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Chase J. Sanders

BEARING THE FIRST AMENDMENT'S CROSSES: AN ANALYSIS OF *STATE v. SHELDON**

CHASE J. SANDERS**

In late 1992, Judge James Salmon of the Circuit Court for Prince George's County struck down Maryland's "cross burning" law[1] as violative of the First Amendment. The law required those who sought to burn crosses publicly to notify the area fire department in advance and to secure the permission of the owner of the property where the burning was to occur.[2] Ironically, Salmon's decision aroused a topical controversy over a criminal statute that was, in prosecutors' offices, anything but topical. Passed by the General Assembly in 1966, the cross burning law lay dormant for a quarter century; Salmon's opinion was the first by a Maryland court to cite the statute. The statute's humble life as a prosecutorial tool probably was owed to its widely, if tacitly, understood constitutional infirmity: it attempted to suppress a specific message—albeit a hateful one—in contravention of the First Amendment's basic command. As any lay person could recognize, the State's alleged concern with preventing fires was merely a pretext for the lawmakers' disagreement with the message inherent in cross burning. How often do cross burnings start raging fires?

Thus, it is not surprising that the Maryland Court of Appeals recently affirmed Judge Salmon's decision,[3] or that it did so in two essential steps. First, the court held that the act of burning a cross constitutes speech for First Amendment purposes.[4] Then, the court decided that the Maryland law could not survive the strict judicial scrutiny that accompanies any governmental regulation that targets speech because of its content.[5] In short, the court reasoned that (*A*) cross burning is speech and (*B*) governmental suppression of cross burning therefore violates the First Amendment. If these determinations were somewhat obvious, however, what came between them was

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* 332 Md. 45, 629 A.2d 753 (1993).

** Associate, Piper & Marbury, Baltimore, Maryland. B.A., 1988, University of Virginia; M.P.P., 1992, Harvard University; J.D., 1992, Harvard Law School. Law clerk to Chief Judge Robert C. Murphy, Court of Appeals of Maryland, 1992-93.

1. MD. ANN. CODE art. 27, § 10A (1992).
2. *Id.*
3. State v. Sheldon, 332 Md. 45, 64, 629 A.2d 753, 763 (1993).
4. *Id.* at 50-52, 629 A.2d at 756-57.
5. *Id.* at 62-64, 629 A.2d at 762-63.

not. The bulk of the court's opinion in *State v. Sheldon* is devoted to a complex explication of First Amendment doctrine that depicts the judges having a palpably difficult time reconciling the Supreme Court's First Amendment jurisprudence.[6] In moving from point *A* to point *B*, the Court of Appeals was forced to run a doctrinal obstacle course.

This Article examines the *Sheldon* opinion, focusing on the jurisprudential impediments that the Court of Appeals faced in reaching its dispositive conclusions. In so doing, the Article uses the court's opinion as a vehicle for exposing some of the flaws in the Supreme Court's First Amendment framework. Part I sets forth the opinion, highlighting the doctrinal difficulties that the Court of Appeals encountered. Parts II and III explore two of the more serious difficulties. Part II addresses the "content-based/content-neutral" distinction and the unfortunate effect that the doctrine of "secondary effects" has on that distinction. Part III discusses the Supreme Court's complex opinion in *R.A.V. v. City of St. Paul*[7] and argues that the *R.A.V.* rule is a second-best alternative to eliminating "fighting words" as a category of constitutionally unprotected speech. The Article attempts to show that, by eliminating its "secondary effects" and "fighting words" doctrines, the Supreme Court could remove two imposing shoals that lower courts face when navigating First Amendment jurisprudence.

I. *STATE V. SHELDON*

A. The Facts and the Opening Premise

In October 1991, Brandon Sheldon set fire to a cross on the property of a black family in Prince George's County.[8] Five months later, Thomas Cole did likewise on State-owned property in the same jurisdiction.[9] Both men were indicted under Maryland's cross burning statute.[10]

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6. *Id.* at 52-62, 629 A.2d at 757-62.
7. 112 S. Ct. 2538 (1992).
8. *Sheldon*, 332 Md. at 49, 629 A.2d at 755.
9. *Id.*, 629 A.2d at 756.
10. MD. ANN. CODE art. 27, § 10A (1992) provides:
It shall be unlawful for any person or persons to burn or cause to be burned any cross or other religious symbol upon any private or public property within this State without the express consent of the owner of such property and without first giving notice to the fire department which services the area in which such burning is to take place. Any person or persons who violates the provisions of this section shall, upon conviction, be deemed guilty of a felony and shall suffer

Sheldon and Cole challenged their indictments in a joint hearing before Judge Salmon, alleging several constitutional deficiencies in the cross burning statute.[11] Judge Salmon agreed that the statute violated the Free Speech Clause of the First Amendment. Accordingly, he overturned their indictments and the statute in a thoughtful—and doctrinally complex—opinion that presaged much of the high court's review.[12] The State appealed.

Starting at point *A*, the Court of Appeals, unanimously per Chief Judge Murphy, declared that the act of burning a cross or any other religious symbol constitutes "speech" as that word is used in the First Amendment.[13] Legally, this conclusion was a "no-brainer" for two reasons. First, the court catalogued several Supreme Court decisions defining as "speech" certain acts equally or more attenuated than cross burning from the spoken or written word.[14] These included *Tinker v. Des Moines Independent Community School District*,[15] affording free speech protection to students wearing black armbands to protest the Vietnam War; *Brown v. Louisiana*,[16] protecting a sit-in at a lunch counter; and *Texas v. Johnson*,[17] protecting the burning of the American flag. Second, the Court of Appeals observed that the *R.A.V.* decision was, *sub silentio*, directly on point.[18] In *R.A.V.*, the Supreme Court struck down on free speech grounds a municipal statute that prohibited, among other acts, cross burning, thereby implicitly recognizing cross burning as "speech."[19]

Sheldon's opening premise—that cross burning represents constitutional speech—was both legally correct and eminently reasonable. One who burns a cross in public clearly intends to send a message. In light of the principles underlying the First Amendment, it cannot be relevant that he or she chooses to speak with symbols rather than words.[20] As one commentator has observed, "if

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punishment for a period not to exceed 3 years or shall be fined an amount not to exceed $5,000 or shall suffer both such fine and imprisonment in the discretion of the court.

Id.

11. *Sheldon*, 332 Md. at 49, 629 A.2d at 756.
12. CT 92-0081A; CT 92-0817X (Nov. 24, 1992).
13. *Sheldon*, 332 Md. at 50-52, 629 A.2d at 756-57.
14. *Id.* at 51, 629 A.2d at 756-57.
15. 393 U.S. 503, 505-06 (1969).
16. 383 U.S. 131, 142 (1966).
17. 491 U.S. 397, 405-06 (1989).
18. *Sheldon*, 332 Md. at 52, 629 A.2d at 756.
19. *R.A.V.*, 112 S. Ct. at 2550.
20. *See, e.g., Johnson*, 491 U.S. at 404 ("[W]e have long recognized that [First Amendment] protection does not end at the spoken or written word.").

thin slivers of processed wood pulp—papers—are obviously protected when crafted to carry a message, why are thicker pieces of wood that carry messages—crosses—any different?"[21]

Before moving on to the doctrinal exegesis, one should note what the Court of Appeals did not include in its opening premise. The court never suggested that cross burning, though "speech" in the eyes of the First Amendment, may fall into one of the narrow categories of unprotected speech. As will become clear, this was an important nondevelopment.

