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The Globalization Of Hate: Are Domestic Terrorism Laws Sufficient To Quell New Threats From Alt-Right Lone-Wolf Extremists?

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**THE GLOBALIZATION OF HATE: ARE
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FROM ALT-RIGHT LONE-WOLF
EXTREMISTS?**

*By Jason J. Sullivan-Halpern**

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I. INTRODUCTION

On the afternoon of March 15, 2019, the Prime Minister of New Zealand and thirty other select individuals received an email

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containing a seventy-four page manifesto entitled “The Great Replacement.”¹ Nine minutes later, the manifesto’s author, Brenton Tarrant, began a mass shooting at two Christchurch mosques that left over fifty worshippers dead in its wake.² It was the deadliest terrorist attack in New Zealand’s history.³

In the manifesto, which he also posted to a website popular with the alt-right called *8chan* just minutes before the attacks, Tarrant intended to “set out his ideology, rationale, and self-justification for the impending atrocity,”⁴ which he himself described as a terrorist attack.⁵ Much of the manifesto was dedicated to lamenting a “white genocide” being committed by immigrants – particularly those from “Islamic nations.”⁶ Although Tarrant firmly denied working directly with any white nationalist groups or movements therein, he clarified that he “donated to many” and “interacted with many more.”⁷

¹ *Jacinda Ardern’s office received manifesto from Christchurch shooter minutes before attack*, ABC NEWS (last updated Mar. 17, 2019, 8:04 AM), <https://www.abc.net.au/news/2019-03-17/jacinda-ardern-christchurch-shooter-manifesto-email/10909874>; Brenton Tarrant, *The Great Replacement*, CRIME PREVENTION RES. CTR. (2019), <https://crimeresearch.org/wp-content/uploads/2019/03/The-Great-Replacement-New-Zealand-Shooter.pdf>.

² *Jacinda Ardern’s office received manifesto from Christchurch shooter minutes before attack*, ABC NEWS (Mar. 17, 2019, 8:04 AM), <https://www.abc.net.au/news/2019-03-17/jacinda-ardern-christchurch-shooter-manifesto-email/10909874>; *Accused shooter in Christchurch mosque attacks that left 51 dead pleads not guilty to all charges in New Zealand court*, SOUTH CHINA MORNING POST (June 14, 2019, 6:50 AM), <https://www.scmp.com/news/asia/australasia/article/3014443/accused-shooter-christchurch-mosque-attacks-left-51-dead>.

³ Graham Macklin, *The Christchurch Attacks: Livestream Terror in the Viral Video Age*, 12 CTC SENTINEL 1, 19 (2019), <https://ctc.usma.edu/app/uploads/2019/07/CTC-SENTINEL-062019.pdf>.

⁴ *Id.*

⁵ “Do you consider it a terrorist attack? By the definition, then yes. It is a terrorist attack.” Tarrant, *supra* note 1, at 12.

⁶ The Christchurch shooter wrote: “Was the attack ‘islamophobic’ [sic] in origin? Islamic nations in particular have high birth rates, regardless of race or ethnicity, and in this there was an anti-islamic [sic] motivation to the attacks, as well as a want for revenge against islam [sic] for the 1300 years of war and devastation that it has brought upon the people of the West and other peoples of the world.” Tarrant, *supra* note 1, at 13.

⁷ *Id.* at 10.

Five months after the Christchurch attacks, Patrick Crusius entered a Walmart in the border town of El Paso, Texas with an AK-47 assault rifle.⁸ He proceeded to murder twenty-two shoppers, including eight Mexican nationals, before leaving the store and surrendering to authorities.⁹ Crusius told the authorities he spent the last ten hours driving to El Paso from Dallas, on the other side of the state, in order to kill “Mexicans.”¹⁰

Nineteen minutes before he began his attack, Crusius posted his own manifesto on *8chan*. “In general, I support the Christchurch shooter and his manifesto,” he wrote.¹¹ Crusius further elaborated his views, stating that “This attack is a response to the Hispanic invasion of Texas. [. . .] I am simply defending my country from *cultural and ethnic replacement* brought on by an invasion.”¹² Throughout the rest of his manifesto, Crusius explicitly and implicitly referenced various white supremacist ideologies as his justifications for committing the attack.¹³

Can we simply classify such tragedies as isolated violent hate crimes? The media and public at large are increasingly questioning

⁸ Robert Moore & Mark Berman, *El Paso suspect said he was targeting ‘Mexicans,’ told officers he was the shooter, police say*, WASH. POST (Aug. 9, 2019, 1:42 PM), https://www.washingtonpost.com/national/el-paso-suspect-said-he-was-targeting-mexicans-told-officers-he-was-the-shooter-police-say/2019/08/09/ab235e18-bac9-11e9-b3b4-2bb69e8c4e39_story.html.

⁹ Cedar Attanasio, *El Paso mass shooting suspect pleads not guilty in 22 deaths*, ASSOCIATED PRESS (Oct. 10, 2019), <https://www.apnews.com/3fd473325d17429784e91a3c8c7b3909>.

¹⁰ *Id.*

¹¹ Daniel Politi, *El Paso Suspect Reportedly a Trump Supporter Who Wrote Racist, Anti-Immigrant Manifesto*, SLATE (Aug. 3, 2019, 9:02 PM), <https://slate.com/news-and-politics/2019/08/el-paso-suspect-shooter-trump-racist-manifesto.html> (emphasis added); see also *Here’s the El Paso Shooter’s Full Manifesto: Read it Before You Believe the News*, PULPIT & PEN (Aug. 2019), <https://pulpitandpen.org/2019/08/05/heres-the-el-paso-shooters-full-manifesto-read-it-before-you-believe-the-news> [hereinafter *El Paso Shooter’s manifesto*] (supposedly the full text of the manifesto).

¹² *Id.* (emphasis added).

¹³ Michael Davis, *The Manifesto Posted On 8chan By Alleged El Paso Shooter Minutes Before Attack*, MIDDLE EAST MEDIA RES. INST. (Aug. 6, 2019), https://www.memri.org/reports/manifesto-posted-8chan-alleged-el-paso-shooter-minutes-attack#_ednref1.

this characterization given the increased frequency of domestic terrorist acts committed by lone wolves who identify with the alt-right.¹⁴ Some news outlets, such as The New York Times,¹⁵ have extensively researched the connections between these attacks and maintain that the perpetrators are part of a single *global* white nationalist movement that continues to grow.¹⁶ However, while it is clear to many onlookers that these attacks are connected, they are not uniformly being investigated or prosecuted as acts of terrorism given that each has occurred in a different jurisdiction and has therefore been subject to varying domestic laws concerning terrorism.

This article analyzes whether the statutes criminalizing terrorism in the United Kingdom, New Zealand, and the United States are sufficient to address the further rise of such acts of alt-right terrorism. Part II explores the process by which these terrorists are radicalized by their participation in extremist online communities. In doing so, it further elaborates on the connections between recent terrorist attacks committed by supporters of the alt-right in Oslo, London, Christchurch, and El Paso. Part III focuses on the last three attacks mentioned, explaining how the statutes criminalizing terrorism in the United Kingdom, New Zealand, and the United States applied or could have applied to each case, including why each attack should be classified as domestic terrorism. Part III also considers if anyone affiliated with their perpetrators through extremist online communities could have been criminally liable for encouraging terrorism, providing material support for terrorism, or conspiring to commit acts of terrorism in each respective jurisdiction. Part IV briefly summarizes the proceeding discussions and concludes that identifiable gaps in counter-terrorism laws in these jurisdictions

¹⁴ E.g., Nick Robins-Early, *El Paso Was The Latest Target Of A Deadly, Global White Supremacist Movement*, HUFFINGTON POST (Aug. 5, 2019, 6:08 PM), https://www.huffpost.com/entry/white-nationalist-el-paso-christchurch-shooting_n_5d488476e4b0ca604e36aba0.

¹⁵ Weiyi Cai & Simone Landon, *Attacks by White Extremists Are Growing. So Are Their Connections.*, N.Y. TIMES (Apr. 3, 2019), <https://www.nytimes.com/interactive/2019/04/03/world/white-extremist-terrorism-christchurch.html>.

¹⁶ See also Colin P. Clarke, *The Cult of Breivik*, SLATE (Mar. 18, 2019, 2:56 PM), <https://slate.com/news-and-politics/2019/03/anders-breivik-new-zealand-right-wing-terrorism-inspiration.html>.

have been deliberately exploited by fringe elements of the alt-right in order to continue to inspire lone-wolves to commit acts of terrorism with relative impunity. These gaps may be closed by ensuring that committing an act of domestic terrorism is a defined criminal offense, that established groups that radicalize their perpetrators are outlawed, and that inciting terrorism is a crime which is enforced against the individuals who do so. Until they are, alt-right terrorism will continue to proliferate across the globe.

II. THE RISE OF ALT-RIGHT EXTREMISM

A. Common Ideologies

Some commentators trace the alarming rise of domestic terrorism committed by lone-wolves affiliated with the alt-right back to the attacks committed by Anders Breivik, a far-right extremist who killed seventy-seven people in a bombing and mass shooting near Oslo, Norway in 2011.¹⁷ Like the Christchurch and El Paso shooters, Breivik disseminated a manifesto online shortly before beginning his attack.¹⁸ It was over 1,500 pages long and entitled “2083: A European Declaration of Independence.”¹⁹ Throughout the manifesto, Breivik warns against the many dangers of “multiculturalism,” which he describes as “the root cause of the ongoing Islamisation of Europe which has resulted in the ongoing Islamic colonisation of Europe through demographic warfare (facilitated by [Europe’s] own leaders).”²⁰

This was Breivik’s invocation of the Great Replacement Theory, which was similarly the subject of the manifestos of the Christchurch and El Paso attackers. Its basic underlying idea is that “white European populations are being deliberately replaced at an

¹⁷ Cai & Landon, *supra* note 17.

¹⁸ Matthew Taylor, *Breivik sent ‘manifesto’ to 250 UK contacts hours before Norway killings*, THE GUARDIAN (July 26, 2011, 6:58 PM), <https://www.theguardian.com/world/2011/jul/26/breivik-manifesto-email-uk-contacts>.

¹⁹ Anders Breivik, *2083: A European Declaration of Independence*, PUBLIC INTELLIGENCE (2011), <https://info.publicintelligence.net/AndersBehringBreivikManifesto.pdf>.

²⁰ *Id.*

ethnic and cultural level through migration and the growth of minority communities.”²¹ Many subscribers to the theory – including the Christchurch attacker – describe this process as a “white genocide.”²² These individuals are part of the fringes of the *alt-right movement*, an already rather fringe movement which has been defined as “a set of far-right ideologies, groups and individuals whose core belief is that ‘white identity’ is under attack by multicultural forces using ‘political correctness’ and ‘social justice’ to undermine white people and ‘their’ civilization.”²³ The movement “encompasses a range of people on the extreme right who reject mainstream conservatism in favor of forms of conservatism that embrace implicit or explicit racism or white supremacy.”²⁴ Like many modern far-right collectives, it is highly decentralized, existing in the dark corners of the Internet on social media, online message boards, and the like. This makes the alt-right considerably “harder to monitor than other terrorist organizations, such as Islamic State and al-Qaeda, whose supporters operated within well-defined networks that are well known to law enforcement agencies.”²⁵

B. Radicalization Pathways

Although such racist ideologies have been circulating in far-right circles for many years, researchers observed that discussions about the Great Replacement Theory on Twitter steadily increased

²¹ Jacob Davey & Julia Ebner, *The Great Replacement: The Violent Consequences of Mainstreamed Extremism*, INST. FOR STRATEGIC DIALOGUE 1, 7 (2019), <https://www.isdglobal.org/wp-content/uploads/2019/07/The-Great-Replacement-The-Violent-Consequences-of-Mainstreamed-Extremism-by-ISD.pdf>.

²² *Id.* (“The Great Replacement theory is closely linked to other theories which are popular in white supremacist, ethno-nationalist and nativist circles, including the ideas of white genocide and Eurabia – with these concepts often used interchangeably.”)

²³ *ALT-RIGHT*, SOUTHERN POVERTY LAW CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/alt-right> (last visited Sept. 14, 2019).

²⁴ *Alt Right: A Primer about the New White Supremacy*, ANTI-DEFAMATION LEAGUE (2019), <https://www.adl.org/resources/backgrounders/alt-right-a-primer-about-the-new-white-supremacy> (last visited Sept. 2, 2019).

