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v. Price*, 334 Md. 149, 638 A.2d 93 (1994)

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CRIMINAL LAW — CONSTITUTIONAL LAW —
MARYLAND'S "SON OF SAM" STATUTE DOES NOT
COMPEL A CRIMINAL DEFENDANT TO TURN OVER
NOTORIETY OF CRIMES CONTRACTS TO THE
ATTORNEY GENERAL. *Curran v. Price*, 334 Md. 149, 638
A.2d 93 (1994).

I. INTRODUCTION

Crime does pay. Criminals sell their stories to the media, which serve up battery, rape, and murder to a hungry public. Victims relive the horror of their ordeals in tabloids, newscasts, and talk shows while their assailants profit in jail. In response, some states have enacted statutes that permit earnings from the sale of a criminal's story to be confiscated and to be made available to his victims.

In 1977, New York became the first state to enact such a statute.¹ The statute was enacted in response to public outrage that serial killer David Berkowitz, popularly known as the "Son of Sam," stood to profit substantially by selling his account of five violent murders.² The statute was intended to furnish to the victims earnings from the sale of Berkowitz's story.³ Statutes similar to the New York law,

1. Gregory G. Sarno, Annotation, *Validity, Construction, and Application of "Son of Sam" Laws Regulating or Prohibiting Distribution of Crime-Related Book, Film, or Comparable Revenues to Criminals*, 60 A.L.R.4th 1210, 1213 (1988); N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1995).

2. Lisa A. Morelli, *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board: How the Characterization of a Speech Regulation Can Effectively Destroy a Legitimate Law*, 42 CATH. U.L. REV. 651, 652 n.5 (1993).

3. *Id.* New York's law provided, in pertinent part:

1. Every person, firm, corporation, partnership, association or other legal entity contracting with any person . . . accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall . . . pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives.

N.Y. EXEC. LAW § 632-a(1)(1982). The money given to the board was to be held in escrow. *Id.* If the perpetrator was convicted, and if the victim obtained a civil judgment for damages against the perpetrator, the judgment would be paid out of the escrow account. *Id.* The statute was never enforced against Berkowitz himself because he was declared incompetent to stand trial, and the statute applied only to convicted persons at the time. *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 111 (1991).

now commonly called "Son of Sam" laws, were subsequently enacted in many states.⁴

The Maryland General Assembly enacted a "Son of Sam" law in 1987.⁵ Maryland's law, article 27, section 764 of the Maryland Annotated Code, was created to provide an opportunity for victims to be compensated from the earnings of "notoriety of crimes contracts."⁶ Under section 764, "any person who enter[ed] a notoriety of crimes contract with a defendant" was required to submit to the Attorney General of Maryland a copy of the contract and all moneys owed to the defendant under the contract.⁷ The Attorney General was given sole authority to determine whether a contract met the statute's definition of a notoriety of crimes contract.⁸

The Attorney General was required to deposit any earnings from a notoriety of crimes contract into an interest bearing escrow account and was required to hold those earnings until a judgment of civil damages could be obtained by the defendant's victims.⁹ If a victim was awarded civil damages against the defendant, the money was to

4. See, e.g., ALA. CODE §§ 41-9-80 to -84 (1991); ALASKA STAT. § 12.61.020 (1990); ARIZ. REV. STAT. ANN. §§ 13-4201 to -4202 (1989 & Supp. 1994); CAL. CIV. CODE § 2225 (West Supp. 1995); COLO. REV. STAT. §§ 24-4.1-201 to -207 (1990 & Supp. 1994); DEL. CODE ANN. tit. 11, §§ 9101-06 (1987 & Supp. 1994); NEB. REV. STAT. §§ 81-1835 to -1842 (1994); OHIO REV. CODE ANN. §§ 2969.01 - .06 (Baldwin 1994); S.D. CODIFIED LAWS ANN. §§ 23A-28A-1 to -14 (1988 & Supp. 1995); TENN. CODE ANN. §§ 29-13-401 to -411 (Supp. 1994). Congress has also enacted a federal "Son of Sam" law entitled the Victims of Crime Act of 1984. 18 U.S.C. §§ 3681-82 (1994).

5. Fern Shen, *Md. Sues to Block Ex-Teacher From Profiting From Sex Story*, WASH. POST, July 27, 1993, at B1.

6. MD. ANN. CODE art. 27, § 764(a)(5)(1992 & Supp. 1995). As amended in 1992, "notoriety of crimes contracts" included those contracts with respect to:
 (i) The reenactment of a crime by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation or live entertainment of any kind; (ii) The expression of the defendant's thoughts, feelings, opinions, or emotions regarding a crime involving or causing personal injury, death or property loss as a direct result of the crime; or (iii) The payment or exchange of any money or other consideration or the proceeds or profits that directly or indirectly result from a crime, a sentence, or the notoriety of a crime or sentence.

Id.

7. *Id.* § 764(b)(1)-(2).

8. Subsection (c)(2)(i) provides that "[a]fter the passage of 30 days, but before the expiration of 180 days from receipt of the contract or moneys described in subsection (b) (2) of this section, the Attorney General shall render a decision as to whether a contract is a notoriety of crimes contract." *Id.* § 764(c)(2)(i) (Supp. 1995).

9. *Id.* § 764(e)(1)(i)-(ii) (1992 & Supp. 1995).

be taken from the escrow account to satisfy the judgment.¹⁰ If, after five years, there were funds remaining in the account after all civil judgments had been satisfied, the money in the escrow account was to be returned to the defendant.¹¹

Attorney General J. Joseph Curran was the first to attempt to enforce Maryland's "Son of Sam" law.¹² Ronald Price, a former high school teacher in Anne Arundel County, was indicted for, and later convicted of, child sexual abuse and "unnatural and perverted sex acts."¹³ Shortly after Price's indictment, the *Washington Post* reported that he had "signed an option to tell his story to a Hollywood movie producer."¹⁴ Curran believed that this was a notoriety of crimes contract.¹⁵ He reasoned that there would be no public interest in the life story of this Maryland high school teacher were it not for his commission of crimes.¹⁶ Maryland's "Son of Sam" law required that a copy of the notoriety of crimes contract be submitted by the movie producer to the Attorney General's Office for review.¹⁷ Because no copy had been submitted, an Assistant Attorney General wrote to Price's attorney to request further information about Price's contract.¹⁸ Price's attorney admitted the existence of a contract but would not deliver or discuss it, arguing that section 764 was unconstitutional.¹⁹

10. Subsection (e)(2)(i) provides:

If, within 5 years of the establishment of the escrow account, the victim brings or has a pending civil action in a court of competent jurisdiction or has recovered a money judgment for damages against the defendant or has been awarded restitution, the Attorney General shall pay . . . to the victim funds from the escrow account to the extent of the money judgment or the amount of restitution.

Id. § 764(e)(2)(i).

11. *Id.* § 764(e)(4)(i).

12. Shen, *supra* note 5.

13. Curran v. Price, 334 Md. 149, 156 & n.1, 638 A.2d 93, 97 & n.1 (1994). Price was charged with three counts of child sexual abuse and perverted sex practices based on the sexual relationships Price had with three of his female students, one of whom was fourteen years old. Shen, *supra* note 5, at B3. Price admitted to these sexual relationships and to four others he had with students during his twenty years at Northeast High School. *Id.* Price was convicted of both charges and is currently serving a twenty-six year sentence. Price, 334 Md. at 156 n.1, 638 A.2d at 97 n.1.

14. Price, 334 Md. at 156 n.2, 638 A.2d at 97 n.2 and accompanying text.

15. *Id.* at 157, 638 A.2d at 97.

16. *Id.*

17. See MD. ANN. CODE art. 27, § 764(b)(1) (1992 & Supp. 1995).

18. Price, 334 Md. at 156-57, 638 A.2d at 97. The Assistant Attorney General undoubtedly would have requested a copy of the contract from the party or parties who had offered to buy Price's story, too, if the identity of such party or parties were known.

19. *Id.* at 157, 638 A.2d at 97. A *Washington Post* article reported that Timothy

The Attorney General sought an injunction in the Circuit Court for Anne Arundel County compelling Price to deliver the contract.²⁰ The circuit court found the statute to be "unconstitutional and unenforceable"²¹ and, therefore, denied the injunction.²² On appeal, the Court of Appeals of Maryland²³ performed a detailed constitutional analysis of section 764.²⁴ The court explained that section 764 was overbroad in several areas²⁵ and outlined the required modifications.²⁶ The court did not, however, declare the statute unconstitutional.²⁷ The court was able to avoid invalidating the statute because it based its holding entirely upon the non-constitutional principles of statutory construction.²⁸

The court of appeals stated that the circuit court had erred by declaring the "Son of Sam" statute unconstitutional because there was a non-constitutional ground upon which the case could have been decided.²⁹ Using the principles of statutory construction, the court of appeals concluded that section 764 did not authorize the Attorney General to compel Price to turn over a suspected notoriety of crimes contract.³⁰ As the court interpreted the statute, only parties

Umbreit, one of Price's attorneys, told Curran, via letter, that the state had no right to attach Price's profits from its sale under the "Son of Sam" law because the statute was unconstitutional. Shen, *supra* note 5, at B1. In a letter to Curran dated June 22, 1993, Umbreit wrote: "The statute is presumptively inconsistent with the First Amendment since it imposes financial burdens on speakers because of the content of their speech." *Id.*

20. *Price*, 334 Md. at 157, 638 A.2d at 97.

21. *Id.* "[T]he court determined that § 764 was unconstitutionally overinclusive on its face and [that it, therefore,] violated the principles of the First Amendment." *Id.*

22. *Id.*

23. Price appealed to the Court of Special Appeals of Maryland. *Id.* The court of appeals granted certiorari prior to review by the court of special appeals because of the important constitutional issues raised by the case. *Id.* at 157-58, 638 A.2d at 97.