B. The Doctrinal Maze

1. The Standard of Review.—The Court of Appeals then dove headlong into the Supreme Court's extensive jurisprudence surrounding governmental regulation of speech.[22] The first issue the judges faced was determining the proper standard for evaluating the cross burning law.[23] The court began by setting forth the two most commonly employed lenient standards for reviewing regulations of speech.[24] The court noted that, under the Supreme Court's decision in *United States v. O'Brien*,[25] government may legitimately regulate speech when: (a) the regulation is within the government's constitutional power; (b) the regulation furthers an important governmental interest; (c) the governmental interest is unrelated to the suppression of expression; and (d) the incidental restriction on expression is no greater than necessary.[26] By its very terms, the *O'Brien* standard applies to speech regulations that are "unrelated to the suppression of expression."[27]

By contrast, under the Supreme Court's ruling in *Clark v. Community for Creative Non-Violence*,[28] the Court of Appeals observed that government may restrict speech if the restriction is "narrowly tailored to serve a significant governmental interest, and . . . leave[s]

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21. Akhil R. Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 134 (1992).

22. The reader should bear in mind that Part I focuses on the *Sheldon* opinion and, thus, explains the pertinent First Amendment doctrine only to the extent the Court of Appeals did. The doctrine will be more fully discussed *infra* in Parts II and III.

23. This question also was the most important, insofar as a speech regulation's constitutional fate often hinges on whether it receives relaxed or heightened scrutiny. *See infra* text accompanying notes 90-93.

24. *Sheldon*, 332 Md. at 53-54, 629 A.2d at 758.

25. 391 U.S. 367, 377 (1968).

26. *Sheldon*, 332 Md. at 53, 629 A.2d at 758 (citing *O'Brien*, 391 U.S. at 377).

27. *Id.* at 53, 629 A.2d at 758.

28. 468 U.S. 288 (1984).

open ample alternative channels for communication of the information."[29] The *Clark* standard, the court noted, applies to regulations that restrict only the "time, place, or manner"[30] of expression or that are "content-neutral."[31] The court explained that a "content-neutral" restriction, according to *Renton v. Playtime Theaters, Inc.*,[32] is one that is "*justified* without reference to the content of the regulated speech."[33]

The doctrinal soup, one observes, already has gotten thick. Indeed, at this point in the *Sheldon* opinion, the Court of Appeals stopped, took a breath, and recapitulated the doctrine it had just delineated in condensed form.[34] The court noted, however, that the complexity of the jurisprudence was more apparent than real; while the *O'Brien* and *Clark* standards are "formally distinct" in terms of the exact species of speech regulations to which they apply, the court quoted the Supreme Court's own observation that the *O'Brien* test is "little, if any, different"[35] from *Clark*'s "time, place, or manner" standard.[36]

The court then spelled out the other, more demanding standard for reviewing speech regulations. This standard applies, the court observed, to regulations that are neither unrelated to the suppression of expression nor content-neutral—in other words, to "content-based" regulations.[37] Under *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[38] "[s]tates must show that [such] regulations [are] necessary to serve a compelling state interest and that [they are] narrowly drawn

29. *Sheldon*, 332 Md. at 54, 629 A.2d at 758 (quoting *Clark*, 468 U.S. at 293).

30. *Id.*

31. *Id.*

32. 475 U.S. 41 (1986).

33. *Sheldon*, 332 Md. at 53-54, 629 A.2d at 758 (quoting *Renton*, 475 U.S. at 48 (citations omitted)).

34. *Id.* at 54, 629 A.2d at 758.

35. *Id.* (quoting *Clark*, 468 U.S. at 298).

36. What the Court of Appeals did *not* note at this point, but could have, is that there also is little difference between the species of regulations to which the standards apply. A regulation that is "unrelated to the suppression of expression," such as the prohibition on burning one's draft card at issue in *O'Brien*, is little different vis-a-vis the First Amendment's purposes than one that seeks to regulate the "time, place or manner" of expression, such as the prohibition on sleeping in a public park at issue in *Clark*. Both types of regulations are subsets of the general category of "content-neutral" restrictions and, thus, are reviewed under similar standards. *See infra* text accompanying notes 90-92.

37. *Sheldon*, 332 Md. 54-55, 629 A.2d at 758-59.

38. 460 U.S. 37 (1983).

to achieve that end."[39] This standard, of course, represents strict scrutiny.[40]

The Court of Appeals then held that the cross burning statute was content-based, and therefore subject to strict scrutiny, for two reasons.[41] First, referring to its earlier definition of content-neutrality, the court opined that the statute was not "*justified* without reference to the content of the regulated speech."[42] The court posited that the law could not be justified as a fire protection measure—and thus could not be justified without looking to the speech it regulated—because it added little in scope to Maryland's pre-existing fire protection scheme.[43] Statutory and common law already broadly criminalize trespass and arson, argued the court, so how could the legislature justify the separate criminalization of one small threat of fire? In so reasoning, however, the court met its first major doctrinal difficulty. There is no requirement that all statutes sweep broadly, or that statutes cannot visit incremental change upon the fields they regulate. There is no denying that, as written, the cross burning law was a fire protection measure, even if a trivial one. Doctrinally, at least, the court had to stretch to deem the statute "content-based."[44]

The court's second reason for declaring the statute content-based explains why it stretched the doctrine. This was that, more important than any doctrine, the legislature intended to suppress the communicative element of cross burning.[45] The court sketched the legislative history of two amendments to the cross burning statute, enacted in 1980 and 1981, by which the General Assembly stiffened the penalties

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39. *Sheldon*, 332 Md. at 55, 629 A.2d at 759 (quoting *Perry*, 460 U.S. at 45).

40. *Id.* at 55, 629 A.2d at 758-59. The salient observation at this juncture is the Court of Appeals's definition of "content-based" regulations, a notion to be discussed in detail in Part II. By defining a "content-based" regulation as one that relates to speech and is not content-neutral—that is, by defining "content-based" as merely the opposite of content-neutral—the court left its earlier definition of content-neutrality as the only doctrinal foundation on which to decide the all-important question of whether the cross burning statute was in fact content-neutral (and thus worthy of lenient scrutiny) or content-based (requiring strict scrutiny). See *infra* text accompanying notes 90-93 for further discussion of standards of review for statutes regulating speech.

41. *Sheldon*, 332 Md. at 55, 629 A.2d at 759.

42. *Id.* at 56, 629 A.2d at 759 (quoting *Renton*, 475 U.S. at 48).

43. *Id.*

44. To add to the confusion, the State *conceded* that the statute was content-based even as it argued that the statute was "*justified* without reference to the content of the regulated speech." The court rejected the concession, *id.* at 55 n.1, 629 A.2d at 759 n.1, and then held the statute content-based anyway.

45. *Id.* at 56-57, 629 A.2d at 759-60.

for noncompliant cross burners.[46] This history indicated that the legislature never intended the cross burning statute as a fire protection measure at all, but as a means of burdening the act of burning religious symbols.[47] The court noted that the law was sponsored by a civil rights activist in an era of racial tension and was amended amidst lofty rhetoric that decried intimidation and fear as opposed to the threat of fires.[48] From this, the court deduced that the General Assembly's motive in passing the cross burning statute was to quell the message, and not the specter of conflagration, in the act of cross burning. Thus, the court fortified its unsteady doctrinal conclusion that the statute was content-based by pointing to the government's apparent censorial purpose in enacting the statute. Improper motive trumped uncertain doctrine to render the statute content-based, and the court was ready to apply strict scrutiny.

2. The R.A.V. *Hierarchy.*—Before it could apply strict scrutiny, however, the court chose to run a second doctrinal gauntlet. In *R.A.V.*, the Supreme Court struck down a St. Paul ordinance that criminalized, *inter alia*, cross burning.[49] The Minnesota Supreme Court had attempted to save the ordinance by narrowly construing it to prohibit only "fighting words," or words that "tend to incite an immediate breach of the peace"[50] and that, therefore, do not receive First Amendment protection.[51] The United States Supreme Court, though it accepted Minnesota's narrow construction, nevertheless overturned the statute by fashioning a rule against content-based regulations even within unprotected classes of speech such as fighting words.[52] Because St. Paul's ordinance outlawed only "politically

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46. *Id.* There was no legislative history of the law's original enactment in 1966. *Id.* at 56, 629 A.2d at 759.

