2019).

219. Ariane de Vogue & Devan Cole, *Supreme Court Won’t Take Up Appeal of Michelle Carter’s Conviction for Role in Boyfriend’s Suicide*, CNN (Jan. 13, 2020), <https://www.cnn.com/2020/01/13/politics/supreme-court-michelle-carter-boyfriend-suicide/index.html> (on file with the *University of the Pacific Law Review*); see *Carter*, 115 N.E.3d at 570 (presenting the analysis ruling that Carter did not have a viable First Amendment claim to rebut the charge of involuntary manslaughter).

220. De Vogue, *supra* note 219.

to conduct because the text messages she sent were both “objectively and subjectively reckless,” sustaining the involuntary manslaughter conviction.<sup>221</sup> The outcome in the Massachusetts case follows a recent trend of charging those who *encourage* suicide with manslaughter.<sup>222</sup> It is not the words that are *said* that justify the imposition of liability, but rather the harm that is the result of conduct—i.e., the end of another person’s life.<sup>223</sup>

Online, the rejection of traditional social norms occurs as speakers feel heightened protection both from distance and the shield of a screen, where they are unlikely to face repercussions for their actions.<sup>224</sup> To some, technology may present the perfect platform to commit a crime and conduct themselves in a manner in which they would not carry themselves in face-to-face interactions.<sup>225</sup> Furthermore, legislation and Supreme Court decisions are unlikely to address hate speech produced on the Internet in part because the Internet operates outside of a single jurisdiction.<sup>226</sup> However, the holding in *Matal v. Tam* remains controlling precedent, leaving hate speech a protected form of expression in the United States.<sup>227</sup> *Matal’s* holding, however, does not protect crimes that hate motivates.<sup>228</sup> But even the Federal Bureau of Investigation (“FBI”) makes clear on its webpage that “[h]ate itself is not a crime—and the FBI is mindful of protecting freedom of speech.”<sup>229</sup>

Policing the presence of violent content on the Internet raises multiple problems.<sup>230</sup> First, the Internet presents jurisdictional issues.<sup>231</sup> Questions continue

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221. Zavala, *supra* note 217, at 303.

222. *Id.* at 310.

223. *See id.* (explaining that the common law of manslaughter imposed liability for any conduct that was reckless of the probable harmful consequences).

224. Richard Delgado & Jean Stefancic, *Hate Speech in Cyberspace*, 49 WAKE FOREST L. REV. 319, 322 (2014).

225. *See* Ashley B. Chin, Comment, *Suicide by Text: The Case of Michelle Carter*, 21 J. TECH. L. & POL’Y 261, 261 (2017) (stating that “the use of technology to commit crime has become an ideal way for some”).

226. *See* Delgado & Stefancic, *supra* note 224, at 327–28 n. 55 (discussing the reasons why hate speech on the Internet is likely to continue to evade review and legislation to address its impacts); *see also* Farzad Damania, *The Internet: Equalizer of Freedom of Speech? A Discussion on Freedom of Speech on the Internet in the United States and India*, 12 IND. INT’L & COMP. L. REV. 243, 246–48 (2002) (illustrating some of the problems associated with regulating speech when conduct can occur outside of a single jurisdiction).

227. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

228. *See Hate Crimes*, FBI, <https://www.fbi.gov/investigate/civil-rights/hate-crimes> (last visited June 6, 2020) (on file with the *University of the Pacific Law Review*) (defining a hate crime as “criminal offense against a person or property motivated in whole or in part by an offender’s bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity”).

229. *Id.*

230. *See, e.g.*, Bertrand De La Chapelle & Paul Fehlinger, *Jurisdiction on the Internet: How to Move Beyond the Legal Arms Race*, OBSERVER RES. FOUND. (Oct. 14, 2016), <https://www.orfonline.org/expert-speak/jurisdiction-on-the-internet/> (on file with the *University of the Pacific Law Review*) (discussing the jurisdictional problems that arise when balancing the need for legal systems to act while still respecting the sovereignty of other nations).

231. *See* Susan W. Brenner & Bert-Jaap Koops, *Approaches to Cybercrime Jurisdiction*, 4 J. HIGH TECH. L. 1, 3 (2004) (describing some of the problems when establishing what jurisdiction would be proper to litigate a crime that took place on the Internet).

