

# False Flags and the First Amendment: Lying Through Symbolic Speech

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## ABSTRACT

*Ivan Hunter, a leader of the right-wing Boogaloo Bois, recently pleaded guilty to participating in a riot when he fired his AK-47 at the Minneapolis Police Third Precinct during a Black Lives Matter protest in May of 2020. Hunter’s target—the home base of Derek Chauvin, the officer captured on video killing George Floyd—burned down at the hands of protesters the same evening. This Essay argues that Hunter’s conduct is best understood as symbolic speech under the First Amendment, a conclusion few analyses would bother to reach because such speech would still be categorically excluded from First Amendment protection. Hunter’s actions are not only more fully comprehensible as speech, but they also serve as an exemplar of an undertheorized category: dishonest symbolic speech. Indeed, through his violence rather than through words, Hunter trafficked in a powerful form of political propaganda. Drawing on this remarkable yet increasingly representative case, the Essay offers two critiques of First Amendment jurisprudence. First, relying on the First Amendment to identify speech artificially impedes our ability to classify and process communicative events of substantial public consequence, especially as public concern grows about the spread of misinformation. Second, the underappreciated power of symbolic speech to spread lies offers a new and significant basis for skepticism about the longstanding doctrinal distinction between pure and symbolic speech.*

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## INTRODUCTION

On May 28, 2020, protestors burned the Minneapolis Police Third Precinct to the ground.<sup>1</sup> The incident occurred just three days after bystanders recorded officers from the Third Precinct killing George Floyd, an unarmed Black man.<sup>2</sup> Floyd's killing set off worldwide protests.<sup>3</sup> Although many of these demonstrations were peaceful,<sup>4</sup> early protests in Minneapolis were particularly raucous, leading the governor to bring in the Minnesota National Guard to maintain order.<sup>5</sup>

Initially, the narrative behind the destruction of the Third Precinct seemed relatively straightforward. The building was the most salient physical manifestation of the policing tactics that drew many protestors into the streets, and thus it became a prominent target. The four initial arson indictments that followed did little to undermine the most intuitive explanation for why protestors attacked the Third Precinct.<sup>6</sup> Months later, however, a fifth man pleaded guilty to his role in the attack on the Third Precinct.<sup>7</sup> Ivan Harrison Hunter—a self-identified leader of the right-wing

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<sup>1</sup> For a detailed account of the incident, including the controversial decision by city leaders to abandon the building to the angry crowd, see Angela Caputo, Will Craft & Curtis Gilbert, *What Happened at Minneapolis' 3rd Precinct—and What It Means*, APMREPORTS (June 30, 2020), <https://www.apmreports.org/story/2020/06/30/what-happened-at-minneapolis-3rd-precinct> [<https://perma.cc/B5CW-6LHT>].

<sup>2</sup> See *id.* (noting that police killed Floyd on Memorial Day, three days earlier).

<sup>3</sup> See *Protests Across the Globe After George Floyd's Death*, CNN (June 13, 2020, 3:22 PM), <https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html> [<https://perma.cc/6BWA-PX49>] (collecting photographs of BLM protests from around the world).

<sup>4</sup> See Dalton Bennett, Sarah Cahlan, Aaron C. Davis & Joyce Sohyun Lee, *The Crackdown Before Trump's Photo Op*, WASH. POST (June 8, 2020), <https://www.washingtonpost.com/investigations/2020/06/08/timeline-trump-church-photo-op/?arc404=true> [<https://perma.cc/NQ4X-X4BV>] (noting that “[m]any [BLM protests] were peaceful”).

<sup>5</sup> See, e.g., Andy Mannix, *Man Pleads Guilty to Helping Burn Down Minneapolis Third Precinct Headquarters*, STAR TRIB. (Nov. 19, 2020, 7:56 PM), <https://www.startribune.com/staples-man-pleads-guilty-to-helping-burn-down-mpls-third-precinct/573131291/> [<https://perma.cc/9WMZ-LTP5>].

<sup>6</sup> See WCCO-TV Staff, *4 Men Indicted for Fire That Toted Minneapolis Police 3rd Precinct*, CBSN MINNESOTA (Aug. 25, 2020, 7:14 PM), <https://minnesota.cbslocal.com/2020/08/25/4-men-indicted-for-fire-that-toted-minneapolis-police-3rd-precinct/> [<https://perma.cc/5JJM-9ZJ9>]. At least one of the four men indicted later pleaded guilty. See Mannix, *supra* note 5.

