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Statutory Construction And The Right To Vote

by Byron L. Warnken

In State v. Broadwater, the Court of Appeals of Maryland unanimously affirmed the Circuit Court for Prince George's County, reinstating the right to vote of a former Maryland state senator who had been convicted of infamous crimes. This was a case of first impression, interpreting the 1974 exception to the rule of lifetime disenfranchisement.

Background
Tommie Broadwater, Jr., while a Maryland state senator from Prince George's County, was convicted in 1983, in the United States District Court for the District of Maryland, of four counts of food stamp fraud and one count of conspiracy to commit food stamp fraud. He was sentenced to three years, concurrent on each count, with all but six months suspended, followed by four years probation and 1,000 hours of community service. Additionally, he was fined $20,000.00 and ordered to pay $18,420.00 in restitution. As a result of his conviction, Broadwater's name was stricken from the registry of qualified voters in Prince George's County.

While Broadwater was incarcerated, the Maryland General Assembly and the voters modified the Maryland Constitution, requiring voter registration as a condition of eligibility for seeking or holding elective office. After Broadwater served his prison term and while he was on probation, he unsuccessfully challenged this constitutional amendment as a violation of the equal protection clause of the United States Constitution.

Upon completion of his probationary period, he attempted to register again as a voter but was denied because of his "conviction of disqualifying crimes." Broadwater filed suit in the Circuit Court for Prince George's County against the Prince George's County Board of Supervisors of Elections for denying him the right to vote. The State of Maryland, through the Office of the Attorney General, intervened on behalf of the Board.

At both the trial level and the appellate level, Broadwater's attack was based on principles of statutory construction and constitutional equal protection analysis. The statutory construction argument was whether one criminal proceeding in which there is an adjudication of guilt and sentencing thereon is only one "conviction" within the meaning of the election laws and thus Broadwater is eligible to vote. The constitutional argument was whether, assuming the statute were interpreted to deny Broadwater the right to vote, the statute would violate equal protection by restoring the right to vote to rehabilitated first-timers who were convicted of one count in one trial, while imposing lifetime disenfranchisement on rehabilitated first-timers who were convicted of multiple counts in one trial.

Circuit Court Judge Robert J. Woods ruled that the statute is constitutional and that Broadwater's interpretation of it is correct. The State and the Board appealed on the statutory construction issue; Broadwater cross-appealed on the equal protection issue. The State filed a petition for a writ of certiorari, asking the Court of Appeals of Maryland to take the case prior to consideration by the Court of Special Appeals of Maryland. The court of appeals granted the State's petition and sua sponte granted a cross-petition for the equal protection issue on which Broadwater had cross-appealed. In its affirmance of the circuit court, the court of appeals adopted most, but not all, of Broadwater's seven statutory construction arguments. However, the court declined to address the equal protection argument. Judge Rodowsky stated:

"At issue here is how § 3-4(c) applies where there were guilty verdicts and sentences on multiple counts charging infamous crimes in a single indictment against a person never previously convicted of an infamous crime. . . . Based primarily on the legislative history of the section and on the social history immediately surrounding its enactment, we hold that Broadwater's construction is correct." 10

Statutory Construction
Broadwater's various statutory construction arguments all support the position that the legislature did not intend the disparate result of reinfranchising rehabilitated first-timers convicted of one count in one trial, while disenfranchising for life rehabilitated first-timers convicted of multiple counts in one trial. Argued affirmatively, the Maryland General Assembly, under the theory of rehabilitation of ex-offenders, enacted article 33, section 3-4(c), ending Maryland's rule of lifetime disenfranchisement of convicted felons, with the intent that first-timers, such as Broadwater, are entitled to vote after completing their period of incarceration and parole.

From 1851 to 1972, under both the Maryland Constitution and the Maryland Annotated Code, persons convicted of infamous crimes were disenfranchised for life, unless pardoned by the Governor. In 1972, the legislature enacted a law, subject to voter approval, "providing for the repeal of the constitutional prohibition of the right to vote for these persons." The statute proposed that the voters delegate to the legislature the decision "to regulate or prohibit the right to vote of a person convicted of infamous crimes."
or other serious crimes...." In 1974, the General Assembly ameliorated the lifetime disenfranchisement by restoring the right to vote to any person if, "in connection with his first such conviction only, he has completed any sentence imposed pursuant to that conviction...."14

The dispute in this case was simple. The State asserted that each count or unit of prosecution constitutes a "conviction" within the meaning of section 3-4(c). Accordingly, because Broadwater was convicted of multiple counts in one trial, he is beyond his "first such conviction" and therefore ineligible to vote. Broadwater asserted that "conviction", under section 3-4(c), means a criminal proceeding in which there is adjudication of guilt and sentencing. Accordingly, because there was only one criminal prosecution, i.e., he was tried, convicted, and sentenced only once, such adjudication was his "first such conviction" and he is therefore eligible to vote.

The 1974 amendment changed the law from one of total disenfranchisement to one of less-than-total disenfranchisement. It provided some amelioration of the civil disability of lifetime disenfranchisement previously imposed upon the right to vote. However, the legislature did not totally eliminate the disability.

"[T]he search for legislative intent [is] an effort to '... discern some general purpose, aim, or policy reflected in the statute...."15 Here, the legislative intent can be gleaned from synthesizing the answers to two questions: (1) why did the legislature ameliorate the harshness at all, and (2) why didn't it completely ameliorate the disenfranchisement? The only theory that explains some, yet not total, restoration of the right to vote is rehabilitation. This is the only rational explanation for restoring the right to vote to some persons while continuing to deny forever the right to vote to others. Persons convicted of infamous crimes and rehabilitated may vote; persons convicted of infamous crimes and not rehabilitated may not vote. The rehabilitation line is drawn "in connection with his first such conviction only."16

Broadwater argued that the legislative goal of rehabilitation can be discerned from the national trend concerning the restoration of voting rights at the time of the 1974 amendment, from general principles of statutory construction, and by analogy to the judicial interpretation of similar statutory language.