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to exist regarding what may establish jurisdiction for crimes committed online.<sup>232</sup> Speech disseminated on the Internet can instantaneously extend beyond jurisdictional boundaries.<sup>233</sup> Second, the Internet supports the deterioration of societal norms.<sup>234</sup> In both the context of hate speech and child pornography, there is a growing acceptance of views and speech that society has historically shamed.<sup>235</sup>

With the advent of the Internet, hate speech spreads more readily and leaves lasting impacts.<sup>236</sup> Minority groups in the United States have reported a rise in both hate speech on the Internet and hate crimes.<sup>237</sup> The way individuals propagate hate speech online is different than spoken hate speech.<sup>238</sup> When someone says something hateful aloud, it does not remain in a published online world; it goes away.<sup>239</sup> The reality of online speech is that words, thoughts, and ideas online are more permanent.<sup>240</sup> They are a reminder of the hate that exists towards certain groups or individuals.<sup>241</sup>

Following mass shootings in El Paso, Texas, and Dayton, Ohio, The Washington Post called for the incitement framework to apply and for enforcement of online speech to occur.<sup>242</sup> However, when a court categorizes speech as inciteful, what is the appropriate punishment for the speaker?<sup>243</sup> The Washington Post author correctly notes that it would require the courts to draw lines at what is imminent and when speech becomes likely to incite imminent lawless action.<sup>244</sup> However, the author underestimates the intra-jurisdictional problems that speech presents and the additional issues stemming from punishing speech for the sake of obtaining

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232. *Id.*

233. De La Chapelle & Fehlinger, *supra* note 230.

234. See Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029, 1044–45 (2016) (describing in an example how the Internet is different and produces different effects than what a pre-Internet world would have reacted to someone taking sugar packets and emptying the salt and pepper shakers into a purse).

235. See Michael S. Waltman, *The Normalizing of Hate Speech and How Communication Educators Should Respond*, 67 COMM. EDUC. 259, 260–61 (2018) (describing the increasing amounts of hate speech present in American politics and the normalization of such rhetoric); DEP’T JUST., *supra* note 192 (shedding light on the promotion of communication and collaboration between child pornography creators creating a “relationship premised on a shared sexual interest in children” which works against the traditional shame that would be associated).

236. Delgado & Stefancic, *supra* note 224, at 320.

237. *Id.* at 319.

238. *Id.* at 323.

239. *Id.*

240. *Id.*

241. *Id.*

242. Danielle Allen & Richard Ashby Wilson, *The Rules of Incitement Should Apply To – and Be Enforced on – Social Media*, WASH. POST (Aug. 8, 2019, 1:41 PM), <https://www.washingtonpost.com/opinions/2019/08/08/can-speech-social-media-incite-violence/> (on file with the *University of the Pacific Law Review*).

243. See *id.* (describing incitement as an inchoate crime).

244. *Id.*

judicial line-drawing.<sup>245</sup>

Holding sharers liable under a theory of aiding and abetting would not impose liability on someone who shares a video for the sake of reporting on an event.<sup>246</sup> Rather, by holding the sharer liable for his active role in helping a shooter share his message, the derivative liability comes from the principal by the sharer's goal to aid the principal.<sup>247</sup>

The reality is that the Internet provides a different type of forum—raising a multitude of issues that our Founding Fathers could not have predicted.<sup>248</sup> The speed of dissemination of information on the Internet and the ability to protect anonymity makes the Internet a breeding ground for content that society has oft rejected.<sup>249</sup> Looking at the conduct of the sharer not as one who speaks but as one who helps in the principal's terror campaign addresses the limits of the Internet.<sup>250</sup>

### B. Overinclusive First Amendment Jurisprudence?

As discussed above, the First Amendment offers broad protections to speakers, even when their speech is unpopular.<sup>251</sup> The First Amendment protects publication of crimes that are likely to later attract a “copycat” who will attempt or carry out a similar crime in a similar way.<sup>252</sup> This protection exists despite the inherent dangers

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245. See Damania, *supra* note 226, at 246–48 (describing the difficulties inherent in trying to regulate conduct that occurs over the Internet, specifically, jurisdictional issues); Joshua Spector, *Spreading Angst or Promoting Free Expression? Regulating Hate Speech on the Internet*, 10 U. MIAMI INT'L. & COMP. L. REV. 155, 156 (2001) (illustrating some of the dangers that may occur with judicial review and the implicit subjective elements when evaluating speech).