<sup>7</sup> Rachel Olding, *Far-Right Boogaloo Admits Shooting Up Cop Station Amid Floyd Protests*, DAILY BEAST (Oct. 3, 2021, 5:36 PM), <https://www.thedailybeast.com/far-right-boogaloo-ivan-harrison-hunter-admits-posing-as-blm-supporter-during-minneapolis-george-floyd-riot> [<https://perma.cc/S5VN-FZ57>]. Hunter was indicted in October of 2020. Affidavit in Support of an Application for a Criminal Complaint, United States v. Hunter, No. 20-MJ-

Boogaloo Bois—traveled from Texas to Minnesota with the specific aim of participating violently in the protests.<sup>8</sup> He fired an AK-47 at the Third Precinct thirteen times while other protestors were inside, then joined in the looting and arson of the building.<sup>9</sup> After shooting at the building, Hunter walked toward a rolling camera, high-fived another protestor, and shouted, “Justice for Floyd!”<sup>10</sup>

Given the Boogaloo Bois’s commitment to “exploit[ing] unrest in order to start a second civil war,”<sup>11</sup> Hunter’s interest in the discord in Minneapolis was probably not driven by solidarity with the protestors so much as a commitment to sparking a broader conflict between authorities and the populace. Hunter appears to have seen an opportunity to sow chaos and to attribute that chaos to a social movement different from his own—to Black Lives Matter (“BLM”) rather than to the Boogaloo Bois. He sought to tell the world a lie about BLM’s propensity for violence, and, in doing so, to invite a harsher police response.<sup>12</sup>

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758 (HB), (D. Minn., filed Oct. 19, 2020), [http://stmedia.startribune.com/documents/Hunter\\_complaint\\_affidavit.pdf](http://stmedia.startribune.com/documents/Hunter_complaint_affidavit.pdf) [hereinafter Affidavit] [<https://perma.cc/VCF5-ZDHM>].

<sup>8</sup> See Affidavit, *supra* note 7, at 15.

<sup>9</sup> Jeff Truesdell, *Member of Far-Right Group Accused of Firing on Minn. Police Station During George Floyd Protests*, PEOPLE (Oct. 26, 2020, 5:56 PM), <https://people.com/crime/member-far-right-group-accused-firing-minn-police-station/> [<https://perma.cc/N5AJ-ZP6F>]. Hunter has since pleaded guilty to the allegations discussed in this report. See Matt Speic, *Texas Man, 24, Admits Shooting at Minneapolis Police Station During Riot*, MPRNEWS (Sep. 30, 2021, 9:35 PM), <https://www.mprnews.org/amp/story/2021/09/30/texas-man-24-admits-shooting-at-minneapolis-police-station-during-riot> [<https://perma.cc/VLW7-ETLX>].

<sup>10</sup> See Truesdell, *supra* note 9.

<sup>11</sup> Khrysgiana Pineda, *The Boogaloo Movement is Gaining Momentum. Who Are the Boogaloo ‘Bois’ and What Do They Want?*, USA TODAY (Jun. 19, 2020, 3:10 PM), <https://www.usatoday.com/story/news/nation/2020/06/19/what-is-boogaloo-movement/3204899001/> [<https://perma.cc/YHM6-8PTG>].

<sup>12</sup> The lie was subtler than it might have been because some of the BLM protestors in Minneapolis that evening also attacked the Third Precinct, albeit with explosive devices or fire rather than firearms. See Mannix, *supra* note 5 (describing how some protestors used fire and a Molotov cocktail in their attack on the building); WCCO-TV Staff, *supra* note 6 (discussing an indictment that accuses some protestors of using “explosive devices to attempt to start fires in the building”). Notably, the Boogaloo Bois have attempted to incite peaceful BLM protestors to violence in other parts of the country as well. See, e.g., Ed Komenda, *Men Tied to ‘Boogaloo’ Movement Conspired to Spark Protest Violence in Las Vegas, Feds Say*, USA TODAY (June 4, 2020, 6:02 PM), <https://www.usatoday.com/story/news/nation/2020/06/04/boogaloo-movement-terrorism-related-charges-3-men-feds-say/3147563001/> [<https://perma.cc/Y6E9-UB6E>] (reporting that a U.S. attorney “said authorities have been focused on violent instigators hijacking peaceful protests and demonstrations across the country to exploit ‘the real and legitimate outrage over