²⁵ Cameron Houston & Shane Wright, *Alt-right extremists are not being monitored effectively*, SYDNEY MORNING HERALD (Mar. 17, 2019, 6.05 PM), <https://www.smh.com.au/national/alt-right-extremists-are-not-being-monitored-effectively-20190317-p514y0.html>.

following Breivik's attack in Oslo in 2011 and peaked following Tarrant's attack in Christchurch in 2019.²⁶ According to extremism expert J. M. Berger, the Theory is well-suited to inspiring violent extremism because it employs at least four of the five "crisis narratives" prevalent in extremist ideologies: conspiracy, dystopia, impurity, and existential threat.²⁷ The inclusion of such narratives can determine an ideology's potential for mobilizing audiences and inspiring violent action; Berger notes:

Narratives function at the core of extremism; they fuel the process of self-identification with an in-group and link problems and grievances experienced by the in-group to the existence and actions of out-group(s). In particular, *extremists use crisis narratives that imply that all crises experienced by the in-group can only be solved through hostile action against the outgroup*.²⁸

Individuals who come to accept such an ideological framework may eventually ask themselves if they're doing enough in response to the perceived crisis.²⁹ If the answer is "no," they may align themselves with extremist groups more prepared to take the hostile measures against the out-group that are ultimately necessary to abate the crisis (in their minds).³⁰ The individual's acceptance of this framework, the escalation of their willingness to take these hostile measures, and their progressive involvement in such activities can generally be understood as the process of *radicalization*.³¹

²⁶ Davey & Ebner, *supra* note 22, at 19-21.

²⁷ *Id.* at 10.

²⁸ *Id.* (emphasis added) (citing J.M. Berger, EXTREMISM (2018)); *but see Radicalization and Violent Extremism: Lessons Learned From Canada, the U.K. and the U.S.*, NATIONAL INSTITUTE OF JUSTICE (July 28-30, 2015), <https://www.ncjrs.gov/pdffiles1/nij/249947.pdf> (other researchers have observed that it is possible to engage in extremist violence without adopting an extremist belief system, which may be the case, for example, when individuals join violent extremist groups primarily because members of their pre-existing social groups are involved in them).

²⁹ J.M. BERGER, EXTREMISM 124-27 (MIT Press 2018).

³⁰ *Id.* at 126.

³¹ *Id.* at 117-27.

Alt-right communities have utilized a variety of online platforms to disseminate white supremacist propaganda which contributes to the radicalization of some of their supporters. Researchers monitoring the *r/altright* subreddit from July 2016 to January 2017, for example, concluded that the popular Reddit subforum “presented clear signs of known warning behaviors of violent extremism, particularly fixation [with race and racial degradation] and [in-group/out-]group identification.”³² This was evidenced by analyzing the frequency with which racial terms were used by posters and the level of anger apparent from those posts.³³ The most popular racial terms used were terms “associated with white identity or the development of an ethnostate.”³⁴ The researchers found that “increasing fixation . . . on race and racial concepts and an increasing anger in comments that mentioned these racial terms” was measurable over time.³⁵

Another group of researchers analyzing 331,849 YouTube videos on 360 channels associated with the alt-right discovered that a steady migration of users from milder to more extreme alt-right channels could be shown by cross-referencing the videos’ 79 million combined comments.³⁶ Many users who commented on milder alt-right videos (i.e., alt-*light* videos) were found to have commented on more extreme alt-right videos at later dates.³⁷ The study’s authors argue these findings may demonstrate a pathway of radicalization for the alt-right also exists on YouTube.³⁸ They speculate that the website’s algorithm for recommending channels based on similar content could be responsible for this pathway as the milder and more

³² Ted Grover & Gloria Mark, *Detecting Potential Warning Behaviors of Ideological Radicalization in an Alt-Right Subreddit*, 193 PROCEEDINGS OF THE THIRTEENTH INTERNATIONAL AAAI CONFERENCE ON WEB AND SOCIAL MEDIA 193, 202-03 (2019), <https://www.aaai.org/ojs/index.php/ICWSM/article/view/3221/3089>.

³³ *Id.* at 199-203.

³⁴ *Id.* at 199.

³⁵ *Id.* at 202.

³⁶ Manoel Horta Ribeiro et. al., *Auditing Radicalization Pathways on YouTube*, CORNELL: COMPUTERS & SOC’Y (Sept. 3, 2019), <https://arxiv.org/pdf/1908.08313.pdf>.

³⁷ *Id.*

³⁸ *Id.*

extreme alt-right channels were often linked through a successive series of such automated recommendations.³⁹

Researchers looking specifically at anti-Semitism among alt-right communities on 4chan's Politically Incorrect board (“/pol/”) and the right-wing Twitter spinoff Gab demonstrated these sort of fringe websites are propaganda factories for the alt-right which support such pathways of radicalization. In analyzing 160 million memes from over 2.6 billion posts on /pol/, Gab, Twitter, and Reddit, the researchers found that the /pol/ board was surprisingly effective in originating certain anti-Semitic memes that were later shared widely on the mainstream sites, Twitter and Reddit.⁴⁰ Anti-Semitic memes originating on the mainstream sites did not become as popular on the fringe websites.⁴¹ According to the researchers, this finding “suggest[s] that /pol/ acts as a primary reservoir to incubate and transmit [hate] to downstream Web communities.”⁴² Researchers speculate that the resulting success of the memes originating from /pol/ could be due to the fact they often consist of anti-Semitic variants on popular mainstream memes, making “antisemitism more accessible and common” to users.⁴³

Another study specifically analyzing memes designed to promote the Great Replacement Theory shows those memes might be successful for additional reasons. Researchers reviewed a collection of 480 of such memes on various websites and found that “90% (431) of [those] pieces of content contained generalised dehumanising and racist discussion playing on racial stereotypes, themes of racial impurity, the threat of cultural differences between Europeans and people from Africa and the Middle East, and anti-Semitic conspiracy theories.”⁴⁴ They argue this finding “demonstrates how material shared around this topic rarely engages with the ideas

³⁹ *Id.*

⁴⁰ Joel Finkelstein et. al, *A Quantitative Approach to Understanding Online Antisemitism*, CORNELL: COMPUTERS & SOC'Y 1, 10 (Sept. 5, 2018), <https://arxiv.org/pdf/1809.01644.pdf>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Davey & Ebner, *supra* note 22, at 23.

underlying the Great Replacement theory, but instead simply appeals to emotion and pre-existing prejudices.” This comports with the general understanding among experts on terrorism that there are many factors, such as pre-existing biases, which might predispose an individual to radicalization including but not limited to their mental health, social circles, and criminal history.⁴⁵

Researcher Luke Munn argues that while the process of online radicalization is unique for each alt-right violent extremist, there are three main “cognitive phases” many experience.⁴⁶ The first is *normalization*, during which humor and irony is critical.⁴⁷ Harsh white supremacist ideas are “repackaged in the visual vernacular of the Web: animated GIFs, dumb memes, and clever references.”⁴⁸ The purpose of this content is to “trivialize and thus normalize racism and xenophobia.”⁴⁹ Because they take the form of jokes, their consumer feels more comfortable sharing these ideas because they can later disclaim them as such.⁵⁰ Each further exposure to these ideas shocks the consumer less and prepares them for the second stage: *acclimation*.⁵¹ This is the phase we typically think of as “online radicalization,” where the consumer “becomes successively conditioned” to a series of increasingly extremist environments.⁵² For instance, if they are actively participating in a mainstream alt-right community such as the *r/altright* subreddit, they might start participating in a more fringe one, like 4chan’s or 8chan’s /pol/ board. Each progression “establishes a new cognitive baseline for what is acceptable,” desensitizing the consumer further and further.⁵³ The final phase is *dehumanization*. This is the point when consumer

⁴⁵ Allison Smith, *Risk Factors and Indicators Associated With Radicalization to Terrorism in the United States*, NAT’L INST. JUST. 1, 14 (June 2018), <https://www.ncjrs.gov/pdffiles1/nij/251789.pdf>.

⁴⁶ Luke Munn, *Alt-right pipeline: Individual journeys to extremism online*, 24 FIRST MONDAY 6 (June 2019), <https://firstmonday.org/ojs/index.php/fm/article/view/10108/7920>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

has become so desensitized to racism and xenophobia that they no longer even acknowledge the individuality or humanity of those they hate, referring to them simply as part of a faceless army of “invaders” or “enemies.”⁵⁴ This cognitive phase is often a prerequisite to violence, Munn notes, because not acknowledging the other’s humanity “shifts the enemy out of the category of ethical consideration altogether” and therefore leaves little justification to oppose their mistreatment.⁵⁵

C. Specific Examples: London, El Paso, and Christchurch

Relatively little is publicly known about the alt-right extremists who committed the acts of domestic terrorism in Christchurch and El Paso discussed in Part I. However, what we do know about their experiences suggests they were radicalized via the ideology and process outlined here. Each apparently believed their attacks were part of a semi-concerted last-ditch effort to save the white race from an ongoing “genocide” brought about by surreptitious multicultural forces.

These recent attacks took place in the context of a post-Breivik landscape. Breivik’s devastating attack in Norway in 2011 “targeted a youth summer camp attended by the children of liberal Norwegian politicians as ‘revenge’ for the Norwegian government’s embrace of Muslim immigrants,” which he viewed as destroying European culture.⁵⁶ It was the deadliest lone-wolf terrorist attack in the continent’s history.⁵⁷ At his first public court hearing, Breivik attempted to give a speech where he described himself as the “Commander” of a “resistance movement” fighting against multiculturalism in Europe.⁵⁸ This “Commander” moniker was

⁵⁴ *Id.*

⁵⁵ Munn, *supra* note 47.

⁵⁶ Clarke, *supra* note 17.

⁵⁷ Asne Seierstad, *Does mass murderer Anders Breivik still pose a threat to the security of Europe?*, IRISH EXAMINER (May 7, 2016), <https://www.irishexaminer.com/viewpoints/analysis/the-long-read-does-mass-murderer-anders-breivik-still-pose-a-threat-to-the-security-of-europe-398049.html>.

⁵⁸ *Anders Behring Breivik in ‘commander’ boast*, THE GUARDIAN (Nov. 14, 2011, 7:24 AM), <https://www.theguardian.com/world/2011/nov/14/anders-behring-breivik-norway-court>.

embraced by Breivik's many online followers, who also hailed him as a hero, saint, and martyr.⁵⁹ He became a living symbol to rally the many "individuals and groups that fall under the broad tent of neo-Nazi ideology and white supremacy, particularly those that advocate for the use of violence against perceived adversaries: immigrants, Muslims, Jews, and any politicians deemed to have liberal leanings or who embrace multiculturalism or tolerance of other races, religions, and sects."⁶⁰ When asked about Breivik years later, prolific Internet troll and influential white supremacist Andrew "Weev" Auernheimer remarked: "We all love and support him unconditionally."⁶¹ Memes featuring Breivik are still shared in alt-right circles today.

Years after Breivik's attacks, in 2017, a British man named Darren Osborne rented a utility van for the express purpose of driving it into a group of Muslims participating in a planned march near a mosque in Finsbury Park, North London. He succeeded in injuring eleven and killing one.⁶² After plowing into the group of worshippers, Osborne exited the van and yelled "I want to kill all Muslims!" before he was wrestled to the ground by others.⁶³ He was detained by authorities at the scene shortly thereafter.⁶⁴

Osborne, who was described by acquaintances as a "loner," had become radicalized in a matter of mere weeks.⁶⁵ His introduction to the extreme right was *Three Girls*,⁶⁶ a BBC docu-drama series about

⁵⁹ Clarke, *supra* note 17.

⁶⁰ *Id.*

⁶¹ Asne Seierstad, *Is Norwegian Mass Murderer Anders Breivik Still a Threat to Europe?*, NEWSWEEK (Apr. 13, 2016, 6:52 AM), <https://www.newsweek.com/anders-breivik-neo-nazi-suicid-norway-asne-seierstad-447247>.

⁶² Vikram Dodd & Matthew Taylor, *London attack: 'Aggressive' and 'strange' suspect vowed to 'do some damage'*, THE GUARDIAN (June 20, 2017, 2:44 PM), <https://www.theguardian.com/uk-news/2017/jun/19/several-casualties-reported-after-van-hits-pedestrians-in-north-london>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Lizzie Dearden, *Darren Osborne: How Finsbury Park terror attacker became 'obsessed' with Muslims in less than a month*, THE INDEP. (Feb. 2, 2018, 12:27 AM), <https://www.independent.co.uk/news/uk/crime/darren-osborne-finsbury-park-attack-who-is-tommy-robinson-muslim-internet-britain-first-a8190316.html>.