246. See, e.g., WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 13.2(c) (3d ed. 2019) (explaining for an accomplice to be liable “the accomplice must intend that his acts have the effect of assisting or encouraging another”).

247. See Kadish, *supra* note 153, at 336–37 (illustrating the derivative nature of accomplice liability and the requirement that the accomplice intentionally assists the principal).

248. See Olivia Waring, *When Was the Internet Invented?*, METRO NEWS (Mar. 22, 2018, 1:12 PM), <https://metro.co.uk/2018/03/22/when-was-the-internet-invented-7408002/> (on file with the *University of the Pacific Law Review*) (indicating that the Internet was available for commercial public use in 1989); *About the Founding Fathers*, CONSTITUTIONFACTS.COM, <https://www.constitutionfacts.com/us-founding-fathers/about-the-founding-fathers/> (last visited June 6, 2020) (on file with the *University of the Pacific Law Review*) (illustrating that James Madison was the last living Founding Father, having died in 1836).

249. See Michael Grothaus, *Facebook: Original Christchurch Shooting Video Had 200 Live Views and 4,000 Total Views*, FAST COMPANY (Mar. 19, 2019), <https://www.fastcompany.com/90321977/facebook-original-new-zealand-shooting-video-had-200-live-views-and-4000-total-views> (on file with the *University of the Pacific Law Review*) (illustrating how rapidly the shooting video spread).

250. See *New Zealand Man Jailed for 21 Months for Sharing Christchurch Shooting Video*, BBC (June 18, 2019), <https://www.bbc.com/news/world-asia-48671837> (on file with the *University of the Pacific Law Review*) (illustrating the actions that Arps took by sending the video to thirty people and requesting for cross hairs and a kill count to be added to the footage).

251. See *supra* Part IV (describing the value in First Amendment protections and the wide breadth of speech that protected under the First Amendment).

252. David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 28 (1994).



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of copycats, illustrating the strength of the First Amendment.<sup>253</sup> The incitement framework as illustrated in *Brandenburg* is too narrow to extend to the republication of shooter videos on the Internet as inciting imminent lawless action.<sup>254</sup> The requirement for imminence under *Brandenburg* is too far removed from the online sharing of videos.<sup>255</sup>

In practice, the requirements set out in *Brandenburg* are difficult to apply.<sup>256</sup> Courts must evaluate whether harm is likely, which is difficult even from the Internet.<sup>257</sup> The rate at which content spreads online and the masses of people who instantaneously have access to postings presents a greater question for courts to determine: at which point does the likelihood of harm cross the threshold of incitement?<sup>258</sup> Further, the imminence requirement of *Brandenburg* poses another question: is it imminent from the time of posting or from the time the reader reads it?<sup>259</sup> The Court has not addressed the temporal nature of the imminence requirement, but there is a suggestion that speech would need to show “at least some . . . temporal imminence.”<sup>260</sup> If the imminence requirement includes acts that

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253. *Id.*; see John Annese, *NYPD Terrorism Big Who Busted Wannabe Zodiac Killer in the 90s Retires*, N.Y. DAILY NEWS (Oct. 3, 2017, 9:51 PM), <https://www.nydailynews.com/new-york/nypd-terrorism-big-busted-wannabe-zodiac-killer-retires-article-1.3539659> (on file with the *University of the Pacific Law Review*) (describing the actions of Heriberto “Eddie” Sada who was a copycat killer, mirroring the style of the killings committed by the Zodiac Killer who killed in San Francisco); see also Andrew Osborn, *‘Scream’ Movies Are Blamed by Teenage Girl’s Copycat Killer*, THE GUARDIAN (Nov. 18, 2001), <https://www.theguardian.com/world/2001/nov/18/filmnews.film> (on file with the *University of the Pacific Law Review*) (detailing the acts of Theiry Jaradin who took inspiration from the movie “Scream” while stabbing and killing a fifteen-year-old girl, dressed in a costume similar to the one worn by the actor in the “Scream” film); cf. Macklin, *supra* note 13, at 22 (noting that Tarrant likely studied the “*modus operandi*” of terrorist Anders Breivik when preparing to carry out his own attack, citing Breivik as his inspiration).