47. *Id.* at 56-57, 629 A.2d at 759.

48. *Id.*

49. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2541 (1992). The Minnesota statute provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id.

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

51. *R.A.V.*, 112 S. Ct. at 2542; *see Sheldon*, 332 Md. at 58, 629 A.2d at 760.

52. *R.A.V.*, 112 S. Ct. at 2543-45. Apparently focusing on the *R.A.V.* holding, the Court of Appeals did not explicitly state the *R.A.V.* rule. *See Sheldon*, 332 Md. at 58-60, 629 A.2d at 760-61.

selected" fighting words, it was impermissibly content-based.[53]

However, the Supreme Court delineated three exceptions to its rule (none of which saved the St. Paul ordinance).[54] These exceptions provided the Court of Appeals with its second major doctrinal impediment. In *Sheldon*, the Court of Appeals felt compelled to explain the *R.A.V.* exceptions and to evaluate Maryland's cross burning statute against them, *even though the State never argued that its cross burning statute proscribed only fighting words*, which meant that the *R.A.V.* rule and its exceptions technically were not in play.[55] In other words, because the Court of Appeals (unlike the Minnesota Supreme Court) never construed the Maryland cross burning statute as regulating only unprotected speech, *R.A.V.*'s rule against content-based regulations of unprotected speech and its exceptions were theoretically inapposite.[56] Why the court chose to address the *R.A.V.* exceptions thus is unclear.[57]

In any event, the court plunged in. The first *R.A.V.* exception "occurs 'when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.'"[58] The Court of Appeals offered the Supreme Court's own example of such a situation: a content-based prohibition of only the most lascivious forms of obscenity would be constitutionally permissible, for lasciviousness is the very reason obscenity is proscribable.[59]

The second *R.A.V.* exception occurs when a content-based statute aims only at "the 'secondary effects' of the targeted speech and so is *'justified* without reference to the content of the regulated speech.'"[60] This exception derives from *Renton*, the court explained, in which the Supreme Court upheld a city zoning ordinance restricting adult movie theaters to certain isolated areas.[61] The Supreme Court accepted the city's argument that the ordinance targeted not the expressive elements of adult theaters but the "secondary effects" of those theaters—increased crime and decreased commerce and property

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53. *Id.* For the Court of Appeals's treatment of *R.A.V.*, see *Sheldon*, 332 Md. at 58, 629 A.2d at 760.

54. *R.A.V.*, 112 S. Ct. 2545-47.

55. *Sheldon*, 332 Md. at 58-60, 629 A.2d at 760-61.

56. Herein lies the importance of the Court's threshold omission to interpret cross burning as possibly unprotected speech.

57. For speculation as to why the Court of Appeals addressed the *R.A.V.* exceptions, see *infra* text accompanying notes 152-154.

58. 332 Md. at 58, 629 A.2d at 760 (quoting *R.A.V.*, 112 S. Ct. at 2545).

59. *Id.* (citing *R.A.V.*, 112 S. Ct. at 2545).

60. *Id.* at 58-59, 629 A.2d 760 (quoting Renton v. Playtime Theaters, Inc. 475 U.S. 41, 48 (1986)).

61. *Renton*, 475 U.S. at 43.

values—and thus treated the ordinance, though facially content-based, as content-neutral.[62] Hence, the second exception to the *R.A.V.* rule consists of *Renton*-like situations in which an "apparently content-based statute has content-neutral intentions."[63]

The third exception to the *R.A.V.* rule occurs when "there is no realistic possibility that official suppression of ideas is afoot."[64] Again, the Court of Appeals provided the Supreme Court's own example: "a state could prohibit only those obscene movies featuring blue-eyed actresses . . . because the targeting of that subset [of obscenity] would be utterly unrelated to suppressing ideas."[65] The Court of Appeals perceptively noted that the third *R.A.V.* exception simply is a generalized version of the first; a state may proscribe any subset of constitutionally proscribable speech, not only for the very reason the speech is proscribable in the first place, but also for any reason unrelated to suppressing speech.[66]

The Court of Appeals then set about evaluating the cross burning statute under the three *R.A.V.* exceptions, even though it was, as suggested above, a foregone conclusion that the exceptions would not save the statute because the *R.A.V.* rule was literally inapplicable in *Sheldon*.[67] The first exception did not apply, the court noted summarily, for insofar as the State had not argued that the cross burning law regulated fighting words *at all*, the statute could hardly be cast as an effort to regulate only the most inciteful of constitutionally proscribable fighting words.[68]

Nor did the cross burning law, said the court, have *Renton*-like "content-neutral intentions," for several reasons. The first two, unsurprisingly, were the same as those on which the court relied when deciding that the statute was not content-neutral in the first place: the law's "scant contribution to Maryland's fire protection scheme,"[69]

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62. *Sheldon*, 332 Md. at 59, 629 A.2d at 761 (citing *Renton*, 475 U.S. at 48-49). The doctrine of "secondary effects" will be discussed in detail *infra* in Part II.B.

63. *Sheldon*, 332 Md. at 58, 629 A.2d at 760.

64. *Id.* at 59, 629 A.2d at 761 (quoting *R.A.V.*, 112 S. Ct. at 2547).

65. *Id.* at 59-60, 629 A.2d at 761 (citing *R.A.V.*, 112 S. Ct. at 2547).

66. *Id.* at 59, 629 A.2d at 761.

67. *See supra* notes 54-57 and accompanying text.

68. *Sheldon*, 332 Md. at 60, 629 A.2d at 761-62. The State did not even contend that the first *R.A.V.* exception applied to the cross burning law. The State's entire argument in defense of the statute consisted of (a) the second *R.A.V.* exception (the *Renton* doctrine); (b) the third *R.A.V.* exception; and (c) the argument that the statute was necessary and narrowly tailored to serve a compelling governmental interest (that it survived strict scrutiny). *Id.* at 60-62, 629 A.2d 761-62.

69. *Id.* at 62, 629 A.2d at 762.

and its legislative history indicating an intent to suppress speech.[70] The Court of Appeals then added a third reason specific to the context of the second *R.A.V.* exception: the alleged "secondary effects" of cross burning were dubious at best.[71] Unlike the threat of crime or reduced property values surrounding adult theaters, the court opined, the threat of fires from burning crosses is rather tenuous.[72] The State's failure to regulate other activities that pose a far more significant threat of fires, such as "the burning of leaves or cars, or having barbecues or bonfires,"[73] undermined its claim that it was attacking only the "secondary effects" of cross burning.[74] As the court succinctly observed, "[T]he State has chosen to regulate such a small subset of potential blazes that its allegedly content-neutral goal of protecting the citizenry from inferno cannot be taken seriously."[75]

Finally, the third *R.A.V.* exception did not apply, the court determined, because the State had failed to argue that the cross burning statute regulated only proscribable speech. This failure undercut any claim that the law carved out a subset of proscribable speech for reasons unrelated to suppressing that speech.[76] In any event, the court noted, for the reasons discussed in dispelling the second exception, the cross burning statute clearly was related to suppressing speech.[77]

Having determined that the cross burning statute was content-based and was not saved by any of the *R.A.V.* exceptions, the Court of Appeals had cleared its doctrinal hurdles in assessing the statute's constitutionality. The court had, at last, reached point *B*: it was ready to apply strict scrutiny to the State's regulation of speech.