Hunter's involvement thus complicates our understanding of the destruction of the Third Precinct.<sup>13</sup> His conduct also highlights the conceptual limitations First Amendment jurisprudence imposes for interpreting events of public consequence.<sup>14</sup> Hunter's actions are best understood as expressive conduct, an instance of symbolic speech for First Amendment purposes.<sup>15</sup> But because that conduct is unequivocally unprotected by the First Amendment—and, indeed, unequivocally criminal—there is limited legal merit in conceptualizing it as speech. Instead, public interpretations of his conduct are likely to hew closely to the legal framing provided by prosecutors, namely that Hunter traveled in interstate commerce with the intent to participate in a riot.<sup>16</sup> Its prosecutorial advantages aside, that description carries substantial collateral implications, erasing the true significance of Hunter's actions *as speech* and eliding the substantial differences between the actions of BLM protestors and those who coopt their protests for other purposes.

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Mr. Floyd's death for their own radical agendas," and noting the arrest of three Boogaloo Bois in Nevada suspected of doing exactly that).

<sup>13</sup> See Mannix, *supra* note 5 ("Several people, of seemingly different motivations, have been charged with lighting the precinct building on fire.").

<sup>14</sup> Note also that this conduct is part of a broader pattern. See Truesdell, *supra* note 9 (reporting that, in Minneapolis alone, "Hunter [is] the third member of the Boogaloo Bois to be charged . . . with provoking violence that otherwise had been blamed on Black Lives Matter protesters advocating for social justice in the immediate aftermath of Floyd's death"); see also Tess Owen, *Far-Right Extremists Are Hoping to Turn the George Floyd Protests Into a New Civil War*, VICE (May 29, 2020, 5:41 PM), <https://www.vice.com/en/article/pkyb9b/far-right-extremists-are-hoping-to-turn-the-george-floyd-protests-into-a-new-civil-war> [<https://perma.cc/7FNC-UPXT>]. For more information on right-wing movements seeking to provoke conflicts with authorities in general, see Mia Bloom, *Far-Right Infiltrators and Agitators in George Floyd Protests: Indicators of White Supremacy*, JUST SECURITY (May 30, 2020), <https://www.justsecurity.org/70497/far-right-infiltrators-and-agitators-in-george-floyd-protests-indicators-of-white-supremacists/> [<https://perma.cc/P3UV-8P9K>].

<sup>15</sup> Some distinguish purely symbolic speech from broader "speech plus" that may incorporate vocal or verbal speech, though that distinction is controversial and contested. See Joshua Waldman, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1848 n.13 (1997). I treat "symbolic speech" as interchangeable with "expressive activity" or "expressive conduct" more broadly, and either characterization of Hunter's actions should generate the same result.

<sup>16</sup> See Affidavit, *supra* note 7. There might have been other ways to charge Hunter that would have invoked the expressive dimension of his conduct more clearly, especially because, as discussed at length below, Hunter sought to communicate a falsehood. Courts have upheld some regulation of dishonest speech, such as for "defamation, fraud, or [where there is] some other legally cognizable harm associated with a false statement." *United States v. Alvarez*, 567 U.S. 709 (2012). But that is no objection to the argument advanced here, given the actual charges in this case.

Moreover, Hunter's conduct is also a powerful example of *dishonest* expressive activity, a category that has been neglected by scholars. Some have long been skeptical of the doctrinal distinction between conduct and speech,<sup>17</sup> but the incident in Minneapolis underscores a further—and, until now, untheorized—reason for that skepticism: we can tell lies through our conduct just as through pure speech, and not just lies about our own intentions or beliefs. Indeed, in the case of Ivan Hunter, the expressive conduct amounts to a sophisticated lie with serious public policy implications—that is, propaganda. This analysis reaches an increasing number of “false flag” operations,<sup>18</sup> and its implications undermine the traditional distinction between pure and symbolic speech.

This Essay proceeds in two Parts. Part I develops the argument that Hunter's actions are most appropriately and fruitfully interpreted as unprotected First Amendment activity. Part II utilizes Hunter's case to illuminate the category of dishonest expressive conduct, linking that analysis to recent work on propaganda. Part II continues by arguing that the underappreciated power of symbolic speech to express lies of public consequence further erodes the artificial distinction between pure speech and symbolic speech that has long undergirded the differential standards of scrutiny judges apply to regulations that burden these respective categories of expression.