254. See Scott Hammack, Note, *The Internet Loophole: Why Threatening Speech On-line Requires a Modification of the Courts’ Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 67 (2002) (describing more generally the issues with the feasibility of *Brandenburg*’s framework being operational on the internet).

255. See Weaver, *supra* note 134, at 1278 (alteration in original) (presenting the argument that “[t]he requirement of imminence suggests a higher level of immediacy, and it is not clear that many Internet publications are likely to cause imminent lawless conduct”).

256. See Hart, *supra* note 132, at 115 (explaining the difficulty with applying *Brandenburg* lies in the reality that “[w]e cannot judge what harm is likely with hindsight, because life unfolds in real time”).

257. See *id.* (describing the difficult task of determining when speech would meet the incitement framework as established by *Brandenburg*).

258. See Meagan Flynn, *No One Who Watched New Zealand Shooter’s Video Live Reported It to Facebook, Company Says*, WASH. POST (Mar. 19, 2019), <https://www.washingtonpost.com/nation/2019/03/19/new-zealand-mosque-shooters-facebook-live-stream-was-viewed-thousands-times-before-being-removed/> (on file with the *University of the Pacific Law Review*) (describing that 4,000 people had viewed Tarrant’s livestream of Facebook before the site was able to remove the video); see also Hart, *supra* note 132, at 115 (describing how in application, the incitement test makes it difficult for courts to determine the likelihood of harm).

259. See Andee Gale, *How Long Does Your Information Stay on the Internet?*, DIGITAL JOURNEY (July 22, 2015), <http://digitalresources.nz/article/5yoLEjc> (on file with the *University of the Pacific Law Review*) (illustrating another element complicating the internet is the reality that “[t]he Internet is forever . . . even when you think it’s gone”).

260. Calvert, *supra* note 137, at 132.

follow speech closely in time, how can courts properly apply the imminence standard when posts on the Internet remain online indefinitely?<sup>261</sup> If the online postings amount to hate speech, the First Amendment jurisprudence protects that speech as well.<sup>262</sup>

Any laws drafted to criminalize the glorification of terror, as other countries have done, would require extreme drafting precision.<sup>263</sup> Such laws would be content-based, requiring them to survive strict scrutiny.<sup>264</sup> Glorification laws, under First Amendment jurisprudence, also run the risk of being overly broad.<sup>265</sup>

Furthermore, laws punishing glorification would likely cause a chilling effect on speech.<sup>266</sup> Such a chilling effect was at the center of concerns leading up to the passage of the United Kingdom's 2006 Terrorism Act.<sup>267</sup> Where glorification laws exist, they run the risk of criminalizing speech that is political in nature, such as when there is support for groups trying to overturn political systems.<sup>268</sup> There is value in protecting speech that is unpopular or that represents a minority viewpoint.<sup>269</sup> In fact, *Brandenburg's* incitement test partly exists to provide protection to political speech—protecting minority political views and criticism of the government.<sup>270</sup>

The COVID-19 outbreak is an illustrative example of the dangers of silencing minority opinions.<sup>271</sup> At the beginning of the COVID-19 outbreak in China,

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261. *Id.* at 132–33; Gale, *supra* note 259.

262. *See generally* Section IV.C. (discussing that hate speech is protected under the First Amendment).

263. *See* Michael C. Shaughnessy, Comment, *Praising the Enemy: Could the United States Criminalize the Glorification of Terror Under an Act Similar to the United Kingdom's Terrorism Act 2006?*, 113 PENN. ST. L. REV. 923, 980 (2009) (noting that the framework of *Brandenburg* would make it difficult for a glorification of terror law to pass muster under the incitement framework).

264. *See* *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (describing laws that must survive strict scrutiny “requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest”) (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010)).

265. *See* Kendrick, *supra* note 135, at 1653 (describing that an overly broad law is “invalid not because it incidentally chills protected expression but because it directly reaches protected expression”).

266. *See id.* at 1652 (explaining that a chilling effect often is the result of “uncertainty in the legal process” and when speech gets closer to the “line” of unprotected speech, persons are less likely to communicate).

267. *See New Terror Law Comes into Force*, *supra* note 97 (citing concerns about the chilling effect of the 2006 glorification laws).