### The National Trend Toward Voting Rights Restoration

When interpreting statutes, courts consider "the circumstances existing and events occurring"17 when they were enacted, including the "cause or necessity of making the Act...."18 The statutory 1974 amelioration of the long-standing rule of lifetime disenfranchisement was no accident. It reflected the legislature's understanding of, and agreement with, the extensive trend at the beginning of the 1970's to ameliorate the historical harshness of disenfranchisement through the enactment of laws restoring the right to vote to rehabilitated ex-offenders who had completed the sanctions resulting from their convictions.

"The 1974 Amendment changed the law from one of total disenfranchisement to one of less-than-total disenfranchisement."

Disenfranchisement of certain ex-offenders, on theories such as punishment and the purity of the ballot, has existed for centuries.19 Lifetime disenfranchisement demonstrates a rejection of, or at least a failure to consider, rehabilitation. The dilemma posed by these conflicting goals [of protection of society and rehabilitation of ex-offenders] is clearly reflected in existing civil disability laws. In the apparent interest of societal protection, legislatures have seen fit to place numerous restrictions on activities of convicted criminals...after release from prison. Although these laws were enacted in piecemeal fashion over a period spanning two centuries and in many instances were founded upon penal concepts that have long since been discredited, they continue to deprive former convicts of many rights and privileges exercised by normal citizens.20

Under the policy of disenfranchisement, "the protection of the public is only tenuous...while the loss to the offender is the opportunity to share in government. [D]isenfranchisement can find its analogue in ancient physical ostracism: instead of physically expelling the individual, he is expelled from the body politic."21

During the past twenty-five years, a rapidly emerging theory of rehabilitation has favored restoration of the right to vote for ex-offenders. "If the criminal justice system is intended to rehabilitate criminals, it must treat them as full-fledged citizens."22 Part of the impetus for this trend came from four model acts espousing a rehabilitation approach to the disenfranchisement/restoration issue.

The model act of the National Probation and Parole Association provides for restoration of the right to vote upon release from incarceration.23 The Model Penal Code includes restoration of the right to vote upon completion of probation and/or parole conditions.24 Both the model act of the National Council on Crime and Delinquency25 and the Uniform Act on Status of Convicted Persons26 provide for restoration of the right to vote upon completion of probation, incarceration, and/or parole. Legal commentators also insisted upon reform:

"[M]ethods for timely restoration of all deprived rights and privileges to reformed offenders are essential if ex-convicts are to make satisfactory readjustment in the community."

...[T]he entire scheme of civil disabilities must be re-examined and restrictions that are not necessary to protect the public must be eliminated. ..."

"[I]maginative measures are needed to ensure that the disabilities imposed are removed as soon as the convict's rehabilitative progress indicates this action is warranted.27"

Another commentary included:

"[D]isenfranchisement as a consequence of criminal conviction should be abandoned in a society committed to individual rights and a just rehabilitative penal system."

...[T]ime and attitudes change. Criminal disenfranchisement may derive from ancient and once venerated doctrines, but its use today is an anachronism. ...

...The recent trend away from this practice [of disenfranchisement] re-
Justice (then Justice) Rehnquist stated:

"The word 'convicted' includes the words 'punished' and 'condemned,' and the word 'convicted' includes the word 'punished' and 'condemned.'" 47

The only reasonable interpretation of "in connection with his first such conviction only" derives not from the number of counts charged, but from whether the defendant is involved in his first criminal proceeding resulting in adjudication of guilt and sentencing. Regardless of the number of counts, if it is the first time that the defendant has been tried, convicted, and sentenced, it is "in connection with his first such conviction."

The Court of Appeals had previously construed the meaning of the terms "convicted" and "conviction" in the context of a civil disability statute. In Myers v. State, 44 the court addressed whether a person who was found guilty of perjury and given probation before judgment was "convicted" of perjury and thus incompetent to testify. 45 Without a statutory definition, the court stated that "the meaning of 'convicted' and 'conviction' turns upon the context and purpose with which those terms are used." 46

"[A] 'conviction' is 'that legal proceeding which ascertains the guilt of the party...." 44

The word 'convicted' involves all the necessary proceedings from the charge to the sentence inclusive. 48 "The word 'punished' refers plainly to the penalty to be affixed to the crime, but the word 'convicted' is much broader in meaning.... [T]he word 'convicted' includes the accusation and the trial." 49

Broadwater argued, and the court agreed, that the only relevant "context and purpose" of "conviction" is whatever the legislature intended when it specified that a person otherwise disqualified could, following completion of his sentence, vote "in connection with his first such conviction only." In using the statutorily undefined word "conviction," the legislature meant "criminal proceeding." "Conviction" in article 33, section 3-4(c), refers to the process and not to the result.

The word "conviction," used as a measurement of the number of adjudicatory proceedings and not as a measurement of the number of counts, is better understood in the context of "only," the first of two qualifiers necessary for restoration of the right to vote. That right, having been lost as a result of conviction of infamous crimes, can be restored only in connection with the defendant's first such conviction. "Only" means "a single... in-
The legislature’s message is clear. It would no longer bar from the voting booth forever those persons convicted of infamous crimes. However, it would provide only one chance for rehabilitation and hence restoration of the right to vote. The legislature did not provide this opportunity only to those with “one count”; instead, it provided this opportunity only once—to “first-timers.”