⁶⁶ *Id.*

the Rochdale grooming scandal: a massive child sex-abuse ring orchestrated by Muslim men. The series was strongly criticized as reinforcing already wide-spread Islamophobia in Britain.⁶⁷ Osborne became “obsessed’ with Muslims” after watching the series and began to “binge” on Twitter posts by Britain First, a domestic hate group.⁶⁸ He also sought out anti-Muslim articles and YouTube videos online,⁶⁹ some of which were from the United States.⁷⁰ While Osborne did not cite any prior attacks as an inspiration for his, it closely followed the assassination of British Labour Party Member of Parliament Jo Cox in 2016 by Thomas Mair, a right-wing extremist, as well as the banning of three extreme right-wing groups that same year.⁷¹ It was later revealed that Osborne chose the Finsbury Park mosque for his attack not only because he knew many Muslims would be attending the march there that night, but because he “believed that the leader of the Labour Party was due to attend and the Mayor of London may also [be] there.”⁷²

Two years after Osborne’s attack, Tarrant, the Christchurch attacker, thanked several alt-right lone-wolf terrorists – including Osborne and Breivik – for inspiring him to “take a stand against ethnic and cultural genocide.”⁷³ He explained: “[f]rom where did [I] receive/research/develop [my] beliefs? The internet, of course. You

⁶⁷ Waqas Tufail, *Rottherham, Rochdale, and the Racialised Threat of the Muslim Grooming Gang*, INTERNATIONAL J. CRIME, JUST. & SOC. DEMOCRACY 30 (2015), <https://doi.org/10.5204/ijcjsd.v4i3.249>; Dodd & Taylor, *supra* note 63.

⁶⁸ Vikram Dodd & Kevin Rawlinson, *Finsbury Park attack: man ‘brainwashed by anti-Muslim propaganda’ convicted*, THE GUARDIAN (Feb. 1, 2018, 2:48 PM), <https://www.theguardian.com/uk-news/2018/feb/01/finsbury-park-van-attacker-darren-osborne-found-guilty-murder-makram-ali>; R. v. Osborne [2008] Woolwich Crown Court [7] (Eng.) (sentencing remarks of Cheema-Grubb J), <https://www.judiciary.uk/wp-content/uploads/2018/02/r-v-osborne-sentencing-remarks.pdf>.

⁶⁹ Tristan Kirk, *Darren Osborne guilty: Anti-Muslim rhetoric from far-right leaders played ‘major role’ in radicalisation of Finsbury Park attacker, police say*, EVENING STANDARD (Feb. 1, 2018, 6:30 PM), <https://www.standard.co.uk/news/crime/darren-osborne-guilty-antimuslim-rhetoric-from-farright-leaders-played-major-role-in-radicalisation-a3755991.html>.

⁷⁰ R. v. Osborne [2008] Woolwich Crown Court [7] (Eng.).

⁷¹ Dodd & Rawlinson, *supra* note 69.

⁷² R. v. Osborne [2008] Woolwich Crown Court [7] (Eng.).

⁷³ Tarrant, *supra* note 1, at 18.

will not find the truth anywhere else.”⁷⁴ Tarrant claimed that he acquired his beliefs over “a great deal of time, from a great deal of places” online and emphasized that they were not at all influenced by the outside world.⁷⁵

Signs that Tarrant was radicalized by the alt-right online were abundant throughout the events immediately leading up to his attack too. He announced the attack on 8chan’s /pol/ board roughly ten to twenty minutes before it began, writing: “Well lads, it’s time to stop [****] posting and time to make a real life effort post. I will carry out and [sic] attack against the invaders, and will even live stream the attack via [F]acebook.” Minutes later, he posted the promised link to his livestream with the title “‘Screw Your Optics,’ a reference to the words posted on Gab by a far-right Pittsburgh gunman before he killed [eleven] people at a synagogue in October 2018.”⁷⁶ In the livestreamed video, Tarrant is initially seen in his car driving to the scene of his first attack.⁷⁷ Before exiting the car, he says, “Remember lads, subscribe to PewDiePie,”⁷⁸ a reference to a popular YouTube personality from Sweden who has been widely criticized for making racist comments and “flirting with alt-right culture.”⁷⁹ In a section of his manifesto entitled “Emotions rule over facts,” Tarrant ominously states: “Memes have done more for the ethnonationalist movement than any manifesto.”⁸⁰ He goes on to credit memes five more times in the document.⁸¹

Crusius, the El Paso attacker, publicly acknowledged his agreement with Tarrant’s views in his own manifesto posted to

⁷⁴ *Id.* at 17.

⁷⁵ *Id.*

⁷⁶ Tess Owen, *Decoding the racist memes the alleged New Zealand shooter used to communicate*, VICE NEWS (Mar. 15, 2019, 5:46 PM), https://www.vice.com/en_us/article/vbwn9a/decoding-the-racist-memes-the-new-zealand-shooter-used-to-communicate/.

⁷⁷ Macklin, *supra* note 3.

⁷⁸ *Id.*

⁷⁹ Aja Romano, *YouTube’s most popular user amplified anti-Semitic rhetoric. Again.*, VOX (Dec. 13, 2018, 3:00 PM), <https://www.vox.com/2018/12/13/18136253/pewdiepie-vs-tseries-links-to-white-supremacist-alt-right-redpill>.

⁸⁰ Tarrant, *supra* note 1, at 47.

⁸¹ *Id.* at 45, 47.

8chan. It contained much of the same rhetoric of the Great Replacement Theory.⁸² Like Tarrant, Crusius also “told investigators that he came to his views by doing research online.”⁸³ A cursory review of his social media accounts before they were taken down revealed that he “liked tweets that had the #BuildtheWall hashtag as well as a photo using guns to spell out ‘Trump,’ and posts from Paul Joseph Watson, a far-right Youtuber who works with Alex Jones at InfoWars.”⁸⁴ Not much else is known about Crusius’ online presence before the attack, but his use of 8chan to disseminate a manifesto – the third use of 8chan by an alt-right terrorist for that purpose that year⁸⁵ – suggests that he was aware it was a hotspot for alt-right activity and probably posted there prior. The manifesto generally reads as though it is addressed to the alt-right too. For example, Crusius warns any readers considering taking actions similar to his not to “attack heavily guarded areas to fulfill your super soldier [Call of Duty] fantasy.”⁸⁶ This statement is somewhat telling. Followers of the alt-right observe that online communities where they tend to congregate like Reddit, 4chan/8chan, and Discord have significant populations of (video) gamers and that many individuals involved in the alt-right are themselves gamers.⁸⁷

D. Scope of the Issue

White supremacist attackers were responsible for seventy-eight percent of the eighty-three extremist killings in the United States in 2018.⁸⁸ This was a significant increase over the thirty-seven

⁸² Politi, *supra* note 12; *El Paso Shooter’s manifesto*, *supra* note 12.

⁸³ Erin Ailworth et. al., *Lost in Life, El Paso Suspect Found a Dark World Online*, WALL STREET JOURNAL (Aug. 8, 2019, 8:09 PM), <https://www.wsj.com/articles/lost-in-life-el-paso-suspect-found-a-dark-world-online-11565308783>.

⁸⁴ Politi, *supra* note 12.

⁸⁵ Gianluca Mezzofiore & Donie O’Sullivan, *El Paso mass shooting is at least the third atrocity linked to 8chan this year*, CNN (Aug. 5, 2019, 7:43 AM), <https://www.cnn.com/2019/08/04/business/el-paso-shooting-8chan-biz/index.html>.

⁸⁶ *El Paso Shooter’s manifesto*, *supra* note 12.

⁸⁷ *See generally All Things Considered: Right-Wing Hate Groups Are Recruiting Video Gamers*, NPR (Nov. 5, 2018), <https://www.npr.org/2018/11/05/660642531/right-wing-hate-groups-are-recruiting-video-gamers>.

⁸⁸ *Report: Murder and Extremism in the United States in 2018*, ADL CENTER ON EXTREMISM 1, 4 (Jan. 2019), <https://www.adl.org/media/12480/download>.

extremist-related murders documented in 2017.⁸⁹ In England and Wales, hate crimes related to race have increased by 123% since 2013.⁹⁰ “Between April 2017 and March 2018, the U.K. government [also] noted an increase of [thirty-six] percent of the number of people referred to the government’s counter-extremism program for far-right activities.”⁹¹ The attacks in London, Christchurch, and El Paso discussed here may just be small contributions to this international surge of race-based violence, or they might collectively be driving it. The process of self-radicalization reinforced by the alt-right as well as its decentralized nature makes it challenging to determine how many attacks that specific community has encouraged or enabled. There is no comprehensive data on this in the U.S. or elsewhere.

The features of the alt-right movement engender legal issues in terms of: (1) whether acts of domestic terror inspired by its ideologies are prosecuted as acts of terror or something less culpable, and (2) who besides their perpetrators could be criminally liable in connection with those attacks and for what crimes. Each of these issues is addressed in kind below.

III. THE APPLICABILITY OF DOMESTIC TERRORISM LAWS

How lone-wolf, alt-right violent extremists are radicalized is relevant to an analysis of why domestic terrorism laws do or do not apply to their attacks in a particular jurisdiction. The factual circumstances surrounding these attacks also generally inform whether other individuals associated with the perpetrators are potentially criminally liable for the attacks. The domestic laws applicable to the El Paso, London, and Christchurch attacks mentioned above are surveyed in detail below. A comparison of the

⁸⁹ *Id.*

⁹⁰ Matthew Weaver, *Hate crime surge linked to Brexit and 2017 terrorist attacks*, THE GUARDIAN (Oct. 16, 2018, 5:52 PM), <https://www.theguardian.com/society/2018/oct/16/hate-crime-brexit-terrorist-attacks-england-wales>.

⁹¹ *United Kingdom: Extremism & Counter-Extremism*, COUNTER EXTREMISM PROJECT (2019), <https://www.counterextremism.com/countries/united-kingdom> (last visited Nov. 18, 2020).

relevant advantages and disadvantages of each legal regime in such contexts is the focus of discussion here.

A. United States

Federal criminal laws in the United States strictly differentiate domestic terrorism from international terrorism. The term “domestic terrorism” first entered the statutory lexicon in 2001 following the passage of the Patriot Act, a response to the September 11 terrorist attacks on the World Trade Center intended to provide the United States with more comprehensive legal tools to fight terrorism.⁹² According to the Act:

[T]he term “domestic terrorism” means activities that— (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended— (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States . . .⁹³

“International terrorism” is defined similarly and includes not only acts dangerous to human life that are violations of criminal laws in the United States, but those that “*would be* a criminal violation *if* committed within the jurisdiction of the United States or of any State.”⁹⁴ The primary difference between these definitions is that such acts are only international terrorism when they “occur primarily outside the territorial jurisdiction of the United States, or *transcend national boundaries* in terms of the means by which they are accomplished, the persons they appear intended to intimidate or

⁹² Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism (USA Patriot Act) Act of 2001, 107 P.L. 56, 115 Stat. 272 (LEXIS 2019).

⁹³ 18 U.S.C.S. § 2331(5) (LEXIS through Pub. L. No. 116-65).

⁹⁴ § 2331(1)(A) (LEXIS 2019) (emphasis added).

coerce, or the locale in which their perpetrators operate or seek asylum.”⁹⁵

Nevertheless, while domestic terrorism is defined under federal law, it is not actually criminalized therein.⁹⁶ Only a “federal crime of terrorism” is listed.⁹⁷ That crime applies to offenses that are “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct” in the course of committing one or more of the many crimes enumerated in the statutes.⁹⁸ These enumerated crimes fall into three categories: (1) “offenses committed with particular weapons – such as chemical, biological, and nuclear weapons or more common explosives – and [with] tactics historically associated with terrorism, such as taking hostages or hijacking aircraft;” (2) offenses concerning “targets of . . . violence where there is a distinct federal interest, such as violence against federal officials, federal facilities, and mass transit or communications systems;” and (3) crimes against persons and property that have an “international nexus” in that they involve

⁹⁵ § 2331(1)(C) (LEXIS 2019) (emphasis added).

⁹⁶ See Katie Dilts, *One of These Things is Not Like the Other: Federal Law’s Inconsistent Treatment of Domestic and International Terrorism*, 50 MCGEORGE L. REV. 711 (2019).

⁹⁷ 18 U.S.C.S. § 2332b (LEXIS 2019); see also *id.* § 2332 (similarly criminalizing homicides, attempted homicides, and conspiracies to commit homicide with transnational aspects to them).