24. *See id.* at 159-70, 638 A.2d at 98-104.

25. *Id.* at 167-70, 638 A.2d at 102-03. If the constitutionality of the statute were properly before the court, the statute would have been invalidated because the court determined that it was a content-based regulation of speech that was not narrowly tailored. *Id.* at 168-70, 638 A.2d at 103.

26. *Id.* The specific modifications recommended by the court are discussed *infra* notes 169-201 and accompanying text.

27. *Id.* at 177, 638 A.2d at 107. "[W]e shall not reach the constitutionality of § 764 on its merits." *Id.*

28. *Id.* at 171-77, 638 A.2d at 104-07.

29. *Id.* at 177, 638 A.2d at 107. "We have long adhered to the policy of not deciding constitutional issues unnecessarily. . . . If a decision on a constitutional question is not necessary for proper disposition of the case, we will not reach it." *Id.* at 171, 638 A.2d at 104 (citations omitted).

30. *Id.* at 177, 638 A.2d at 107. The suit against Price was remanded to the circuit court with instructions that the complaint be dismissed. *Id.*

contracting *with* criminal defendants — not the defendants themselves — could be compelled to turn over suspected notoriety of crimes contracts.³¹

The *Price* decision is troublesome because the Court of Appeals of Maryland ignored one of the time-honored principles of judicial restraint. It is every court's duty to avoid decisions on constitutional grounds unless absolutely necessary to decide the case.³² If a case can be disposed of on non-constitutional grounds, a court is bound to do so.³³ Indeed, the court of appeals based its decision, in *Curran v. Price*, on non-constitutional grounds simply by interpreting the plain language of Maryland's "Son of Sam" law.³⁴

Nevertheless, the court conducted a detailed constitutional analysis of the statute, even though the constitutional findings were not necessary to the court's holding.³⁵ This gratuitous and lengthy disquisition was likely meant to inform the Maryland General Assembly about the constitutional violations in the statute. By doing so, the court all but ensured that the "Son of Sam" law would withstand judicial review the next time the statute came before a Maryland court. The court stepped outside its role as interpreter of the law to advocate a "Son of Sam" law for Maryland.

II. BACKGROUND

A. Constitutional Principles

The court of appeals began its opinion with a review of relevant constitutional principles developed by the Maryland and the federal courts.³⁶ The court explained that a government may restrict speech through a statute either directly or indirectly.³⁷ A statute that is

31. *Id.* at 174, 638 A.2d at 106. This would most often be a member of the media, e.g., book and magazine publishers or television and movie producers.

32. *Id.* at 177, 638 A.2d at 107.

33. *Id.*

34. *Id.*

35. *Id.* at 159-70, 638 A.2d at 98-104.

36. *Price*, 334 Md. at 159-70, 638 A.2d at 98-104.

37. *See id.* at 163-66, 638 A.2d at 100-01; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 789 (2d ed. 1988). "First, government can aim at ideas or information, in the sense of singling out actions for government control or penalty either (a) because of the specific message or viewpoint such actions express, or (b) because of the effects produced by awareness of the information or ideas such actions impart." *Id.* (emphasis deleted). "Second, without aiming at ideas or information in either of the above senses, government can constrict the flow of information and ideas while pursuing other goals" *Id.* (emphasis deleted). "Speech" includes more than the "spoken or written word." *State v. Sheldon*, 332 Md. 45, 50, 629 A.2d 753, 756 (1993). The Supreme Court has held that "certain conduct may be 'sufficiently imbued

intended to silence a particular idea, message or viewpoint is a content-based regulation of speech.³⁸

Content-based regulations of speech are presumptively unconstitutional.³⁹ “[G]overnment 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.”⁴⁰ The presumption against constitutionality can be overcome, however, if the statute meets the dual requirements of the strict scrutiny test.⁴¹ The strict scrutiny test requires that statutes be first: “necessary to serve a compelling state interest,”⁴² and second: “narrowly drawn to achieve that end.”⁴³ Review under the extremely burdensome strict scrutiny test⁴⁴ is warranted because content-based statutes present the danger “that the Government may effectively drive certain ideas or viewpoints from the marketplace.”⁴⁵

with elements of communication to fall within the scope of the First and Fourteenth Amendments.” *Id.* at 50-51, 629 A.2d at 756 (citation omitted). For example, wearing black armbands and flag burning have been considered “speech” when done to protest the Vietnam War and the Reagan Administration, respectively. *See* *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (black armbands); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning).

38. *See* TRIBE, *supra* note 37, at 794; Morelli, *supra* note 2, at 654.

39. *Price*, 334 Md. at 163, 638 A.2d at 100; TRIBE, *supra* note 37, at 790.

40. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986) (quoting *Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972)).

41. *See, e.g.*, Morelli, *supra* note 2, at 654-55. Statutes must be necessary to accomplish a compelling interest of the state and must be written narrowly enough that they do not reach behavior unrelated to that compelling interest. TRIBE, *supra* note 37, at 833.

42. *Sheldon*, 332 Md. at 62, 629 A.2d at 762 (1993) (quoting *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983)); *accord* TRIBE, *supra* note 37, at 833.

43. *Sheldon*, 332 Md. at 62, 629 A.2d at 762.

44. “[A] law rarely survives [strict] scrutiny” *Burson v. Freeman*, 504 U.S. 191, 199-200 (1992); Morelli, *supra* note 2, at 654-55.

45. *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 114 (1991) (citing *Leathers v. Medlock*, 499 U.S. 439, 448 (1991)). One of the rationales advanced for the decision to secure a right of free speech in the United States Constitution is that the framers wanted to preserve a “marketplace of ideas.”

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

To satisfy the first prong of the strict scrutiny test, a state must prove that it has a compelling interest that justifies abridging the First Amendment rights of its citizens and that the particular means chosen to abridge those rights are necessary to serve the state's interest.⁴⁶ A state's interest is compelling if it satisfies two criteria: "First, the state must have a strong interest in realizing the statute's underlying policies Second, the magnitude of the state interests achieved must outweigh the restriction's chilling effect on speech."⁴⁷ If the state's interest is not compelling, the statute will be declared void.⁴⁸ Similarly, if the means chosen to regulate the speech are not necessary to advance the state's compelling interest, the statute will be declared void.⁴⁹

The second prong of the strict scrutiny test requires that the statute be drafted narrowly, that is, to restrict no more speech than absolutely necessary.⁵⁰ This prong of the strict scrutiny test is also known as an overbreadth provision.⁵¹ A statute is considered narrowly tailored, and not overbroad, if a court can discern no other scheme that would deter less speech but still achieve the state's objective.⁵² "The doctrine of overbreadth is designed to protect First Amendment freedom of expression from laws written so broadly that the fear of punishment might discourage people from taking advantage of that freedom."⁵³

46. See *Sheldon*, 332 Md. at 62, 629 A.2d at 762.

47. Morelli, *supra* note 2, at 654 n.20 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 833 n.12 (2d ed. 1988)).

48. See TRIBE, *supra* note 37, at 798-99.

49. See *Sheldon*, 332 Md. at 62, 629 A.2d at 762 (invalidating a Maryland cross burning statute because it was not necessary to serve the state's interest — protecting the community from fire hazards).

50. *Id.*; TRIBE, *supra* note 37, at 833. "The overbreadth doctrine has often been understood as an exception to the rule that individuals generally may not litigate the rights of third parties." *Id.* at 1023 (citations omitted).

As the Supreme Court recently described the doctrine, "an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."

Id. (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)).

51. See *Simon & Schuster*, 105 U.S. at 121. An overly broad statute is one that, while regulating unprotected speech in which the government has a compelling interest, "sweeps [protected speech, unrelated to the state's interest] within its ambit" TRIBE, *supra* note 37, at 1022 (citations omitted).

52. Morelli, *supra* note 2, at 654 n.20.

53. *Outmezguine v. State*, 335 Md. 20, 36, 641 A.2d 870, 878 (1994). Laurence Tribe makes an analogy to a Sword of Damocles to describe the chilling effect of an overbroad statute. TRIBE, *supra* note 37, at 1023. "[T]he value of a

A statute that is not narrowly tailored will be declared void⁵⁴ because it presents the danger that citizens will self-censor their constitutionally-protected speech.⁵⁵ Invalidation of a statute is a remedy that is used sparingly, however.⁵⁶ “[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.”⁵⁷ A statute will be invalidated as overbroad only if it regulates a substantial amount of protected speech.⁵⁸

In contrast to statutes that are intended to restrict speech directly, the court of appeals explained, it is also possible for the government to burden speech indirectly, through statutes aimed at producing other results.⁵⁹ Statutes that burden speech indirectly are called “content-neutral” regulations.⁶⁰ Such regulations are not aimed at the content of the speech itself, but at some other aspect of the speech — for example, the effects of the speech on the community.⁶¹ “Content-neutral” statutes can be “justified without reference to the content of the regulated speech.”⁶²

A governmental restriction of speech is not automatically permissible merely because it is content-neutral.⁶³ Content-neutral regu-

Sword of Damocles is that it hangs — not that it drops.” *Id.* Thus, the mere existence of an overbroad statute, Tribe argues, deters speech. *Id.* “The only solution, then, is to strike down such an overbroad law altogether until it is rewritten or until an appropriate court authoritatively narrows it.” *Id.*

54. See TRIBE, *supra* note 37, at 1022; Morelli, *supra* note 2, at 654. “If a government regulation is aimed at the communicative impact of an act, the regulation is unconstitutional unless the government can show that there is a compelling state interest that outweighs the restriction on speech and that the regulation is narrowly tailored to achieve this objective.” *Id.* (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-8, at 833 n.12 (2d ed. 1988)).

55. *Outmezguine*, 335 Md. at 36, 641 A.2d at 878.