268. Walker, *supra* note 91, at 1141; *New Terror Law Comes into Force*, *supra* note 97.

269. *See* Elliot Hannon, *Rare Public Anger in China After Silenced Doctor Who Warned of Coronavirus Dies of the Virus*, SLATE (Feb. 7, 2020, 10:39 AM), <https://slate.com/news-and-politics/2020/02/china-doctor-lidies-coronavirus-whistleblower-public-anger-dissent.amp> (on file with the *University of the Pacific Law Review*) (recounting how the Chinese government silenced Doctor Li's warnings of what would become COVID-19 as an “illegal rumor” and how this has harmed millions).

270. JoAnne Sweeny, *Incitement in the Era of Trump and Charlottesville*, 47 CAP. U. L. REV. 585, 594 (2019).

271. *See* Emily Feng & Amy Cheng, *Critics Say China Has Suppressed and Censored Information in Coronavirus Outbreak*, OR. PUB. BROADCASTING (Feb. 19, 2020, 8:50 AM), <https://www.opb.org/news/article/npr-critics-say-china-has-suppressed-and-censored-information-in-coronavirus-outbreak/> (on file with the *University of the Pacific Law Review*) (indicating that a delayed response may have made the outbreak in China worse).

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Chinese officials silenced a medical doctor when the doctor began to report on the suspected outbreak.<sup>272</sup> For the first four weeks of the outbreak, Chinese officials attempted to minimize how severe the disease was.<sup>273</sup> Even in the wake of widespread anger following the death of the doctor, China has remained steadfast in silencing speech that criticizes its handling of the virus.<sup>274</sup> Officials suspended accounts on WeChat, an application with many users in China, that discussed the outbreak and that potentially communicated criticisms of the government’s handling of the outbreak.<sup>275</sup> It is possible that the delayed reaction of Chinese officials to mitigate the spread at the start of the outbreak made the extent of the virus worse.<sup>276</sup> The Chinese Government’s reaction to suppress the speech underscores and exemplifies the real-world consequences of suppressing speech.<sup>277</sup>

In short, absent a Supreme Court ruling that glorification of terror is a specific area of speech that no longer has First Amendment protection, glorification laws are likely incompatible with current First Amendment jurisprudence.<sup>278</sup> There also remains a question—even if First Amendment jurisprudence changed—with the potential dangers inherent in glorification laws.<sup>279</sup> While the spread of terror online is undoubtedly dangerous, there is a concern that glorification laws would “limit or silence legitimate reporting or criticism.”<sup>280</sup> Broadly drafted glorification laws run the risk of penalizing media outlets that provide valuable information to the public about current events.<sup>281</sup>

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272. Hannon, *supra* note 269.

273. Feng & Cheng, *supra* note 271.

274. Hannon, *supra* note 269.

275. Feng & Cheng, *supra* note 271.

276. Julia Belluz, *China Hid the Severity of Its Coronavirus Outbreak and Muzzled Whistleblowers — Because It Can*, VOX (Feb. 10, 2020, 10:10 AM), <https://www.vox.com/2020/2/10/21124881/coronavirus-outbreak-china-li-wenliang-world-health-organization> (on file with the *University of the Pacific Law Review*).

277. *See id.* (describing the impact of delayed response and “muzzling” whistleblowers); *cf.* Jeff John Roberts, *China’s Coronavirus Propaganda Has Shifted Dramatically, Report Finds*, FORTUNE (Mar. 30, 2020, 4:49 PM), <https://fortune.com/2020/03/30/china-coronavirus-propaganda-has-shifted-dramatically/> (on file with the *University of the Pacific Law Review*) (examining trends in Chinese state media propaganda surrounding news about the Coronavirus and the presence of state-sponsored disinformation campaigns about the global pandemic).

278. *See* *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792 (2011) (noting the need for a history of proscription to recognize a category of speech as unworthy of First Amendment protections).

279. *Misuse of Anti-Terror Legislation Threatens Freedom of Expression*, COUNCIL EUR.: COMMISSIONER FOR HUM. RTS. (Apr. 12, 2018), <https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression> (on file with the *University of the Pacific Law Review*).