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<sup>17</sup> See, e.g., John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975) (“But burning a draft card to express opposition to the draft . . . involves no conduct that is not at the same time communication, and no communication that does not result from conduct.”); Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) (“A constitutional distinction between speech and conduct is specious. Speech is conduct, and actions speak.”) (emphasis in original).

<sup>18</sup> See Em Steck & Andrew Kaczynski, *Marjorie Taylor Greene Indicated Support for Executing Prominent Democrats in 2018 and 2019 Before Running for Congress*, CNN (Jan. 26, 2021, 11:31 PM), <https://amp.cnn.com/cnn/2021/01/26/politics/marjorie-taylor-greene-democrats-violence/index.html> [<https://perma.cc/99CX-YJMQ>] (defining “false flag operation” as “acts that are designed by perpetrators to be made to look like they were carried out by other individuals or groups,” and noting a common conspiracy theory that the Parkland High School shooting was such an event); see also Pineda, *supra* note 11. False allegations of “false flag” operations are also increasingly common. See, e.g., Holmes Lybrand & Tara Subramaniam, *Fact checking Republicans’ Unsubstantiated Claims that Antifa Infiltrated Capitol Riot*, CNN (Jan. 8, 2021, 5:08 PM), <https://amp.cnn.com/cnn/2021/01/07/politics/capitol-antifa-infiltration-fact-check/index.html> [<https://perma.cc/CV2S-L24G>] (documenting unsubstantiated allegations that Antifa participated in the January 6, 2021, attack on the U.S. Capitol).

## I. WHEN VIOLENCE ITSELF BECOMES EXPRESSIVE CONDUCT

### A. *Applying the Test for Expressive Conduct*

For nearly a century, American courts have recognized that certain conduct bears such obvious expressive value that it triggers a First Amendment analysis as speech.<sup>19</sup> At the most general level, the Supreme Court has observed that the “communicative element [of someone’s] conduct [may be] sufficient to bring into play the First Amendment.”<sup>20</sup> Notable examples include the burning of American flags and draft cards,<sup>21</sup> sit-ins,<sup>22</sup> and nude dancing.<sup>23</sup> But courts have struggled to draw a clear line between conduct and speech, perhaps because the line is largely artificial.<sup>24</sup>

The Supreme Court sketched out the test for expressive conduct—albeit rather roughly—in *Spence v. Washington*.<sup>25</sup> In 1970, the appellant in that case, Harold Spence, modified an American flag by adding strips of removable tape in the shape of large peace signs, and then displayed the flag out of the window of his Seattle apartment.<sup>26</sup> The State of Washington subsequently convicted Spence under an “improper use” statute that “[forbade] . . . the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material.”<sup>27</sup>

The *Spence* test for determining when First Amendment analysis applies to conduct comprises two main factors.<sup>28</sup> Notably, in introducing these factors, the Court did not clearly enumerate them; rather, the Court simply attached special significance to its conclusions that (1) Spence had evinced “an intent to convey a particularized message”<sup>29</sup> and (2) that there was a great likelihood under the circumstances “that the message would be

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<sup>19</sup> See Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 556 (2006).

<sup>20</sup> *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

<sup>21</sup> See *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1098–1105 (1968) (discussing both); see also Waldman, *supra* note 15, at 1849 (discussing *Texas v. Johnson*, 491 U.S. 397 (1989), a flag-burning case that reached the Supreme Court).

<sup>22</sup> See *Symbolic Conduct*, *supra* note 21, at 1095–98 (discussing sit-in cases).

<sup>23</sup> See generally Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005) (analyzing the Supreme Court’s symbolic speech jurisprudence in the context of nude dancing).

<sup>24</sup> See *supra* note 17.

<sup>25</sup> 418 U.S. 405 (1974).

<sup>26</sup> *Id.* at 405.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 410–11.

<sup>29</sup> *Id.*

understood by those who viewed it.”<sup>30</sup> The Court found that these criteria were met in part because of the symbolic value of flags and the communicative power of the peace symbol.<sup>31</sup> Moreover, as the Court noted, “the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol.”<sup>32</sup> Specifically, Spence’s display was “roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment.”<sup>33</sup> In sum, Spence potently juxtaposed symbols with the aim of communicating a message that, given the context set by synchronous events of significance, the public was likely to grasp.