56. *Id.*

57. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). “A plausible challenge to a law as void for overbreadth can be made only when (1) the protected activity is a significant part of the law’s target, and (2) there exists no satisfactory way of severing the law’s constitutional from its unconstitutional applications so as to excise the latter clearly in a single step from the law’s reach.” TRIBE, *supra* note 37, at 1022 (emphasis deleted).

58. *Taxpayers for Vincent*, 466 U.S. at 800-01; *Outmezguine*, 335 Md. at 36, 641 A.2d at 878; TRIBE, *supra* note 37, at 1024.

59. See *Price*, 334 Md. at 163-64, 638 A.2d at 100-01; Morelli, *supra* note 2, at 654 (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 790 (2d ed. 1988)).

60. See *Renton v. Playtime Theatres*, 475 U.S. 41, 46-47 (1986).

61. The effect that speech has on the community is an example of a “secondary effect” of speech. See *id.* at 47.

62. *Id.* at 48 (emphasis deleted)(citations omitted).

63. See *id.* at 47.

lations withstand judicial review more easily, however, because they are reviewed under a less onerous standard than the strict scrutiny test.⁶⁴ A regulation that aims only at the “secondary effects” of speech will be invalidated only if it “leaves too little breathing space for communicative activity, or leaves people with too little access to channels of communication, whether as would-be speakers or as would-be listeners.”⁶⁵

In *Renton v. Playtime Theatres*,⁶⁶ the Supreme Court upheld a content-neutral regulation of speech.⁶⁷ The city of Renton enacted an ordinance prohibiting adult movie theaters from locating within 1,000 feet of a single or multiple-family dwelling, park, residential zone, or church or within one mile of a school.⁶⁸ The restrictions did not apply to all movie theaters, but only to adult movie theaters.⁶⁹ Two adult movie theater owners challenged the ordinance as a content-based regulation of speech, arguing that their theaters had been regulated solely upon the basis of the content of the films they showed.⁷⁰

The Supreme Court explained that if the ordinance were truly content-based, aimed at ridding the community of sexually explicit films, it would have banned adult theaters altogether.⁷¹ Instead, the legislature chose to restrict only the location of adult theaters.⁷² The Court, therefore, categorized the ordinance as a content-neutral “time, place, and manner restriction.”⁷³ The Court held that the ordinance was designed to prevent crime and to protect property values, retail

64. *See id.* Such regulations are evaluated under the standard for time, place, and manner restrictions. *Id.* Under this standard of review, a regulation will be upheld if it is “designed to serve a substantial governmental interest and do[es] not unreasonably limit alternative avenues of communication.” *Id.* (citations omitted).

65. TRIBE, *supra* note 37, at 978 (footnote omitted).

66. 475 U.S. 41 (1986).

67. *Id.* at 54-55. “In sum, we find that the Renton ordinance represents a valid governmental response to the ‘admittedly serious problems’ created by adult theaters . . . while also satisfying the dictates of the First Amendment.” *Id.*

68. *Id.* at 44. The minimum distance required between an adult theater and a school was later reduced to 1,000 feet. *Id.* at 45.

69. *Id.* at 44. “The term ‘adult motion picture theater’ was defined as ‘[a]n enclosed building used for presenting . . . visual media, distinguished or characteri[z]ed by an emphasis on . . . “specified sexual activities” or “specified anatomical areas” . . . for observation by patrons therein.’” *Id.* (citation omitted).

70. *Id.* at 45. The content upon which the ordinance was based was “specified sexual activities” or “specified anatomical areas.” *Id.* at 44. The theaters challenged the statute on First and Fourteenth Amendment grounds. *Id.* at 45.

71. *See id.* at 46, 48.

72. *Id.*

73. *Id.*

trade, and the quality of life in Renton.⁷⁴ Thus, the ordinance targeted the secondary effects of the theaters on the community, not the content of adult films.⁷⁵ The Court concluded by saying: “[T]he Renton ordinance is completely consistent with our definition of ‘content-neutral’ speech regulations as those that ‘are justified without reference to the content of the regulated speech.’”⁷⁶

The Court explained that regulations that target only the “secondary effects” of speech should be evaluated under the test for content-neutral time, place, and manner restrictions.⁷⁷ Such regulations will be upheld if they are “designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.”⁷⁸ In *Renton*, the Supreme Court determined that both criteria were satisfied, and it upheld the ordinance.⁷⁹ The Court held that the city had a substantial interest “‘in attempting to preserve the quality of urban life’” in Renton.⁸⁰ The Court also held that reasonable alternative avenues of communication were available because there were 520 accessible acres in the city of Renton upon which adult theatres could operate.⁸¹

In *State v. Sheldon*,⁸² the Court of Appeals of Maryland applied the Supreme Court’s reasoning in *Renton* to a Maryland cross-burning statute.⁸³ The statute required that persons wishing to burn a religious symbol, first, get permission from the owner of the property on which the burning would occur and, second, notify the fire department.⁸⁴ In *Sheldon*, the state of Maryland argued that the cross-burning statute was enacted to protect society from the “secondary effects” of burning religious symbols, namely fire hazards.⁸⁵ The state claimed that any resulting burden on speech was an

74. *Id.* at 48.

75. *Id.* at 47. “The ordinance by its terms is designed to prevent crime, protect the city’s retail trade, maintain property values, and generally ‘protect and preserv[e] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life,’ not to suppress the expression of unpopular views.” *Id.*

76. *Id.* at 48 (emphasis deleted).

77. *Id.* at 49. “[Z]oning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to ‘content-neutral’ time, place, and manner regulations.” *Id.*

78. *Id.* at 47.

79. *Id.* at 50-55.

80. *Id.* at 50 (quoting *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion)).

81. *Id.* at 53.

82. 332 Md. 45, 629 A.2d 753 (1993).

83. *Id.* at 58-59, 61, 629 A.2d at 760-61.

84. *Id.* at 48-49, 629 A.2d at 755.

85. *Id.* at 60, 629 A.2d at 761.

unintentional consequence.⁸⁶ The court of appeals disagreed and invalidated the statute.⁸⁷

The court of appeals could find no way to justify the cross-burning statute without reference to the content of the speech it restricted.⁸⁸ Maryland already had adequate laws to protect society from fire hazards,⁸⁹ so there would be no need for the cross-burning statute unless it was regulating the "speech" associated with cross-burning. Also, the legislative history clearly showed that the cross-burning statute was enacted to prevent the expression of ideas the legislature found unpalatable.⁹⁰ The court held that the cross-burning statute was a content-based regulation of speech.⁹¹

Once the cross-burning statute was categorized as a content-based restriction of speech, the court was required to apply the strict scrutiny test.⁹² The statute failed the first prong of the test — that the statute be necessary to serve a compelling state interest.⁹³ Although the court of appeals noted that "fire protection is certainly a compelling interest,"⁹⁴ the cross-burning statute was invalidated.⁹⁵ The court held that the statute was not *necessary* to achieve the state's compelling interest⁹⁶ because Maryland already had adequate fire protection measures.⁹⁷

86. *See id.*

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

88. *Id.* at 56, 629 A.2d at 759.

First, the very definition of content-neutral indicates that the cross burning statute is not. A content-neutral regulation . . . is one which is "justified without reference to the content of the regulated speech" We see no way to justify the cross burning statute without referring to the substance of the speech it regulates, because the statute does not protect property owners or the community from unwanted fires any more than the law already protected those groups before the statute's enactment.

Id. (emphasis in original) (citation omitted).

89. *Id.* The court explained that Maryland's arson and trespass laws, already in effect, provided sufficient protection from fire hazards. *Id.*

90. *Id.* at 56-57, 629 A.2d at 759-60. "[T]he legislative history of the cross burning statute reveals that the State's true purpose in enacting the statute was to express disagreement with the act of burning religious symbols." *Id.* at 56, 629 A.2d at 759.

91. *Id.* at 55, 57, 629 A.2d at 759-60.

92. *Id.* at 62, 629 A.2d at 759-60. "We believe the cross burning statute is a content-based regulation of speech, and therefore must be subject to strict scrutiny." *Id.* at 55, 629 A.2d at 759.

93. *Id.* at 62, 629 A.2d at 762. "Maryland's cross burning statute cannot survive this [strict] scrutiny, because it is not necessary to serve the State's asserted interest." *Id.*

94. *Id.* at 62 n.2, 629 A.2d at 762 n.2.

95. *Id.* at 64, 629 A.2d at 763. "[T]he cross burning statute must fall." *Id.*

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

97. *Id.* at 56, 629 A.2d at 759. The court explained that Maryland's arson and trespass laws, already in effect, provided sufficient protection from fire hazards. *Id.*

When the court of appeals examined Maryland's "Son of Sam" law, in *Curran v. Price*, it had not only the *Renton* and *Sheldon* opinions to guide it, but also the Supreme Court's interpretation of a similar "Son of Sam" law. In *Simon & Schuster, Inc. v. New York Crime Victims Board*,⁹⁸ the Supreme Court invalidated New York State's "Son of Sam" law,⁹⁹ declaring it an overly broad content-based regulation of speech.¹⁰⁰ The statute required any entity contracting with a person "convicted"¹⁰¹ of a crime to give a copy of such contract and any moneys owed to the Crime Victims Board.¹⁰² The statute applied to all contracts that would provide compensation to the convicted person for an account of his crime.¹⁰³ The moneys given to the Board were to be placed into an escrow account and were to be held for five years.¹⁰⁴ During that time, the victims of the convicted person could attempt to obtain a judgment of civil damages against him.¹⁰⁵ If the victim were successful, the judgment would be paid out of the escrow account.¹⁰⁶ If no actions were pending after five years, any moneys remaining in the escrow account would be returned to the convicted person.¹⁰⁷

In *Simon & Schuster*, the Supreme Court determined that New York's "Son of Sam" law was content-based because it provided a "financial disincentive to create or publish" certain works, based on

98. 502 U.S. 105 (1991).

