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Practitioner's Comment

Comment

Notes

GENERAL STATEMENT

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PRACTITIONER'S COMMENT

All in the Family: Family Dynamics and Successful Business Succession Planning

M. MICHAEL BABIKIAN

I. INTRODUCTION

Estate planning has traditionally been defined as the systematic disposition of wealth from one generation to the next. The purpose of this article is to refine this definition and its related components in those cases where a family business constitutes a substantial portion of the family fortune, and continuation of the family business is the primary objective. There are two crucial aspects to the successful disposition of a family business. The first revolves around the definition of successful. It may be considered that a succession plan created in a tax-efficient manner is likely to be successful. However, a second aspect - properly dealing with the "softer" issues, namely family dynamics - is one of the most important factors that, in all probability, leads to a successful family business succession.

II. PROBLEM

One indication of a successful family business succession plan is the transfer of one generation's wealth to the next generation. However, 70% of all family business successions fail to achieve this objective.[1] Consequently, over 90% of all family business successions will fail in transitioning wealth within three generations.[2] "Short-sleeves to

1. ROY WILLIAMS & VIC PREISSER, PREPARING HEIRS: FIVE STEPS TO A SUCCESSFUL TRANSITION OF FAMILY WEALTH AND VALUES 18 (Robert D. Reed Publishers 2003).

2. The 90% figure stated is based on application of the 70% figure quoted in the previous sentence. If 100 family businesses are used to exemplify this calculation, 70% or 70 of the family business successions would fail to properly transition wealth from generation one to two. This means only 30 of the 100 family business successions would be successful from generation one to

short-sleeves within three generations" is an oft-quoted statement. This succinctly states the phenomenon of wealth typically not surviving three generations. The quote summarizes the dilemma of a family that earns wealth during the first generation (hence the short sleeves) while the second generation (wearing long sleeves) squanders the fruits of the first generations labor. Since the failure rate of family business succession is so high, the third generation is left to their own devices for sustenance and, accordingly, returns to the ranks of the short sleeved.

III. CAUSES

Failure to transfer family business wealth typically occurs in one of two ways. Either the sale of the business or the operation of the ongoing business is mishandled from a family dynamics standpoint. Although many estate planners appreciate the reality of this, few understand the dynamics involved in breaking the cycle.

IV. SOLUTION

Family business succession planning involves many of the traditional notions of estate planning, but it also involves a unique asset - the family business. Typically, a significant portion of the family wealth is comprised of the family business. The family business is typically idiosyncratic when compared to other assets in a wealthy family's portfolio.[3] Since a family business is a unique asset, it requires particular attention. For these and other reasons family business succession planning can be one of the most challenging undertakings for an estate planner.

Very few specialties within the financial services arena are more demanding for professionals than succession planning where a family business is involved. There is much more to integrating this asset in a successful estate plan than drafting a buy-sell agreement funded with life insurance and then providing for estate equalization to the children not involved in the family business. It is not sufficient to be

two. From generation two to three another 70% of the family business successions would fail. Therefore, 21 (70% of 30) of the 30 remaining family businesses would fail to successfully transition wealth. This would leave a total of 9 (100-70-21=9) family businesses that successfully transitioned wealth from generation one to three. Accordingly, over 90% (100-9>90) of all family business successions would fail in transitioning wealth within three generations.

3. While many assets can be divided into shares and distributed to family members, a family business requires the family to work through numerous troublesome issues due to the difficulty in dividing the ownership and operation of the business.

knowledgeable in tax efficient planning techniques. An effective advisor must not only have a thorough understanding of financial products and their specialized uses, asset protection, the latest estate and tax planning laws, but also understand family-dynamic planning techniques that are more likely to result in a successful disposition of wealth to subsequent generations.[4]

For example, an estate planner dealing with a family business must determine if the business is going to be retained by the family and, if so, who will operate it. These are just a few of the family dynamics issues that must be addressed in the context of a family business if it is to have a chance to succeed in future generations.

V. Discussion

A. Extent

Family businesses truly are the "life blood of the American economy."[5] It has been estimated that "40% of the national's GNP is attributable to family businesses" and that "more than nine out of ten new jobs are the result of family businesses."[6] An interesting fact about wealth is that only 20% of all workers in America are self-employed, yet they make up 66% of the millionaires.[7] As it was pointed out in a 2001 survey, there are "7.2 million people worldwide with investable assets of at least $1 million, up from 5.2 million in 1997. These 7.2 million millionaires control about a third of the world's wealth . . . . [T]here are also 425 billionaires, 274 of them in America alone."[8]

There are many different statistics that are cited for the amount of money that will change hands in the near future. A Boston College study conducted in 1999, and subsequently repeated and reaffirmed in 2003 cites $56 trillion as a middle level estimate of wealth transfers for the 50-year period between 1998 and 2052.[9] The study only counted

4. The combination of these attributes and skills makes for a very challenging proposition and allows one to appreciate the relatively low level of successful family business successions despite the care and expense typically incorporated in a succession plan. At the same time the advisor is constantly admonished to keep the planning simple.

5. Edward F. Koren, *Preserving The Patriarch's Patrimony For The Prodigal And Other Paranormal (Or Normal) Progeny: Non-Tax Considerations In Family Business Succession Planning*, 31- 12 UMLCEP § 1200 (2000).