C. The Inevitable Conclusion

Under strict scrutiny, the cross burning law stood no chance. The court reiterated the test: "To survive strict scrutiny, a law must be 'necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.'"[78] In a last-gasp effort to save its statute,

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70. *Id.* at 60, 629 A.2d at 761.
71. *Id.* at 60-61, 629 A.2d at 761-62.
72. *Id.* at 61, 629 A.2d at 762.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 61-62, 629 A.2d at 762.
77. *Id.*
78. *Id.* at 62, 629 A.2d at 762 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

the State reversed course and discarded all pretensions of the statute as a fire prevention measure. The statute, claimed the State, furthered a compelling governmental interest in eradicating racial and religious disharmony and in promoting social tolerance.[79] Though it accepted this governmental interest, the Court of Appeals nonetheless concluded that the cross burning law was not "necessary" to serve it.[80] The statute, said the court, only inconveniences a few bigots; it does nothing to remedy the effects of their bigotry, which is the true measure of an effective antidiscrimination statute.[81] Thus, the cross burning law must fall.[82]

The court's conclusion, like its opening premise, was eminently reasonable. After all, laws rarely survive strict scrutiny, even if they are well-intentioned; the Bill of Rights cannot be cast aside "even for the noblest of purposes."[83] But even though it reached the right result, the *Sheldon* opinion is, in one way, troubling. In its graphic depiction of the doctrinal jungle that First Amendment law has become, *Sheldon* does little to reassure one's faith in the courts' continuing ability to keep the First Amendment's basic principles in mind. The next two parts explore the two knotty areas of the jungle that entangled the Court of Appeals and suggest how some of the vines may be cut away.

II. THE CROSS BURNING STATUTE: CONTENT-NEUTRAL OR CONTENT-BASED?

A. The Basic Framework

The Supreme Court's basic First Amendment jurisprudence classifies governmental regulations of speech into two categories.[84] Regulations that limit communication without regard to the message conveyed are deemed "content-neutral."[85] Laws restricting billboards, outdoor concerts, or public preaching after dark are all content-neutral regulations.[86] By contrast, regulations that limit

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79. *Id.*

80. *Id.* at 63, 629 A.2d at 762-63.

81. *Id.* at 63-64, 629 A.2d at 763.

82. *Id.* at 64, 629 A.2d at 763.

83. *Id.* at 63, 629 A.2d at 763.

84. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2 (2d ed. 1988) (discussing a "two-track" approach in First Amendment analysis).

85. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) [hereinafter Stone, *Content Regulation*].

86. For actual examples of content-neutral regulations in First Amendment jurisprudence, see, e.g., Los Angeles City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (involving a law against posting signs on public property); Schneider v. Town of Irvington, 308 U.S. 147 (1939) (addressing a law against distribution of leaflets); Eanes v.

communication because of the message conveyed are "content-based."[87] Laws restricting political advertisements or racist newsletters would be content-based.[88] The First Amendment, of course, keeps vigilance over both types of regulations, for both content-neutral and content-based restrictions of speech can threaten the values underlying that Amendment, principally the search for truth through free exchange in the "marketplace of ideas."[89]

As the *Sheldon* court indicated, however, content-neutral statutes generally receive more lenient constitutional scrutiny than content-based statutes.[90] Content-neutral statutes usually are subjected to some form of judicial balancing test, most commonly the *Clark* or *O'Brien* tests.[91] These balancing tests permit courts to look favorably on statutes that legitimately further governmental interests without incidentally suppressing too much speech and, conversely, to look disparagingly on statutes that do the opposite.[92] Content-based regulations, by contrast, generally receive strict scrutiny, for they are presumptively invalid.[93]

State, 318 Md. 436, 569 A.2d 604 (1990) (discussing a noise ordinance).

87. *See* Stone, *Content Regulation*, *supra* note 85, at 190 (emphasis added).

88. For jurisprudential examples, see, e.g., Miller v. California, 413 U.S. 15 (1973) (involving a law restricting the distribution of obscene material); Burson v. Freeman, 112 S. Ct. 1846 (1992) (discussing a law prohibiting political solicitation within 100 feet of a polling place on election day). While the foregoing definitions of "content-neutral" and "content-based" provide the basic framework in First Amendment law, commentators have pointed out that the distinction is a simplistic one that often blurs. *See, e.g.*, Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

89. A thorough discussion of the First Amendment's philosophical underpinnings is obviously beyond the scope of this Article. For such a discussion, see Stone, *Content Regulation*, *supra* note 85, at 193 n.8, and citations therein.

90. *See supra* Part I.A.1.

91. *See id.*; Stone, *Content Regulation*, *supra* note 85, at 193; Redish, *supra* note 88, at 119; Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) [hereinafter Stone, *Content-Neutral Restrictions*] (discussing seven different balancing tests that the Supreme Court has used to evaluate content-neutral speech regulations).

92. *See* Stone, *Content Regulation*, *supra* note 85, at 193.

93. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992). One commonly cited subspecies of content-based regulations is the *viewpoint-based* restriction, which is a law that suppresses the communication of a particular point of view. Statutes restricting criticism of the government or antiunion demonstrations would constitute viewpoint-based regulations. *See, e.g.*, Boos v. Barry, 485 U.S. 312 (1988) (involving a law prohibiting the display of signs bringing foreign governments into disrepute within 500 feet of their embassies). Viewpoint-based regulations represent a particularly pernicious form of content-based statutes, for "by effectively excising a specific message from public debate, [they] mutilate[] 'the thinking process of the community' and [are] thus incompatible with the central precepts of the first amendment." Stone, *Content Regulation*, *supra* note 85, at 198. For this reason, the Supreme Court usually will not allow the lack of viewpoint discrimination to excuse a content-based statute. *Boos*, 485 U.S. at 319.

Commentators have advanced four basic rationales for the distinction in treatment between content-based and content-neutral statutes. First, because content-neutral regulations treat all speakers equally while content-based restrictions discriminate against certain speakers, a concern for equality would dictate more exacting scrutiny of content-based regulations.[94] Second, content-neutral regulations affect all speech equally, but content-based restrictions impede only certain substantive areas of speech and thereby distort the public debate; hence, content-based regulations require more careful review.[95]

Third, unlike content-neutral restrictions, content-based regulations raise the specter of government trying to shield the citizenry from what it deems an undesirable "communicative impact" of certain speech.[96] This rationale suggests that courts must carefully scrutinize content-based regulations to ensure that government is not paternalistically concerned with preventing people from hearing "bad" or provocative speech, instead of allowing the populace to conduct its own fully informed search for truth.[97] Finally, closely related to the third rationale is the notion that content-based regulations, unlike content-neutral ones, evoke the suspicion that government is censoring speech with which it disagrees.[98] This rationale justifies demanding scrutiny of content-based regulations even more than the third rationale, for governmental suppression of speech simply because the government disagrees with that speech offends the First Amendment's "search for truth" ideal even more than suppression of speech for paternalistic reasons. Both the third and fourth rationales, however, share a common thread: content-based regulations evince the possibility that government has an improper motive in suppressing speech, a motive that stems from misguided paternalism or self-indulgence rather than from a legitimate effort to serve the people.[99]

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94. *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Stone, *Content Regulation*, *supra* note 85, at 201.

95. *See* Andrea Oser, Note, *Motivation Analysis in Light of* Renton, 87 COLUM. L. REV. 344, 353 (1987); Stone, *Content Regulation*, *supra* note 85, at 217.

96. *See* Oser, *supra* note 95, at 354; Stone, *Content Regulation*, *supra* note 85, at 207.

97. *See* Oser, *supra* note 95, at 354; Stone, *Content Regulation*, *supra* note 85, at 207; FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15-19 (1982).

98. *See* Oser, *supra* note 95, at 354; Stone, *Content Regulation*, *supra* note 85, at 227.