99. *Id.* at 123.

100. *Id.* "New York has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income. The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective. As a result, the statute is inconsistent with the First Amendment." *Id.*

101. The New York law stated:

A person convicted of a crime shall include any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted.

N.Y. EXEC. LAW § 632-a(10)(b) (1982).

102. *Id.* § 632-a(1); *Simon & Schuster*, 502 U.S. at 106-09.

103. *Simon & Schuster*, 502 U.S. at 109. The statute applied to all contracts with respect to:

[T]he reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime

N.Y. EXEC. LAW § 632-a(1).

104. N.Y. EXEC. LAW § 632-a(1); *Simon & Schuster*, 502 U.S. at 109.

105. N.Y. EXEC. LAW § 632-a(1); *Simon & Schuster*, 502 U.S. at 109.

106. N.Y. EXEC. LAW § 632-a(1); *Simon & Schuster*, 502 U.S. at 109.

107. N.Y. EXEC. LAW § 632-a(4); *Simon & Schuster*, 502 U.S. at 109.

their subject matter.¹⁰⁸ The Court, therefore, applied the strict scrutiny test.¹⁰⁹ The High Court found that “ensuring that victims of crime are compensated by those who harm them” and “that criminals do not profit from their crimes,” were compelling state interests.¹¹⁰ Nevertheless, the Court felt that the statute was not sufficiently tailored to serve those interests because it burdened many works unrelated to those interests.¹¹¹ The statute was, therefore, declared overbroad.¹¹²

The Court attributed the statute’s unconstitutional overbreadth both to the broad definition of “convicted person” and to the unlimited range of subjects covered by the statute.¹¹³ Under the statute’s broad definition of “convicted person,” the statute applied to any works wherein the author admitted that he had committed a crime, regardless of whether he was ever accused, charged, or convicted.¹¹⁴ The statute also applied to “works on *any* subject, provided that they express[ed] the author’s thoughts or recollections about his crime, *however tangentially or incidentally.*”¹¹⁵

Maryland’s “Son of Sam” law was modeled after the New York law that was later invalidated in *Simon & Schuster*.¹¹⁶ Maryland’s law was amended by the legislature in an attempt to remedy the

108. *Simon & Schuster*, 502 U.S. at 117. The Supreme Court would not address the State of New York’s argument that the “Son of Sam” statute was content-neutral. *Id.* The Court found it unnecessary to address the argument because, looking ahead to the elements of the strict scrutiny test, it was clear that the statute would fail on overbreadth grounds. *Id.* at 121 n.1.

109. *Id.* at 117.

110. *Id.* at 117, 119.

111. *Id.* at 121-23. The Court noted that the statute “clearly reach[ed] a wide range of literature that d[id] not enable a criminal to profit while a victim remain[ed] uncompensated.” *Id.* at 121.

112. *Id.* at 123. “[T]he Son of Sam law is not narrowly tailored.” *Id.*

113. *Id.* at 121. “These two provisions combine to encompass a potentially very large number of works.” *Id.*

114. *Id.* To demonstrate the overbreadth of the New York law, the court explained that the statute, if it had been in effect at the time, would have covered many historic works — all unrelated to New York’s goals. *Id.*

Had the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as *The Autobiography of Malcolm X*, which describes crimes committed by the civil rights leader before he became a public figure; *Civil Disobedience*, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the *Confessions of Saint Augustine*, in which the author laments “my past foulness and the carnal corruptions of my soul,” one instance of which involved the theft of pears from a neighboring vineyard.

Id. (citations omitted).

115. *Id.* (emphasis added).

116. *Curran v. Price*, 334 Md. 149, 159, 638 A.2d 93, 98 (1994).

defects that the Supreme Court had identified in the New York law.¹¹⁷ For example, the definition of notoriety of crimes contracts was expanded to include contracts "with respect to 'the payment or exchange of any money or other consideration or the proceeds or profits that directly or indirectly result from a crime . . .'"¹¹⁸ This expansion was an attempt to make the statute content-neutral by placing the focus on the profit derived from the contract rather than on the subject matter of the material.¹¹⁹

Maryland's General Assembly also attempted to eliminate the overly broad areas that the Supreme Court had identified in the New York law.¹²⁰ One of the problems with the New York law was its broad definition of "convicted person."¹²¹ The General Assembly, therefore, narrowed the definition of "defendant," Maryland's counterpart to New York's "convicted person," to a person charged with or convicted of a crime.¹²² Another problem with the New York law was that it could be applied to works only tangentially or incidentally related to a crime.¹²³ Subsections (c)(2)-(3) were added to the Mary-

117. *Id.* at 159-60, 638 A.2d at 98.

118. *Id.* at 161, 638 A.2d at 99.

119. *Id.*

It was the purpose of the Maryland legislature, in amending § 764, to make its provisions content-neutral and remedy the problem of overbreadth. To this end, the amendments to § 764 . . . added language to the original subsection (b) which broadened the description of applicable contracts to include not only those with respect to reenactment of a crime or the expression of the defendant's thoughts, feelings, opinions or emotions regarding the crime, *but also* those with respect to "the payment or exchange of any money or other consideration or the proceeds or profits that directly or indirectly result from a crime, a sentence, or the notoriety of a crime or sentence."

Id. (quoting MD. ANN. CODE art. 27, § 764(a)(5)(iii) (emphasis added)).

120. *Id.* at 165, 638 A.2d at 101. "It was the purpose of the Maryland legislature, in amending § 764, to . . . remedy the problem of overbreadth." *Id.* at 161, 638 A.2d at 99.

121. *Simon & Schuster*, 502 U.S. at 121.

122. *Price*, 334 Md. at 161, 638 A.2d at 99. The definition of defendant was narrowed by eliminating subsection (a)(2)(ii), which provided that: "'Defendant' includes a person who has voluntarily and intelligently admitted to the commission of a crime for which the person is not prosecuted." MD. ANN. CODE art. 27, § 764(a)(2)(ii) (Supp. 1995). This definition was broad enough to sweep in defendants who the Supreme Court had held should not be penalized. *See Simon & Schuster*, 502 U.S. at 121. The current definition of "defendant" includes only persons "charged with or convicted of a crime in [Maryland] involving or causing personal injury, death, or property loss as a direct result of the crime, and includes a person found not criminally responsible for criminal conduct under § 12-108 of the Health-General Article." MD. ANN. CODE art. 27, § 764(a)(2)(i).

123. *Simon & Schuster*, 502 U.S. at 121.

land law as a remedy.¹²⁴ Subsection (c)(2) provided for the review by the Attorney General of suspected notoriety of crimes contracts.¹²⁵ The statute required that the Attorney General determine within thirty days whether a contract was, in fact, a notoriety of crimes contract.¹²⁶ Subsection (c)(3) provided an exemption for works that were only tangentially related to the defendant's crime.¹²⁷

B. Principles of Statutory Construction

The Court of Appeals of Maryland is bound by common law precedent to base its holding on non-constitutional grounds whenever possible.¹²⁸ In *Price*, the court was able to base its holding on the non-constitutional principles of statutory construction.¹²⁹ "The cardinal rule of statutory construction is to ascertain and carry out the real legislative intent."¹³⁰ To do this, courts look to the language of the statute, construed in its ordinary usage.¹³¹ Courts must harmonize or reconcile all words so that no part of the statute is "rendered nugatory or superfluous."¹³² If there is no ambiguity in the wording

124. *Price*, 334 Md. at 161, 165, 638 A.2d at 99, 101.

125. *Id.* at 165-66, 638 A.2d at 101. Subsection (c)(2) provides that "[a]fter the passage of 30 days, but before the expiration of 180 days from receipt of the contract . . . the Attorney General shall render a decision as to whether a contract is a notoriety of crimes contract." MD. ANN. CODE art. 27, § 764(c)(2)(i) (Supp. 1995).

126. *Price*, 334 Md. at 165-66, 638 A.2d at 101. The Attorney General could keep the contract under review for up to 180 days "for cause." MD. ANN. CODE art. 27, § 764(c)(2)(ii) (Supp. 1995).

127. *Price*, 334 Md. at 166, 638 A.2d at 101. Subsection (c)(3) provides that
For the purposes of rendering a decision under this subsection, there shall be a rebuttable presumption that the contract is a notoriety of crimes contract. The defendant may rebut this presumption by establishing to the satisfaction of the Attorney General that the subject matter of the contract only tangentially or incidentally relates to the crime.

MD. ANN. CODE art. 27, § 764(c)(3) (Supp. 1995).

128. *Price*, 334 Md. at 171, 638 A.2d at 104. The requirement that a court avoid constitutional questions when there is another ground upon which the case can be decided is part of a court's self-imposed justiciability requirements. *TRIBE*, *supra* note 37, at 69.

129. *Price*, 334 Md. at 177, 638 A.2d at 107. "[W]e shall not reach the constitutionality of § 764 on its merits. Instead, we decide only that the statute does not require a defendant to submit to the Attorney General a suspected notoriety of crimes contract" *Id.*

130. *Police Comm'r v. Dowling*, 281 Md. 412, 418, 379 A.2d 1007, 1010 (1977); *see also Condon v. State*, 332 Md. 481, 491, 632 A.2d 753, 757 (1993).

131. *Condon*, 332 Md. at 491, 632 A.2d at 758; *Dowling*, 281 Md. at 418, 379 A.2d at 1010.