⁹⁸ 18 U.S.C.S. § 2332b(g)(5) (LEXIS 2019); but see Shirin Sinnar, *Separate And Unequal: The Law of “Domestic” And “International” Terrorism*, 117 MICH. L. REV. 1333, 1352-1353 (2019) (arguing the third category “converts violent acts – as well as threats, attempts, and conspiracies to commit such acts – into federal crimes where there is an international link, irrespective of political intent”). There seems to be some confusion about this. The federal crime of terrorism, which requires a political motivation, is defined under § 2332b(g)(5) and refers back to § 2332b as a whole (“Acts of terrorism transcending national boundaries”) as an enumerated crime that constitutes the federal crime of terrorism if undertaken with such a political motivation. Section 2332b(a) outlines an “offense” that does not require that a violent act have a political motivation, only that it involve conduct occurring both inside and outside of the United States. Section 2332b(a) can thus be read as a separate crime of “terrorism transcending national boundaries” *vis-à-vis* the federal crime of terrorism under § 2332b(g)(5) notwithstanding the recursive nature of that latter definition. While Sinnar’s alternate reading of § 2332b(g)(5) is fair, it does not significantly change the analysis presented here.

conduct occurring both inside and outside of the United States – including threats, attempts, and conspiracies to commit such crimes.⁹⁹ In addition to the federal crime of terrorism itself, the statutes provide that *any other felony* that “involved, or was intended to promote, [the] federal crime of terrorism” is eligible for a terrorism sentencing enhancement.¹⁰⁰

For example, under the first category of enumerated crimes, the arson or bombing of any property used in interstate or foreign commerce – such as an airplane travelling across international borders – can constitute the federal crime of terrorism if done for the purpose of intimidating or coercing the U.S. government.¹⁰¹ Under the second category, abducting or killing a member of Congress for similar purposes constitutes the federal crime of terrorism.¹⁰² Generally, methods of international terrorists are accounted for while the favorite of domestic lone-wolf terrorists in the U.S. – mass shootings – is absent in the federal terrorism statutes.

What stands out about the federal crime of terrorism, beyond its focus on traditional methods of *international* terrorism, is that it does not criminalize acts that seek to coerce or intimidate a *civilian population*, only those which also seek to coerce or intimidate the U.S. government itself.¹⁰³ While the scope of the federal definition of “domestic terrorism” acknowledges that such attacks may be *ideologically* motivated, the federal crime of terrorism only focuses on

⁹⁹ Sinnar, *supra* note 100, at 1352-53 (2019); 18 U.S.C.S. § § 2331- 2339D (LEXIS 2019).

¹⁰⁰ 18 U.S.C.S. app. § 3A1.4 (LEXIS through Pub. L. No. 116-65); *see also* *United States v. Graham*, 275 F.3d 490, 517 (6th Cir. 2001) (“the defendant need not have been convicted of a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5) for the district court to find that he intended his substantive offense of conviction or his relevant conduct to promote such a terrorism crime” under the sentencing enhancement guidelines).

¹⁰¹ 18 U.S.C.S. § 2332b(g)(1); §2332b(g)(5)(B)(i); 18 U.S.C.S. § 844(i) (LEXIS 2019).

¹⁰² 18 U.S.C.S. § 2332b(g)(1); § 2332b(g)(5)(B)(i); 18 U.S.C.S. § 351(a) (LEXIS 2019).

¹⁰³ *See United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014); *see also United States v. Awan*, 607 F.3d 306 (2d Cir. 2010).

those that are *politically* motivated.¹⁰⁴ This discrepancy has significant implications in the context of terrorism committed by the alt-right, which is often motivated by vehemently racist, white supremacist ideologies that are otherwise not overtly “political” in the sense that they directly oppose governmental affairs.¹⁰⁵

Of course, acts of domestic terrorism can also violate state laws. Virginia’s criminal code quite broadly defines the offense of “domestic terrorism” as “engaging in or taking a substantial step to commit a violation of the criminal laws of [Virginia] with the intent to: (A) cause death or serious bodily injury to multiple persons; or (B) threaten any civilian population with mass destruction, mass killings, or kidnapping.”¹⁰⁶ New York’s statute criminalizing domestic terrorism mirrors the language of the federal definition of “domestic terrorism,” providing that:

[One] is guilty of a crime of terrorism when, with intent to intimidate or coerce a civilian population, influence[s] the policy of a unit of government by intimidation or coercion, or affect[s] the conduct of a unit of government by murder, assassination or kidnapping, he or she commits a specified offense.¹⁰⁷

These state laws are seemingly rarely invoked compared to federal terrorism laws though.

Texas currently has no domestic terrorism statute on its books. Under Virginia’s or New York’s statute, Crusius, the El Paso shooter, would undoubtedly be criminally liable though. Both statutes criminalize killings that threaten or intimidate a civilian population. The general tenor of Crusius’ manifesto was that Mexicans are invading America and need to be taught a violent lesson. “This attack

¹⁰⁴ 22 U.S.C.S § 2656f(d)(2) (LEXIS 2019) (“the term ‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”).

¹⁰⁵ *Political*, MERRIAM-WEBSTER DICTIONARY ONLINE (last visited Nov. 9, 2019), <https://www.merriam-webster.com/dictionary/political>.

¹⁰⁶ 13 V.S.A. Section 1703(a)(1) (LEXIS 2019).

¹⁰⁷ N.Y. C.L.S. Penal § 490.25(1) (LEXIS 2019).

is a response to the Hispanic invasion of Texas. They are the instigators, not me,” he explains.¹⁰⁸ From such statements, one can certainly infer that the purpose of Crusius’ attack, which specifically targeted “Mexicans,” was to threaten or intimidate that population generally – especially considering Crusius made his manifesto public and committed his attack in a very public place: Walmart. According to New York state courts, the phrase “*intending to intimidate or coerce a civilian population*” implies, at minimum, “an intention to create a pervasively terrorizing effect on people living in a given area, directed either to all residents of the area or to all residents of the area who are members of some broadly defined class, such as a gender, race, nationality, ethnicity, or religion.”¹⁰⁹ The El Paso shooting demonstrably had such a “terrorizing effect” on the Latinx, and especially Mexican-American, communities in Texas and many others around the U.S..¹¹⁰

Since no state or federal crime of *domestic terrorism* was available, Crusius was charged with capital murder, Texas’ most serious crime.¹¹¹ Early on, news media reported that he may also be charged with federal hate crimes, but the viability of such charges has been seriously questioned on the grounds that federal hate crimes only encompass activities that cross state lines, which does not seem to be the case with the El Paso shooting.¹¹² Crusius cannot be

¹⁰⁸ *El Paso Shooter’s Manifesto*, *supra* note 12.

¹⁰⁹ *People v. Morales*, 2011 NY Slip Op 4537, ¶¶ 8-9, 86 A.D.3d 147, 157, 924 N.Y.S.2d 62, 68 (App. Div.), *reversed in part on other grounds*, 2012 NY Slip Op 8439, 20 N.Y.3d 240, 958 N.Y.S.2d 660, 982 N.E.2d 580 (agreeing that defendant killing two people to intimidate a rival gang did not rise to the level of intimidating or coercing a civilian population under New York’s domestic terrorism statute).

¹¹⁰ See Dianna M. Nájera et. al., *It’s real. It’s violent’: After El Paso, Latinos across America live in fear*, USA TODAY (Aug. 16, 2019, 1:23 PM), <https://www.usatoday.com/story/news/nation/2019/08/16/el-paso-texas-mass-shooting-latino-hispanic-reaction/2027932001/>.

¹¹¹ Mark Berman & Robert Moore, *El Paso shooting suspect indicted by grand jury on capital murder charge*, WASH. POST (Sept. 18, 2019, 12:59 P.M.), https://www.washingtonpost.com/national/el-paso-shooting-suspect-indicted-by-grand-jury-on-capital-murder-charge/2019/09/18/71fe3634-d703-11e9-86ac-0f250cc91758_story.html.

¹¹² Thomas T. Cullen, *The Grave Threats of White Supremacy and Far-Right Extremism*, N.Y. TIMES (Feb. 22, 2019), <https://www.nytimes.com/2019/02/22/opinion/christopher-hasson-extremism.html>.

charged with the *federal crime of terrorism* for similar reasons. That crime requires “conduct transcending national boundaries” unless weapons or tactics historically associated with terrorism are involved or a distinctly federal interest is implicated.¹¹³ Although Crusius’ attack involved “conduct transcending national boundaries” in a very loose sense in that his attack killed eight Mexican nationals, prompting Mexico’s Foreign Minister to threaten legal action against the United States,¹¹⁴ it did not involve “conduct occurring outside of the United States in addition to the conduct occurring in the United States,” which is how that phrase is defined in the statute outlining the federal crime of terrorism.¹¹⁵

Although Crusius’ attack meets the federal definition of “international terrorism” in that the conduct involved appears to “transcend national boundaries in terms of . . . the persons they appear intended to intimidate or coerce,”¹¹⁶ no *federal crime of international terrorism* exists either.¹¹⁷ “International terrorism” is similarly only defined in reference to other crimes under the terrorism statutes and does not constitute a separate offense.¹¹⁸ Therefore, all terrorism falls under the purview of the federal crime of terrorism under federal criminal law.

In federal court, a conviction for capital murder can be subject to the terrorism sentencing enhancement. The enhancement applies to felonies that “promote” terrorism in that they “help bring about, *encourage*, or contribute to a federal crime of terrorism.”¹¹⁹ However, in such circumstances, the actor must still commit the

¹¹³ 18 U.S.C.S. § 2332b(a)(1) (LEXIS 2019).

¹¹⁴ David K. Li, *Mexico vows to take legal action against U.S. after El Paso massacre*, NBC NEWS (Aug. 5, 2019, 3:19 PM), <https://www.nbcnews.com/news/us-news/mexico-vows-take-legal-action-against-u-s-wake-deadly-n1039096>.

¹¹⁵ 18 U.S.C.S. § 2332b(g)(1) (LEXIS 2019).

¹¹⁶ 18 U.S.C.S. § 2331(1)(C) (LEXIS 2019).

¹¹⁷ *See generally* 18 U.S.C.S. §§ 2331 — 2339D (LEXIS 2019).

¹¹⁸ *Id.*

¹¹⁹ 18 U.S.C.S. app. § 3A1.4; *Avan*, 607 F.3d 306 at 309 (emphasis added); *United States v. Arnaout*, 431 F.3d 994, 1002 (7th Cir. 2005) (“the word ‘promote,’ as used in § 3A1.4, signifies that where a defendant’s offense or relevant conduct helps or encourages a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5)(B), then § 3A1.4 is triggered”).

underlying felony with the additional specific intent to “influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct” as the federal crime of terrorism requires.¹²⁰ Although Crusius’ attack was arguably more racially motivated than politically motivated, some of his statements do suggest he saw himself as fighting back against the government. He argued that his actions were necessary because “Hispanics will take control of the local and state government of my beloved Texas, changing policy to better suit their needs. They will turn Texas into an instrument of a political coup which will hasten the destruction of our country.”¹²¹ Unlike the federal crime of terrorism, the sentencing enhancement does not require the conduct involved in the offense transcend national boundaries.¹²² As such, Crusius’ conviction could have been subject to the enhancement under this view if he was charged with capital murder in federal court rather than state court.

Although Crusius cannot be charged with the federal crime of terrorism or subjected to the sentencing enhancement, it is worth asking if anyone associated with his attacks could be held liable if he had been so charged in federal court. Congress has criminalized a wide variety of activities associated with terrorism, such as providing

¹²⁰ *United States v. Stewart*, 590 F.3d 93, 138 (2d Cir. 2009); *United States v. Elshinany*, No. ELH-16-009, 2018 U.S. Dist. LEXIS 51362, at *11-12 (D. Md. Mar. 28, 2018) (“As to the phrase ‘calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct’ in 18 U.S.C. § 2332b(g)(5)(A), the ‘standard’ for the enhancement focuses on the offense, asking ‘whether it was calculated, i.e., planned—for whatever reason or motive—to achieve the stated object.’”).

¹²¹ *El Paso Shooter’s Manifesto*, *supra* note 12.

¹²² *United States v. Garey*, 383 F. Supp. 2d 1374 (M.D. Ga. 2005), *habeas corpus dismissed*, 2006 U.S. Dist. LEXIS 53286 (E.D. Ky. July 18, 2006), *habeas corpus denied*, 2006 U.S. Dist. LEXIS 81898 (E.D. Ky. Oct. 16, 2006), *remanded*, 483 F.3d 1159, 20 Fla. L. Weekly Fed. C 480 (11th Cir. 2007), *habeas corpus denied*, 2007 U.S. Dist. LEXIS 33510 (E.D. Ky. May 7, 2007), *affirmed*, 546 F.3d 1359, 21 Fla. L. Weekly Fed. C 1223 (11th Cir. 2008) (defendant’s conduct involved a federal crime of terrorism since it was intended to affect the conduct of government and involved weapons of mass destruction; furthermore, conduct transcending national boundaries was not required for the enhancement, even though it was required for the substantive offense); *cf. United States v. Salim*, 549 F.3d 67 (2d Cir. 2008) (agreeing the sentencing enhancement does not require transnational conduct, but concluding the federal crime of terrorism does not either).

material support to terrorists and harboring or concealing terrorists. “Material support” is broadly defined as including “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . , and transportation.”¹²³

Two separate statutes prohibit providing material support to terrorists. The first criminalizes *intentionally* or *knowingly* providing material support – such as resources, expertise, or training – that facilitates past or future terrorist *acts*.¹²⁴ Providing firearms to a terrorist organization would undoubtedly constitute a violation because one can readily assume they will be used for violence furthering its terrorist objectives.¹²⁵ In contrast, providing a group deemed to be a terrorist organization with training on how to report violations of its constituents’ human rights to the United Nations does not seemingly facilitate any acts of violence and therefore would not constitute a violation.¹²⁶ The defendant’s awareness of the extent to which the materials they provided would support terrorism is the critical inquiry.¹²⁷

For this reason, most material support cases arise under the second statute,¹²⁸ which criminalizes *knowingly* providing material

¹²³ 18 U.S.C.S. § 2339A(b)(1) (LEXIS 2019).