99. Because it is probably rare that the government acts purely out of its own opinion in suppressing speech, but usually also desires to forestall the influence of that speech on the public, the third and fourth rationales often coexist. *See* Oser, *supra* note 95, at 354 n.67 (citing John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975)). Thus, concern with improper motive is probably a more accurate, as well as more convenient, means of

So which was Maryland's cross burning statute, content-neutral or content-based? The answer was difficult enough under the Supreme Court's basic "two-track" framework. Arguably, the statute was content-neutral: by imposing only logistical restrictions on the act of cross burning, the statute on its face regulated that act without regard to its communicative elements.[100] Furthermore, the law did not ban cross burning outright; it levied only "place" (where the property owner has consented) and "manner" (after notifying the local fire department) restrictions on the act of burning crosses.[101]

In fact, the cross burning law was both content-neutral and content-based, because it imposed place and manner restrictions but also targeted a certain type of speech: cross burning. Therefore, it was a "hybrid": a content-based "time, place or manner" regulation.[102] Thus, the cross burning statute beautifully confounded the Supreme Court's basic First Amendment framework, even before the knots in the doctrine. The Court of Appeals faced a doctrinal conundrum in the cross burning statute simply through the nature of the statute itself.[103]

How, then, did the court conclude that the statute was content-based? To answer this question, one must examine the twist in the doctrine.

B. The Monkey Wrench: the Doctrine of Secondary Effects

As the Court of Appeals explained in *Sheldon*, the Supreme Court in *Renton* upheld a municipal ordinance that zoned adult movie theaters into certain discrete locations.[104] The Court did so by

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describing the third and fourth rationales for the content-based/content-neutral distinction.

100. *See supra* note 10 (quoting the cross burning statute).

101. *See id.*

102. *See* Oser, *supra* note 95, at 345; Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1905 (1989).

103. At this point, one may wonder why the State conceded that the statute was content-based, *see supra* note 44, when in fact it had plausible arguments to assert that the statute was content-neutral. One can only conclude that the State blundered. Presumably, the State was confused by the content-based element of the cross burning statute, namely, the fact that the statute applied to only one small realm of speech. The State should have argued that, as a place and manner regulation that did not ban cross burning, the statute was content-neutral. The State's confusion in conceding that the statute was content-based is ironic: it shows that the State, too, was focused on the cross burning statute as a speech regulation, not as a fire protection measure. For an outline of the State's three-part argument, see *supra* note 68; for further discussion as to how the State argued, see *infra* notes 152-154 and accompanying text.

104. *Sheldon*, 332 Md. at 58, 629 A.2d at 760-61 (citing Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986)).

accepting Renton's argument that its ordinance aimed not at the content of the "expression" in adult theaters, but at the "secondary effects of such theaters on the surrounding community."[105] These "secondary effects" included increased crime and deleterious effects on "the city's retail trade, . . . property values, and . . . quality of urban life."[106] Though the Court admitted that the Renton ordinance "treats theaters that specialize in adult films differently from other kinds of theaters,"[107] it held that the ordinance's focus on "secondary effects" rendered it "completely consistent with our definition of content-neutral speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'"[108] The statute should be treated as content-neutral, the Court continued, because its focus on secondary effects obviated the usual concern underlying content-based statutes: that "'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'"[109] Thus, applying the *Clark* standard for content-neutral "time, place or manner" restrictions,[110] the *Renton* Court upheld the ordinance.[111]

Renton's reasoning is dubious. The Supreme Court treated the Renton ordinance as content-neutral because it was supposedly "*justified* without reference to the content of the regulated speech."[112] But was it? In one sense, one must refer to the content of the speech that the *Renton* ordinance regulated in order to justify it, for the ordinance's concern with particular "secondary effects" arose only on account of the regulated speech. As one commentator has noted, "a regulation is content-based if the danger sought to be avoided is created by the content of the speech regulated."[113] In *Renton*, the Supreme Court attempted to divorce the city's asserted justification for the statute from the particular speech it regulated. But this was impossible: the justification hinged directly on the

105. *Renton*, 475 U.S. at 47.
106. *Id.* at 48.
107. *Id.* at 47.
108. *Id.* at 48 (quoting, with emphasis, Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).
109. *Id.* at 48-49 (quoting Police Dept. v. Mosley, 408 U.S. 92, 95-96 (1972)).
110. *See supra* text accompanying notes 28-33.
111. *Renton*, 475 U.S. at 54-55.
112. *Id.* at 48.
113. Oser, *supra* note 95, at 347.

speech. If the theater were not an adult cinema, the alleged "secondary effects" would not have been a threat.[114]

Ironically, Maryland's cross burning statute may have come closer to being "justified without reference to the content of the regulated speech" than the ordinance at issue in *Renton*. The harm that the cross burning law ostensibly sought to address was well-recognized and was not unique to the restricted speech. As the *Sheldon* court observed, any number of activities present fire hazards.[115] By contrast, few if any business establishments other than adult theaters raise the specter of degenerative "secondary effects." In this light, Maryland seemed more justified than Renton in raising the "secondary effects" flag, for Maryland was less vulnerable to the charge that it was disguising its dislike for the regulated speech by pointing to a "secondary effect" unique to that speech.

This was so, however, only by pure coincidence arising from the fact that the speech in *Sheldon* was symbolic. The act of cross burning allows one to "speak" through the confined use of fire. While government is not ordinarily in the habit of restrictively zoning business enterprises to prevent crime, government is in the habit of regulating fire hazards to prevent destructive blazes. In *Sheldon*, Maryland tried to seize on the fact that cross burning involves an ordinarily regulable activity to suppress the communicative aspect of cross burning. The Court of Appeals, however, saw through the State's attempt.[116]

The State's disingenuous effort illustrates the problem with the doctrine of "secondary effects": it allows government to make an end run around the content-based/content-neutral distinction and the rationales underlying that distinction. The "secondary effects"

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114. *See* Kimberly K. Smith, *Zoning Adult Entertainment: A Reassessment of* Renton, 79 CALIF. L. REV. 119, 142 (1991) ("The secondary effects addressed by adult-use zoning ordinances flow from the sexual content of the speech; the adult businesses would not have deleterious effects if they sold only chemistry textbooks.")

115. *Sheldon*, 332 Md. at 56, 629 A.2d at 759.

116. As Part I indicates, the court rejected the State's "secondary effects" argument in two parts. Initially, it determined the statute to be content-based, finding that *Renton*'s doctrinal definition of content neutrality did not apply to the cross burning law. *See supra* text accompanying notes 41-48. Later, in addressing the *R.A.V.* rule and its exceptions, the court held *Renton*'s reasoning inapposite to the cross burning law and thereby directly rejected the notion that the State's concern with "secondary effects" should afford the statute content-neutral analysis. *See supra* text accompanying notes 69-75. The reader should not be confused by the fact that the court did not fully grapple with the doctrine of "secondary effects" until it discussed the *R.A.V.* exceptions, which are discussed *infra* in Part III.B., for the "secondary effects" doctrine long preceded *R.A.V.* The State in *Sheldon* just happened to invoke "secondary effects" through the vehicle of the *R.A.V.* exceptions.

doctrine permits government to conceal its effort to target speech based on its content by pointing to some neutral reason why the speech is harmful.[117] Thus, the doctrine facilitates governmental ability to harbor an improper motive in regulating speech, which undermines the third and fourth rationales for the content-based/content-neutral distinction.[118]

The Supreme Court should abandon the doctrine of "secondary effects" because the government should not be allowed to enact content-based speech restrictions simply because it professes to have a good reason. Indeed, the government will always profess to have a good reason.[119] Instead, as the Court opined well before it created the "secondary effects" doctrine, the government must have a compelling reason for regulating speech, and its regulation must be necessary and narrowly drawn to achieve the government's purpose.[120] In short, content-based regulations must remain subject to strict scrutiny.