132. *Condon*, 332 Md. at 491, 632 A.2d at 758; *see also Dowling*, 281 Md. at 419, 379 A.2d at 1011.

of a statute, it alone represents the intent of the legislature, and the courts need not look further.¹³³

Sometimes, however, the plain language of the statute is ambiguous, and courts must look elsewhere to determine legislative intent.¹³⁴ Courts may consider the consequences of alternate meanings of a word and may adopt the meaning most consistent with common sense, prevailing law, or public policy.¹³⁵ Courts can also examine a statute's legislative history.¹³⁶ Legislative intent can be construed from drafts of the bill before its enactment, transcripts of debates about the bill on the legislative floor, and amendments to a statute after its enactment.¹³⁷

III. THE INSTANT CASE

Attorney General J. Joseph Curran attempted to enforce Maryland's "Son of Sam" law for the first time in the Spring of 1993 — six years after the statute's enactment.¹³⁸ When Curran demanded a copy of a suspected notoriety of crimes contract from criminal defendant Ronald Price, however, Price's attorney refused, arguing that section 764 was unconstitutional.¹³⁹ Curran sought injunctive relief in the Circuit Court for Anne Arundel County.¹⁴⁰ Price stated that the "Son of Sam" law was unconstitutional, but put forth no legal argument to support that belief.¹⁴¹ The American Civil Liberties Union, appearing as *amicus curiae*, argued that Maryland's "Son of Sam" statute burdened a substantial amount of speech that was unrelated to the state's compelling interests and, therefore, that the statute was an unconstitutional, overly broad, content-based regulation of speech.¹⁴²

The Attorney General of Maryland argued that the "Son of Sam" law was a content-neutral regulation that indirectly burdened

133. See *Dowling*, 281 Md. at 418, 379 A.2d at 1010-1011; *Condon*, 332 Md. at 491, 632 A.2d at 758.

134. *Condon*, 332 Md. at 492, 632 A.2d at 758.

135. *Id.* at 491-92, 632 A.2d at 758.

136. *Id.* at 492, 632 A.2d at 758.

137. *E.g.*, *State v. Sheldon*, 332 Md. 45, 56-57, 629 A.2d 753, 759-60 (1993).

138. See *Shen*, *supra* note 5.

139. *Curran v. Price*, 334 Md. 149, 156-57, 638 A.2d 93, 97 (1994).

140. *Id.* at 157, 638 A.2d at 97.

141. *Id.* at 159, 638 A.2d at 98.

142. *Id.* In support of this argument, the court explained that some contracts would eventually be found to be exempt from § 764 because they would not fit the definition of notoriety of crimes contracts. *Id.* at 166, 638 A.2d at 102. Such contracts would not be related to the state's compelling interests. *Id.* Nevertheless, the parties to the contracts would have been unconstitutionally burdened during the Attorney General's review. *Id.*

speech.¹⁴³ The goal of the statute, Curran argued, was not to prevent a criminal from telling his story merely because the legislature does not like such stories; this would be a content-based statute, aimed at silencing the speech itself.¹⁴⁴ The statute's real goal, the Attorney General argued, was to prevent a "secondary effect" of the speech — that a criminal could profit from his own crime while his victims remained uncompensated.¹⁴⁵ Any burden the statute would place on the speech itself, the Attorney General argued, was purely incidental.¹⁴⁶

The trial court denied the Attorney General's request for injunctive relief and declared section 764 unconstitutional because it was an overly broad, content-based regulation of speech.¹⁴⁷ The Attorney General appealed to the Court of Special Appeals of Maryland.¹⁴⁸ The Court of Appeals of Maryland granted certiorari prior to review by the court of special appeals.¹⁴⁹ The court of appeals vacated the decision of the circuit court because a decision on the constitutional question was deemed unnecessary.¹⁵⁰ The court of appeals, instead, used the principles of statutory construction to arrive at its holding — that the "Son of Sam" law did not compel a criminal defendant to provide a copy of a suspected notoriety of crimes contract to the Attorney General, although it clearly did require the other contracting party to do so.¹⁵¹

The primary rule of statutory construction is to determine and to give effect to the intent of the legislature.¹⁵² However, the intent of the General Assembly in enacting the "Son of Sam" law was not immediately apparent to the court of appeals because the statute contained ambiguous language.¹⁵³ Subsection (d) of section 764 prohibited a "person" from concealing the existence of a notoriety of

143. *Id.* at 158, 638 A.2d at 98. Notwithstanding the constitutional arguments made in his petition, Attorney General Curran urged the court of appeals not to address the constitutionality of the "Son of Sam" law at oral arguments. *Id.* Because all Curran requested was an injunction so that he could review Price's contract, Curran felt that the constitutional issues were not before the court and that the court should wait for a full review of the factual record before determining the constitutionality of § 764. *Id.*

144. *Id.* at 162, 638 A.2d at 100. The state's goal was to prevent criminals from *profiting* from their crimes, not from speaking about them. *Id.*

145. *Id.* at 162-63, 638 A.2d at 99-100.

146. *See id.*

147. *Id.* at 157, 638 A.2d at 97.

148. *Id.*

149. *Id.* at 157-58, 638 A.2d at 97.

150. *Id.* at 177, 638 A.2d at 107.

151. *Id.*

152. *Condon v. State*, 332 Md. 481, 491, 632 A.2d 753, 757 (1993); *Police Comm'r v. Dowling*, 281 Md. 412, 418, 379 A.2d 1007, 1010 (1977).

153. *Price*, 334 Md. at 173, 638 A.2d at 105.

crimes contract or from making or receiving payments under such a contract.¹⁵⁴ Ronald Price was a "person," as defined in the statute, and the Attorney General argued that Price was concealing a contract in violation of subsection (d).¹⁵⁵ In contrast, subsection (b) provided that any "person who enter[ed] into a notoriety of crimes contract *with a defendant*" had to submit a copy of the contract and any money owed to the defendant under the contract to the Attorney General.¹⁵⁶ The court recognized that the two provisions were in conflict: subsection (d) applied to criminal defendants but subsection (b) did not.¹⁵⁷

Maryland's principles of statutory construction require that all parts of a statute be read together and reconciled if possible.¹⁵⁸ The court was able to reconcile the conflicting provisions by concluding that the General Assembly intended a distinction between "person" and "defendant" and that no criminal defendant could be considered a "person" for the purposes of subsection (d).¹⁵⁹ To support this decision, the court noted that the legislature provided separate definitions for "person" and "defendant" in the statute itself.¹⁶⁰ The court held that the Attorney General was not authorized to institute the suit seeking an injunction against Price because, as written, neither subsection (b) nor subsection (d) applied to the criminal defendant.¹⁶¹ Instead, subsections (b) and (d) applied only to those persons who contracted *with* the criminal defendant.¹⁶²

The court found this interpretation to be in accord with public policy.¹⁶³ The court explained that a defendant's production of a notoriety of crimes contract would implicitly acknowledge the commission of a crime.¹⁶⁴ To require such an acknowledgment, before

154. MD. ANN. CODE art. 27, § 764(d)(1)-(2) (1992); *Price*, 334 Md. at 171, 638 A.2d at 104.

155. *Price*, 334 Md. at 171, 638 A.2d at 104.

156. MD. ANN. CODE art. 27, § 764(b)(1)-(2) (Supp. 1995) (emphasis added); *Price*, 334 Md. at 171, 638 A.2d at 104.

157. *See Price*, 334 Md. at 172-74, 638 A.2d at 104-06.

158. *See id.* at 173, 638 A.2d at 105.

159. *Id.* at 174, 638 A.2d at 105-06. "[T]he language [of the statute] suggests a distinction between a 'person' and a 'defendant'" *Id.*

160. *Id.* "That the distinction between a 'person' and a 'defendant' was intended by the General Assembly is clear from the separate definitions given those terms in the definitions section of the statute." *Id.*

161. *Id.* at 177, 638 A.2d at 107.

162. *Id.*

163. *Id.* at 174, 638 A.2d at 106. "Considering the consequences of each interpretation, the construction limiting subsection (d) to nondefendants is an interpretation that is more reasonable and more consistent with public policy." *Id.*

164. *Id.* at 176, 638 A.2d at 107. Section 764 is not part of a state regulatory scheme "unrelated to the enforcement of its criminal laws," *id.* (quoting *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. 549, 550 (1990)),

trial, would be “inconsistent with public policy protecting the rights of the accused” and would raise “serious questions concerning the defendant’s constitutional privilege against self-incrimination.”¹⁶⁵ By explaining that such a provision would violate a defendant’s right against compelled self-incrimination, the court most likely sought to prevent the General Assembly from rewriting the statute and applying subsection (b) to criminal defendants.¹⁶⁶

Before the court engaged in the statutory interpretation leading to its holding, it gave a detailed analysis of the constitutional infirmities of Maryland’s “Son of Sam” statute.¹⁶⁷ The court of appeals relied heavily upon the Supreme Court’s reasoning in *Simon & Schuster* to decide *Curran v. Price*.¹⁶⁸ The original language of Maryland’s “Son of Sam” law, enacted in 1987, was substantially the same language as that invalidated in *Simon & Schuster*.¹⁶⁹ Section 764 was amended in 1992 to cure some of the constitutional defects identified by the Supreme Court in *Simon & Schuster*.¹⁷⁰

In an attempt to make the statute content-neutral, the General Assembly expanded the definition of notoriety of crimes contracts to include contracts “with respect to . . . ‘the payment or exchange of any money or other consideration or the proceeds or profits that directly or indirectly result from a crime’”¹⁷¹ This expansion was intended to place the focus of the law on the *profits* to the criminal defendant, instead of on the content of his speech.¹⁷² In *Curran v. Price*, the court of appeals held that the statute was still content-based because the language that mirrored the content-based language in the New York statute was never amended.¹⁷³

rather it concerns an area “permeated with criminal statutes.” *Id.* (quoting *Marchetti v. United States*, 390 U.S. 39, 45 (1968)).

165. *Id.* at 174, 638 A.2d at 106.

166. *See id.* at 174-76, 638 A.2d at 106-07.

167. *Id.* at 159-70, 638 A.2d at 98-104.

168. *Id.* at 159, 638 A.2d at 98. “In reviewing the constitutionality of Maryland’s statute, we are guided by the Supreme Court’s decision in *Simon & Schuster v. New York Crime Victims Board*” *Id.* (citation omitted).