6. *Id.*

7. Thomas J. Stanley & William D. Danko, The Millionaire Next Door: The Surprising Secrets of America's Wealthy 8 (Longstreet Press, Inc. 1996).

8. *Id*.

9. Williams & Preisser, *supra* note 1, at 9.

estates with a net value of $1 million or more. The low and high estimates for wealth transfers within the same 50-year period are $28 trillion and $118 trillion, respectively. All of the figures supplied are in 1998 dollars. Regardless of the study or methodology used, it's generally agreed that a great deal of wealth will change hands in the foreseeable future.

B. Causing Failure by Excluding Family Dynamics

Given the importance of family businesses to the United States economy, what causes the high rate of failure in family business succession planning? A 1993 study by Coopers & Lybrand indicated that only between 25% and 30% of family businesses had a succession plan in place.[10] This lack of planning is certainly at the heart of the low success rate of family business succession.[11] The stress of paying estate taxes on the value of the business may well be a reason for this lack of success. The primary reason is that family dynamics succession planning did not "allow the family to bridge the generation gap by having trained and capable successors in place."[12]

Given the fact that the majority of family business successions will fail, the next logical question is what causes the failure. Who or what is to blame? Certainly there are many potential flashpoints in the chain of family business succession planning. The Williams Group focused on this issue. Their research focused on determining the causes behind the low 30% success rate (or the failure rate of 70%) from one generation to the next and the astounding failure rate of over 90% within 2 to 3 generations.[13] They also looked at the differences between families who were part of the 30% success group and compared them to the families that were in the 70% failure group. The study looked at 3,250 families that attempted to transition wealth from one generation to the next.[14]

According to the Williams group study, family business successions fail 60% of the time due to communication breakdown within the family unit, 25% of the time because of failure to prepare heirs,

10. Koren, *supra* note 5, at § 1200.

11. Many financial advisors believe that adequate tax planning will solve the problem of intergenerational taxation eroding family wealth but, in reality, tax planning is merely one of many steps in the process, not a solution to the problem.

12. Koren, *supra* note 5.

13. Williams & Preisser, *supra* note 1, at 23.

14. *Id.* at 30. While the failure rate of 70% seemed consistent from one geographical location to the next (and thus unaffected by the economic style or tax system), it was also consistent regardless of variations in strengths of regional economies.

and 15% of the time because of all other causes.[15] As the Williams Group Study points out, "less than 3% of the failures are due to professional errors in accounting, legal or financial advisory planning, or to estate taxes."[16] This means that advisors have the skills to help with the technical transition of wealth from one generation to the next.

In spite of this, the study shows that the transfer is ineffective. The creative and technical planning is undermined by failures in the softer issues of communication within the family unit, unprepared heirs, and lack of a family mission. In fact, the Williams Group study showed that the largest element in the 15% category was the lack of a family mission.[17] It is for this reason that advisors must pay greater attention to these *soft* issues in order to truly help clients. The technical skills of wealth transfer are certainly important; they should in no way be diminished. However, it appears that advisors need to focus on the non-technical skills. This is because the type of planning required is not necessarily technical in nature. In other words, as stated above, legal and tax planning does not ensure a successful transition of wealth. Rather, it is how well the family is prepared to deal with the transition of wealth that is much more important. Many advisors can attest to the fact that in spite of all of the wonderful and creative planning that was likely instituted by a team of professionals, the family still managed to mess things up.

Notwithstanding the fact that, "[w]hat trust and estate attorneys establish in terms of the division of assets and their control can affect how family members deal with each other for several generations,"[18] it is not until clients die that we see the results of the trusts and estate plans that have been established many years prior. The results are usually negative for the human capital side of the equation as opposed to the financial capital side. Attorneys and planners have the mistaken belief that if a document has the right wording, it is less likely that there will be conflict between family members over the issues covered. However, as pointed out by Brown and Rubin, "[i]f family harmony is the goal, advisors must address how a family is going to manage joint assets in the future."[19] This cannot be overstated when the asset in question is a family business.

15. *Id.* at 49.

16. *Id.* at 48-49.

17. *Id.* at 46.

18. Fredda Herz Brown & Mark B. Rubin, *Attitude Adjustment*, 143 TR. & EST. 57, 57 (2004).

19. *Id.*

In fact, "[t]he origins of the 70% failure rate in estate transitions lie within the family itself . . . [which] implies that solutions to the challenge of insuring success in transitioning family values and wealth also lie within the family itself."[20] Accordingly, the cause and solution of such problems do not lie with the technical plan, but rather with the "softer" issues within the family.