The second qualifier for voting rights restoration is that the defendant must have “completed any sentence imposed pursuant to that conviction, including any period of probation imposed by virtue of parole or otherwise in lieu of a sentence or part of a sentence.” This qualifier shows that restoration of the right to vote is predicated on rehabilitation. Rehabilitation is predicated on completing the outstanding obligation to the State and is limited to “once.”

If article 33, section 3-4(c), were interpreted as the State urged, rehabilitated first-timers who were convicted of one count in one trial could vote. However, rehabilitated first-timers who were convicted of multiple counts in one trial could not vote because they would automatically be beyond their “first such conviction only.” It seems inconceivable that the legislature would enact a voting restoration act for rehabilitated ex-offenders that automatically precludes from its coverage a substantial percentage, if not a majority, of those persons who otherwise would come within its scope. “[W]hen a statute is plainly susceptible of more than one meaning and thus contains an ambiguity the court may consider the consequences resulting from one meaning rather than another and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense.”

Judge Rodowsky stated the position of the Court of Appeals as follows:

Thus, the legislative purpose of the language relied upon by the State concerns the timing or sequence of convictions and not the interrelationship of charges in a multiple count indictment. The “first such conviction” does not refer to the lowest numbered count charging an infamous crime on which there is a verdict or plea of guilty in an indictment charging multiple infamous crimes. “[F]irst such conviction” is used in the broader, layperson’s sense of the occasion of conviction of a person who is a first time offender, as opposed to a repeat offender. If a person who has never previously been convicted of an infamous crime suffers a “first such conviction,” the eligibility to re-register as a voter arises when the first time infamous crime offender has completed the entire sentence imposed on all proven counts for all crimes of all types on the occasion of that “first such conviction.”

“Recidivist statutes are enacted in an effort to deter and punish incorrigible offenders...”

“Conviction” Versus “Violation”

In Montone v. State, the Court of Appeals, adopting the majority view, held that Maryland’s habitual criminal statute requires sequential convictions, meaning that the commission of one crime “must follow the offender’s conviction for the preceding predicate crime. Under the theory of these cases, two convictions obtained on the same day may not each serve as a predicate conviction because the criminal has had no chance to reform between the first conviction and the commission of the offense upon which the second conviction is based.”

The court in Montone found persuasive several opinions from other states. “Recidivist statutes are enacted in an effort to deter and punish incorrigible offenders... They are intended to apply to persistent violators who have not responded to the restraining influence of conviction and punishment.” “It is the commission of the second felony after conviction for the first... that is deemed to make the defendant an incorrigible.”

“When an individual has been convicted two times before being exposed to the institutional rehabilitation efforts afforded by a term of imprisonment, the two convictions shall count only as one...”

In State v. Johnson, not quoted in Montone, the court stated:

[I]f one accepts the more modern view that our system of criminal justice is aimed equally at rehabilitating offenders, then it would not be appropriate to sentence an accused as a second offender before he had had an opportunity to amend his ways after initial confrontation with the courts of law.

The great weight of authority in the United States appears to support the latter view... .

The social demand for increased penal sanctions would be directed primarily at the recidivist and not at an individual who had repeatedly committed offenses condemned by the statute but who had never been brought to the bar of justice.

Comparing statutes that require sequencing of convictions with those that do not, the court of appeals recognized in Montone that statutes that do not require sequencing are intended solely for punishment, and statutes that require sequencing are intended, at least in part, for rehabilitation. The court held that Maryland’s habitual criminal statute is designed to identify persons incapable of rehabilitation. The court stated that only when the second conviction follows “an intervening exposure to the correctional system [can there be a determination of] that individual’s capacity for rehabilitation.”

In Garrett v. State, the court also interpreted Maryland’s habitual criminal statute. Judge Wilner, addressing the legislative policy, stated:

“The legislature in enacting such a statute intended it to serve as a warning to first offenders and to afford them an opportunity to reform, and that the reason for the infliction of severer punishment for a repetition of offenses is not so much that defendant has sinned more than once as that he is deemed incorrigible when he persists in violations of the law after conviction of previous infractions.”

By contrast to “conviction” under the habitual criminal statute, Maryland permits probation before judgment upon a first “violation” of driving while intoxicated or driving under the influence of alcohol, but it prohibits such a favorable disposition “for a second or subsequent violation...” In State v. McGrath, the court addressed the “question of whether... ‘violation’ refers to the actual
transgression ... or the subsequent adjudication of or conviction for the transgression...." The court held that "violation" is different from "conviction" and thus a person becomes, under the statute, a subsequent offender for a second violation, even though he has not yet had a first criminal proceeding or conviction.

Juxtaposing the two terms, the court recognized that when the legislature uses the term "violation," the defendant may go beyond the "first" even though there has been no criminal proceeding. On the contrary, when the legislature uses the term "conviction," the defendant cannot go beyond the "first" even though there has been a criminal prosecution resulting in adjudication of guilt and sentencing, and then, subsequent to conviction, there is conduct that produces another conviction.

Also instructive is the analogy to the concept of "reverse waiver" under the juvenile justice system. "Reverse waiver" permits transferring certain cases from criminal court to juvenile court "if a waiver is believed to be in the interests of the child or society." The purpose is to treat as juveniles, and not as criminals, those persons who are amenable to juvenile rehabilitation. The statute prohibits a "reverse waiver" to juvenile court of those juveniles who have already had "one bite of the apple." Subsection (b) provides: "The court may not transfer a case to the juvenile court under subsection (a) if: (1) The child has previously been waived to juvenile court and adjudicated delinquent; (2) The child was convicted in another unrelated case excluded from the jurisdiction of the juvenile court...." If the juvenile has been through the system before, i.e., been adjudicated delinquent or convicted, the legislative determination is that the person be treated as an adult. The key is whether the juvenile has learned from the mistake and become rehabilitated or become a recidivist. The number of counts in the previous proceeding is immaterial to the legislative concern.