¹²⁴ § 2339A(a).

¹²⁵ *United States v. Warsame*, 537 F. Supp. 2d 1005, 1019 (D. Minn. 2008) (quoting *United States v. Assi*, 414 F. Supp. 2d 707, 718 (E.D. Mich. 2006)).

¹²⁶ *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176 (C.D. Cal. 1998).

¹²⁷ *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008) (“[Under] section 2339A, a donor to terrorism, to be liable under section 2333, must have known that the money would be used in preparation for or in carrying out the killing or attempted killing of, conspiring to kill, or inflicting bodily injury on, an American citizen abroad.”).

¹²⁸ Ronbert H. Schwartz, *Laying the Foundation for Social Media Prosecutions Under 18 U.S.C. § 2339B*, 48 LOY. U. CHI. L.J. 1181 (2017) (“[§] 2339B is more applicable to most fact scenarios?”); *see also, e.g., United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011) (providing martial arts lessons to terrorists); *see also, e.g., Warsame*, 537 F. Supp. 2d at 1019 (providing English lessons to terrorists).

support to a *foreign terrorist organization* (“FTO”).¹²⁹ Under the Immigration and Nationality Act, the Secretary of State is authorized to designate FTOs.¹³⁰ These groups, which currently include Hizballah and Al-Qa’ida, must be (1) foreign organizations that (2) engage in terrorism or retain the ability to do so and (3) threaten the national security of the United States or its citizens.¹³¹ Under this statute, providing material support to such a group is a crime as long as the actor is aware the group is an FTO.¹³² Proving a violation is therefore much simpler than proving a defendant knew the particular resources, expertise, or training they provided would “be used in preparation for, or in carrying out” a specific terrorist act by that group.¹³³

The fact that most material support cases involve assistance to FTOs is problematic in the context of alt-right terrorism. The alt-right largely consists of decentralized, anonymous online communities centered around white supremacist ideologies which are promulgated by memes and hate speech shared by users across the globe. It is therefore not a “foreign *organization*” in the sense that it has members, a hierarchical structure, and so forth – although many alt-right communities do include members of recognized domestic

¹²⁹ 18 U.S.C.S. § 2339B(a)(1) (LEXIS 2019).

¹³⁰ 8 U.S.C.S. § 1189(a)(1); *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE BUREAU OF COUNTERTERRORISM AND COUNTERING VIOLENT EXTREMISM (accessed Nov. 3, 2019), <https://www.state.gov/foreign-terrorist-organizations/>.

¹³¹ 8 U.S.C.S. § 1189(a)(1)(a); U.S. DEP’T OF STATE, *supra* note 134; *The “Foreign Terrorist Organization” Designation Scheme*, AMERICAN CIVIL LIBERTIES UNION (accessed Nov. 3, 2019), https://www.aclu.org/sites/default/files/field_document/fto_designation_briefer_final.pdf; *Holder v. Humanitarian Law Project*, 561 U.S. 1, 1, 130 S. Ct. 2705, 2707 (2010) (“‘National security’ means the national defense, foreign relations, or economic interests of the United States” per 8 U.S.C.S. § 1189(d)(2)).

¹³² 18 U.S.C.S. § 2339B(a)(1); *United States v. Chandia*, 514 F.3d 365, 371 (4th Cir. 2008) (“As we held [before,] the mere fact of designation, rather than the designation’s validity, is what is relevant to a defendant (such as Chandia) who stands accused of providing material support [under §2339B]”); *Warsame*, 537 F. Supp. 2d at 1019; *Holder*, 561 U.S. at 1.

¹³³ *United States v. Chandia*, 514 F.3d 365, 371-72 (4th Cir. 2008); Schwartz, *supra* note 132, at 1186-87.

and foreign hate groups.¹³⁴ Although federal law defines a “terrorist organization” as merely “a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, [terrorist] activities,”¹³⁵ seemingly encompassing diffuse online communities like the alt-right, “terrorism” itself is defined as “premeditated, politically motivated violence perpetrated against noncombatant targets by *subnational groups* or clandestine agents.” An emphasis on organized state-sponsored groups is evident from the Secretary of State’s statutory mandate to investigate countries whose governments provide terrorists with political, diplomatic, monetary, or military support.¹³⁶

In the unlikely event the alt-right is designated as an FTO, companies that facilitate communications for the alt-right could be held accountable for providing material support to them under the second statute. Some commentators have argued that social media platforms like Facebook and Twitter should at least be civilly liable under the statute because their services utilize algorithms that automatically connect users with FTOs, and therefore assist with their recruitment efforts, as well as provide efficient, low-cost platforms for spreading propaganda and fundraising.¹³⁷ Through their failure to proactively moderate such content, companies like Facebook allow FTOs to exist on their platforms.¹³⁸ Because these companies are aware that such FTOs are utilizing their services to further their terrorist objectives, the statute’s *mens rea* requirement that violators *knowingly* support terrorist groups is satisfied.¹³⁹

These statutes provide for accomplice liability and are inchoate offenses like attempt and conspiracy to the extent they

¹³⁴ Spencer Sunshine, *Will Decentralization of Neo-Nazism Spur More Right-Wing Terrorism?*, TRUTHOUT (Mar. 18, 2019), <https://truthout.org/articles/will-decentralization-of-neo-nazism-spur-more-right-wing-terrorism/>.

¹³⁵ 8 U.S.C.S. § 1182(a)(1)(vi)(III).

¹³⁶ 22 U.S.C.S. § 2656f (LEXIS 2019).

¹³⁷ Schwartz, *supra* note 132, at 1208, 1214-16.

¹³⁸ Schwartz, *supra* note 132, at 1208-17.

¹³⁹ Schwartz, *supra* note 132, at 1208-17; *see also* Elizabeth M. Renieris, *Note: Combating Incitement to Terrorism on the Internet: Comparative Approaches in the United States and United Kingdom and the Need for an International Solution*, 11 VAND. J. ENT. & TECH. L. 673, 682-83 (2009).

criminalize supporting terrorism before it actually occurs.¹⁴⁰ Federal terrorism statutes also explicitly criminalize threatening to commit terrorism or attempting or conspiring to do so.¹⁴¹ To be guilty of conspiracy in other contexts, one generally does not need to know the identity of their co-conspirators.¹⁴² Conspiracy only requires an agreement to commit a crime – a “meeting of the minds,” “understanding,” “shared criminal intent,” or “common purpose” depending on the jurisdiction – and an overt act by one of the conspirators in furtherance of its object.¹⁴³ Because a conspirator is not liable for crimes that are not reasonably foreseen to be within the scope of the conspiracy,¹⁴⁴ the existence and object of the conspiracy must be sufficiently apparent to them when making such an agreement.¹⁴⁵ As one commentator notes, on the Internet, “abstract justifications of violence can combine with specific, personal information about possible targets of violence to generate a message that, viewed as a whole, is operational” as the object of a conspiracy under federal terrorism statutes.¹⁴⁶

Although racist discourse in popular alt-right communities like Reddit is demonstrably angry, it presumably does not escalate into specific calls to violent action. A new neo-Nazi social media platform called The Base is trying to change this by utilizing websites like Reddit as pathways of radicalization to “funnel committed extremists from around the internet into a group explicitly focused on providing users with terroristic skills, in order to produce real-world violence.”¹⁴⁷ These skills would consist of “lone wolf terror-

¹⁴⁰ Renieris, *supra* note 143, at 682.

¹⁴¹ 18 U.S.C.S. § 2332b(a)(2).

¹⁴² See e.g. Model Penal Code § 5.03(2) (LEXIS 2019).

¹⁴³ Laurent Sacharoff, *Conspiracy as Contract*, 50 U.C. DAVIS L. REV. 405, 408-9 (2016); Model Penal Code § 5.03.

¹⁴⁴ *Pinkerton v. United States*, 328 U.S. 640 (1946).

¹⁴⁵ Sacharoff, *supra* note 147, at 455-56; see generally Peter Margulies, *The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment*, 2004 UCLA J.L. & TECH. 4 (2004).

¹⁴⁶ Margulies, *supra* note 149.

¹⁴⁷ Ben Makuch & Mack Lamoureux, *Neo-Nazis Are Organizing Secretive Paramilitary Training Across America*, VICE (Nov. 20 2018, 2:45 P.M.), https://www.vice.com/en_us/article/a3mexp/neo-nazis-are-organizing-secretive-paramilitary-training-across-america.

tactics” such as “gunsmithing, data mining, interrogation tactics, counter-surveillance techniques, bomb making, chemical weapons creation, and guerilla warfare”¹⁴⁸ – which constitute “training” and “expert advice or assistance” within the meaning of the material support statute.¹⁴⁹ Users of the website, which include many members of established hate groups, have been observed discussing how they “want to gather with people and plan something out,” like a bombing or “something a bit more destructive.”¹⁵⁰

While conspiracy liability would reach these alt-right terrorist “cells” like The Base, giving prosecutors an opportunity to incarcerate their participants before attacks occur, none of the lone-wolf terrorists considered in this article coordinated their attacks with this level of assistance from such groups as far as we know, so the practical utility of this tool is questionable in the broader landscape of alt-right terrorism.

B. United Kingdom

The United Kingdom (“U.K.”) Parliament passed the Terrorism Act 2000 shortly before 9/11 to replace temporary legislation passed in the 1970s aimed at preventing and punishing terrorism stemming from the long-standing Northern Ireland Conflict.¹⁵¹ The Act greatly expanded the definition of “terrorism” under British criminal law and granted authorities a number of additional powers to quell terrorist threats.¹⁵² According to the Act, “‘terrorism’ means the use or threat of action where[:]”

(a) the action [is one prohibited by the Act], (b) the use or threat is designed to influence the government

¹⁴⁸ *Id.*

¹⁴⁹ 18 U.S.C.S. § 2339A(b) (“[T]he term ‘training’ means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and . . . the term ‘expert advice or assistance’ means advice or assistance derived from scientific, technical or other specialized knowledge.”).

¹⁵⁰ Makuch & Lamoureux, *supra* note 151.

¹⁵¹ *Terrorism Act 2000*, THE GUARDIAN: U.S. EDITION (Jan. 19, 2009, 6:23 AM), <https://www.theguardian.com/commentisfree/libertycentral/2009/jan/19/terrorism-act>.

¹⁵² *Id.*

... or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious ... or ideological cause.¹⁵³

Actions prohibited under the statute include conduct which:

(a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life ... , (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system.¹⁵⁴

The Act was amended in 2008 to additionally criminalize terrorist attacks for the purpose of advancing a "racial" cause.¹⁵⁵ Unlike the U.S. Patriot Act, it applies equally to domestic and international terrorism.¹⁵⁶

The House of Commons passed a separate bill in 2008 which provided for a mandatory sentencing enhancement for serious crimes with a "terrorist connection."¹⁵⁷ Crimes that are eligible include, among many others, murder, kidnapping, causing an explosion likely to endanger life or property, and hijacking.¹⁵⁸ Aiding, abetting, attempting, or conspiring to commit any of the enumerated offenses is also included in the bill.¹⁵⁹ If such a terrorist connection is alleged, courts must consider evidence on that issue, rule on whether such a connection existed, and treat that fact as an aggravating factor if the court determines a connection did exist.¹⁶⁰ The term "terrorist

¹⁵³ Terrorism Act 2000, c. 11, § 1(1) (UK), <http://www.legislation.gov.uk/ukpga/2000/11/section/1>.

¹⁵⁴ *Id.* at §1(2).

¹⁵⁵ Counter-Terrorism Act 2008, c. 28, § 75(1) (UK), <http://www.legislation.gov.uk/ukpga/2008/28/section/75>.

¹⁵⁶ *Id.* at §75(4)(a).

¹⁵⁷ Counter-Terrorism Bill 2007-8, HL Bill [63] cl. 29-31 (UK), <https://publications.parliament.uk/pa/cm200708/cmbills/063/2008063.pdf>.