In lieu of the "secondary effects" doctrine, courts would do well to follow an alternative rule in cases like *Sheldon*, which involve speech restrictions that confound the standard content-based/content-neutral distinction. In such cases, courts should look directly to the government's motive to determine what standard of review to apply to the regulation.[121] The Court of Appeals did so in *Sheldon*, and thus it properly determined that the cross burning statute was content-based.[122] Along the way, unfortunately, the doctrine of "secondary

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117. *See* TRIBE, *supra* note 84, § 12-3, at 798 n.17 ("The [*Renton*] Court . . . found that, despite the restriction's outward appearance, it was not content-*based*, because the government chose to *defend* the rule with reasons other than its impact on the minds of listeners." (emphasis in original)).

118. *See supra* text accompanying notes 97-99.

119. *See* Ely, *supra* note 99, at 1496 ("Restrictions on free expression are rarely defended on the ground that the state simply didn't like what the defendant was saying; reference will generally be made to some danger beyond the message . . . ."); Stone, *Content-Neutral Restrictions*, *supra* note 91, at 56 ("[G]overnment rarely admits that it is attempting to restrict a particular message because it disagrees with the ideas expressed. Rather, the government usually claims that legitimate governmental interests support the restriction."); Oser, *supra* note 95, at 351 ("Read broadly, *Renton* implies that most restrictions on speech will be reviewed with a balancing test [i.e., are content-neutral].")

120. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

121. *See* Oser, *supra* note 95, at 351-61 (urging courts to analyze the government's motive).

122. *Sheldon*, 332 Md. at 57, 629 A.2d at 760. In fact, the statute was not only content-based but viewpoint-based, *see supra* note 93, insofar as it primarily suppressed the ideological position reflected in the act of cross burning. That the doctrine of "secondary effects" could conceivably afford content-neutral analysis to a viewpoint-based statute further demonstrates the inconsistency in that doctrine.

effects" presented a distracting doctrinal cover for the State's true motive and a doctrinal cross for the court to bear in protecting speech.

III. CROSS BURNING, FIGHTING WORDS, AND *R.A.V.*

A. The Basic Framework (Continued)

There is one further twist to the Supreme Court's basic First Amendment jurisprudence outlined in Part II.A. The Court has long recognized that

> [t]here are certain well-defined and narrowly limited classes of speech . . . [that] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[123]

These categories of speech, which consist primarily of private libel, obscenity, and "fighting words," do not enjoy First Amendment protection; government may constitutionally proscribe them.[124]

Of importance in *Sheldon* is the fighting words category. In *Chaplinsky v. New Hampshire*, the Supreme Court sustained the conviction of a Jehovah's Witness under a statute prohibiting, essentially, name calling in public.[125] Walter Chaplinsky, after stirring up a crowd by preaching against organized religion, denounced the Rochester city marshal—to his face—as "a God damned racketeer" and "a damned Fascist."[126] These epithets, almost quaint by contemporary standards, struck the Supreme Court as "'fighting' words—those that by their very utterance inflict injury or tend to incite an immediate breach of the peace."[127] Thus the Court begat "fighting words" as a categorical exception to the First Amendment's protection of speech.[128]

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123. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

124. *See id.*; Stone, *Content Regulation*, *supra* note 85, at 194-95. There are several other discrete areas of unprotected speech, such as child pornography, New York v. Ferber, 458 U.S. 747 (1982), and certain commercial speech, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). *See* Stone, *Content Regulation*, *supra* note 85, at 194-95.

125. *Chaplinsky*, 315 U.S. at 568.

126. *Id.* at 569-70.

127. *Id.* at 572.

128. Subsequent decisions have narrowed the scope of the fighting words doctrine. In Cohen v. California, 403 U.S. 15 (1971), the Court reversed the conviction of a young man who wore a jacket reading "Fuck the Draft" into a Los Angeles courtroom. The Court held, *inter alia*, that these offensive words did not rise to the level of unprotected fighting

Does the act of cross burning constitute fighting words? The idea seems tenuous. Crosses are not usually burned in the middle of an escalating war of words, in which one party overreacts and throws a verbal "punch." The very effort required to assemble or obtain a cross fit for burning, then to set it afire, makes cross burning an unwieldy weapon in a verbal fight. Rather, cross burning usually provides misguided zealots with a means for disturbing the nighttime tranquility and, thereby, comprises the first words in a verbal battle that may or may not follow once the targeted audience has become aware of the message. Cross burning is not the final jeer that provokes an excited crowd into a melee; cross burning is the laborious effort to create an atmosphere of hostility in the first place. So the notion that cross burning could threaten immediate violence or "incite an immediate breach of the peace,"[129] when it usually takes time for unaware listeners to even "hear" the speech, seems somewhat peculiar.[130] Or so one might have thought, until *R.A.V. v. City of St. Paul.*[131]

B. The Monkey Wrench: R.A.V.

In *R.A.V.*, the Supreme Court overturned the convictions of several teenagers, including Robert A. Viktora, under the St. Paul statute quoted in Part I-A.[132] Viktora and his friends had burned a cross inside the fenced yard of a black family early one morning in June 1990.[133] The Minnesota Supreme Court attempted to rescue

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words because they created no immediate threat of violence. *Id.* at 23. *See also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the government cannot prohibit advocacy of violence or lawlessness unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); Note, *"Adding the First Amendment to the Fire": Cross Burning and Hate Crime Laws*, 26 CREIGHTON L. REV. 1109, 1126-30 (1993).

129. *Chaplinsky*, 315 U.S. at 572.

130. One may still argue that cross burning constitutes words that "inflict injury." The Supreme Court has never upheld a speaker's conviction under this part of the *Chaplinsky* test, however—not even in *Chaplinsky*, where the state statute at issue precluded only words tending to incite an immediate breach of the peace. *Chaplinsky*, 315 U.S. at 569. Moreover, the continuing viability of the "inflict injury" dictum in *Chaplinsky* is in doubt; the Court has subsequently referred to the fighting words doctrine as words "'which by their very utterance . . . tend to incite an immediate breach of the peace.'" Gooding v. Wilson, 405 U.S. 518, 525 (1972) (quoting *Chaplinsky*, 315 U.S. at 572); *see* Note, *The Demise of the* Chaplinsky *Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1129 (1993) [hereinafter *Demise of Chaplinsky*].

131. 112 S. Ct. 2538 (1992).

132. *Id.* at 2550; *see supra* note 49 (quoting the St. Paul statute).

133. *R.A.V.*, 112 S. Ct. at 2541.

St. Paul's ordinance by reading it to prohibit only fighting words.[134] That court thereby conceived the notion of cross burning as fighting words, which the Supreme Court was bound to accept.[135] The Supreme Court nonetheless struck down the statute because the statute was impermissibly content-based in prohibiting only fighting words on "specified disfavored topics."[136] In so doing, the majority, per Justice Scalia, constructed an "ornate conceptual castle"[137] that imposed an intricate new rule on First Amendment jurisprudence.

The rule is this: government may not enact content-based speech restrictions *even within the proscribable classes of speech.* (The majority asserted that this rule was not new;[138] but three concurring Justices thought otherwise.[139]) The majority reasoned that the unprotected classes of speech

> can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—[but are not] categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.[140]

In other words, the majority suggested, the proscribable classes of speech are unique in the sense that they can be regulated on account of their content; but they are not unique in the sense that they cannot be regulated for other invidious reasons.

It was this sentiment that the majority attempted to capture in delineating its three exceptions to the new rule.[141] The first and third exceptions were new. The first exception, as the Maryland Court of Appeals recounted in *Sheldon,* is that government may enact

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134. *Id.*

135. *Id.* at 2542.

136. *Id.* at 2547; *see supra* text accompanying notes 50-53.

137. G. Sidney Buchanan, *The Hate Speech Case: A Pyrrhic Victory for Freedom of Speech?*, 21 HOFSTRA L. REV. 285, 285 (1992).