C. Success through Identifying Family Dynamics Factors

The two steps involved in family succession planning should encompass dealing with the family dynamics first, and then, the technical planning issues.[21] In other words, the tax tail should not wag the proverbial planning dog. Tax laws should not determine how a business is passed from one generation to the next. Rather, the estate planner should plan with the family's overall well being in mind, and then, determine the most efficient means of transmitting the wealth to the next generation. Advisors should adopt three of the best practices in this area: an expanded definition of client, an expanded definition of capital, and a more relationship – less transaction – oriented mode of dealing with clients.[22]

The Williams Group study, which compared families with successful family business successions to those that were unsuccessful, found that prerequisites to success most frequently included: 1) total family involvement; 2) a process that integrates the decision made by the entire family; and 3) the learning and practicing of certain skills which include communication, openness, trust, accountability, team consensus building, shared values, and unifying behind a common mission.[23] These findings were significant because they turned conventional wisdom on its head. In the past, other factors, such as estate taxes and poor technical advice, were considered as the cause of wealth succession failure. In fact, the attributes of the family that are more likely to lead to a successful business succession are the attributes of a healthy family. They typify a family that respects the individuals, but works as a cohesive unit and are the same factors that constitute any successful organization that is made up of individuals.

20. Williams & Preisser, *supra* note 1, at 2.

21. Koren , *supra* note 5, at § 1200 (pointing out that anticipating transitions between generations is an opportunity for a family to define how it would like to establish the structures, mechanisms and education programs for decision making over time.).

22. *Id.*

23. Williams & Preisser *supra* note 1, at 31.

These are also the same factors that make up successful teams - from workplace project teams to sports teams.

Clearly, it is much more difficult and time consuming to use a consultative approach where the voices of the individuals are heard and reflected in the decision of the whole. However, this is much more likely to result in a successful family business succession. In law school, estate planning and succession are presented as the opportunity for an individual to exercise *dead hand control* over beneficiaries. This concept does not deal with the likelihood of success. It deals with documents or succession planning in the abstract. The concept of parents controlling what happens in the future does not deal with total family involvement which would more likely ensure success. Once mom and dad are no longer there to make all of the family decisions, one or more of their children may suddenly feel empowered by the threat of a lawsuit to throw a wrench into a succession plan that took many generations into account. The expertly prepared succession plan and tightly written documents cannot prevent a disgruntled family member from destroying the hard work of a generation.

D. Success through Integrating Family Dynamics Factors

A financial advisor who includes family dynamics factors in his or her planning should consider enlisting the help of a professional that deals with the psychological issues of family wealth. Wealth has a profound impact on people. In fact, "[a]lthough affluence has always been a double-edged sword, it has become an increasingly sharp and dangerous one in recent years."[24] The impact of wealth is two-sided; it affects both the generation transferring the wealth and the generation receiving the wealth. Parents are increasingly aware of and concerned with the negative impact of wealth, which includes lack of motivation to work/achieve, laziness, activity overload, overindulgence, sense of entitlement, insularity and snobbery, and extreme materialism.[25] As pointed out by Williams and Preisser, "[t]hose who make plans to transition wealth are ultimately concerned about its impact on the lives and well being of their beneficiaries."[26]

Books such as *Silver Spoon Kids*[27] help parents prepare their children for the influence of wealth when a business succession occurs in the future. This preparation "requires a broad spectrum of study and

24. Eileen Gallo & Jon Gallo, Silver Spoon Kids 1 (Contemporary Books 2002).
25. *Id.* at 3.
26. Williams & Preisser, *supra* note 1, at 12.
27. Gallo & Gallo, supra note 26.

experience." It may not suffice with "sending heirs off to college, or even to a specialized business school to learn finance and economics – thereafter returning to manage the family assets."[28] The quality of the heirs' preparation will shape "the outcome to the central concern that seems to occupy the mind of every parent and/or spouse: 'Will this wealth help or harm my family?'"[29]

E. Success Through Implementing Family Dynamics

One of the traits of families that successfully transitions wealth is that they have a process that implements the decisions made by the entire family.[30] This typically starts as a family mission statement that is built on the consensus of the family. This and the other important facets of the family are built into the estate plan. This second step ensures that all of the important decisions that have been made are not lost, but rather memorialized in the business succession plan documents.

Finally, learning and practicing certain skills that make successful business succession more likely is very important. As a logical corollary, these skills will not only increase the likelihood of a successful wealth transition, but may also promote family harmony in general. The Williams Group study found that "most families understood what should be done and what could be done, but they lacked the will or the skills to put that knowledge into practice."[31] The focus should be more on implementing and practicing than learning. While people know many things that they should or should not do, they often do not have the skills to implement the change and practice it on a regular basis. For example, most people today agree that smoking is hazardous to one's health, yet there are many people that do not practice what they have learned. Human behavior is such that, if we do not practice what we learn on a regular basis, we will not change. Accordingly, not only must the family learn the skills that make successful business succession more likely, but they must also practice them on a regular basis.

28. Williams & Preisser, *supra* note 1, at 13.

29. *Id.*

30. *Id.* at 33.

31. *Id.* at 51.

VI. A New Look at Family Succession Planning – Consequent From the Inclusion of Family Dynamics Factors

A. Assets Redefined

An advisor may have a tendency to view assets in terms of what can be placed on a balance sheet. However, family business advisors must expand their understanding of assets to include not only capital assets, but human assets as well. Business assets beyond traditional capital assets must be identified in order to ensure that they will pass to the next generation and beyond. Traditional concepts of estate planning involve the disposition of wealth or assets from one generation to the next. Successful succession plans will take other aspects into consideration, such as the emotional and social elements of family members.