¹⁵⁸ *Id.* at sch. 2.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

connection” is defined recursively to include any offense that “(a) is, or takes place in the course of, an act of terrorism, or (b) is committed for the purposes of terrorism.”¹⁶¹

Nevertheless, while “terrorism” is broadly defined under the Act, that definition only applies to several specific criminal offenses. These offenses include: (1) providing or receiving weapons training for the purpose of committing terrorism or encouraging another to do so, (2) directing a terrorist organization at any level, (3) possessing any items in circumstances which give rise to a reasonable suspicion such item will be used to commit terrorism, and (4) collecting any documents “of a kind likely to be useful to a person committing or preparing an act of terrorism.”¹⁶² Despite this partitioning, the Crown Prosecution Service has made clear that crimes with only a “terrorist connection” are no less “terrorism” than any of the crimes defined under the Act, as that term is ordinarily understood.¹⁶³

Darren Osborne, the man who drove a van into a group of worshippers leaving a mosque in London in 2017, was charged and convicted of murder and attempted multiple murder.¹⁶⁴ He was sentenced to life in prison for both crimes with a minimum of forty-three years to be served as a result of the terrorism sentencing enhancement.¹⁶⁵ The sentencing judge’s findings of fact outlined how Osborne was “rapidly radicalised over the internet” by an “extreme racist and anti-Islamic ideology.”¹⁶⁶ She remarked, “Your plan was simple. To copy the method used by some Islamist terrorist and take a vehicle to a densely populated place and wreak as much devastation as possible as well as sowing long-lasting terror among the Muslim

¹⁶¹ *Id.* at cl. 84-5.

¹⁶² Terrorism Act 2000, c. 11, §§ 54-58 (UK), <http://www.legislation.gov.uk/ukpga/2000/11/section/1>.

¹⁶³ *Terrorism*, CROWN PROSECUTION SERVICE (2017), <https://www.cps.gov.uk/terrorism> (last visited Jan. 4, 2020).

¹⁶⁴ Dearden, *supra* note 66.

¹⁶⁵ *R. v. Osborne* [2008] Woolwich Crown Court [3]-[4] (Eng.) (sentencing remarks of Cheema-Grubb J), <https://www.judiciary.uk/wp-content/uploads/2018/02/r-v-osborne-sentencing-remarks.pdf>.

¹⁶⁶ *Id.* at [2]-[3].

population. . . . This was a terrorist attack. You intended to kill,” she concluded.¹⁶⁷

This case is a particularly instructive example of how supporters of the alt-right associated with such lone-wolf terrorists can escape criminal liability despite their involvement in the process of radicalization of such individuals. In the weeks leading up to his attack, Osborne followed the Twitter account of Britain First,¹⁶⁸ an alt-right political party dedicated to opposing Islam and “mass immigration.”¹⁶⁹ Prosecutor Jonathan Rees publicly confirmed that Osborne received several private messages from Jayda Fransen, the group’s former deputy leader during that timeframe – although the content of them has remained confidential.¹⁷⁰ Osborne also received emails from Tommy Robinson, the former leader of the English Defence League (“EDL”), a far-right social group with aims similar to Britain First.¹⁷¹ One email discussed an EDL campaign regarding a woman who was raped by Middle Eastern men who were never prosecuted.¹⁷² The email read, “It’s a national outrage . . . I know you will be there for her and together, [sic] we’ll get her the justice she and her family have been denied.”¹⁷³ A line from a Tweet posted by Robinson – “don’t look back in anger” – was also included in a note Osborne left at the scene of his attack.¹⁷⁴ This evidence was presented to jurors at Osborne’s trial.¹⁷⁵ Commander Dean Haydon of Scotland Yard’s Counter Terrorism Command commented that these messages likely played a significant part in Osborne’s radicalization.¹⁷⁶

¹⁶⁷ *Id.* at [3].

¹⁶⁸ Dearden, *supra* note 66.

¹⁶⁹ *Britain First and Racism – The Truth!*, BRITAIN FIRST (2020), <https://www.britainfirst.org/racism> (last visited Jan. 5, 2020).

¹⁷⁰ Dearden, *supra* note 66.

¹⁷¹ *Id.*; Katrine Dermody, *What is the English Defence League?*, PUBLIC RADIO INTERNATIONAL (May 23, 2013, 7:13 PM), <https://www.pri.org/stories/2013-05-23/what-english-defence-league>.

¹⁷² Dearden, *supra* note 66.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Dodd & Taylor, *supra* note 63.

Both Britain First and the EDL have a long history of inciting hatred and violence in the U.K.. Thomas Mair, who is believed to have inspired Osborne's attack, yelled "Britain first!" as he murdered Jo Cox, a pro-immigrant Member of Parliament, in 2016.¹⁷⁷ Fransen and Britain First's leader, Paul Golding, have been arrested on several occasions for harassing Muslims and were both convicted of hate speech-based crimes for such activities in 2018.¹⁷⁸ Golding has been detained by police at least four times pursuant to a counter-terrorism provision of the Terrorism Act 2000.¹⁷⁹ Reports indicate that Golding and Britain First members have been observed patrolling city streets in paramilitary uniforms and vehicles, training in unarmed combat, and attempting to instigate riots.¹⁸⁰ One prominent member was quoted with saying the group was preparing for a "holy war."¹⁸¹ Robinson was similarly convicted of hate speech-based crimes in 2011 for inciting a massive brawl between EDL members and football hooligans,¹⁸² which the EDL actively recruits because of their known propensity for violence.¹⁸³ That same year, EDL members ransacked a Muslim-owned bookstore where they reportedly "manhandled and abused" its patrons.¹⁸⁴ Other members are reported to have physically attacked members of the British Socialist Workers' Party, a far-left political group that actively

¹⁷⁷ *Accused British Assassin Linked To U.S. Neo-Nazi Group*, SOUTHERN POVERTY LAW CENTER (Aug. 3, 2016), <https://www.splcenter.org/fighting-hate/intelligence-report/2016/accused-british-assassin-linked-us-neo-nazi-group>.

¹⁷⁸ Kevin Rawlinson, *Britain First leaders jailed over anti-Muslim hate crimes*, THE GUARDIAN (Mar. 7, 2018, 1:42 PM), <https://www.theguardian.com/world/2018/mar/07/britain-first-leaders-convicted-of-anti-muslim-hate-crimes>.

¹⁷⁹ Adam Bienkov, *Britain First: The violent new face of British fascism*, POLITICS.CO.UK (June 19, 2014, 12:43 PM), <https://www.politics.co.uk/news/2014/06/19/britain-first-the-violent-new-face-of-british-fascism>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *EDL founder Stephen Lennon guilty over football brawl*, BBC NEWS (July 25, 2011), <https://www.bbc.com/news/uk-england-suffolk-14278957>.

¹⁸³ James Treadwell & Jon Garland, *No Surrender to the Taliban! Football Hooliganism, Islamophobia and the Rise of the English Defence League*, ANNUAL BRITISH SOCIETY OF CRIMINOLOGY CONFERENCE (Univ. of Leicester 2010), <http://epubs.surrey.ac.uk/772919/>.

¹⁸⁴ *Mindless EDL thugs storm Muslim exhibition in Cradley Heath market*, HALESOWEN NEWS (Oct. 17, 2011), <https://www.halesowennews.co.uk/news/9309878.mindless-edl-thugs-storm-muslim-exhibition-in-cradley-heath-market/>.

campaigns against the EDL, severely injuring one elderly man.¹⁸⁵ Several EDL members interviewed by academics studying the group also admitted to attacking racial minorities in random acts of violence not reported by news media.¹⁸⁶

The Terrorism Act 2000 does give the Secretary of State discretion to proscribe terrorist groups in a manner similar to the U.S. Immigration and Nationality Act. Groups proscribed must either: (a) commit or participate in acts of terrorism, (b) prepare for terrorism (c) promote or encourage terrorism, or (d) otherwise concern terrorism.¹⁸⁷ An amendment by the Terrorism Act 2006 clarifies that a group promotes or encourages terrorism if it *glorifies* – that is, praises or celebrates – terrorism in a way that persons exposed to their messages would be reasonably expected to infer that what is being glorified should be emulated.¹⁸⁸ Persons who become members of such groups, provide tangible or intangible support to them, or publicly wear or disseminate images of articles of clothing arousing suspicion that they are a member or supporter of such groups can be imprisoned under the Act.¹⁸⁹ The Terrorism Act of 2006 also separately criminalizes encouraging terrorism by *intentionally* or *recklessly* making statements that are likely to be understood by a reasonable person to either directly or indirectly induce the one exposed to them to commit, prepare, or instigate acts of terrorism.¹⁹⁰

These statutes go farther to prevent terrorism than the inchoate counter-terrorism offenses under the U.S. Patriot Act in that

¹⁸⁵ *EDL thugs attack socialists, beat up pensioner*, ALLIANCE FOR WORKERS' LIBERTY (May 7, 2012), <https://workersliberty.org/story/2019-04-11/edl-thugs-attack-socialists-beat-pensioner>.

¹⁸⁶ James Treadwell & Jon Garland, *Masculinity, Marginalization And Violence: A Case Study Of The English Defence League*, 51 BRIT. J. CRIMIN. 621–634 (2011), www.jstor.org/stable/23639102.

¹⁸⁷ Terrorism Act 2000, c. 11, § 3 (UK), <http://www.legislation.gov.uk/ukpga/2000/11/section/1>.

¹⁸⁸ Terrorism Act 2006, c. 11, § 21 (UK), <http://www.legislation.gov.uk/ukpga/2006/11/section/21>.

¹⁸⁹ Terrorism Act 2000, c. 11, §§ 11-13 (UK), <http://www.legislation.gov.uk/ukpga/2000/11/section/1>.

¹⁹⁰ Terrorism Act 2006, c. 11, § 1 (UK), <http://www.legislation.gov.uk/ukpga/2006/11/section/1>.

they not only criminalize providing material support for terrorism or attempting or conspiring to do so, but they also criminalize words or actions that promote radicalization in the first instance. While the U.K. maintains that such offenses are consistent with the government's treaty obligations to prohibit "public provocation to commit a terrorist offence" under the Council of Europe's Convention on the Prevention of Terrorism,¹⁹¹ critics have argued they are so overly broad that they intrude on the human right to freedom of expression.¹⁹² British case law does little to clarify where the line between glorifying terrorism and legitimate free expression is drawn, emphasizing only that whether that line has been crossed is a question of fact for the jury.¹⁹³

In one recent case, several defendants were convicted of supporting terrorism under Section 12 the Terrorism Act 2000 for organizing meetings where they made speeches concerning jihad.¹⁹⁴ The named defendant told attendees that the sun was setting on the British empire and rising on the Islamic State, that Muslims had an "obligation" to fulfill and should stop "procrastinating," that those fighting "on the front line" in Tunisia and Kuwait were "the best of the best," and that "victory" for Islam could soon be achieved.¹⁹⁵ Their convictions were upheld by the Court of the Appeals, which agreed that a jury could conclude such statements would reasonably be understood by attendees as encouraging them to *take action* to

¹⁹¹ JOINT COMMITTEE ON HUMAN RIGHTS FIRST REPORT, 2006-7, app. 5 (UK), <https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/26/2612.htm>.

¹⁹² See e.g. *The Impact of UK Anti-Terror Laws on Freedom of Expression*, ARTICLE 19 (April 2006), <https://www.article19.org/data/files/pdfs/analysis/terrorism-submission-to-icj-panel.pdf> (*hereinafter* Article 19).

¹⁹³ See e.g. *R. v. Alamgir and Others* [2018] EWCA Crim 1553 (Eng.), <http://www.bailii.org/ew/cases/EWCA/Crim/2018/1553.html> ("There is, as [the lower court] directed the jury, a line between the permissible expression of opinion and/or religious belief and the impermissible encouragement of a proscribed organization. It was a matter for the jury, on the evidence and submissions, to reach a view as to whether the prosecution had proved that an individual defendant had crossed that line.")

¹⁹⁴ *Id.*; *R. v. Alamgir and Others* [2018] EWCA Crim 21 (Eng.), <http://www.bailii.org/ew/cases/EWCA/Crim/2018/21.html>.