280. *Id.*

281. *Id.*

C. How Sharing a Video Facilitates the Crime of the Attacker

The United States Code defines acts of terror as “violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States” with the intent to “intimidate or coerce a civilian population.”<sup>282</sup> Tarrant’s deadly actions, which he targeted at the Muslim community, paired with his online manifesto would unquestionably intimidate the Muslim population.<sup>283</sup> Further, Tarrant’s desire to extend his carnage beyond the four walls of the mosque continued his act of terror onto the Internet.<sup>284</sup>

At its core, the basis for extending liability to those who aid and abet a principal actor requires the accomplice’s engagement in an “intentional action designed to persuade or help.”<sup>285</sup> Further justification for extending liability in this circumstance stems from the idea that “knowledge that aid will be given can influence the principal’s decision to go forward.”<sup>286</sup> In response to a call to action, such as Tarrant’s call to “spread his message,” a sharer intentionally engages in an action desired by the principal actor.<sup>287</sup> Further, when sharers act to *manipulate* a video, as exhibited in New Zealand, they no longer are passively sharing a video.<sup>288</sup> The extra step of manipulating a video to overcome blocks on social media is evidence that the sharer took an active role in becoming a part of the mass terror campaign, continuing to intimidate and terrorize the subjects of the principal’s hatred.<sup>289</sup>

In instances like the New Zealand shooting, it appears the principal actor takes

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282. See 18 U.S.C.A. § 2331 (West 2019) (containing both the definition for domestic and international terrorism, illustrating that the acts that Tarrant committed had them been committed in the United States and acts outside of the United States would fall within the definition of the act); Macklin, *supra* note 13, at 19 (describing the anti-Muslim rhetoric and killings of Tarrant).

283. Macklin, *supra* note 13, at 19.

284. See *id.* at 18 (providing the steps that Tarrant took to ensure that his rhetoric, as well as his act of terror continued to live on after the attack subsided).

285. Kadish, *supra* note 153, at 337.

286. *Id.* at 342.

287. See *Exobox Techs. Corp. v. Tsambis*, No. 2:14-CV-00501-RFB-VCF, 2015 WL 82886, at \*4 (D. Nev. Jan. 6, 2015) (describing the nature of an intentional act within the context of posting messages online); Macklin, *supra* note 13, at 19 (detailing Tarrant’s requests online for others to share his messages that he had posted on both Facebook and 8chan).

288. Compare *Manipulate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/manipulating?src=search-dict-hed> (last visited June 6, 2020) (on file with the *University of the Pacific Law Review*) (defining manipulate as “to change by artful or unfair means so as to serve one’s purpose”), with *Share*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/share> (last visited June 6, 2020) (on file with the *University of the Pacific Law Review*) (defining share as “to distribute on the Internet” and “to post (something) on a social media platform”), and Jack Stubbs, *Viral Visuals Driving Social Media Manipulation on YouTube, Instagram: Researchers*, REUTERS (Sept. 25, 2019, 10:08 PM), <https://www.reuters.com/article/us-facebook-disinformation/viral-vi-.l-media-manipulation-on-youtube-instagram-researchers-idUSKBN1WB0ED> (on file with the *University of the Pacific Law Review*) (describing the actions of the sharers and uploaders of the videos online).

289. Compare Macklin, *supra* note 13, at 18 (describing the request made by Tarrant to continue to spread his message online), with *New Zealander Jailed*, *supra* note 6 (describing the actions that Arps took to continue to spread the video online, including the manipulation of the footage to include crosshairs and a kill count).

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actions to ensure the dissemination of the attack online.<sup>290</sup> Tarrant posted on 8chan about ten to twenty minutes before the attack.<sup>291</sup> Tarrant directed others on the forum when he requested readers to “please do your part spreading my message.”<sup>292</sup> When the sharer Arps manipulated and shared the video, following Tarrant’s explicit request to spread his message, Arps deliberately helped Tarrant spread his violence online.<sup>293</sup> Arps effectively showed purpose to aid in Tarrant’s offense, meeting the threshold for accomplice liability under the MPC.<sup>294</sup> Tarrant desired the continuing republication of his attack online in case he would be unable to do so himself.<sup>295</sup> When Arps and other actors stepped in to help keep the video online, they aided Tarrant in his offense of continuing his terror and intimidation by reproducing footage of the live killings.<sup>296</sup>

In looking at a common thread among manifestos, there often exists either a desire to create a legacy in the name of a cause or reference to someone who previously carried out an attack.<sup>297</sup> The almost assured promise for notoriety acts as a motivating factor for the shooter to continue on with his plans.<sup>298</sup> For example, Tarrant’s manifesto cited inspiration to Anders Behring Breivik, a Norwegian man convicted of a bombing in Oslo and a mass shooting at a summer camp for children.<sup>299</sup> Following Tarrant’s attack, a twenty-one-year-old Norwegian man

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290. See Macklin, *supra* note 13, at 18 (describing Tarrant’s deliberate posting on 8chan prior to the attack, linking his manifesto, and providing directions on how to access his live-stream on Facebook once it began).