169. *Id.* “Maryland’s statute was based originally upon the New York statute” *Id.*

170. *Id.* at 159-60, 638 A.2d at 98. “The original Maryland statute was subsequently amended to its current form in 1992 in response to [the *Simon & Schuster*] decision.” *Id.*

171. *Id.* at 161, 638 A.2d at 99.

172. *See id.* at 162, 638 A.2d at 99. The Attorney General argued that the statute’s “true purpose [was] not to prevent criminals from communicating about their crimes, but to prevent them from making financial profit from their crimes while their victims [went] uncompensated.” *Id.*

173. *Id.* at 161, 166, 638 A.2d at 99, 102. The court noted that subsection (c)(3) provided limiting language, but also noted that the language of subsections (a)(5)(i) and (ii) was still “virtually identical to the language invalidated by the

The court of appeals noted that the review required under subsections (c)(2) and (c)(3) of section 764 provided further proof that the "Son of Sam" law was content-based.¹⁷⁴ Maryland's General Assembly had added subsections (c)(2) and (c)(3) to Maryland's "Son of Sam" law in response to *Simon & Schuster*.¹⁷⁵ The Supreme Court held that New York's "Son of Sam" law was "significantly over-inclusive" because it swept too broadly and covered works only tangentially or incidentally related to the defendant's crime.¹⁷⁶ Subsection (c)(2), providing for the review of suspected notoriety of crimes contracts by the Attorney General to determine whether they were covered by section 764,¹⁷⁷ and subsection (c)(3), providing an exemption for works that were only tangentially related to the defendant's crime,¹⁷⁸ fixed the overbreadth problem identified in the New York law.¹⁷⁹ Nevertheless, these subsections created a new constitutional problem. The new subsections of Maryland's "Son of Sam" statute placed great emphasis on the *content* of the account of the crime that would be sold under the contract.¹⁸⁰ Thus, the court of appeals did not find the "Son of Sam" law to be content-neutral, as the Attorney General had advocated. Rather, the statute was held to be content-based,¹⁸¹ which meant that it would have had to withstand strict scrutiny in order to have been upheld.

Supreme Court in [*Simon & Schuster*]." *Id.* at 166, 638 A.2d at 102. "As we see it, while the language of § 764(a)(5)(iii) does not expressly target speech, its addition does not appear to negate the content-based nature of the language in subsections (a)(5)(i) and (ii)." *Id.* at 161, 638 A.2d at 99.

174. *See id.* at 169-70, 638 A.2d at 103.

175. *Id.* at 159-61, 638 A.2d at 98-99.

176. *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 121 (1991).

177. MD. ANN. CODE art. 27, § 764(c)(2)(i)-(ii) (Supp. 1995); *Price*, 334 Md. at 169, 638 A.2d at 103.

178. MD. ANN. CODE art. 27, § 764(c)(3) (Supp. 1995); *Price*, 334 Md. at 169, 638 A.2d at 103.

179. *Price*, 334 Md. at 166, 638 A.2d at 102. "[T]he limiting language of (c)(3) would provide a means of escape for the famous works of literature which the Court noted would be swept into the definition's overbroad grasp . . ." *Id.*

180. *Id.* at 161, 638 A.2d at 99.

As we see it, while the language of § 764 (a)(5)(iii) does not expressly target speech, its addition does not appear to negate the content-based nature of the language in subsections (a)(5)(i) and (ii). These subsections still define a notoriety of crimes contract by the content of the work to which it relates, specifically "the reenactment of a crime" or "the expression of the defendant's thoughts, feelings, opinions, or emotions regarding a crime."

Id.

181. *Id.* at 162-63, 638 A.2d at 100. "[T]he statute's language, specifically that in subsections (a)(5)(i) and (ii), appears to be content-based in that it requires the Attorney General to analyze the content of the work in order to determine its applicability to the statute." *Id.*

If the constitutionality of the "Son of Sam" statute had been before the court in *Price*, the statute would have failed the second prong of the strict scrutiny test.¹⁸² Maryland's high court explained that by allowing an exemption for tangentially related works the General Assembly cured the overbreadth problem that was identified in *Simon & Schuster*, but, at the same time, the General Assembly created a different overbreadth problem.¹⁸³ If the account of the defendant's crime were found by the Attorney General to have been unrelated to the state's compelling interest because it was only tangentially related to the defendant's crime, and therefore exempt from section 764, the defendant would still have been deprived of his earnings during the Attorney General's review.¹⁸⁴ Such a deprivation would have been a violation of the defendant's First Amendment right of free speech because: "It is . . . beyond question that to deny compensation for certain speech will chill such speech."¹⁸⁵

The court of appeals explained that the financial burden upon the tangentially related works could have been tolerated if there had been sufficient procedural safeguards built into the statute "to avoid unduly suppressing protected speech."¹⁸⁶ In *Freedman v. Maryland*,¹⁸⁷ the Supreme Court listed the procedural safeguards that would be required if future prior restraints on speech were to be upheld.¹⁸⁸ In *Curran v. Price*, however, the court of appeals concluded that the "statutory scheme [of section 764] impose[d] a heavy burden upon protected expression" and that the review process arguably "provide[d] insufficient procedural safeguards to withstand constitutional scrutiny."¹⁸⁹

First, under Maryland's "Son of Sam" law any criminal's contract to sell a story about himself was presumed to be a notoriety

182. *Id.* at 166-70, 638 A.2d at 102-03.

183. *See id.* at 166, 638 A.2d at 102.

184. *Id.* "[T]he limiting language of (c)(3) would provide a means of escape for the famous works of literature which the Court noted would be swept into the definition's overbroad grasp . . ." *Id.*

185. *Id.* at 162, 638 A.2d at 99.

186. *Id.* at 167, 638 A.2d at 102. The Supreme Court set forth guidelines for creating valid prior restraints on speech in *Freedman v. Maryland*, 380 U.S. 51 (1965).

187. 380 U.S. 51 (1965).

188. For a discussion of the safeguards required by the *Freedman* court see *infra* notes 190-201 and accompanying text. "Although the first amendment is not an absolute bar to prior restraints, the Supreme Court has repeatedly said that any 'system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity.'" TRIBE, *supra* note 37, at 1041 (quoting *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963)).

189. *Price*, 334 Md. at 169-70, 638 A.2d at 103. "Section 764's process of review would appear to conflict with the standards set forth in *Freedman* in several respects." *Id.* at 169, 638 A.2d at 103.

of crimes contract.¹⁹⁰ In order for a defendant to have his funds returned to him, the *defendant* had the burden of proving that the subject of the work was only tangentially related to his crime.¹⁹¹ In *Freedman*, the Supreme Court held that a valid prior restraint on speech would have to have a statutory presumption in *favor* of the defendant.¹⁹² In other words, the State of Maryland, not the defendant, would have to bear the burden of proving that the contract being reviewed was a notoriety of crimes contract.¹⁹³ Therefore, in order to withstand the rigors of the strict scrutiny test in the future, section 764 will have to be re-written so that the statutory presumption favors the defendant.¹⁹⁴

Second, under Maryland's "Son of Sam" law the Attorney General's decision as to whether a contract was a notoriety of crimes contract was final unless the defendant or the party contracting with him sought judicial review.¹⁹⁵ In *Freedman*, the Supreme Court determined that only a procedure that would *require* a judicial determination would constitute a valid restraint.¹⁹⁶ To withstand strict scrutiny by the court of appeals in the future, therefore, the General Assembly will have to re-write section 764 to provide for automatic judicial review of the Attorney General's decision.¹⁹⁷

Finally, under Maryland's "Son of Sam" law the Attorney General was allowed to review a suspected notoriety of crimes contract for up to six months prior to any judicial review.¹⁹⁸ In addition, the Attorney General could extend that review period for an unlimited time "for cause."¹⁹⁹ In *Freedman*, the Supreme Court held that a

190. MD. ANN. CODE art. 27, § 764(c)(3) (Supp. 1995).

191. *Id.* This subsection provides:

For the purposes of rendering a decision under this subsection, there shall be a rebuttable presumption that the contract is a notoriety of crimes contract. The defendant may rebut this presumption by establishing to the satisfaction of the Attorney General that the subject matter of the contract only tangentially or incidentally relates to the crime.

Id.

192. *Freedman*, 380 U.S. at 58; *Price*, 334 Md. at 168, 638 A.2d at 103.

193. *See Price*, 334 Md. at 168, 638 A.2d at 103.

194. *See id.* at 169-70, 638 A.2d at 103.

195. MD. ANN. CODE art. 27, § 764(c)(6) (Supp. 1995). This subsection provides:

The decision of the Attorney General rendered under this subsection is a final decision and may be appealed by a defendant or a victim only in accordance with subsection (n) of this section within 60 days after the appellant received notice of the decision.

Id.

196. *Freedman*, 380 U.S. at 58.

197. *See Price*, 334 Md. at 169-70, 638 A.2d at 103.

198. MD. ANN. CODE art. 27, § 764(c)(2)(i) (Supp. 1995).

199. *Id.* § 764(c)(2)(ii).

valid restraint on speech would have to assure that the final judicial review would be prompt.²⁰⁰ Although the Court of Appeals of Maryland did not specify the exact amount of time that should be given to the Attorney General for review, it announced that six months was too long.²⁰¹

IV. ALTERNATIVE APPROACHES

A. *Impact of Statutory Interpretation*

Subsection (b) of section 764 was interpreted by the court of appeals to be inapplicable to criminal defendants.²⁰² This interpretation by the court of appeals will have a significant impact on the future usefulness of Maryland's "Son of Sam" law. If criminal defendants cannot be compelled to deliver copies of suspected notoriety of crimes contracts to the state, the "Son of Sam" law will be more difficult to enforce.²⁰³ To extract a copy of a contract from a criminal defendant would be relatively easy, without the prohibitions imposed by the court of appeals, because the Attorney General would know where the defendant would be and could bring him into court at any time to compel production. But the Court of Appeals of Maryland has decided that compelling a criminal defendant to produce a notoriety of crimes contract violates his constitutional protection against self-incrimination.²⁰⁴ Therefore, the state may only force the party contracting *with* the defendant to produce the contract.²⁰⁵

A party who contracts with a defendant is legally bound by section 764²⁰⁶ and can be forced by court order to comply with its

200. *Freedman*, 380 U.S. at 59.