B. Client Redefined

Many times, an advisor thinks of the individual who created the business as his client. However, in the context of a family business, the client is the whole family relationship. Serving multiple clients may complicate matters for the family advisor, but it can prove to be much more rewarding for the client.[32] It can also position the advisor as a multi-generational advisor. Accordingly, advisors must learn to expand their definition of client both in a longitudinal and latitudinal fashion. The advisors must expand their understanding of the family relationships over multiple generations (longitudinal). They must also look at the growth of families to include in-laws, or as many clients like to call them out-laws (latitudinal).

C. Expanded Role of Advisor

An advisor may approach the client-professional relationship from the standpoint of an expert. The financial advisor has expert information that the client does not have, and thus, provides answers to problems.

On the other end of this spectrum is a pure counselor who does not provide answers, but actually directs the client's discussion of issues to a workable solution. Counselors are more process oriented while experts are more conclusion oriented. Financial advisors would

32. Koren, *supra* note 5, at § 1200. Clearly, there are ethical and conflict-of-interest issues when attorneys serve more than one client. Yet many manage the conflicts and find it not only worthwhile, but also rewarding.

better serve their client's needs by falling somewhere in between a pure counselor and a pure expert. The advisor should take a more consultative approach.

Advisors should ask different questions. For example, "What do you want as your legacy?" A client may often see his or her legacy as something other than the money or the wealth, although that is certainly an important component. Nonetheless, they may see their legacy as the character of their children or the charitable involvement of their heirs.

D. Family Governance Plan

Families need a plan for governing themselves. Advisors are very accustomed to developing and reviewing business plans, but they are typically not as familiar with family governance plans. Families should hold regular meetings where they consider the business of the family. This is very similar to what a business does. A family that is made up of many people, much like any other entity, must determine how it is going to govern itself. A family can develop a mission, a vision, and values which will all be used to determine and test proposed courses of action.

Decisions can be made in a number of ways. The two most popular are vote or consensus. While voting for an outcome is much easier, it often leads to future conflicts as many of the family members may feel that they do not have a voice. A preferable, but more difficult approach may be to use consensus. This approach is more involved, but it bears with it the likelihood of fewer conflicts in the future.

Furthermore, the path to family business leadership must be clearly marked with educational and experiential requirements. The family governance plan must account for those who enter the family business. This factor alone should decrease family conflicts. Family members typically select who is to take over the business in a very subjective fashion. Many patriarchs or matriarchs select the "fair haired child" to assume the family business leadership role even if he or she is not best suited for the job. This may prove to be a path to divisiveness and jealousy. Ultimately, this can destroy the business despite its having the best talent at the helm. The patriarch or matriarch may not see the problems come to fruition because the ill feelings may not surface until the parents have passed away. At that time the siblings that did not have a voice because they were not hand picked as the leader of the business may now find themselves in the interesting

position of wielding a great deal of power. They now have the ability to disrupt the family succession plan by way of litigation or the like.

Many of these issues can be avoided by using consensus within the family unit to determine how and when individuals enter the family business. The creation of objective hiring guidelines rather than the subjective practices of many family businesses may provide a better solution. This is often difficult for families to do because many entrepreneurs do not create lines of separation between their family and business, but it can prove to be quite rewarding for future generations.

E. Family Business Transfer Redefined

Experts have differing definitions of a successful transfer of wealth. Pursuant to one definition, the family wealth remains under the control of the intended beneficiaries.[33] This definition is broad enough to classify a sale of the family business to individuals outside of the family as a successful transfer of wealth. The sale of the business merely converts the asset, in this case the family business, into another form such as cash. This is a reformatting of the wealth rather than a loss of the asset. While this definition may be satisfactory for many assets, it is inconsistent with the goal of maintaining the family business. Alternatively, Williams and Preisser define an unsuccessful transfer of wealth as "[a]ny combination of taxes, losses, economic downturns, missed market opportunities, litigation expenses," or any other acts which involuntarily remove specific assets from the control of the beneficiaries.[34] Accordingly, the definition of a successful transfer of wealth is dependent upon the intended beneficiaries remaining in control of the assets after the transfer. Where the objective is to retain the family business and family harmony, it must be recognized that some family members may wish to retain the business while others want the wealth in another form. The latter must be satisfied with other assets.

VII. Conclusion

The foundation of a successful transfer of the family business involves a succession plan created by competent advisors. More importantly, it requires proper attention afforded to the "softer" issues – family dynamics. Consideration of family dynamics in family business succession planning makes it more likely that the succession plan will

33. Williams & Preisser, *supra* note 1, at 15.

34. *Id.*

be properly carried out. This is because advisors will improve the likelihood of success through an expanded definition of client and capital and a more relationship oriented mode of dealing with clients, consequent from dealing with family dynamics factors.

COMMENT

Protecting Society from the "Criminal at Heart": A Search for a Solution to Inconsistent Judicial Application of the Multiple Conviction Clause of the Deportation Provision of the Immigration Statute

STEVEN MARCUS

I. INTRODUCTION

One of the most important objectives of American immigration policy is to protect this nation's interests by excluding or deporting those found to be undesirable. The immigration provisions are designed to further this selective immigration policy by regulating the flow of foreign nationals into the country.[1] The law defines certain undesirable foreign nationals by grouping them into general categories of inadmissibility and deportability based on health, criminal activity, national security concerns, moral, economic and other legally significant grounds.[2] Once admitted into the United States, foreign

1. The current provisions of the immigration law are provided in the Immigration and Nationality Act of 1952, 66 Stat. 163, *amended by* Immigration Act of 1990, 8 U.S.C. §§ 1 - 1778 (1990).