The exact same description captures Ivan Hunter’s conduct. There are police stations, assault rifles, and bullets in Texas, but Hunter traveled hundreds of miles to the doorstep of the Third Precinct—during BLM protests in Minneapolis, no less—to communicate something he could only articulate from that specific place and time. He picked out the building that symbolized police brutality to many BLM protestors in the streets, firing on it repeatedly.<sup>34</sup> Moreover, he did so after embedding himself with a group of

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<sup>30</sup> *Id.* at 411. *See also* Adler, *supra* note 23, at 1114 n.19 (quoting *Spence* to highlight two factors and referring to them jointly as the “*Spence* test”). *But see* Waldman, *supra* note 15, at 1849 (purporting to identify a third factor in the *Spence* test: “the context of the conduct”). I endorse Adler’s reading of the *Spence* test and I will address the relevance of context below. Notably, Waldman argues that courts emphasize the second of the two factors, often “imput[ing] [intent] based on *Spence*’s second factor.” *Id.* at 1862. Regardless of how many factors we identify, note that courts may at times apply the test rather loosely. *See* Adler, *supra* note 23, at 1114 n.19 (observing that the Court has not always explicitly referred to the *Spence* test in assessing whether conduct qualifies as speech even when it adheres roughly to the two principles reflected in that test). Note also that the particularized message communicated by the examined conduct need not be “narrow [and] succinctly articulable.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

<sup>31</sup> *Spence*, 418 U.S. at 410.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* A careful reading of *Spence* thus reveals why, *contra* Waldman, the Court’s emphasis on the value of context for shaping the meaning of symbols does not itself constitute a free-standing factor in the *Spence* test. The Court addresses context specifically in discussing the audience’s interpretation of the symbols deployed by a communicator, but the use of symbols is not a necessary condition for expressive conduct. Context is therefore best understood as helping to influence a court’s assessment of the second prong of the test, especially where the conduct at issue involves the use of symbols. Indeed, as Waldman concedes, courts infrequently invoke “context” in deploying the *Spence* test. *See* Waldman, *supra* note 15, at 1863 (noting that, under the *Spence* test, the context of the conduct is irrelevant “except insofar as it is necessary to identify [the appropriate] category of conduct”).

<sup>34</sup> Hunter appears to have selected his target quite deliberately. *See* Lois Beckett, ‘Boogaloo Boi’ Charged in Fire of Minneapolis Police Precinct During George Floyd Protest, THE GUARDIAN (Oct. 23, 2020, 3:58 PM), <https://www.theguardian.com/world/2020/oct/23/texas-boogaloo-boi-minneapolis-police->

BLM protestors, and he ensured that observers would associate the shooting with BLM by contemporaneously shouting, “Justice for Floyd!”<sup>35</sup>

The violence *was* the message: BLM protestors are seething, armed with guns, and setting their sights on the police.<sup>36</sup> There can be little doubt that many observers both grasped Hunter’s meaning and accepted those propositions as true.<sup>37</sup> Indeed, the ideology of the Boogaloo Bois suggests that Hunter’s purpose was incitement.

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building-george-floyd [<https://perma.cc/D5RS-9VKR>] (noting that Hunter is accused of messaging another alleged Boogaloo Boi to urge him to “go for police buildings”).

<sup>35</sup> This final action in the chain—shouting, “Justice for Floyd”—clearly amounts to actual speech, but that fact carries no serious implications for the analysis presented here. Hunter’s utterance served merely to button-up the symbolic lie that preceded it.

<sup>36</sup> Others have argued that violence can serve a communicative function, though not necessarily a dishonest one. *See generally, e.g.*, Huey P. Newton, *In Defense of Self Defense: The Correct Handling of Revolution*, in *ESSAYS FROM THE MINISTER OF DEFENSE* (1968), available at <https://archive.lib.msu.edu/DMC/AmRad/essaysministerdefense.pdf> [<https://perma.cc/F8L8-MEWU>] (arguing that small “Vanguard” groups of Black activists in the United States should adopt guerrilla warfare for the Black community to model the “correct strategy” for overcoming racist oppression). *See also* VICKY OSTERWEIL, *IN DEFENSE OF LOOTING: A RIOTOUS HISTORY OF UNCIVIL ACTION* 14 (2019) (describing riots as “communicative, but unlike protests [in that] they do not aim their speech . . . at leaders or the state [so much as] those outside the traditional avenues of power”).