¹⁹⁵ *R. v. Alamgir and Others* [2018] EWCA Crim 21 [¶ 8] (Eng.).

support ISIS, a proscribed terrorist group – not simply adopt a similar opinion.¹⁹⁶

In another recent case, two defendants appealed their convictions for supporting a proscribed terrorist group under Section 12 by challenging the definiteness of the term “support” in the statute.¹⁹⁷ The defendants were “experienced speakers, perceived by others as leaders” who had a “large following on social media” where they often shared propaganda from ISIS.¹⁹⁸ They also made several speeches “to emphasise the obligation on [sic] others to obey, or provide support to Al Baghdadi,” the leader of ISIS – which included the obligation to travel to the Islamic State.¹⁹⁹ The defendants argued that because their speeches did not contain explicit invitations to commit violence, but merely invited generalized support for ISIS, they did not “encourage” terrorism in a way that constituted indirect support for it.²⁰⁰ The Court of Appeals rejected this argument, concluding that providing “support” for terrorism, as that term is ordinarily understood, simply means engaging in any “conduct that strengthens, promotes or assists organisations which are concerned with terrorism.”²⁰¹ This includes an individual providing “moral or intellectual support” for a proscribed group even if no one else is in fact induced by it.²⁰² Such affirmation constitutes the *actus reus* of the offense while the defendant’s awareness of their conduct and the

¹⁹⁶ R. v. Alamgir and Others [2018] EWCA Crim 1553 (Eng.) (upholding conviction); R. v. Alamgir and Others [2018] EWCA Crim 21 (Eng.) (detailing facts supporting the conviction); *see also* Choudary and Rahman v. R. [2016] EWCA Crim 61 [¶ 46] (Eng.), <http://www.bailii.org/ew/cases/EWCA/Crim/2016/61.html> (“As the judge was also careful to emphasise, there must be proof of an invitation of support for the proscribed organisation. This is to be distinguished from the (mere) expression of personal beliefs, or an invitation to someone else to share an opinion or belief, conduct that does not fall within the ambit of the section 12(1)(a) offence.”).

¹⁹⁷ Choudary and Rahman v. R. [2016] EWCA Crim 61 (Eng.), <http://www.bailii.org/ew/cases/EWCA/Crim/2016/61.html>.

¹⁹⁸ *Id.* at ¶¶ 11-14.

¹⁹⁹ *Id.* at ¶ 15.

²⁰⁰ *Id.* at ¶¶ 15-16.

²⁰¹ *Id.* at ¶¶ 37-46.

²⁰² *Id.* at ¶ 59.

proscribed status of the group constitutes its *mens rea*.²⁰³ The Court emphasized that this understanding of “supporting” terrorism is likewise consistent with the statutory construction of both Acts’ provisions which criminalize “encouraging” terrorism – although each provision addresses slightly different conduct.²⁰⁴

Determining whether criminal liability could attach to Fransen or Robinson under these statutes in the context of Osborne’s attack is difficult since most convictions for supporting or encouraging terrorism in the U.K. involve proscribed groups. While many have called for Britain First and the EDL to be proscribed,²⁰⁵ neither has been as of November 2019.²⁰⁶ Nevertheless, while proscription of a terrorist group is explicitly required to be found guilty of being a member, supporting, or displaying articles of such a group under the Terrorism Act 2000,²⁰⁷ it is not required to be found guilty of encouraging terrorist acts or disseminating terrorist publications under the Terrorism Act 2006.²⁰⁸ All that is required under the latter statute is that “terrorism” is *intentionally* or *recklessly* encouraged or assisted.²⁰⁹ This was made clear by amendments to both statutes in the Counter-Terrorism and Border Security Act 2019, which explicitly made it an offense to express “an opinion or belief that is supportive of a proscribed organization” under the 2000 Act and reworded the offense criminalizing encouraging terrorism

²⁰³ *Id.* at ¶¶ 16, 48, 51-2.

²⁰⁴ Choudary and Rahman v. R. [2016] EWCA Crim 61 (Eng.), *supra* note 201.

²⁰⁵ See e.g. May Bulman, *Britain First should be listed as a terrorist organisation, suggests Labour MP*, THE INDEP. (Nov. 25, 2016, 3:38 PM), <https://www.independent.co.uk/news/uk/home-news/britain-first-terrorist-organisation-listed-lousie-haigh-jo-cox-thomas-mair-labour-mp-a7439036.html>; e.g., see also Nigel Copsey, *The English defence league: Challenging our country and our values of social inclusion, fairness and equality*, FAITH MATTERS (2010), <https://research.tees.ac.uk/ws/portalfiles/portal/6480809/116066.pdf>.

²⁰⁶ *Proscribed terrorist groups or organisations*, U.K. HOME OFFICE (July 12, 2013), <https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2> (last updated Nov. 4, 2019).

²⁰⁷ Terrorism Act 2000, c. 11, §§ 11-13 (UK).

²⁰⁸ Terrorism Act 2006, c. 11, §§ 1-2 (UK).

²⁰⁹ *Id.*

under the 2006 Act without adding any language regarding proscribed groups.²¹⁰

Osborne’s attack constituted terrorism under the Terrorism Act 2000 in that it endangered life and caused serious violence in order to “intimidate the public or a section of the public . . . for the purpose of advancing a . . . racial or ideological cause.”²¹¹ However, it is not clear if Britain First or the EDL encouraged the offense within the meaning of the Terrorism Act 2006. Both groups have been careful to distance themselves from such terror attacks. In response to Jo Cox’s murder, Golding ironically remarked that “he would like to see the person who carried it out ‘strung up by the neck on the nearest lamp post,’” thereby disavowing any involvement with the attacker on behalf of Britain First.²¹² Contrary to numerous reports detailing their members’ militant escapades, the EDL states on their website: “Our activities are peaceful. We are committed to non-violence.”²¹³

Whether these groups *appreciate* that their ideology and violent activities would radicalize individuals like Osborne to commit terrorist attacks cuts to the heart of the issue of their potential culpability. Criminal liability for encouraging terrorism under the Terrorism Act 2006 again requires that the defendant engaged in conduct which directly or indirectly promoted terrorism either (1) *intentionally* or (2) *recklessly*.²¹⁴ This means the defendant must either (1) expect that terrorism will be promoted or (2) understand there is a

²¹⁰ Counter-Terrorism and Border Security Act 2019, c. 3, §§ 1, 5 (UK), <http://www.legislation.gov.uk/ukpga/2019/3/contents>. To clarify, this bill was passed after the case concerning providing moral or intellectual support for terrorism, Choudary and Rahman v. R. [2016] EWCA Crim 61 (Eng.), was decided.

²¹¹ Terrorism Act 2000, c. 11, § 1 (UK).

²¹² Katie Forster & Oliver Wright, *Jo Cox dead: Britain First denies involvement in attack on Labour MP*, THE INDEP. (June 16, 2016, 5:47 PM), <https://www.independent.co.uk/news/uk/home-news/jo-cox-shot-dead-britain-first-denies-involvement-labour-mp-birstall-shooting-stabbing-attack-a7086001.html>.

²¹³ *About Us: Mission Statement*, ENGLISH DEFENCE LEAGUE (Jan. 3, 2016), <http://www.englishdefenceleague.org.uk/mission-statement/> (last visited Jan. 5, 2020) [<https://web.archive.org/web/20200414181418/http://www.englishdefenceleague.org.uk/mission-statement/>].

²¹⁴ Terrorism Act 2006, c. 11, § 1(2)(b) (UK).

substantial and unreasonable risk it will be and consciously disregard that risk.²¹⁵

As articles like this and others demonstrate, there is plenty of circumstantial evidence that alt-right groups like Britain First and the EDL are aware their activities radicalize their followers given the prevalence of violent attacks committed by them. However, establishing beyond a reasonable doubt that their leaders anticipated there was a *substantial risk* that an anonymous person like Osborne would be incited enough by their online hate speech to commit such an extreme act of violence is another story. Since whether these groups' leaders possessed the requisite *mens rea* to be found guilty of encouraging terrorism is a question of fact for the jury, there is nothing stopping the Crown from bringing cases against such individuals and hoping for convictions. British prosecutors' decisions to forgo such charges in light of the evidence presented here appears to be motivated by expediency, which is in stark contrast to the legal obstacles that U.S. prosecutors face under state and federal counter-terrorism laws.

C. New Zealand

Like the U.S. Congress, the New Zealand Parliament reformed its counter-terrorism laws to respond to post-9/11 threats, but did so through a more succinct piece of legislation: The Terrorism Suppression Act 2002. It straightforwardly provides that one "commits an offence who engages in a terrorist act."²¹⁶ A "terrorist act" is defined as:

An act . . . intended to cause, in any 1 or more countries, 1 or more of the *outcomes specified in subsection*

²¹⁵ See generally JANET LOVELESS, COMPLETE CRIMINAL LAW: TEXT, CASES, AND MATERIALS 91-150 (Oxford University Press, 2008), https://blackwells.co.uk/extracts/9780199228287_loveless.pdf. This is certainly an over-generalization of the concepts of *intentionality* and *recklessness* in British law, but the finer distinctions between them are beyond the scope of this discussion. The definition proffered here loosely comports with the concepts of objective and subjective recklessness under British law.

²¹⁶ Terrorism Suppression Act 2002, s 6A (N.Z.), <http://www.legislation.govt.nz/act/public/2002/0034/55.0/DLM1106564.html>.

(3), and . . . carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention: (a) to induce terror in a civilian population; or (b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.²¹⁷

Qualifying outcomes under subsection (3) include: death; serious bodily injury; “a serious risk to the health or safety of a population;” and destruction of or serious damage to the economy, environment, or “property of great value or importance” (e.g., historical landmarks).²¹⁸ Like the U.K.’s statutes, the Act applies equally to domestic and international terrorism and criminalizes a much wider array of conduct than the U.S. statutes.

Tarrant was charged with committing a terrorist act, fifty counts of murder, and forty accounts of attempted murder shortly after the Christchurch shootings.²¹⁹ This was reportedly the first time a terrorist charge had been levied under the Act.²²⁰ Tarrant’s trial is expected to begin on May 4, 2020 following his not guilty plea to all charges.²²¹

Similar to the U.S. and U.K. statutes, the Act provides a process by which the Prime Minister can designate terrorist groups so that the Crown can charge their members, recruiters, suppliers, and financiers with specific crimes under the Act.²²² Designation of a group is only allowed if the Prime Minister has “good cause to suspect” the group has *knowingly* committed or participated in one or

²¹⁷ *Id.* at s 5(2) (emphasis added).

²¹⁸ *Id.* at s 5(3).

²¹⁹ Shannon Van Sant, *Accused Shooter In New Zealand Mosque Attacks Charged With Terrorism*, NPR (May 21, 2019, 1:19 PM), <https://www.npr.org/2019/05/21/725390449/accused-shooter-in-new-zealand-mosque-attacks-charged-with-terrorism>.

²²⁰ *Id.*

²²¹ *Christchurch attack: Brenton Tarrant pleads not guilty to all charges*, BBC NEWS: ASIA (June 14, 2019), <https://www.bbc.com/news/world-asia-48631488>.

²²² Terrorism Suppression Act 2002, ss 10-13, 20-24 (N.Z.).

more terrorist acts.²²³ As of October 2020, no white nationalist or affiliated groups have been so designated.²²⁴

In his manifesto, Tarrant admitted that he donated to white nationalist groups and interacted with their members.²²⁵ This was confirmed by Tom Sewell, the president of the Lads Society, a prominent Australian white nationalist group.²²⁶ Sewell claimed that he reached out to Tarrant in an online community both frequented years earlier to ask him “to join a project to help create a ‘parallel society’ of only white people.”²²⁷ Tarrant declined, insinuating to Sewell that he “didn’t believe there was a peaceful solution to European people being genocided.”²²⁸ Sewell asserts that the Lads Society does not support violence “at this time,” but that “if you make the peaceful alternative impossible, you leave only the other option.”²²⁹ While there have been no reports that the group has committed acts of physical violence against others or glorified such actions publicly, their verbal harassment of people of color in Australia has been well-documented.²³⁰

If the Lads Society had strongly encouraged Tarrant to commit the shootings, it is possible their members would be criminally liable for doing so, albeit not under the Terrorism Suppression Act. Unlike the U.K. statutes, encouraging acts of lone-

²²³ *Id.* at ss 20-24.

²²⁴ *Lists associated with Resolutions 1267/1989/2253 and 1988*, NEW ZEALAND POLICE (Oct. 15, 2019), <https://www.police.govt.nz/advice/personal-community/counterterrorism/designated-entities/lists-associated-with-resolutions-1267-1989-2253-1988>.

²²⁵ Tarrant, *supra* note 1, at 10.

²²⁶ Patrick Begley, *Threats from white extremist group that ‘tried to recruit Tarrant’*, THE SYDNEY MORNING HERALD (May 2, 2019, 12:01 AM), <https://www.smh.com.au/national/threats-from-white-extremist-group-that-tried-to-recruit-tarrant-20190501-p51j5w.html>.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See e.g. Kristy Champion, *A “Lunatic Fringe”? The Persistence of Right Wing Extremism in Australia*, 13 PERSPECTIVES ON TERRORISM 2, 12-13 (Leiden University, 2019), <https://www.universiteitleiden.nl/binaries/content/assets/customsites/perspectives-on-terrorism/2019/issue-2/volume-13-issue-2.pdf>.

wolf terrorism is not an offense under the Act.²³¹ However, New Zealand's criminal code does provide that "one is a party to and guilty of an offence who . . . *incites*, counsels, or procures any person to commit the offence."²³² Black's Law Dictionary defines "incitement" as "an instance of provoking, urging on, or stirring up."²³³ Incitement is historically a common law inchoate offense which is not entirely premised on accomplice liability because "it is immaterial to the liability of the inciter that the crime that is instigated is not carried out" by the incitee.²³⁴ The offense of encouraging terrorism under the U.K.'s Terrorism Act 2006 is consistent with this common law understanding of incitement.²³⁵ As the U.K.'s Law Commission, who supported including such an offense, explained to Parliament, what makes an inciter's actions culpable is their desire, hope, or belief that their incitement will result in the commission of the substantive offense, not whether the incitee intends on following through with it.²³⁶

IV. CONCLUSION

From the foregoing review of the criminal laws applicable to terrorism in the U.S., U.K., and New Zealand and how they applied or could have applied in the context of the El Paso, London, and Christchurch attacks respectively, we can better understand why none of these laws are well-suited to address the rise of terrorism inspired by the alt-right.