2. Pursuant to 8 U.S.C. § 1182(a), aliens who fall within one of the following categories are ineligible to receive visas and ineligible to be admitted to the United States: (1) health-related grounds; (2) criminal and related grounds; (3) security and related grounds; (4) public charge; (5) labor certification and qualifications for certain immigrants; (6) illegal entrants and immigration violators; (7) documentation requirements; (8) ineligible for citizenship; (9) aliens previously removed; and (10) miscellaneous grounds. Please note that inadmissibility provisions are also applicable to 8 U.S.C. § 1255, which regulates acquisition of permanent residence status in the United States, commonly known as Green Card.

nationals can be deported only if found to be in violation of one of the deportability provisions of the Immigration and Nationality Act.[3]

An immigration law provision that aims to protect this country from any external threat is the removal measure directed at undesirable foreign nationals who are involved in criminal misconduct.[4] Pursuant to section 237(a)(2)(A)(ii) of the Immigration and Nationality Act,[5] a foreign national is deportable for multiple convictions involving moral turpitude, not arising out of a "single scheme of criminal misconduct."[6] In particular, the statute provides for deportation of those foreign nationals who commit two or more crimes involving moral turpitude.[7] However, the *single scheme of criminal misconduct* language of the statute effectively provides for an exception to this deportability legislation. Criminal acts that arise out of a *single scheme of criminal misconduct* are not deemed to be "multiple crimes"[8] under the statute.[9] As such, these inherently related offenses do not present sufficient grounds for deportability under this provision.

3. 8 U.S.C. § 1227(a) provides for any alien who is admitted to the United States to be removed if the alien is within one or more of the following classes of deportable aliens: (1) inadmissible at time of entry or of adjustment of status or violates status; (2) criminal offenses; (3) failure to register and falsification of documents; (4) security and related grounds; (5) public charge; and (6) unlawful voters.

4. Despite functional similarities, the inadmissibility and deportability provisions maintain some technical differences. Both inadmissibility provision, 8 U.S.C. § 1182 (a)(2)(B), and deportability provision, 8 U.S.C. § 1227(a)(2)(A)(ii), prohibit admission and allow for deportation of foreign nationals who are repeated criminals. There are the following notable differences that pertain to the topic of this article. 8 U.S.C. § 1182 (a)(2)(B) inadmissibility statement contains a categorical statement of inadmissibility for foreign individuals who are barred from entering the United States based on the convictions of "2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from *a single scheme of misconduct*, and regardless of whether the offenses involved moral turpitude . . . ." (emphasis added) 8 U.S.C. § 1182 (a)(2)(B). The deportability provision of 8 U.S.C. § 1227(a)(2)(A)(ii) regulates and defines the meaning of *multiple criminal convictions* as "two or more crimes involving moral turpitude, not arising out of *a single scheme of criminal misconduct* . . . ." (emphasis added) 8 U.S.C. § 1227(a)(2)(A)(ii). In addition to unexplained statutory differences, the courts have struggled to interpret these legislative provisions.

5. 8 U.S.C. § 1227(a)(2)(A)(ii).

6. *See* 8 U.S.C. § 1227(a).

7. *See* Jordan v. De George, 341 U.S. 223, 231 (1951) (pointing out that lack of statutory definition for the term "moral turpitude" has always posed a problem to the judicial system). *See also* Crimes Involving Moral Turpitude and Controlled Substance Violators, 22 C.F.R. § 40.21 (2005); *Jordan*, 341 U.S. at 235 (establishing that an act that involves moral turpitude is conduct that is denoted by baseness, vileness or depravity in the private and social duties, owing to one's fellow man or society in general, contrary to accepted and customary rules, and is dependent upon depraved or vicious motives on the part of the foreign national).

8. *See* 8 U.S.C. § 1227(a)(2)(A)(ii).

9. *Id.*

The problem arises when various federal jurisdictions attempt to apply this provision of the law. Because the statute does not provide a definition of the term *single scheme of criminal misconduct*, different federal judicial entities and jurisdictions adhere to inconsistent standards. This lack of definitive language in the statute has resulted in inconsistent interpretation and application of federal immigration law.

This comment aims to resolve these differences by attempting to define the term *single scheme of criminal misconduct* by means of reconstructing legislative history and underlying public policies behind the legislative evolution of the deportability provision. The comment also sets forth a flexible standard to aid federal appellate courts in rendering uniform judicial application of the statutory language in section 237(a)(2)(A)(ii)[10] that is consistent with the Congressional intent.