Hunter’s situation adds a twist, and his subsequent indictment and guilty plea will undermine the efficacy of his communication to some extent—but only to some extent—because the jig will be up among the subset of the population that learns of these developments and manages to unwind any previous, erroneous conclusions they drew about the use of firearms during the attack on the Third Precinct. Note that, the very same evening on which Hunter fired on the Third Precinct, one of Hunter’s confederates allegedly took matters even further by killing a Federal Protective Services officer in Oakland, California. *See* Andy Mannix, *Texas Member of Boogaloo Bois Charged with Opening Fire on Minneapolis Police Precinct During Protests Over George Floyd*, *STAR TRIBUNE* (Oct. 24, 2020, 12:13 PM), <https://www.startribune.com/charges-boogaloo-bois-fired-on-mpls-precinct-shouted-justice-for-floyd/572843802/?refresh=true> [<https://perma.cc/Z6AE-9PRS>].

<sup>37</sup> Indeed, news reports attributed the shooting to broader unrest. *See Minneapolis Mayor Jacob Frey Calls Minneapolis Unrest ‘Unacceptable’; President Donald Trump Promises Action*, *STAR TRIBUNE* (May 29, 2020, 11:34 AM), <https://www.startribune.com/frey-unrest-unacceptable-trump-promising-action/570830002/> [<https://perma.cc/ZKJ6-CCF3>]. Even critics of the Court’s speech-conduct jurisprudence would surely see this as an act of speech. *See, e.g.*, Henkin, *supra* note 17, at 79–80 (“The meaningful constitutional distinction is not between speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct. If it is intended as expression, if in fact it communicates, especially if it becomes a common comprehensible form of expression, it is ‘speech.’”).



*B. Unprotected Expressive Conduct Remains Best Understood as Speech*

Importantly, Spence won his case.<sup>38</sup> After concluding that Spence was prosecuted “for the expression of an idea through activity,”<sup>39</sup> the Court turned to scrutinizing the “interests advanced by [Washington] to support its prosecution.”<sup>40</sup> The Court emphasized that Spence displayed a privately-owned flag out of the window of a private apartment, and his conduct produced no serious risk of a “breach of the peace” or disorderly protest.<sup>41</sup> These factors moved the Court to dismiss Washington’s interests in prosecuting Spence.

By contrast, Hunter engaged in violence specifically with the hope of inciting more.<sup>42</sup> As a result, Hunter’s speech would be categorically excluded from First Amendment protection.<sup>43</sup> Even if it were not, the strength of the government interest in preventing citizens from shooting at occupied government buildings—especially police facilities—and the content-neutral nature of the relevant criminal prohibition effectively doom a First Amendment challenge to the federal statute under which he was charged.<sup>44</sup>

<sup>38</sup> See *Spence*, 418 U.S. 405, 406.

<sup>39</sup> *Id.* at 411. Even the prosecutor conceded that Spence sought to communicate a message through his use of the flag. *Id.* at 409.

<sup>40</sup> *Id.* at 411.

<sup>41</sup> *Id.* at 408–09.

<sup>42</sup> The *Spence* Court was especially skeptical about protecting expressive conduct in the context of rowdy protests, distinguishing Spence’s conduct from “mindless nihilism.” *Id.* at 410. Hunter’s conduct was arguably nihilistic in some calculated, or even principled, sense.

<sup>43</sup> See Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 844–45 (2005) (noting that “legislatures may regulate—even ban—unprotected speech categories in their entirety,” including “punishing all speech within the following categories: threats, fighting words, obscenity, child pornography, and speech that imminently incites illegal activity.” (internal citations omitted)). Notably, advocacy in favor of law-breaking or violence may remain protected by the First Amendment if it does not stand imminently to incite illegal activity. See *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969). But that qualification does not appear to apply to Hunter.

<sup>44</sup> Courts generally analyze content-neutral governmental regulations of expressive conduct under the test laid out by the Supreme Court in *United States v. O’Brien*, 391 U.S. 367 (1968).

To satisfy the [*O’Brien*] test, a government regulation: (1) must be “within the constitutional power of the Government”; (2) must further “an important or substantial governmental interest”; (3) must be “unrelated to the suppression of free expression”; and (4) cannot create an incidental restriction on First Amendment freedoms “greater than is essential to the furtherance of that interest.”