Addressing the right of ex-offenders to vote, the legislature did not consider the number of counts relevant. Instead, it focused on the number of criminal proceedings. It was the intent of the legislature to restore the right to vote only to those who were rehabilitated. A person does not demonstrate a lack of rehabilitation by committing a second violation following a first violation. Rather, a person demonstrates a lack of rehabilitation by committing a second violation following a first conviction.

Louisiana offers the only previous judicial analysis of the statutory phrase "for the first conviction only." In State v. Wimberly,79 the defendant was found guilty, in one criminal proceeding, of five counts of drug distribution and two counts of drug possession, and the judge imposed a suspended sentence. Louisiana law provides that the judge may impose a suspended sentence "for the first conviction only." The State argued that, because of the multiple counts, Wimberly was not being sentenced for his first conviction only, and thus a suspended sentence was in violation of the statute. In an analysis that goes to the heart of the issue in Broadwater, the Supreme Court of Louisiana stated:

"[A] defendant is a first offender until he has proved incorrigible after a previous conviction."

Article 893 shares characteristics and objectives with the multiple offender statute, and various repeated offense statutes. The common legislative aim of such statutes is to serve as a warning to first offenders, to afford them an opportunity to reform. Each statute is designed to accomplish these objectives, at least in part, by limiting the judge's sentencing discretion after a first conviction and by erecting a threat of enhanced punishment for subsequent convictions...

The general rule is that a defendant is a first offender until he has proved incorrigible after a previous conviction. Whether the defendant has demonstrated such incorrigibility seems more relevant than whether a defendant faces more than a single charge in his first prosecution. The latter eventuality may depend entirely on fortuitous circumstances or the prosecutor's discretion.76

Measuring "for the first conviction only" from the other direction is People v. Phillips,76 which interpreted the language "convicted of a second or subsequent offense." The court stated: "[A]n enhanced penalty should not be imposed until the offender has had the opportunity to reform due to the salutary discipline of the punishment which he has received as a consequence of his first conviction."77

Singular and Plural Include Each Other

Although most rules of statutory construction evolved from the judiciary, a few came from the legislature. One such principle of interpretation was provided by the Maryland General Assembly in article 1, section 8, as follows: "The singular always includes the plural, and visa versa, except when such construction would be unreasonable."

The statutory language at issue in Broadwater was "in connection with his first such conviction only." Through the use of article 1, section 8, the legislature provided that article 33, section 3-4(c), has the same meaning it would have if it had been enacted as follows: "in connection with his first such conviction or convictions only." This further demonstrates that "first" and "only" taken together mean one time — one criminal proceeding. At that proceeding, so long as it is the "first" such proceeding, it does not matter whether the defendant faces one count or more. Singular and plural are interchangeable as to the word "conviction" because the legislature's concern was whether the defendant was coming before the bar of justice for the first time, and thus subject to rehabilitation under the statute, or whether the defendant was returning to the bar of justice unrehabilitated. In Su v. Weaver,80 the court of appeals faced a similar issue when interpreting the following provision of the Maryland Health Claims Arbitration Act:

Determinations—The arbitration panel shall first determine the issue of liability with respect to a claim referred to it. If the arbitration panel determines that a health care provider is liable to the claimant or claimants, it shall then consider,
assess, and apportion appropriate damages against one or more of the health care providers that it has found to be liable.81

In Su, the trial judge permitted the claimant to introduce into evidence the arbitration panel's determination as follows: "1. LIABILITY: Defendant is Liable." However, the judge denied the physician's attempt to introduce into evidence the accompanying opinion, which contained specific findings as to each count. The claimant contended that "issue" is singular; the physician contended that "issue" can be singular or plural, depending upon the number of counts and theories advanced by the claimant. The court of appeals agreed with the physician, relying on article 1, section 8.

The General Assembly's concern in enacting the legislation at issue in Su was not the number of counts presented by the claimant. Rather, the concern was to have all claims presented at one stage, followed by one apportionment of damages. This can only happen if the allegation, be it one count or many, is presented first, prior to an assessment of damages. The frame of reference was the first versus multiple adjudications because the policy underlying the compulsory arbitration system for malpractice cases would be defeated if the claimants were permitted multiple "bites of the apple."

Similarly, the legislature's concern, when enacting the voting rights restoration statute, was "first" versus "subsequent" adjudications. A "rehabilitation" that would afford the ex-offender the right to vote was offered only after the first adjudication. On the other hand, the rehabilitative policy would be defeated if the convict, having previously been convicted and sentenced, came before the court as a recidivist yet was still entitled to the benefits of rehabilitation.

Consistent with this analysis is the opinion of former Attorney General Burch, interpreting the then applicable version of the statute that entitled a sheriff to a $5.00 fee "for service of a paper not including an execution of attachment."83 Applying article 1, section 8, the Attorney General ruled that "paper" includes paper or papers.84 The legislature's concern was for payment to the sheriff "for service". Like the word "conviction" in section 3-4(c), the word "service" is a term of art lending itself to an argument that each separate document is a separate

service under the statute. Nonetheless, the Attorney General ruled that "[t]he intent is compensation to the sheriff for his efforts in effecting service, which are the same whether the service involves one paper or several papers."84 It would have allowed form to prevail over substance to permit the sheriff to abuse the fee service schedule by counting each paper within a stack as a new service within the meaning of the statute. Similarly, it would have been form over substance, in light of the legislative goal, to permit the State to abuse the right to vote by treating each guilty count in one trial as if it were a separate trial.