291. *Id.*

292. *Id.*

293. See *White Supremacist Philip Arps*, *supra* note 69 (illustrating that Arps shared the video with thirty people and requested a friend to add the crosshairs); see also *United States v. Boleyn*, 929 F.3d 932, 939 (8th Cir. 2019) (describing the requirement of “proof that the accomplice intended to promote or facilitate the underlying crime” under the MPC, which would require Arps to have known of Tarrant’s request).

294. Compare MODEL PENAL CODE § 2.06(3)(a) (AM. LAW INST., Proposed Official Draft 1962) (describing the elements for accomplice liability), and *New Zealander Jailed*, *supra* note 6 (explaining Arps’ manipulation and sharing of the video), with Macklin, *supra* note 13, at 18 (explaining that Tarrant had requested for others to continue to share his media online after the attack).

295. Macklin, *supra* note 13, at 18.

296. See *White Supremacist Philip Arps*, *supra* note 69 (describing Arps’ addition of cross-hairs and kill count to Tarrant’s livestream).

297. See Brad J. Bushman, *Narcissism, Fame Seeking, and Mass Shootings*, 62 AM. BEHAV. SCIENTIST 229, 230–34 (2017) (describing the narcissistic traits of mass shooters and reporting the narcissistic statements and actions that mass shooters took prior to carrying out their attacks, including a Columbine shooter stating that he “want[ed] to leave a lasting impression on the world,” and a Norwegian gunman who practiced for interviews for after the attack and hired a company to “cleanse the online profiles of him after the mass shooting, so that his grandiose image would be preserved”); Jason Burke, *Norway Mosque Attack Suspect ‘Inspired by Christchurch and El Paso Shootings,’* THE GUARDIAN (Aug. 11, 2019), <https://www.theguardian.com/world/2019/aug/11/norway-mosque-attack-suspect-may-have-been-inspired-by-christchurch-and-el-paso-shootings> (on file with the *University of the Pacific Law Review*) (describing the Norway suspect mentioning the inspiration from other mass shooters and other online extremists in his manifesto).

298. See Shyong, *supra* note 57 (describing the research that indicates that mass shooters are motivated by the media coverage that is likely to follow their carnage).

299. Adam Taylor, *New Zealand Suspect Allegedly Claimed ‘Brief Contact’ with Norwegian Mass Murderer Anders Breivik*, WASH. POST (Mar. 15, 2019, 8:42 AM),

attempted to carry out an attack on a mosque, referred to Tarrant as “Saint Tarrant,” and claimed that Tarrant chose him to carry out his own act.<sup>300</sup> History shows a repeated pattern of reading, posting, and then acting upon manifestos and the extremist ideals underlying their texts.<sup>301</sup> Republishing and disseminating videos on behalf of principal attackers who cannot spread their message themselves helps to provide the notoriety that many attackers desire.<sup>302</sup> Support from online communities and the almost assured promise of widespread media coverage work to maintain the underlying motivating factor to obtain notoriety for their actions.<sup>303</sup> The promise of the escape in a getaway car after committing a crime motivates the principal actor to carry out their initial act.<sup>304</sup> In the scenario of a mass shooting, the promise of a legacy can provide the shooter with the final push to commit their act of terror.<sup>305</sup> It is this assistance and encouragement that justifies linking the actions of the principal attacker with the sharer.<sup>306</sup>

## VII. CONCLUSION

Without a change in First Amendment jurisprudence, it is unlikely that either federal or state legislatures could enact laws penalizing the glorification of terror.<sup>307</sup> The Internet has created a reality where communication online is more readily available, easier to use, and less expensive than ever before.<sup>308</sup> “Gatekeepers” that previously existed in society are not present online to keep potentially dangerous speech at bay, and those who wish to communicate dangerous messages are better able to find like-minded individuals who share

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<https://www.washingtonpost.com/world/2019/03/15/new-zealand-suspect-allegedly-claimed-brief-contact-with-norwegian-mass-murderer-anders-breivik/> (on file with the *University of the Pacific Law Review*).