Adler, *supra* note 23, at 1115–16 (quoting *O’Brien*, 391 U.S. at 377). Some have characterized the *O’Brien* test as a form of intermediate scrutiny. See Waldman, *supra* note 15, at 1848 (“[I]f a particular form of conduct is held to be ‘symbolic speech’—a mixture of

This comparison underscores that Spence earned First Amendment protection because he met two criteria: (1) his conduct “spoke” for First Amendment purposes and, further, (2) the statute that prohibited his speech gave way under the level of judicial scrutiny generally applied to regulations that burden fundamental constitutional rights. That result illuminates two levels at which expressive conduct can fail to earn First Amendment protection. Some expressive conduct will simply fall outside the scope of First Amendment analysis altogether;<sup>45</sup> the Supreme Court has stated that it “cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea,”<sup>46</sup> and therefore some conduct with communicative effect will not technically count as speech at all. But a second category of expressive conduct, which encompasses Hunter’s actions, will qualify as speech under the First Amendment while falling short of protection on the second step of the analysis—either categorically or because a court specifically upholds the burdensome regulation.<sup>47</sup>

There is typically no legal purpose in seeking a court’s determination that expressive conduct amounts to speech unless that conduct also has a reasonable prospect of earning protection at the second level. As a result, expressive conduct that plainly amounts to speech but that nevertheless is likely to elude constitutional protection may never be identified as speech at

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‘speech’ and ‘nonspeech’ elements—then a law regulating such conduct is subject to *O’Brien* intermediate scrutiny.”); *United States v. Miselis*, 972 F.3d 518, 535 n.8 (4th Cir. 2020) (“[T]he First Amendment does protect *expressive* conduct through an intermediate . . . level of scrutiny under *United States v. O’Brien*” (emphasis in original)). If a regulation fails the third prong of the *O’Brien* test—that is, if the government’s interest in regulating the conduct relates to its expressive content—then traditional strict scrutiny applies. Adler, *supra* note 23, at 1115 n.26.

The “improper use” statute at issue in *Spence* specifically prohibited the modification (for exhibition or display) of state and federal flags and signs. *See Spence*, 418 U.S. at 406–07. Hunter was charged under 18 U.S.C. § 2101, the Anti-Riot Act. *See Affidavit*, *supra* note 7. Interestingly, in August of 2020, the Fourth Circuit found that parts of the Anti-Riot Act relating to pure speech violate the First Amendment, though the bulk of the statute remains intact. *See Miselis*, 972 F.3d 518. More importantly, the Fourth Circuit voiced skepticism that “any of the statute’s conduct-related purposes implicate expressive conduct or, if so, fail to pass muster under *O’Brien*.” *Id.* at 535 n.8.

<sup>45</sup> *See generally* Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318 (exploring in depth the significance of this phenomenon and naming it “First Amendment coverage”).

<sup>46</sup> *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

<sup>47</sup> Other cases fall into this category as well. *See, e.g.*, *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000) (upholding an ordinance that prohibited nude dancing despite the Court’s recognition that nude dancing is a form of expressive activity entitled, just barely, to limited First Amendment protection).

all.<sup>48</sup> Yet the fact that Hunter's conduct amounts to speech is critical not just to identifying whether it warrants legal protection, but also to grasping its nature, aims and effects. The very structure of First Amendment jurisprudence obscures that crucial fact. The charges in Hunter's case—and his lack of incentive to raise a First Amendment defense—only reinforce this result, entirely erasing his communicative intentions and the resulting import of his conduct.

## II. WHEN VIOLENCE ITSELF BECOMES PROPAGANDA

Despite the Court's conclusion that he communicated a particularized message, Spence could have sought to convey a variety of normative or descriptive points with his flag. But the thrust of his message appears to have been disapproval of violence committed by or within the United States. In theory, Spence could have used the flag to lie about his own personal views, though few reasons for doing so present themselves. Whatever the precise message intended, the Supreme Court ultimately accepted that Spence honestly expressed his own views.<sup>49</sup>

By contrast, Hunter's message is interesting and important from a public policy standpoint because it was dishonest—not just calculated to mislead the public about his personal views, but, more powerfully, designed to obscure his identity to facilitate a lie about an entire social movement. The public's perception of BLM carries substantial implications for police reform and race relations more generally. That is why Hunter is not the only Boogaloo Boi to attempt to incite violence at BLM protests, and why those efforts matter.