Broadwater's position was that the legislature, in its use of the word "conviction", meant a criminal proceeding and not an individual criminal count. However, even if conviction does mean count, as a result of article 1, section 8, it means count or counts. As the court stated in Fogle v. State,85 "the term 'after former felony conviction' does not necessarily mean only one conviction. 'Conviction' may mean in a general sense one or more convictions."86

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**"the legislature, in its use of the word 'conviction', meant a criminal proceeding..."**

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**Remedial Legislation**

Judge Rodowsky stated that "[t]he construction which we adopt is also consistent with the rule favoring liberal construction of remedial statutes."87 The 1974 amendment presented the court with classic remedial legislation. It was designed to do what no prior Maryland law had done — restore the right to vote to rehabilitated first-timers. In accord with the modern, enlightened trend, the legislature intended to remedy the historical wrong of imposing the same lifetime disenfranchisement upon both rehabilitated and unrehabilitated ex-offenders. Statutes that are "remedial in nature, designed to correct existing law... are to be liberally construed in order to advance the remedy,..."88

This particular remedial legislation was also designed to eliminate a civil disability. Any ambiguity as to disfranchisement versus disenfranchisement should be interpreted in favor of restoration of the right to vote and against the civil disability of permanent disfranchisement. The court of appeals "has consistently and repeatedly embraced [the] position" that civil disability statutes should be interpreted in favor of "valuable rights and privileges to be lost...."89 One of the reasons for such an interpretation is the goal of rehabilitating ex-offenders.

Other states construe ambiguities similarly. The Vermont disenfranchisement statute provides: "[T]his chapter shall be liberally construed, so that if there is any reasonable doubt whether a [person should be disenfranchised] the person shall have the right to have the person's name immediately returned to the checklist."90 The West Virginia Attorney General stated:

[W]e should not deprive [the] right to vote, except by clear words of disfranchisement.... He ought to have a voice and representation under principles of free government. True, he has once offended, but he has paid the penalty fixed by the law of his state. Reflect that the Constitution is broad in its grant of suffrage.... To exclude him the language must be clear.... It is wrong to debar of a great privilege except where there is no escape from it.91

Laws governing the qualification and registration of voters should be "construed liberally and favorably toward the right to vote."92 The Supreme Court of Oklahoma similarly stated: "[W]e think (as the majority of courts appear to) that when... the imposition of a penalty as serious as disenfranchisement is involved, the strict legal definition of such terms should be applied."93 Likewise, the Supreme Court of Georgia stated: "Forfeitures are not favored, and courts incline against them. When a statute may be construed so as to give a penalty, and also so as to withhold the penalty, it will be given the latter construction."94

Moreover, civil disabilities, such as disfranchisement, have also been considered criminal or quasi-criminal punishment.95 "The history of disability statutes demonstrates that these laws were inspired in England as punitive measures and were perpetuated by American legislatures without consideration of their rationale or effect."96 Statutes that are penal in nature are strictly construed.97 Any ambiguity as to the punishment intended

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should be resolved, under the rule of leniency, in favor of the person to be punished. 

**Effect of House Bill 617**

The State argued that the defeat, in 1978, of House Bill 617 supports its position. The State argued that House Bill 617 attempted unsuccessfully to accomplish what Broadwater claimed to be the meaning of article 33, section 3-4 (c). The State’s position was that if the law already meant what Broadwater claimed, then there would have been no need to introduce House Bill 617. Broadwater countered this argument on two grounds. 

First, the court of appeals has recognized that the enactment of an amendment does not explain what the law meant prior to the amendment. A fortiori, non-enactment does not explain what the law means. “[T]he fact that a bill on a specific subject fails of passage in the General Assembly is a rather weak reed upon which to lean in ascertaining legislative intent.” Moreover, the relevance of legislative activity, whether resulting in enactment or non-enactment, toward the understanding of the intent of the legislature prior to such activity, is even more dubious when there has been no judicial gloss to make the legislature aware of any statutory defect or ambiguity. Neither the court of appeals nor the court of special appeals had ever interpreted article 33, section 3-4(c), prior to the Broadwater case. In addition, the court of appeals has recognized that legislative attempts, both successful and unsuccessful, may merely seek to eliminate ambiguities in existing law. 

Second, the defeat of House Bill 617 in no way affected the Broadwater case. By taking out of context the words “if simultaneously sentenced” from House Bill 617, the State argued that the bill would have accomplished what Broadwater was arguing. The State misunderstood the two fundamental changes in the law that House Bill 617 would have made, neither of which addressed the meaning of the statute before the court in Broadwater. 

The disqualifying crimes in section 3-4(c) are “theft or other infamous crime.” “Infamous crime” means any felony, treason, perjury, or any crime involving an element of deceit, fraud or corruption. House Bill 617 would have changed the focus of the disqualification from the type of crime involved to the size of penalty imposed. An “infamous crime” would have become “any crime (or combination of crimes, if simultaneously sentenced) for which the total sentence imposed, after deducting any suspension or relief from sentence granted by the court, is confinement in a correctional facility for more than one year or a fine of $2,500 or more, or both.” 

Under section 3-4(c), disenfranchisement for first-timers lasts until completion of the sanction and for recidivists it lasts forever. House Bill 617 would have continued the lifetime disenfranchisement for recidivists and would have changed the period of disqualification for first-timers to the completion of the sanction or one year, whichever is greater.

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**“The disqualifying crimes... are ‘theft or other infamous crimes.’”**

Thus, not only does nonenactment provide no explanation of legislative intent, even if it did the nonenactment would have had to have been of a bill substantially similar to the position argued by Broadwater. House Bill 617 was too dissimilar to have its defeat serve as any message from the legislature as to its intent in 1974 when it changed, through Senate Bill 57, the law of lifetime disenfranchisement. The court of appeals, having already resolved the statutory construction issue, elected not to address the State’s argument surrounding the non-enactment of House Bill 617. 