II. Background

Currently, there are at least three different judicial approaches to interpreting the multiple conviction clause of the deportability statute. These include the *common or single plan approach*, the *reflection approach* and the *single criminal episode approach.*

Common or Single Plan Approach (Second, Third, and Ninth Circuit Courts of Appeals)

The Ninth Circuit has consistently upheld its *common or single plan* test for determining whether *a single scheme of criminal misconduct* exists. This Circuit has held that where an alien presents credible and uncontradicted evidence that the multiple criminal acts "were planned at the same time and executed in accordance with that plan,"[11] these acts will be deemed arising out of a *single scheme of criminal misconduct*. This would not make the alien deportable under the statute.[12]

10. *Id.*

11. Gonzalez-Sandoval v. INS, 910 F.2d 614, 616 (9th Cir. 1990).

12. *See* Wood v. Hoy, 266 F.2d 825 (9th Cir. 1959) (holding that a single scheme existed because two robberies were planned by the participants at the same time, and were committed within three days of each other, by the same people, using the same means). *See also Gonzalez-Sandoval*, 910 F.2d at 617 (holding that where two robberies of the same bank which occurred within two days of each other, were conceived and planned by defendant at the same time, they thus arose out of a *single scheme of criminal misconduct*). *But see* Leon-Hernandez v. INS, 926 F.2d 902, 905 (9th Cir. 1991) (holding that two acts of sexual misconduct that were part of an ongoing relationship between the alien and a person under the age of 16, were not intended to be a part of the asserted scheme because a substantial period of nine months separated the two crimes).

The *common or single plan* courts have construed Congressional intent, as memorialized into this legislative provision, to give the *common or single plan* alien a second chance, while not sparing the *non-common or single plan* recidivist.[13] In *Leon-Hernandez v. INS*,[14] the court held that a *single scheme of criminal misconduct* must arise out of a "nebulous intention to repeat the crime."[15] The court explained that the *single scheme* is meant to be associated with *a common plan* that was devised prior to execution of such pre-planned criminal misconduct:

> The word "scheme" implied a specific, more or less *articulated and coherent plan or program of future action*, much more than a vague, indeterminate expectation to repeat a prior criminal *modus operandi*. As used in the statute, "scheme" is not to be construed as an abstract concept or strategy capable of future application at any time and any place, but planned definitely for none. (emphasis added)[16]

Lack of Substantial Interruption or Reflection Approach (First Circuit Court of Appeals)

Although similar to the *common or single plan* test, the First Circuit has taken a different approach to interpreting the statute. The court in *Pacheco v. INS*[17] interpreted the statutory language to refer to "a temporally integrated episode of continuous activity."[18] The *Pacheco* court held that in order to find a *single scheme of criminal misconduct* within the meaning of the statute, the "scheme must take place at one time and there must be no substantial interruption that would allow the participant to disassociate himself from his enterprise and reflect on what he has done."[19]

13. *See* Nason v. INS, 394 F.2d 223, 227 (2nd Cir. 1968), *cert. denied*, 393 U.S. 830 (1968) (holding that two crimes of mail fraud were part of a single scheme because, with the exception of usage of different fictitious names, the alien committed crimes identical in every respect); Michel v. INS, 206 F.3d 253 (2nd Cir. 2000); Sawkow v. INS, 314 F.2d 34 (3rd Cir. 1963) (holding that two crimes of vehicular theft, which occurred within a one day interval, were part of a single scheme because the crimes were of the same nature and committed within a short period of time).

14. *Leon-Hernandez*, 926 F.2d 902.

15. *Id.* at 905.

16. *Id.*

17. Pacheco v. INS, 546 F.2d 448 (1st Cir. 1976), *cert. denied*, 430 U.S. 985 (1977).

18. *Id.* at 452.

19. *Id.* at 451 (ordering deportation of an alien who was convicted of two counts of breaking and entering with intent to commit larceny in the case where two crimes were separated by a two-day interval in part because the alien was drunk before and during commission of the criminal acts). *See also* Balogun v. INS, 31 F.3d 8 (1st Cir. 1994) (holding that alien's convictions

Single Criminal Episode Approach (Board of Immigration Appeals, Fourth, Fifth, Seventh, and Tenth Circuit Courts of Appeals)

The most rigid interpretation of the statute is provided by the Board of Immigration Appeals (hereinafter "the Board"). According to the Board's interpretation of the statute, "a transaction that morally constitutes a single crime is a single scheme, even if two crimes technically were committed or flowed from and were the natural consequence of a single act of criminal misconduct."[20] Upon performance of an act which constitutes a complete, individual, and distinct crime, the foreign national becomes deportable upon another commission of such an act, even though one may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct.[21]

Specifically, *In Re Adetiba*[22] reflected the Board's unwillingness to "conclude that Congress intended by the 'single scheme' language to insulate from deportability individuals who formulate a plan at one time for criminal behavior involving multiple separate crimes, while making deportable those who commit only two such crimes without a

involving defrauding different insurance companies by use of mails with different aliases were not part of *single scheme of criminal misconduct*).

20. In Matter of D, 5 I. & N. Dec. 728, 729-30 (B.I.A. 1954), the Board of Immigration Appeals upheld the deportation order of an alien who was convicted of two separate crimes of false pretenses and statutory violation, occurring on two separate occasions. The Board interpreted the statute in the following manner:

> To us, the natural and reasonable meaning of the statutory phrase is that when an alien has performed an act which, in and of itself constitutes a complete, individual and distinct crime then he becomes deportable when he again commits such an act, provided he is convicted of both. The fact that one may follow the other closely, even immediately, in point of time is of no moment. Equally immaterial is the fact that they may be similar in character, or that each distinct and separate crime is a part of an overall plan of criminal misconduct. We differentiate the foregoing situation from that wherein two crimes flow from and are the natural consequence of a single act of criminal misconduct. That is, we distinguish it from the case where technically there are two separate and distinct crimes, but morally the transaction constitutes only a single wrong. For example, a counterfeiter may be indicted in one count for possessing a bill, and in another for passing it, though he cannot pass it without having possession; so also, a person might break and enter a store with intent to commit larceny and in connection therewith commit an assault with a deadly weapon. *Id.* at 729-30.