Elsewhere I have defended an account of propaganda that encompasses manipulative communications that meet some minimum threshold of

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<sup>48</sup> Indeed, the description under which Hunter's conduct constitutes a criminal offense has nothing specifically to do with speech. The federal charges he faces would apply equally to a true BLM protestor who also traveled from out of state with an intention to attack the Third Precinct. The charges only reinforce an interpretation of Hunter's conduct drained of descriptive accuracy. I do not mean to suggest that the other protesters who attacked the Third Precinct engaged in protected speech under the First Amendment. But as intertwined and similar as these events appear to be, they are surprisingly different analytically. The other attacks on the building arguably offer an example of violence as speech, but the level of premeditation is less clear in those instances, and the purpose of their attacks is not necessarily to incite further violence. Thus, although nobody who attacked the building engaged in protected speech, the reasons for which their speech is unprotected may differ. Further, as the next Part discusses, the other protesters' speech was not obviously *dishonest*. See *infra Part II*.

<sup>49</sup> See *Spence*, 418 U.S. at 410 (describing Spence's conduct as "a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government").

persuasive power (the sophistication or propensity to persuade) and persuasive effect (the public policy significance of broader acceptance of the communication's message).<sup>50</sup> Roughly put, manipulative communications are those that advance false factual propositions, or advance true propositions through certain logically defective means.<sup>51</sup> Here, Hunter channeled consequential lies about BLM through the media, effectively reaching a broad audience as part of a multipronged effort by the Boogaloo Bois to attribute violence to BLM and generally spread discord. Hunter's efforts thus amount to a creative and insidious form of propaganda. Moreover, in developing that account of propaganda, I gestured at the breadth of the notion of a "communication."<sup>52</sup> The incident in Minneapolis reveals that *stigmatizing acts*—in this case, criminal acts of violence—can be undertaken as communicative, propagandistic acts.

This result has two primary implications. First, it reinforces the conclusion from the previous Part that unprotected expressive conduct must nevertheless be identified as speech. Second, the fact that such dishonesty is possible without words speaks volumes about the power of symbolic speech and the artificiality of the line between verbal and nonverbal expression. It does not appear that scholars have theorized about the interaction between dishonest symbolic speech and the First Amendment, but they should.<sup>53</sup> Dishonest symbolic speech sharpens a standing challenge to First Amendment jurisprudence. Specifically, the contrived distinction between pure speech and symbolic speech noted above<sup>54</sup> erodes even further once we acknowledge that both forms of communication possess the capacity not just to persuade but also to mislead. Consistency may well require parallel levels of scrutiny for regulations that burden pure speech and symbolic speech.

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<sup>50</sup> G. Alex Sinha, *Lies, Gaslighting and Propaganda*, 68 BUFF. L. REV. 1037, 1077 (2020).

<sup>51</sup> *Id.* at 1066–76 (exploring the concept of "manipulation").

<sup>52</sup> *See id.* at 1066 n.104 (offering a board game, *Clintonopoly*, as an example of a communication that arguably promotes a political message in manipulative fashion). Indeed, there is no reason to think that everything that amounts to propaganda will qualify as speech—even unprotected speech—under the First Amendment.

<sup>53</sup> Dishonest symbolic speech is not entirely new; that phrase is perhaps the most apt description of stolen valor. *See generally* United States v. Alvarez, 567 U.S. 709 (2012) (discussing the unconstitutionality of the Stolen Valor Act, which targeted "falsity and nothing more," and finding that "falsity alone may not suffice to bring . . . speech outside the First Amendment; the statement must be a knowing and reckless falsehood"). But stolen valor does not typically carry the same public policy significance as false flag operations—nor the same propagandistic potential—and has not given rise to any categorical recognition or analysis of dishonest symbolic speech more generally.

<sup>54</sup> *See supra* note 17.

## CONCLUSION

This Essay highlights two difficulties with First Amendment jurisprudence, one practical and one theoretical. On the practical level, First Amendment jurisprudence establishes specific incentives about when to litigate questions of burdened speech. It would be natural but mistaken to allow those incentives to structure our thinking about what amounts to speech in the real world, outside the four corners of legal pleadings. Especially in the escalating battle against the spread of false information, it is essential to develop a more sophisticated capacity to identify the sources of false belief, regardless of whether our constitutional jurisprudence ably identifies those sources as protected communications, or as communications at all. Second, the Essay suggests that the divide between pure speech and symbolic speech is even shallower than most have appreciated, further undermining the jurisprudential case for applying divergent levels of scrutiny to pure speech and symbolic speech.