**Equal Protection**

Broadwater made one nonconstitutional and two constitutional arguments related to equal protection, all of which the court of appeals expressly declined to address. The first argument was that statutes affecting the fundamental right to vote should be construed broadly from the standpoint of the right to vote and strictly from the standpoint of limiting the right to vote. 

Broadwater argued that, even without the court addressing the merits of his equal protection arguments, the mere existence of a nonfrivolous equal protection issue was sufficient for the court to resolve the statutory construction issue in his favor. In *Davis v. State*, Judge Mcluiliffe explained that the stronger the merits of a constitutional challenge, the more the need to interpret the statute in favor of the challenger, thus avoiding the constitutional dilemma. He stated:

As a matter of statutory construction, this Court has consistently adhered to the principle that we will, whenever reasonably possible, construe and apply a statute to avoid casting serious doubt upon its constitutionality. The interpretation urged by the State generates serious equal protection questions. There may be no rational basis for the discrimination that would result from the State’s construction of [the statute].

Broadwater argued that if the court were to rule in favor of the State, such a holding would cast grave doubts upon the constitutionality of article 33, section 3-4(c), particularly in light of the “strict scrutiny-compelling state fundamental right to vote analysis.” When there are two reasonable interpretations, the court should adopt the interpretation that permits it to avoid even reaching the constitutional issue. 

Broadwater’s second equal protection argument was that, because the right to vote is a fundamental constitutional right, if article 33, section 3-4(c), were to restore the right to vote to rehabilitated first-timers who were convicted of one count in one trial, but to impose lifetime disenfranchisement on rehabilitated first-timers who were convicted of multiple counts in one trial, such unequal distribution of the right to vote would fail to satisfy the requisite strict scrutiny test. This test requires a compelling state interest for such discrimination and also requires the least restrictive impact on the right to vote.

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic are illusory if the right to vote is underminded.” It is “a fundamental political right, because [it is] preservative of all rights.” [S]tates distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate... in the selection of public officials undermines the legitimacy of representative government.”
to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." 114 "To the extent that a citizen's right to vote is debased, he is that much less a citizen." 115

Because the right to vote is a fundamental constitutional privilege, any curtailment or denial of that privilege must satisfy the Supreme Court's test of strict judicial scrutiny, requiring the State to demonstrate a compelling governmental interest for such a denial. 116 The Court has stated that, under the compelling state interest test, "a heavy burden of justification is on the State." 117 Even the showing of "a very substantial state interest" is insufficient. 118 Moreover, "the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. . . . Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes [is] not applicable." 119

Not only must denial be compellingly justified, but the justification must be served through the least restrictive of all possible alternatives. In Dunn v. Blumstein, the Supreme Court stated:

Statutes affecting constitutional rights must be drawn with "precision," and must be "tailored" to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." 120

Maryland has likewise recognized that the "right of citizens to vote is a fundamental right in our society and one which is zealously guarded by the courts." 121 In Broadwater v. State, 122 while holding that the right to seek elective office is not a fundamental right, the court of appeals recognized that the strict scrutiny test applies to the right to vote.

With the foregoing framework for analysis, the question becomes how, if at all, does Richardson v. Ramirez 123 affect the application of this constitutional doctrine in the Broadwater case. Richardson addressed the relationship between section one of the fourteenth amendment, the equal protection clause, "in dealing with voting rights as it does," 124 and section two, prohibiting the denial of the right to vote to 21-year-old males, "except for participation in rebellion, or other crime." 125 The Court interpreted section two to permit a state to totally disenfranchise, as a group, all convicted felons. The controlling issue in both the California Supreme Court and the United States Supreme Court was the authority of a state to disenfranchise this group of potential voters, as a group. 126 Although the plaintiffs in Richardson could have challenged the disparity between the means of reenfranchisement available to convicted felons . . . , they did not do so. 127

Broadwater argued that Richardson did not address disenfranchisement of some, but not all, within the "section two" group. If some, but not all, are disenfranchised, the equal protection clause of section one controls. The Court in Richardson recognized this when, notwithstanding its sanction of total disenfranchisement, it remanded the case to address whether there was disparate treatment of convicted felons in different counties and, if so, whether such disparity violated the equal protection clause. 128

Broadwater argued that the Maryland legislature could have elected to disenfranchise all convicted felons. However, when in 1974 it enacted legislation to provide the right to vote to rehabilitated first-timers, it was constitutionally required to provide that right equally to all such people. "[I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, "the Court must determine whether the exclusions are necessary to promote a compelling state interest." 129 As Justice Powell stated: "The right of all persons to vote, once the State has decided to make it available to some, becomes a basic one under the Constitution." 130 The legislature must distribute and restore the right to vote equally because of the requirement of uniform treatment of persons standing in the same relation . . . ." 131

The State countered by arguing that Broadwater did "not cite a single case which holds that a state's disenfranchisement of some or all convicted felons is subject to strict scrutiny." 132 The State continued: Richardson and its predecessors clearly control this case. Indeed, as the circuit court below correctly recognized, in Thiess v. State Administrative Board of Election Laws, 387 F. Supp. 1038 (D. Md. 1974), a three-judge panel rejected an equal protection assault on the very statute assailed here: "State statutes disenfranchising those of its citizens who are convicted of 'infamous crimes' unless pardoned do not contravene the Equal Protection Clause. Thiess, 387 F. Supp. at 1041. In [fact, the] Thiess court tells us that Richardson v. Ramirez represents the final word upon the Equal Protection Claim." 133

Broadwater's third equal protection argument was that, even if the right to vote were not a fundamental constitutional right, if article 33, section 3-4(c), were to restore the right to vote to rehabilitated first-timers who were convicted of one count in one trial, but to impose lifetime disenfranchisement on rehabilitated first-timers who were convicted of multiple counts in one trial, such unequal distribution of the right to vote would fail to satisfy even the rational basis test. He argued that, notwithstanding the historical case of satisfying the rational basis test, the Supreme Court, consistent with the expanding notion of equal protection, has recently held statutes to be violative of the equal protection clause because they were not supported by a rational basis. 134

Conclusion
It appeared all along that the Broadwater case would almost certainly be resolved on statutory construction grounds. The statutory construction issue presented numerous relevant and overlapping principles of interpretation. Although there was authority to support both sides, the analysis supporting Broadwater's position was stronger and the court of appeals was correct to adopt it.