See also Iredia v. INS, 981 F.2d 847, 849 (5th Cir. 1993) ("Under the INS interpretation, a transaction that morally constitutes a single crime is a single scheme, even if two crimes technically were committed or flowed from and were the natural consequence of a single act of criminal misconduct." (citing *In Matter of D*, 5 I.&N. Dec. at 729-30)).

21. *See* In Re Adetiba, 20 I. & N. Dec. 506 (B.I.A. 1992) (finding that an alien accomplished a single criminal object by use or attempted use of credit card, obtained through fraud, and the use of any one credit card was not the natural consequence of a single act of criminal misconduct).

22. *Id.*

plan."[23] The Board interpreted the language of the statute as it did many times in the past,

> to mean that when an alien has performed an act, which, in and of itself constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct.[24]

The Board reasoned this approach to be a better one, undoubtedly because its majority saw "separate and distinct crimes"[25] even if such acts were "in furtherance of a single criminal episode."[26]

The Fourth, Fifth, Seventh, and Tenth Circuits chose to follow the Board's interpretation of the *single scheme of criminal misconduct* language of the statute,[27] some fully deferring to the agency's interpretations.[28]

Uneven Applicability of the Current Deportability Provisions, Example

As an example of uneven applicability, let's take a college freshman, who went out with her girlfriends on too many occasions to cele-

23. *Id.* at 520.

24. *Id.* at 514-5 (citing Matter of B-, 8 I. & N. Dec. 236 (B.I.A. 1958); Matter of M-, 7 I. & N. Dec. 144 (B.I.A. 1956); Matter of J-, 6 I. & N. Dec. 382 (B.I.A. 1954); Matter of Z-, 6 I. & N. Dec. 167 (B.I.A. 1954); Matter of D-, 5 I. & N. Dec. 728 (B.I.A. 1954)).

25. *Id.*

26. *Id.*

27. *See* Nguyen v. INS, 991 F.2d 621 (10th Cir. 1993) (holding that vehicular theft and shooting of police officer, occurring within a short span of time, were not part of a *single scheme of criminal misconduct* because one crime was not necessary for the other one's completion); United States v. Hudspeth, 42 F.3d 1015 (7th Cir. 1994) (en banc) (holding that a series of burglaries where intruders broke through one party wall after another to rob each store in a strip mall count as multiple predicate offenses, even though the crimes closely timed); Iredia v. INS, 981 F.2d 847 (5th Cir. 1993) (holding an alien deportable for convictions on thirteen counts of unauthorized use of credit cards); Animashaun v. INS, 990 F.2d 234 (5th Cir. 1993) (finding an alien deportable for two separate forgery convictions four years apart because each conviction was a complete, individual and distinct crime, not arising from single scheme). *See also* Abdelqadar v. Gonzalez, 413 F.3d 668 (7th Cir. 2005).

28. The Fourth Circuit in *Akindemowo v. INS*, 61 F.3d 282, 285 (4th Cir. 1995) and in *Asika v. Ashcroft*, 362 F.3d 264 (4th Cir. 2004) follows *In re D*, 5 I. & N. Dec. 728, 729 (B.I.A. 1954) and other B.I.A. precedent line of cases. This Circuit fully defers to the agency based on the principles set forth by the Supreme Court in *Chevron v. NRDC*, 467 U.S. 837, 843 (1984). *See* Yousefi v. INS, 260 F.3d 318, 326 (4th Cir. 2001) (citing *Akindemowo*, 61 F.3d at 284). Note that other Circuits (Second and Fifth, in particular) defer to agency interpretation only on those statutes and regulations that the agency administers while they reserve to themselves the right to *de novo* review matters of law not administered by the agency. *See* Michel v. INS, 206 F.3d 253, 262 (2nd Cir. 2000).

brate her admission into college. This young lady, whom we will refer to as Alice, spent all of her allowance on partying with her ever more rowdy friends. Alice also has a painful dilemma. The academic year has started, and although she is very much behind on her studies, she really wants to go to her sorority house party because those handsome hunks from the football team will be there to become acquainted with the new sorority sisters. With the event coming nearer, Alice decides to look at her wardrobe and see what she has available specifically for that special occasion. She is abhorred to find her closet lacking that one outfit that she needs to become "who is that girl." Being known for never giving up and going after what she wants, Alice heads to the mall. On Monday, she manages to sneak out of Tracy's with a "gorgeous" pair of jeans, the cool ones of a popular design. On Wednesday, she drops by Robertson's at the mall to take a stunning top that looks like it is from the 70's. On Friday, Alice cannot believe her bad luck – her curler goes haywire and she rushes to New Fashion at the mall to take a new one.