138. *R.A.V.*, 112 S. Ct. at 2543 ("Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of . . . proscribable expression, so that the government 'may regulate [them] freely.'") (quoting *R.A.V.*, 112 S. Ct. at 2552 (White, J., concurring)).

139. *Id.* at 2552 (White, J., concurring) ("Th[e] categorical approach has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate on the basis of content only upon a showing of compelling need. Today, however, the Court announces that earlier Courts did not mean their repeated statements that certain categories of expression are 'not within the area of constitutionally protected speech.'") (citations omitted).

140. *Id.* at 2543 (emphasis in original).

141. *Id.* at 2545-47. None of the exceptions applied to the St. Paul ordinance.

content-based regulations within the proscribable categories of speech when the basis for the regulation consists entirely of the reason that the speech is proscribable in the first place.[142] The third exception is, as the Court of Appeals observed, simply a more general reiteration of the first:[143] government may enact content-based regulations within the proscribable speech categories for any reason not evincing the "realistic possibility that official suppression of ideas is afoot."[144]

These exceptions were necessarily born with the *R.A.V.* rule. If the government may not generally impose content-based restrictions on the unprotected classes of speech, it may do so where its actions indicate no censorial purpose. To hold otherwise would, perversely, hold government to a higher standard in regulating unprotected speech, because government is generally free to regulate protected speech so long as it has no censorial purpose.[145] The difference is that, in the context of protected speech, content-based statutes usually indicate a censorial purpose (hence they receive strict scrutiny); whereas in the context of unprotected speech, content-based statutes do not presumptively indicate a censorial purpose, because government may legitimately proscribe the speech on account of its content. Hence, government should remain free to enact content-based restrictions of unprotected speech so long as it does not attempt to suppress ideas, just as it may enact content-neutral regulations of protected speech under the same condition.[146]

But the *R.A.V.* majority had to create another exception to its new rule: the *Renton* "secondary effects" doctrine.[147] In *Renton*, as is by now thoroughly familiar, the Court applied a content-neutral analysis to a content-based statute regulating obscenity, a category of proscribable speech.[148] The Court thereby approved a content-based regulation of an unprotected class of speech, which would not have fallen within the new *R.A.V.* exceptions. Thus, to avoid overruling *Renton*, the *R.A.V.* majority had to create a special *Renton*

142. *Id.* at 2545; *see supra* text accompanying notes 58-59.

143. *See supra* note 66 and accompanying text.

144. *R.A.V.*, 112 S. Ct. at 2547; *see supra* text accompanying notes 64-65.

145. *See supra* Part II.A.

146. It is suggested *infra* that, because government ordinarily may enact content-neutral restrictions of protected speech but will have to justify content-based ones, *R.A.V.* creates a working rule that government may enact content-based restrictions of unprotected speech but will have to justify *viewpoint*-based ones. *See supra* note 93.

147. *R.A.V.*, 112 S. Ct. at 2546; *see supra* text accompanying notes 60-63.

148. Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48-50; *see supra* text accompanying notes 105-111.

exception to the *R.A.V.* rule.[149] That *Renton* may have forced the Court's hand in creating another *R.A.V.* exception indicates that, appropriately, the Court may have gotten caught in its own doctrinal web.[150]

In any event, one wonders, how did all this elaborate *R.A.V.* doctrine apply to *Sheldon*? Technically, it didn't. As mentioned in Part I, Maryland never argued that the act of cross burning constitutes proscribable fighting words; thus, it never provided the Court of Appeals with any threshold basis for invoking *R.A.V.*[151] The State apparently was in such a hurry to distinguish *R.A.V.*—by pigeonholing *Sheldon* into one of the *R.A.V.* exceptions—that it did not recognize that the whole *R.A.V.* hierarchy was inapposite.[152] The court discussed *R.A.V.* and its exceptions anyway, probably in deference to

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149. Conceivably, the majority could have incorporated *Renton* into the third *R.A.V.* exception by arguing that a statute's concern with "secondary effects" raises "no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 112 S. Ct. at 2547. But perhaps sensitive to the frequent criticism of *Renton*—as articulated in Part II and by others—that the "secondary effects" doctrine can disguise just such a "realistic possibility," the majority may have felt safer creating a separate "secondary effects" exception to its new rule.

150. Four Justices concurred in the *R.A.V.* result. Justice White, writing for himself and two other Justices, argued that the Court's precedents had established that government can enact any type of speech restriction within the unprotected classes of speech. *R.A.V.*, 112 S. Ct. at 2552 (White J., concurring). Justice White also asserted that, even if the St. Paul ordinance was facially invalid as a content-based restriction, it survived strict scrutiny because it was narrowly tailored to protect minorities. *Id.* at 2556. He claimed that the majority had created a new constitutional doctrine of "underbreadth," under which "a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech." *Id.* at 2554. Justice White also attacked the majority's third exception as "a catchall exclusion to protect against unforeseen problems . . . ." *Id.* at 2558.

Justice White concurred in the majority's result, however, because he believed the St. Paul ordinance was overbroad. *Id.* He contended that the Minnesota Supreme Court had erred in concluding that the ordinance restricted only fighting words, because the ordinance criminalized not only words that threaten "an immediate breach of the peace" but also some that cause "only hurt feelings, offense, or resentment . . . ." *Id.* at 2560. Justice Stevens also believed that the St. Paul statute was overbroad, but concurred separately to express disagreement with both the majority's and Justice White's analyses. *Id.* at 2561 (Stevens, J., concurring).

151. *See supra* text accompanying notes 55-56.

152. Of course, the State could have made *R.A.V.* apposite by arguing that cross burning constitutes fighting words, but this would have presented the State with two dangers. First, there is no reason to believe that the Court of Appeals would have reached a different result from the Supreme Court on this question. Second, such an argument necessarily would have been at odds with the State's argument that the cross burning statute was a fire protection measure. The State's very reliance on *R.A.V.* demonstrates, again, that the State considered the statute a content-based speech regulation even as it promoted it as a fire protection measure. *See supra* note 103.

the State's frequent reference to *R.A.V.* and its explicit reliance on the second and third *R.A.V.* exceptions.[153] Indeed, the State couched its main argument as the *Renton* "secondary effects" exception to *R.A.V.*[154]

R.A.V. thus proved itself a monkey wrench in *Sheldon* in two senses. First, the State's heavy reliance on *R.A.V.*'s doctrine, without the requisite assertion that cross burning constitutes proscribable fighting words, forced the Court of Appeals to review the inapplicable *R.A.V.* exceptions. The State did not argue that the first exception applied to the cross burning statute, but it did contend that the more generalized third exception spared the statute from strict scrutiny.[155] Of course, as the court cursorily observed, the third exception did not apply at all, for it applies only "where totally proscribable speech is at issue."[156] The State also relied heavily on the second exception, the *Renton* "secondary effects" doctrine, when in fact it could have invoked that doctrine apart from *R.A.V.*[157]

More importantly, even had *R.A.V.* been genuinely apposite in *Sheldon*, the *R.A.V.* rule is itself a second-best alternative to eliminating the *Chaplinsky* fighting words doctrine altogether. The Supreme Court should abandon that doctrine for at least two reasons. First, the fighting words doctrine allows government to penalize a speaker unfairly based on how other people react to his speech. Under *Chaplinsky*, a person's speech is unprotected only when a listener is likely to respond violently.[158] By contrast, there is little precedent in the criminal law for hinging one person's criminal status on the behavior of an unrelated actor. Instead, the criminal law usually presumes that freewill intervenes in the deliberative processes of all actors and that a person is ultimately responsible for his own behavior.[159] While a listener who reacts violently to a speaker will

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153. *See supra* note 68.