300. Burke, *supra* note 297.

301. See *id.* (describing coordination on online networks between posters and shooters and the desire to “inspire – and challenge” others to complete violent attacks).

302. See Jillian Peterson & James Densley, *Op-Ed: We Have Studied Every Mass Shooting Since 1966. Here’s What We’ve Learned About the Shooters*, L.A. TIMES (Aug. 4, 2019), <https://www.latimes.com/opinion/story/2019-08-04/el-paso-dayton-gilroy-mass-shooters-data> (on file with the *University of the Pacific Law Review*) (explaining that research has indicated that mass shooters have “media attention [as] one of their main goals”).

303. See Shyong, *supra* note 57 (describing a study that found that media coverage plays a role in the frequency of mass shootings and the online cultures that “debate murderers as if they were favorite athletes”).

304. See James Dwyer, *The Perfect Crime: History of the Getaway Car*, CREDITPLUS (Nov. 27, 2014), <https://www.creditplus.co.uk/blog/perfect-crime-history-getaway-car-6993817/> (describing the “getaway car” as being something that has been “mythologized into something romantic, despite the ending never quite working out as planned”).

305. See Shyong, *supra* note 57 (describing the important role that the media plays in the context of mass shootings).

306. See Kadish, *supra* note 153, at 343 (justifying extending liability because “the [accomplice’s] acts are determined by [their] own choice”).

307. See Shaughnessy, *supra* note 263, at 980 (arguing that the *Brandenburg* standard poses an “obstacle” to passing a law similar to the 2006 Terrorism Act from the United Kingdom).

308. See Weaver, *supra* note 134, at 1279 (illustrating the modern realities of the internet with increasing speed and access to information).

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similar dangerous thoughts.<sup>309</sup>

When a “sharer” goes out of their way to communicate the message of the shooter, the sharer acts with a purpose to continue the original shooter’s campaign of terror.<sup>310</sup> Underlying policy in support of criminalizing actions that result in harm to animals and children would likely support some sort of restraint on depictions of terror.<sup>311</sup> But, as discussed above, it is unlikely that a broad law penalizing the glorification of terror would successfully withstand a First Amendment challenge.<sup>312</sup> A theory of accomplice liability—where the sharer has the purpose of promoting and expanding on an act of terror—finds support in the policy of depriving shooters from what they want: notoriety.<sup>313</sup>

In the United States, the doctrine of accomplice liability extends to a wide range of cases.<sup>314</sup> Our laws have dictated that liability is not extended to just anyone, but only to someone who aids or encourages in the commission of a crime.<sup>315</sup> We allow this extension of liability to an accomplice because of an underlying desire for justice, finding that “one who willingly participates or aids in the commission of a crime deserves punishment.”<sup>316</sup>

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309. *See id.* (describing the gatekeepers before the internet as restricting access to “radio, television or newspapers to propagate [potentially inflammatory] views”).

310. *See supra* Section VI.A (describing the theory of aiding in this context).

311. *See, e.g.*, Peterson & Densley, *supra* note 302 (presenting the campaign “#nonotriety” to reduce the associated fame and subsequent idealization by extremists after mass shootings).

312. Shaughnessy, *supra* note 263, at 980.

313. *See* Peterson & Densley, *supra* note 302 (describing that “in the age of 24-hour rolling news and social media, there are scripts to follow that promise notoriety in death . . . [s]ocietal fear and fascination with mass shootings partly drives the motivation to commit them”).

314. *See, e.g.*, United States v. Seabrooks, 839 F.3d 1326, 1333–34 (11th Cir. 2016) (extending aiding and abetting theory in the context of firearms possession of a convicted felon); State v. Irvin, 334 N.W.2d 312, 316 (Iowa Ct. App. 1983) (approving the application of aiding and abetting in the context of a robbery); State v. Fuller, 632 S.E.2d 509, 513 (N.C. Ct. App. 2006) (allowing imposition of liability through a theory of aiding and abetting theory in the case of “indecent liberties”).

315. *See* Kadish, *supra* note 153, at 337 (applying the liability requires a secondary actor must engaged in an “intentional action designed to persuade or help”).

316. Rogers, *supra* note 156, at 1355.