Most strikingly, despite the significant threat of domestic terrorism in the U.S. and U.K. compared to New Zealand, neither

²³¹ See generally Terrorism Suppression Act 2002 (N.Z.).

²³² Crimes Act 1961, s 66 (N.Z.), <http://www.legislation.govt.nz/act/public/1961/0043/latest/whole.html>.

²³³ *Incitement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²³⁴ Joseph Jaconelli, *Incitement: A Study in Language Crime*, 12 J. CRIMINAL LAW, PHILOSOPHY 245–265, <https://link.springer.com/article/10.1007/s11572-017-9427-8>.

²³⁵ *Id.* (citing Terrorism Act 2006, § 1(5)(b) (UK), *infra*).

²³⁶ THE LAW COMMISSION, INCHOATE LIABILITY FOR ASSISTING AND ENCOURAGING CRIME, 2006, Cm. 6878, at 21-34, 67-69, <https://www.lawcom.gov.uk/document/inchoate-liability-for-assisting-and-encouraging-crime-report/>.

country's statutes definitively criminalize acts of "domestic terrorism" as New Zealand's Terrorism Suppression Act does despite such acts falling under their definitions of "terrorism." The federal crime of terrorism under U.S. law only punishes acts of terrorism to the extent that they involve criminal conduct occurring both inside and outside the U.S., which was not the case in El Paso. Similarly, the U.K's Terrorism Act 2000 focuses on criminalizing participation in and support for proscribed organizations, yet none were involved in the London attack. While together the Terrorism Act 2000 and Terrorism Act 2006 include many other terrorism-related offenses concerning preparing for, coordinating, and encouraging terrorism, these are offenses designed to prevent terrorism, not prosecute its perpetrators as "terrorists" *sui generis* – which is what the public desires. Furthermore, because whether members or affiliates of a group engage in acts of "terrorism" is relevant for a determination of whether such a group should be designated as a "terrorist organization," these statutes seem to engender a proverbial "chicken or the egg" dilemma.

Fortunately, legislation has been introduced in the U.S. House of Representatives to close this loophole by including "acts of terrorism committed [wholly] within the territorial jurisdiction of the United States" under the existing federal crime of terrorism.²³⁷ The proposed addition encompasses violent attacks that intimidate or coerce a civilian population if they implicate interstate commerce or travel, distinctly federal interests, or matters exclusively within federal jurisdiction – such as the mail, government property, or territorial waters.²³⁸ More specifically, if a "facility of interstate or foreign commerce is used in furtherance of the offense," the statute is triggered.²³⁹ The El Paso shooter did purchase the firearm he used to commit the attack online from a Texas-based dealer.²⁴⁰ The Internet

²³⁷ Domestic Terrorism Prevention Act, 116 H.R. 4192, 116th Cong. (2019) (LEXIS 2019).

²³⁸ *Id.* at § 2.

²³⁹ *Id.* at § 2(2)(b)(1)(A).

²⁴⁰ Alanna Autler, *Accused El Paso Mass Shooter, Patrick Crusius Bought Gun Legally*, CBS NEWS LOCAL: DALLAS-FORT WORTH (Aug. 5, 2019, 6:35 PM), <https://dfw.cbslocal.com/2019/08/05/accused-el-paso-mass-shooter-patrick-crusius-bought-gun-legally/>.

has been held to be a facility of interstate commerce in the Fifth Circuit Court of Appeals, which encompasses Texas, as well as several other federal jurisdictions too.²⁴¹ However, the statute also explicitly provides that the offense applies if “the defendant *employs a firearm, dangerous weapon, weapon of mass destruction, or other weapon that has traveled in interstate or foreign commerce,*”²⁴² which was not the case in El Paso and therefore would still not enable prosecutors to charge the shooter with it. It is currently unclear how these two provisions are to be reconciled – or if the House will even pass the amendment to the Patriot Act.

Nevertheless, even where committing acts of domestic terrorism is prosecuted as such, as it is in New Zealand, centering complicity-based counter-terrorism offenses around participating in and supporting designated terrorist organizations has hindered counter-terrorism efforts aimed at the extreme right in the U.S.. White nationalist groups have actively been working to create a “leaderless resistance” since as early as the 1980s in response to such legal regimes.²⁴³ Their approach has been to construct a two-level movement:

First, on an operational level, militant, underground, ideologically motivated cells or individuals (lone wolves) engage in movement-related illegal activity without any centralized direction or control from an organization that maintains traditional leadership positions and membership rosters. Second, on another level, the above-ground public face (the “political wing”) of the movement propagandizes and disseminates ideology—engaging in protected speech.²⁴⁴

²⁴¹ *United States v. Lewis*, 554 F.3d 208 (1st Cir. 2009); *United States v. MacEwan*, 445 F.3d 237 (3d Cir. 2006); *United States v. Barlow*, 568 F.3d 215 (5th Cir. 2009) (“In 2009, it is beyond debate that the Internet and email are facilities or means of interstate commerce.”); *United States v. Schaefer*, 501 F.3d 1197 (10th Cir. 2007), *overruled on other grounds by United States v. Sturm*, 672 F.3d 891 (10th Cir. 2012).

²⁴² Domestic Terrorism Prevention Act § 2(2)(b)(1)(F) (emphasis added).

²⁴³ Jerome P. Bjelopera, *Domestic Terrorism: An Overview*, CONG. RESEARCH SERV., 50 (Aug. 21, 2017), <https://fas.org/sgp/crs/terror/R44921.pdf>.

²⁴⁴ *Id.* at 50-1.

With this dynamic, the public-facing group can disclaim any involvement with attacks committed by lone-wolves while still spreading the ideologies that radicalize them.²⁴⁵ This was demonstrably the case with the London attacker and most likely those in El Paso and Christchurch too.²⁴⁶ By continuing to rely on such a framework for criminalizing terrorist groups, such groups in the alt-right have continued to operate with relative impunity.

Unlike the U.S.'s codes criminalizing material support for FTOs, which fails to extend liability to alt-right communities markedly because of this two-level approach, the crimes of encouraging terrorism in the U.K. and incitement in New Zealand can impose liability on participants in such communities only socially connected to lone-wolf terrorists online. Because these complicity-based crimes depend on relationships between individuals, not their group affiliations, and are inchoate offenses to the extent they criminalize terrorism whether or not it actually occurs, they serve an extremely vital role in counter-terrorism efforts aimed at the alt-right. They must be committed *intentionally* or *recklessly*, which means that appreciating certain conduct entails a substantial risk – in this case, violence motivated by an ideology for the purpose of intimidating a civilian population (i.e., “terrorism”) – is presumably sufficient to meet the required *mens rea* for those crimes.²⁴⁷ The U.K statute is particularly broad, imposing liability for encouraging terrorism if *any member of the public* is directly or indirectly incited by their statements,

²⁴⁵ *Id.* at 50-3.

²⁴⁶ Not much information is publicly available about the El Paso and Christchurch attackers' *specific* interactions with members of well-defined alt-right groups like Britain First, the EDL, and the Lads Society. However, the evidence surveyed above definitively shows those individuals were part of the online communities such groups utilize to recruit and radicalize their members.

²⁴⁷ *E.g.*, Model Penal Code § 2.02 (West 2019); *but see, e.g.*, Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217 (2000) (explaining there has been a long-standing debate about what the *mens rea* for complicity should be). By their explicit terms, the U.K. and N.Z. statutes do not endorse the recently popularized view that complicity can require nothing less than intentionality. *See generally* Dennis J. Baker, *Reinterpreting The Mental Element In Criminal Complicity: Change Of Normative Position Theory Cannot Rationalize The Current Law*, 40 LAW & PSYCHOL. REV. 119 (2015-2016).

meaning the inciter need not even have a particular incitee in mind.²⁴⁸ Liability can even extend to encouraging terroristic acts *overseas* which result in murder under both U.K. and New Zealand law.²⁴⁹

While no directly equivalent offense exists under the U.S. Patriot Act, enacting one is not inconsistent with American law. Inciting someone to commit a crime of violence is already a crime under federal law.²⁵⁰ Despite broad protections for free speech in the U.S., the Supreme Court has consistently held that “fighting words” are not protected by the First Amendment.²⁵¹ These are “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”²⁵² Arizona and Virginia currently have statutes explicitly criminalizing the encouragement of terrorism.²⁵³

Although encouraging terrorism is an offense which *theoretically* appears well-suited to deter the individuals of the alt-right responsible for radicalizing attackers like those in El Paso, London, and Christchurch, there is almost no known precedent for this. Even in the U.K., where the legal basis for doing so is fairly straightforward, only 23 of 809 (2.84%) terrorism-related charges brought since 2001 have cited encouraging terrorism as the principal offense.²⁵⁴ The practical difficulties inherent in prosecuting offenders would be enormous too. Attackers’ online history, text messages, emails, and the like would need to be collected and analyzed to determine if they did receive such encouragement and the identity of

²⁴⁸ Terrorism Act 2006, c. 11, § 1 (UK).

²⁴⁹ Terrorism Act 2000, c. 11, §§ 59-61 (UK) (inciting terrorism overseas); Terrorism Suppression Act 2002, s 58 (NZ) (party to murder outside New Zealand).

²⁵⁰ 18 U.S.C.A. § 373 (West 2019).

²⁵¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

²⁵² *Virginia v. Black*, 538 U.S. 343, 350-60 (2003).

²⁵³ Ariz. Rev. Stat. Ann. § 13-2308.01 (West 2019); Va. Code Ann. § 18.2-46.5 (West 2019).

²⁵⁴ *Operation of police powers under the Terrorism Act 2000: quarterly update to December 2018: annual data tables*, U.K. HOME OFFICE (2019), Table A.05a, <https://www.gov.uk/government/statistics/operation-of-police-powers-under-the-terrorism-act-2000-quarterly-update-to-december-2018> (raw data through Dec. 31, 2018).

the individuals providing it would need to be ascertained. Even if this is achieved, inciters residing overseas would need to be extradited to be tried, which is only possible if a similar offense exists in their home jurisdiction per the principle of dual criminality in international law.²⁵⁵ The content of the communications between the attacker and their inciter(s) would also need to sufficiently evidence the latter's intent, hope, or belief terrorism would result to prove the requisite *mens rea*. Even in Osborne's case, where such communications are well-documented, it appears unlikely Britain First's or the EDL's suggestions were provocative enough to meet this threshold. The process of radicalization they facilitate largely consists of persistent invitations to consider increasingly fringe ideas, and only thinly-veiled calls of action to a lesser extent.

Ultimately, while segments of the alt-right bear all the hallmarks of a terrorist movement, these communities have been tremendously successful at capitalizing on the gaps in domestic terrorism laws to achieve their hateful agendas. Even individuals part of them that have committed devastating acts of violence which clearly meet the statutory definition of "terrorism" cannot directly be prosecuted as terrorists in the U.S. or the U.K.. The public-facing groups that deliberately reinforce the radical ideologies these attackers profess to the world through their manifestos cannot be outlawed because they strategically distance themselves from such zealous supporters. Although certain members of these groups do occasionally stray from making racist remarks into calling for violence, their contributions to the state of affairs which create such lone-wolf extremists has not resulted in criminal liability even though statutes designed to impose it currently exist. Accordingly, the alt-right continues to flourish across the globe even though it has inspired some of the most senseless mass murders of the last decade.

Attacks like those in El Paso, London, and Christchurch will continue unless acts of domestic terrorism are punished as such, the groups that radicalize their perpetrators are censured as a result, and the individuals at the forefront of these campaigns are held accountable as agitators. These attainable goals can be achieved by

²⁵⁵ Restatement (Third) of Foreign Relations Law § 476(1)(c) (1987).

ensuring that committing an act of domestic terrorism is a defined offense, that participation in and support for groups linked to them is criminalized, and laws which punish inciting such actions are enforceable. While the U.S., U.K., and New Zealand each have legal frameworks to accomplish some or all of these goals, they could be far better suited to addressing new terrorist threats from the alt-right.