154. Here again, the State blundered. The State should have argued as its primary position that the cross burning statute was content-neutral. *See supra* note 103. As a secondary position, the State should have contended that, even if the statute was content-based, it should be treated as content-neutral under the *Renton* "secondary effects" doctrine. This doctrine, as noted earlier, *see supra* note 116, exists separate and apart from *R.A.V.* The State did not need to invoke the latter to access the former.

155. *Sheldon*, 332 Md. at 61, 629 A.2d at 762; *see supra* note 68.

156. *Sheldon*, 332 Md. at 61, 629 A.2d at 762 (quoting *R.A.V.*, 112 S. Ct. at 2547).

157. *See supra* notes 116, 154.

158. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

159. I have discussed this theme in more detail in arguing that the First Amendment fighting words doctrine countermands another constitutional provision, the Ninth Amendment. *See* Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759 (1994).

be criminally liable for assault and battery (or worse), *Chaplinsky* breaks with tradition in allowing government to hold a noncomplicitous third party—the speaker—criminally liable for causing the listener's misconduct.[160]

Second, the Supreme Court should remove fighting words from the realm of unprotected speech because governmental efforts to regulate fighting words, relative to the other unprotected classes, are particularly susceptible to viewpoint discrimination.[161] In *R.A.V.*, the majority believed that St. Paul's suppression of cross burning represented intolerable official encroachment upon a particular message.[162] But the Court could not reprimand St. Paul under its existing law because the message being suppressed was cast in the form of proscribable fighting words, which theretofore had been freely regulable by the government. The Court, therefore, expended great energy to construct a new doctrine forbidding content-based regulations within the unprotected classes of speech, excepting regulations evincing no censorial purpose.[163] Given the breadth of this exception, however, as a practical matter, *R.A.V.* stands for the proposition that government remains largely free to regulate the unprotected classes, only not with regulations (such as St. Paul's) that tend to suppress a particular message and thereby evince censorship. In other words, *R.A.V.* primarily outlaws viewpoint-based regulations of unprotected speech.[164]

But instead of constructing an elaborate doctrine to prohibit viewpoint discrimination among all proscribable speech, the Court could have reached the same result in *R.A.V.* by simply overruling *Chaplinsky*. For all its doctrinal glitter, *R.A.V.* will have little precedential value outside the realm of fighting words, for obscenity, private libel, and the other narrow classes of unprotected speech do

160. What is worse, by attaching a speaker's criminal status to the *likelihood* of a violent response, *Chaplinsky* accommodates the reprehensible tendencies of society's most ill-behaved persons. As Professor Sullivan notes, "[I]t seems absurd to give more license to insult Mother Teresa than Sean Penn just because she is not likely to throw a punch." Kathleen M. Sullivan, *The First Amendment Wars*, THE NEW REPUBLIC, Sept. 28, 1992, 35, 40; *see Demise of Chaplinsky*, *supra* note 130, at 1134.

161. *See supra* note 93.

162. *R.A.V.*, 112 S. Ct. at 2550. Interestingly, Justice Stevens expressly did *not* believe the St. Paul ordinance was viewpoint-based. He argued that the statute was "evenhanded," that it simply barred punches "below the belt"—*i.e.*, on the basis of race, color, creed, religion or gender—by *all* parties. *Id.* at 2571 (Stevens, J., concurring).

163. *See supra* text accompanying note 145.

164. *See supra* note 146.

not readily lend themselves to viewpoint-based regulation.[165] Fighting words, by contrast, offer a ready medium for the expression of viewpoints. Indeed, insofar as it will usually require an expressed viewpoint, if only a speaker's personal opinion of his listener, to arouse a listener's ire, viewpoint expression may lie at the very heart of fighting words. Since the First Amendment looks most askance at viewpoint discrimination,[166] the Supreme Court should have used *R.A.V.* as a vehicle to overturn the fighting words doctrine, not to create another doctrinal cross for courts, like the *Sheldon* court, to bear in safeguarding free speech.

CONCLUSION

In the guise of a fire protection measure, Maryland's cross burning statute levied upon the expressive act of burning crosses and other religious symbols special encumbrances, which did not apply to other acts portending more significant fire hazards. Thus, the statute's constitutional weakness was clear: it targeted a particular message for official disapproval. One commentator has poignantly captured the commonsense reasoning that exposes the statute's flaw:

> [T]ruly neutral anti-burning ordinances must apply even-handedly to speakers and nonspeakers alike. If the government allows ordinary cloth to be burned, it cannot invoke environmental protection as a reason to ban flag burning. The only difference between the flag and any other cloth is the ideological symbol printed on the former, and that is, of course, wholly unrelated to the claimed environmental purpose. The same principles apply, of course, to wood and crosses.[167]

Because Maryland had never burdened the burning of wood, or any other material, in the same manner as it chose to burden cross burning, its fire-protection rationale for the statute was transparently pretextual.

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165. This is because it is difficult even to convey a viewpoint through the use of obscenity alone, and libel is an unwieldy tool for expressing viewpoints inasmuch as it generally requires the speaker to maliciously or recklessly utter a falsehood about another person. Thus, it is impractical to fear viewpoint-based regulation of speech that does not easily support the expression of viewpoints.

166. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Sheldon*, 332 Md. at 53, 629 A.2d at 757 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

167. Amar, *supra* note 21, at 139.

Consequently, the Court of Appeals struck down the statute in an eminently reasonable fashion. First, it determined that the First Amendment recognized the act of cross burning as speech.[168] Subsequently, it concluded that the State's attempt to single out this particular speech for special regulation violated the First Amendment.[169]

Between these pertinent determinations, however, the court had to jump through an exhausting series of doctrinal hoops. First, to determine the proper standard by which to review the statute, the court had to classify it under a content-neutral/content-based dichotomy into which the law did not easily fit.[170] Then, having pigeonholed the statute as content-based, the court had to decide whether certain exceptions to the *R.A.V.* rule spared the statute from strict scrutiny review.[171] Under one of these exceptions, the court had to decide whether the statute, though content-based, should be treated as content-neutral on account of the State's claim that the statute innocently targeted the "secondary effects" of cross burning. Only after the court determined that the statute was (a) content-based, (b) not concerned with the "secondary effects" of cross burning, and (c) not spared under another *R.A.V.* exception, could the court then review the statute with strict scrutiny, which spelled the statute's demise.[172] After all this, the *R.A.V.* decision turned out to be technically inapposite, given that the State never argued, and the court never considered, cross burning to constitute proscribable fighting words.

When a statute is challenged as unconstitutional, Justice Roberts once remarked, "the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."[173] The Court of Appeals's opinion in *Sheldon* demonstrates that statutory review under the First Amendment has grown significantly more complicated than simply reconciling the statutory language with the text of the Amendment. This is unfortunate. The Supreme Court should clear some of the underbrush from its First Amendment jurisprudence to facilitate the lower courts in protecting the central constitutional ideal of free speech.

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168. *Sheldon*, 332 Md. at 52, 629 A.2d at 757.
169. *Id.* at 64, 629 A.2d at 763.
170. *Id.* at 53-55, 629 A.2d at 758-59.
171. *Id.* at 60, 629 A.2d at 761.
172. *Id.* at 62, 629 A.2d at 762.
173. U.S. v. Butler, 297 U.S. 1, 62 (1936).

In particular, the Court should abandon its "secondary effects" doctrine because that doctrine permits government to disguise an improper motive to suppress speech based on the manner in which it defends its regulation. The Court should also jettison fighting words as a category of unprotected speech (which would propitiously render the complicated *R.A.V.* hierarchy largely obsolete), because the fighting words doctrine unfairly punishes speakers for their listeners' reactions and too readily encourages government to engage in viewpoint discrimination. By taking these steps, the Supreme Court could remove two hurdles that lower courts face in divining the First Amendment's reach. The Court thereby could move toward a First Amendment jurisprudence that properly asks society to bear the burning crosses of a few misguided speakers, but does not ask courts to bear their own crosses in safeguarding speech.