201. *See Price*, 334 Md. at 169-70, 638 A.2d at 103.

While the Court in *Freedman* considered a period of six months until final appellate review to constitute an impermissible delay, subsection (c)(2)(i) provides for up to six months for administrative review by the Attorney General prior to any judicial review. Subsection (c)(2)(ii) provides for an unlimited extension of that period for cause.

Id. at 169, 638 A.2d at 103.

202. *Id.* at 172-73, 638 A.2d at 105. "Nothing in [subsection (b)] requires defendants to submit [notoriety of crimes] contracts to the Attorney General. . . . We conclude . . . that subsection (b) does not countenance obtaining the contract from Price." *Id.*

203. *Id.* at 177, 638 A.2d at 107.

204. *See supra* notes 63-64 and accompanying text.

205. *Price*, 334 Md. at 174, 638 A.2d at 106. "Subsection (b) applies exclusively to persons contracting with a defendant, and not to defendants." *Id.* at 173, 638 A.2d at 105. "[T]he legislature intended subsection (d) not to apply to defendants; but only to persons contracting with defendants." *Id.* at 174, 638 A.2d at 106.

206. *Id.* at 177, 638 A.2d at 107. "[T]he other party to the contract [made with a defendant] is required by the statute to produce it [sic] and . . . is subject to a severe penalty for failure to do so." *Id.*

provisions. Forcing such compliance, however, is not as simple as it sounds. For example, in *Price* the Attorney General considered it necessary to request a copy of the contract from the defendant because the Attorney General did not know the identity of the other party to the contract.²⁰⁷ Eventually, of course, the account of the crime would be released to the public, and the Attorney General would discover the identity of the other party. The longer that the state is prevented from confiscating the earnings from the contract, however, the greater the risk that those earnings will be dissipated before the victim has had a chance to obtain a civil judgment.²⁰⁸ The court of appeals recognized that its decision would make the enforcement of section 764 more difficult, but the court apparently thought that the penalties for violating the statute would encourage compliance by persons who contract with defendants.²⁰⁹

B. *Impact of Constitutional Interpretation*

Many states have enacted "Son of Sam" statutes.²¹⁰ Variation from the New York law occur mostly in the statutes of limitation, the priorities of allocation, and the distribution of any remaining money.²¹¹ Florida and New Jersey are among the four states that have been called upon to decide the constitutionality of their "Son of Sam" laws.²¹² The opinions of the Florida and New Jersey courts illustrate an alternative position that the Court of Appeals of Maryland could have adopted when deciding *Curran v. Price*.

Florida's "Son of Sam" law is similar to the New York law in its essential elements.²¹³ It establishes a lien in favor of the state

207. *See id.* at 156-57, 638 A.2d at 97. "[A]n assistant Attorney General wrote to Price's counsel inquiring whether Price had, in fact, entered into a contract that might be covered by [section 764], and, if so, *with whom* and for what consideration." *Id.* (emphasis added).

208. As long as a defendant has unfettered access to his money he can, for example, spend it, gift it, hide it or gamble it away, either directly or through an intermediary who is not incarcerated.

209. *Id.* at 177, 638 A.2d at 107.

210. *See, e.g.*, ALA. CODE §§ 41-9-80 to -84 (1991); ALASKA STAT. § 12.61.020 (1990); ARIZ. REV. STAT. ANN. §§ 13-4201 to -4202 (1989 & Supp. 1994); CAL. CIV. CODE § 2225 (West Supp. 1995); COLO. REV. STAT. ANN. §§ 24-4.1-201 to -207 (West 1990 & Supp. 1995); DEL. CODE ANN. tit. 11, §§ 9101-06 (1987 & Supp. 1994); NEB. REV. STAT. §§ 81-1835 to -1842 (1994); OHIO REV. CODE ANN. §§ 2969.01-.06 (Baldwin 1994); S.D. CODIFIED LAWS ANN. §§ 23A-28A-1 to -14 (1988 & Supp. 1995); TENN. CODE ANN. §§ 29-13-401 to -411 (Supp. 1994).

211. *See Sarno, supra* note 1, at 1214-16.

212. Thus far, only New York, New Jersey, Florida, and Maryland have reported opinions discussing the constitutionality of their "Son of Sam" laws.

213. *See generally* FLA. STAT. ANN. § 944.512(1) (West 1985 & Supp. 1995).

upon proceeds owed to a convicted felon, or anyone on his behalf, from "any literary, cinematic, or other account of the crime for which [the felon] was convicted."²¹⁴ The primary difference between the New York and Florida laws is the priority of distribution given to funds attached by the state.²¹⁵ Florida's law requires that one-quarter of the proceeds earned by the defendant be immediately distributed to his dependents.²¹⁶ If the defendant has no dependents, this portion of the proceeds goes to the Crimes Compensation Trust Fund to be distributed to other victims of crime in Florida.²¹⁷ Second in priority for distribution are the victims of the felon or their dependents.²¹⁸ The victims or their dependents also receive one-quarter of the proceeds.²¹⁹ If there are no victims, this quarter of the proceeds is given to the Crimes Compensation Trust Fund; if the victims' damages are less than one-quarter of the proceeds, the remainder goes to the Crimes Compensation Trust Fund.²²⁰ The defendant's legal fees, given top priority for distribution under the New York law, are third in line for distribution under the Florida law.²²¹

The constitutionality of the Florida law was challenged, in an intermediate appellate court, in *Rolling v. State*.²²² The trial court had temporarily enjoined the disbursement to the defendant of the proceeds "obtained from any recounting of a crime."²²³ On appeal, the defendant claimed that the "Son of Sam" law was "an improper prior restraint upon constitutionally protected speech."²²⁴ The court declined to reach the defendant's constitutional challenge, however, because there were other grounds upon which to dispose of the case.²²⁵

The Florida court decided the case using the principles of statutory construction.²²⁶ The express language of the statute did not provide for a temporary injunction prior to a defendant's conviction.²²⁷ In fact, the statute clearly stated that the state's right to a

214. *Id.* § 944.512(1).

215. *Id.* § 944.512(2)(a)-(d).

216. *Id.* § 944.512(2)(a).

217. *Id.*

218. *Id.* § 944.512(2)(b).

219. *Id.*

220. *Id.* Subsection (2)(c) provides that all court costs in prosecution of the convicted felon should be paid before the residue is placed into the Crimes Compensation Trust Fund. *Id.* § 944.512(2)(c).

221. *Id.*

222. 630 So. 2d 635, 636 (Fla. Dist. Ct. App. 1994).

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 637.

227. *Id.*

lien was contingent upon the defendant's conviction for the alleged crime.²²⁸ The appellate court vacated the lower court's decision without addressing the issue of whether a more narrowly drafted injunction would have passed constitutional muster.²²⁹ The Florida law has not yet undergone another constitutional challenge.

New Jersey's "Son of Sam" law is also similar to New York's "Son of Sam" law.²³⁰ The New Jersey law requires anyone contracting with a defendant for an account of his crime to give a copy of the contract and all moneys owed to the defendant to the Violent Crimes Compensation Board.²³¹ The New Jersey law has a different set of distribution priorities than the New York law.²³² An important difference between the New Jersey and the New York law is that, under New Jersey law, the defendant does not have access to any of the proceeds taken from him under the "Son of Sam" law unless a court orders it for his legal defense.²³³ In contrast, under the New York law, any money remaining in escrow after five years is returned to the defendant.²³⁴

New Jersey's "Son of Sam" law was challenged on First Amendment grounds in *Fasching v. Kallinger*.²³⁵ The defendants challenging the constitutionality of the law were Kallinger and his publisher, Simon & Schuster.²³⁶ The argument apparently raised by both defendants was that by seizing their profits under the "Son of Sam" law the state of New Jersey was placing a prior restraint on speech in contravention of the First Amendment.²³⁷ The trial court denied Simon & Schuster's motion for summary judgment, finding the statute to be a reasonable time, place, and manner restriction.²³⁸ Simon & Schuster appealed.

228. *Id.* at 636.

229. *Id.* at 637.

230. N.J. STAT. ANN. § 52:4B-26 to -33 (West 1986 & Supp. 1995).

231. *Id.* § 52:4B-28.

232. *Id.* § 52:4B-30(a)(1)-(5). First in line for distribution are victims who have obtained civil judgments against the defendant. *Id.* § 52:4B-30(a)(1). Second in priority is anyone to whom a court has ordered restitution. *Id.* § 52:4B-30(a)(2). Third in priority are the judgment creditors of the defendant. *Id.* § 52:4B-30(a)(3). Any costs to the Victims Board will be paid fourth. *Id.* § 52:4B-30(a)(4). The remainder, if any, goes to the Victims Board. *Id.* § 52:4B-30(a)(5).

233. *Id.* § 52:4B-32.

234. N.Y. EXEC. LAW § 632-a(4) (McKinney 1982 & Supp. 1995); *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 114-15 (1991).

235. 510 A.2d 694 (N.J. Super. Ct. App. Div. 1986).

236. *Id.* at 696-97.

237. It is clear that the defendants sued on First Amendment grounds. *Id.* at 696. It is also clear that Simon & Schuster claimed that their profits were being seized. *Id.* at 702-04. The complete argument to the court, however, is not explained in the opinion.