The equal protection issue presented a conflict between the fundamental right to vote and the power of the State to disenfranchise convicted felons. The authority on the State's side was quite strong. Because Broadwater prevailed under the court's resolution of the statutory construction issue, the court was correct to avoid the constitutional question.

The six-year saga of former Senator Broadwater in the federal and state courts has come to an end. As a result of the reinstatement of Broadwater's right to vote by the court of appeals, he becomes eligible to seek public office, and Broadwater has announced that he plans to do so. Consequently, Broadwater now leaves the judicial arena and reenters the political arena.
ENDNOTES

1 A.2d at 422-23.
8 Note, The Effect of Expungement on a Criminal Conviction, 40 S. Cal. L. Rev. 127, 135 & 135 n.75 (1967).
9 Restoring the Right, supra at 731-33, 739.
11 MPC § 306.6 (1962).
14 Collateral Consequences, supra at 1159 (emphasis added).
15 Restoring the Right, supra at 721, 757 (emphasis added).
16 Collateral Consequences, supra at 1147-48.
17 Restoring the Right, supra at 727; see, e.g., Minn. Code Ann. § 609.165, Advisory Committee Comment ("rehabilitation will be promoted by removing the stigma and disqualification to active community participation resulting from the denial of his civil rights").
18 See Collateral Consequences, supra at 1172.
19 Restoring the Right, supra at 756 n.209. Id. at n. 210.
23 Id. at 55.
26 Id. at 1535-54.
27 Md. Ann. Code art. 33, § 3-6(e) (emphasis added).
31 People v. Weinberger, 21 A.2d 353, 251 N.Y.S.2d 790, 793 (1964) ("The use of the term may vary with the particular statute involved, and its meaning presents a question of legislative intent."); State ex rel. Scott v. Cox, 243 S.W. 144, 146 (Mo. 1922) ("The word 'conviction' has more than one connotation. Its implications in a given case are to be determined from the connection in which it is used.").
32 State v. Brantley, 1 Ohio St. 2d 139, 205 N.E.2d 391, 393 (1965) (emphasis added).
33 Smith v. State, 75 Fla. 468, 78 So. 530, 532 (1918) (emphasis added).
34 People v. Black, 122 Cal. 73, 75 P. 385, 386 (1898).
37 Md. Ann. Code art. 33, § 3-4(c).
41 Id. at 608-09, 521 A.2d at 724-25 (citations omitted) (emphasis added).
42 Id. at 609, 521 A.2d at 725 (quoting State v. Conley, 222 N.W.2d 501 (Iowa 1974)).
43 Id. (quoting Coleman v. Commonwealth, 276 Ky. 802, 125 S.W.2d 728 (1939)) (emphasis added by the court of appeals).
44 Id. (quoting Conms v. Commonwealth, 652 S.W.2d 859, 861 (Ky. 1983)) (emphasis added by the court of appeals).
46 262 A.2d at 241-42 (quoting in part Gonzalez v. United States, 224 F.2d 431, 433 (1st Cir. 1955)).
48 Montone, 308 Md. at 613, 521 A.2d at 728.
50 Id. at 113, 474 A.2d at 938 (quoting Annotation, Habitual Criminal Statutes, 24 A.L.R.2d 1247, 1248 (1952)) (emphasis added by Judge Wilner).
54 Id. § 594(a); see In re Rice v. B., 43 Md. App. 645, 406 A.2d 690 (1979).
56 Md. Ann. Code art. 27, § 594(b) (emphasis added).
57 14 So. 2d 666 (La. 1982).
59 414 So. 2d at 672-74 (citations omitted) (emphasis added); see Md. Ann. Code art. 27, § 340(1)(5) (1987) (permitting the prosecution to charge multiple thefts, committed pursuant to one scheme, as one count or as multiple counts).
61 371 N.E.2d at 1219 (citations omitted).
63 Md. Ann. Code art. 33, § 3-4(c).
64 313 Md. 370, 545 A.2d 692 (1988).
66 Id. § 7-402(a)(o).
68 Id. at 780.
70 Id. at 212.
71 Broadwater, 317 Md. at 353, 563 A.2d at 426.
citizenship. . . . No citizen should be disfranchised lightly or on ultra-technical grounds."; In re Merrill, 96 Cal. App. 58, 273 P. 863, 866 (1928) ("the right to vote is a constitutional right, and is not to be denied, unless there is a plain provision of the Code, relative to the method of exercising that right, which prohibits it.").

312 Md. 172, 539 A.2d 218 (1988).

109Id. at 179-80, 539 A.2d at 221-22 (citations omitted).

110Brief of Appellee/Cross-Appellant at 31-47.

G. Helleman Brewing Co., Inc. v. Stroh Brewery Co., 308 Md. 746, 763-64, 521 A.2d 1225, 1234 (1987). In Slate v. Zitomer, 275 Md. 534, 544, 341 A.2d 789, 795 (1975), cert. denied sub nom. Gaperich v. Church, 423 U.S. 1076 (1976), Judge Eldridge applied this principle of adopting an interpretation that avoids addressing the merits of the constitutional issue, stating that the "constitutional argument is not frivolous."