238. *Id.* at 699. The trial court found that even if the statute did incidentally burden

The Appellate Division of the Superior Court of New Jersey was able to avoid a constitutional analysis of its "Son of Sam" law.²³⁹ Like the Florida court in *Rolling*, the New Jersey court disposed of the case using principles of statutory construction.²⁴⁰ The superior court held that the clear language of the statute provided that only the criminal defendant, not the publisher, was obliged to forfeit his profits under the New Jersey "Son of Sam" law.²⁴¹ Kallinger was held to have no ground for appeal because an adverse judgment had not been entered against him at the trial level.²⁴² The Attorney General of New Jersey agreed with the court's interpretation of the statute's express language.²⁴³ In addition, the legislative history and title of the statute supported the court's interpretation.²⁴⁴

The "Son of Sam" laws of Maryland, Florida, and New Jersey have each been challenged on constitutional grounds.²⁴⁵ The presiding courts each disposed of the challenges on non-constitutional grounds,²⁴⁶ but only the Florida and New Jersey courts demonstrated proper judicial restraint. These two courts carefully avoided unnecessary interpretations of the constitutionality of their statutes.²⁴⁷ The Court of Appeals of Maryland, in contrast, engaged in a detailed constitutional analysis unnecessary to its holding.²⁴⁸ This holding — that the language of Maryland's "Son of Sam" statute did not authorize the Attorney General's suit against Ronald Price — required no constitutional analysis.

Had the constitutionality of Maryland's "Son of Sam" law been properly before the court of appeals, the law would have been

expression, it was valid because it met the dual requirements of the strict scrutiny test. *Id.*

239. *Id.* at 696, 704.

240. *Id.* at 702-04.

241. *Id.* at 702-03.

242. *Id.* at 704. Only Simon & Schuster had moved for summary judgment below and had been denied. *See id.*

243. *Id.*

244. *Id.* at 703-04.

Here, the title — "An Act Concerning Certain Monies Received By Persons Accused of Crimes" surely suggests limiting the reach of the 1983 amendments to the proceeds owed the criminal.

The legislative history as well supports a construction limiting the statute's reach to proceeds owed one accused or convicted of a crime.

Id. at 703.

245. *Curran v. Price*, 334 Md. 149, 638 A.2d 93 (1994); *Rolling v. Florida*, 630 So. 2d 635 (Fla. Dist. Ct. App. 1994); *Fasching v. Kallinger*, 510 A.2d 694 (N.J. Super. Ct. App. Div. 1986).

246. *Price*, 334 Md. at 177, 638 A.2d at 107; *Rolling*, 630 So. 2d at 636; *Fasching*, 510 A.2d at 696, 704.

247. *See Rolling*, 630 So. 2d at 636; *Fasching*, 510 A.2d at 696, 704.

248. *See Price*, 334 Md. at 159-70, 638 A.2d at 98-104.

invalidated.²⁴⁹ The court of appeals would have followed the holding of *Simon & Schuster* — that a law that places a financial burden on speech is a content-based regulation that requires review under the strict scrutiny test.²⁵⁰ The court of appeals then would have held that Maryland's "Son of Sam" law was not sufficiently tailored to withstand the strict scrutiny test.²⁵¹ The constitutionality of Maryland's "Son of Sam" law, however, was not properly before the court in *Curran v. Price*.²⁵² The court of appeals itself stated the precedent by which it was bound: "If a decision on a constitutional question is not necessary for a proper disposition of the case, we will not reach it."²⁵³ The constitutional analysis of section 764 was improper and unnecessary because there was a non-constitutional ground available for the proper disposition of the case, namely, statutory interpretation.²⁵⁴

The court of appeals adhered to the principle of "not deciding constitutional issues unnecessarily" only in the narrowest sense — the court did not "decide," that is, base its holding, on the constitutionality of section 764.²⁵⁵ This narrow interpretation of the well-established principle does not lend validity to the court's actions, however, because it nevertheless engaged in a detailed constitutional analysis. The court explained that section 764 was overbroad in several areas²⁵⁶ and outlined the required modifications.²⁵⁷ The effect

249. *See id.* at 169-70, 638 A.2d at 103. "It is thus clear that this statutory scheme imposes a heavy burden upon protected expression and it may well be argued that the process of review provides insufficient procedural safeguards to withstand constitutional scrutiny." *Id.*

250. *Id.* at 162, 638 A.2d at 100. "[T]he statute's language, specifically that in subsections (a)(5)(i) and (ii), appears to be content-based in that it requires the Attorney General to analyze the content of the work in order to determine its applicability to the statute. Content-based statutes . . . warrant strict judicial scrutiny." *Id.* at 162-63, 638 A.2d at 100; *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 117 (1991).

251. *Price*, 334 Md. at 167-70, 638 A.2d at 102-03. The court explained that some contracts would eventually be found to be exempt from § 764 because they would not fit the definition of notoriety of crimes contracts. *Id.* at 166, 638 A.2d at 102. Such contracts would not be related to the state's compelling interests. *Id.* Nevertheless, the parties to the contracts would have been unconstitutionally burdened during the Attorney General's review. *Id.*

252. *Id.* at 171, 638 A.2d at 104.

253. *Id.*

254. *Id.* at 171-77, 638 A.2d at 104-07.

255. *Id.* at 177, 638 A.2d at 107. "[W]e shall not reach the constitutionality of § 764 on its merits." *Id.*

256. *Id.* at 168-70, 638 A.2d at 101-04. If the constitutionality of the statute were properly before the court, the statute would have been invalidated because the court determined it to be a content-based regulation of speech that was not narrowly tailored. *Id.* at 168-70, 638 A.2d at 103; *see supra* note 249.

257. *Id.* at 168-70, 638 A.2d at 103. The recommended modifications are discussed *supra* notes 169-201 and accompanying text.

of this detailed constitutional analysis is the same as it would have been if the court had, in fact, “decided” the case on constitutional grounds; the General Assembly can use the court’s opinion to rewrite the “Son of Sam” statute so that it will withstand judicial scrutiny the next time the statute’s validity is challenged. By interpreting the constitutionality of section 764 unnecessarily, the court assumed two inappropriate roles — the roles of legislator and advocate.

V. CONCLUSION

Maryland’s General Assembly has decided that criminals should not be permitted to profit from their crimes while their victims remain uncompensated.²⁵⁸ To this end, the General Assembly enacted a “Son of Sam” law.²⁵⁹ The law provided that a criminal’s earnings under a notoriety of crimes contract could be confiscated by the state and made available to compensate the criminal’s victims.²⁶⁰ Maryland’s “Son of Sam” statute provided that the Attorney General could demand a copy of any suspected notoriety of crimes contract in an effort to determine whether he could enforce the statute.

In 1993, Attorney General J. Joseph Curran attempted to enforce Maryland’s “Son of Sam” law for the first time.²⁶¹ When criminal defendant Ronald Price refused to produce a copy of a suspected notoriety of crimes contract for review, Curran sought an injunction in the Circuit Court for Anne Arundel County.²⁶² The injunction was denied in the circuit court because the judge found that the “Son of Sam” law violated Price’s First Amendment right to free speech.²⁶³ The Court of Appeals of Maryland granted certiorari to hear Curran’s appeal, performed a gratuitous constitutional analysis of the “Son of Sam” law, and outlined the required modifications. The court did not, however, declare the statute unconstitutional. Instead, the court based its holding on statutory interpretation. The court held that the language of the statute authorized the Attorney General to compel parties contracting *with* a defendant, not the defendant himself, to

258. *Price*, 334 Md. at 154-55, 638 A.2d at 96. Maryland’s “Son of Sam” statute was “enacted to prevent criminals from profiting from their own crimes through ‘notoriety of crimes contracts’” *Id.* at 154, 638 A.2d at 96.

259. MD. ANN. CODE art. 27, § 764 (1992 & Supp. 1995); *Price*, 334 Md. at 154, 638 A.2d at 96.

260. MD. ANN. CODE art. 27, § 764(b)(2) (1992 & Supp. 1995); *id.* § 764(e)(1)(i) (1992 & Supp. 1995).

261. *See* Shen, *supra* note 5, at B1.

262. *Price*, 334 Md. at 157, 638 A.2d at 97.

263. *Id.* “[T]he court determined that § 764 was unconstitutionally overinclusive on its face and [that it, therefore,] violated the principles of the First Amendment.” *Id.*

produce a suspected notoriety of crimes contract.²⁶⁴ The court of appeals vacated the decision of the circuit court and remanded the case with instructions that it be dismissed.²⁶⁵

By basing its holding on statutory construction, the Court of Appeals of Maryland claimed to have exercised judicial restraint in deciding *Curran v. Price*.²⁶⁶ This case is troublesome, however, because the court engaged in a detailed constitutional analysis entirely unnecessary to its holding.²⁶⁷ By analyzing the constitutional issues unnecessarily, the court ignored a long-standing principle of judicial restraint.²⁶⁸ The *Price* opinion gratuitously identified the constitutional shortcomings of section 764²⁶⁹ in a manner likely to facilitate amendment of the statute in the General Assembly. The court of appeals undermined the separation of powers in Maryland by implying advocacy of a law and then advising the legislature on how to produce the law. This judicial legislation was a step beyond both the immediate focus of the case and the court's role as interpreter of laws. In *Curran v. Price*, the Court of Appeals of Maryland vitiated essential boundaries between the judiciary and the legislature.

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264. *Id.* at 174, 638 A.2d at 106. This would most likely be a member of the media, e.g., book and magazine publishers or television and movie producers.

265. *Id.* at 177-78, 638 A.2d at 107.

266. *Id.* at 171, 638 A.2d at 104.

267. *Id.* at 166-70, 638 A.2d at 101-04.

268. The precedent was clearly stated in the opinion, but the constitutional issues were analyzed in an earlier section of the opinion. *Id.* at 159-70, 638 A.2d at 98-104.

269. *Id.*