113Id. at 567; see Richardson v. Ramirez, 418 U.S. 24, 83 (1974) (Marshall, J., dissenting) ("The ballot is the democratic system's coin of the realm."); Reynolds, 377 U.S. at 561-62 ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); Oregon v. Mitchell, 400 U.S. 112, 139 (1970) (quoting in part United States v. Classic, 313 U.S. 299, 315 (1941)) ("This 'right to choose, secured by the Constitution,' is a civil right of the highest order."); accord Katzenbach v. Morgan, 384 U.S. 641, 654 (1966) ("precious and fundamental").

114Kramer, 395 U.S. at 627-28 ("whether the exclusions are necessary to promote a compelling state interest. . . . The need for exacting judicial scrutiny"); Evans v. Corman, 398 U.S. 419, 422 (1970) ("purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny"); Reynolds, 377 U.S. at 562 ("infringement of the right of citizens to vote must be carefully and meticulously scrutinized"); Harper v. Virginia Board of Elections, 383 U.S. 663, 383 U.S. at 670 ("classifications which might invade or restrain [the right to vote] must be closely scrutinized and carefully confined"); Dunn v. Blumstein, 405 U.S. 330, 360 (1972) ("exact standard of precision"); Rosario v. Rockefeller, 410 U.S. 752, 768, rehearing denied, 411 U.S. 959 (1973) (Powell, J., dissenting) ("withstand the strict judicial scrutiny called for").

115Dunn, 405 U.S. at 343.

116Id.

117Kramer, 395 U.S. at 627-28 (emphasis added).

118Dunn, 405 U.S. at 343 (citations omitted).

119Id. at 567; see Richardson v. Ramirez, 418 U.S. 24, 83 (1974) (Marshall, J., dissenting) ("The ballot is the democratic system's coin of the realm."); Reynolds, 377 U.S. at 561-62 ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); Oregon v. Mitchell, 400 U.S. 112, 139 (1970) (quoting in part United States v. Classic, 313 U.S. 299, 315 (1941)) ("This 'right to choose, secured by the Constitution,' is a civil right of the highest order."); accord Katzenbach v. Morgan, 384 U.S. 641, 654 (1966) ("precious and fundamental").

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115Dunn, 405 U.S. at 343.

116Id.

117Kramer, 395 U.S. at 627-28 (emphasis added).

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119Id. at 567; see Richardson v. Ramirez, 418 U.S. 24, 83 (1974) (Marshall, J., dissenting) ("The ballot is the democratic system's coin of the realm."); Reynolds, 377 U.S. at 561-62 ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); Oregon v. Mitchell, 400 U.S. 112, 139 (1970) (quoting in part United States v. Classic, 313 U.S. 299, 315 (1941)) ("This 'right to choose, secured by the Constitution,' is a civil right of the highest order."); accord Katzenbach v. Morgan, 384 U.S. 641, 654 (1966) ("precious and fundamental").

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115Dunn, 405 U.S. at 343.

Broadwater also argued that the prosecutor determines which counts to charge and which counts to press to the jury. As the Supreme Court of Louisiana stated, when interpreting the language "for the first conviction only," "whether a defendant faces more than a single count in his first prosecution . . . may depend entirely on fortuitous circumstances or the prosecutor's discretion." *State v. Wimberly*, 414 So.2d 666, 674 (1982). *Cf. Trop v. Dulles*, 356 U.S. 86, 118-19 (1956) (exterritorial discretion resulted as much from prosecutorial discretion within military trials as any other factor).

Broadwater further argued that the reenfranchisement statute, if so interpreted, is fatally flawed because of its overinclusiveness and its failure to tailor to the least restrictive alternative. In *Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa 1974), the court invalidated a statute that prohibited civil service employment of convicted felons. Finding the statute overinclusive, the court stated: "[N]o consideration is given to the nature and seriousness of the crime." *Id.* at 581. The court in *Butts* also found that "the time elapsing since the conviction [and] the degree of the felon's rehabilitation . . . are similarly ignored." *Id.* Finally, the overinclusiveness analysis of *Butts* addressed the law's failure to consider "the circumstances under which the crime was committed . . ." *Id.*; see also *Bullock v. Carter*, 405 U.S. 134, 146 (1972) (statute "extraordinarily ill-fitted to [its] goal; other means to protect those valid interests are available").

Broadwater also argued that the voting restoration statute, if so interpreted, is fatally flawed because it contains an unconstitutional irrebuttable presumption. The State's interpretation classifies together, and disenfranchises for life, both recidivists and rehabilitated first-timers convicted of multiple counts in one trial. The recidivists, prior to becoming recidivists, had the opportunity to restore their right to vote by becoming rehabilitated, i.e., by never again being convicted of a disqualifying crime, assuming only one count in the first trial. By contrast, rehabilitated first-timers, who were convicted of more than one count in one trial, are irrefutably presumed not capable of rehabilitation. They will never be permitted even one chance at rehabilitation because they received their second conviction along with their first conviction. The statute declares that, as a matter of law, all first-timers convicted of one count in one trial, who do not become recidivists, are rehabilitated, and thus their right to vote is automatically restored upon completion of their sanction. On the other hand, the statute declares that, as a matter of law, all first-timers convicted of multiple counts in one trial, even if they never become recidivists, are, and for the rest of their lives remain, unrehabilitated and incapable of becoming rehabilitated, and thus their right to vote is automatically denied for life. In *Carrington v. Rash*, 380 U.S. 89 (1965), the Supreme Court stated: "[T]he presumption here created is . . . definitely conclusive. . . incapable of being overcome by proof of the most positive character." . . . Not one of them can ever vote." *Id.* at 96 (citation omitted). In *Rosario*, the Court analyzed the common thread among six of its prior rulings, each holding unconstitutional a voting statute. "In each of those cases, the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote." *Id.* at 757; see also *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969) (striking down a "rigid, arbitrary formula").

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