Upon her arrest on Friday by a guard in the mall parking lot, Alice breaks down and confesses to all her misdeeds. Our college freshman repeats her confession to the judge, while also pleading guilty to two counts of petty theft. This being Alice's first offense, this barely legal teen is placed on a few months of probation, required to pay restitution to the injured clothing magnates, and requested to attend some "good behavior" classes, while performing a number of hours of community service. However, Alice's real troubles are not behind, but ahead of her. Even before she happily waltzes out of the court room, federal immigration officials determine the origin of her foreign accent. Depending on the jurisdiction where these minor offenses were committed, Alice may be in deep trouble.

If our college friend, while attending an academic institution in Texas, committed these minor crimes in that state, she is in bigger trouble than she anticipated. According to the Fifth Circuit's interpretation of section 237 of the Immigration and Nationality Act,[29] each criminal act will be deemed a complete, individual and distinct crime, subject to the multiple conviction clause of the deportability statute.[30] In other words, having gotten used to sunny Texas, Alice will be forced to experience the gloom of London suburbs after her removal from the United States.

29. Immigration and Nationality Act of 1952 § 237, 8 U.S.C. § 1227 (1990).

30. *See Iredia*, 981 F.2d at 849 (quoting Matter of D, 5 I. & N. Dec. 728, 729-30 (BIA 1954)). *See also* In Re Adetiba, 20 I. & N. Dec. 506 (BIA 1992).

If Alice just happens to be attending an Ivy League institution in Massachusetts, she is still short on her luck. The First Circuit adopted a standard, which interprets the multiple conviction clause to mean "a temporally integrated episode of continuous activity."[31] If she had realized that she needed all those items on the day before the party, and had gone on a "shopping spree," which was to have commenced and ended within that short period of time, she could argue that her conduct was within the statutory exception. Otherwise, Alice will most probably have no choice but to continue her education somewhere else, but not in the United States.

However, if Alice was studying in Southern California, her immigration lawyer will argue before the immigration court that she acted on a preconceived, coherent plan to be well dressed and groomed for the big party. To her immense luck, a court located in the Ninth Circuit would probably allow Alice to continue her education in the United States.[32]

In order to understand these inconsistencies in the law, and to resolve any outstanding issues such as the ones presented above, the legislative history of the provision in question must be analyzed.[33]

III. Analysis

A. Legislative History in the Context of Evolving Immigration Policy

a. Immigration Policy and Legislative Provisions in the Pre-Codification Period – from Passive Encouragement to Early Attempts in Limiting Admissions

From its inception, the country's survival depended on the new immigrants from the Old World. Initially, the United States subscribed to the immigration policy of passive encouragement, with the first immigration laws enacted to encourage and not to restrict immi-

31. *See* Pacheco v. INS, 546 F.2d 448 (1st Cir. 1976), *cert. denied*, 430 U.S. 985 (1977); Balogun v. INS, 31 F.3d 8 (1st Cir. 1994).

32. *See* Wood v. Hoy, 266 F.2d 825 (9th Cir. 1959); Gonzalez-Sandoval v. INS, 910 F.2d 614 (9th Cir. 1990); Leon-Hernandez v. INS, 926 F.2d 902 (9th Cir. 1991).

33. Romualdo P. Ecleavea, Annotation, What Constitutes 'Single Scheme of Criminal Misconduct' for Purpose of § 214(a)(4) of Immigration and Nationality Act of 1952 (8 U.S.C.A. § 1251(a)(4)), Providing for Deportation of Aliens Convicted of Two Crimes Involving Moral Turpitude, Not Arising Out of Single Scheme of Criminal Misconduct, 19 A.L.R. Fed. 598 (1974) (containing an extensive survey of statutory implications on varying interpretations of criminal misconduct pursuant to the statute).

gration into this country.[34] In fact, "[i]t was not until the latter part of the nineteenth century that the Federal Government placed any legislative restrictions upon the entry of aliens into the country."[35]

The first restrictions on immigration were placed in 1875 when Congress enacted its first exclusion laws prohibiting entry of convicts and prostitutes.[36] This was soon followed by the 1882 amendment to allow for exclusion of "idiots, lunatics, or persons likely to become public charges."[37] Despite certain restrictions placed on importation of cheap foreign labor, the United States' policy toward immigration did not change.[38] These new immigration laws were designed to improve conditions on the vessels transporting the immigrants to the New World.[39]

Further legislative additions to the excludability provisions of the immigration law expanded the classes of inadmissible aliens primarily for health and safety reasons. On March 3, 1903, Congress enacted laws which barred from admission persons suffering from serious mental or physical disorders, paupers, polygamists, as well as, notably, defining the term "convicts." This immigration provision, enacted by the Fifty-Seventh Congress during the Second Session, in March 3, 1903, as "[a]n Act to regulate the immigration of aliens into the United States,"[40] restricted "persons who have been convicted of a felony or other crime or misdemeanor involving moral turpitude" from entering the United States.[41] The amendment to this provision which resembles the current inadmissibility provisions was enacted by the Fifty-Ninth Congress in 1907.[42]

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34. *See* Alien Immigration Act of 1864, 13 Stat. 385. The only exception to the general policy was the enactment of the Alien Enemies Act of 1798, 1 Stat. 570, adopted as part of the alien and sedition laws. This Act enabled the President to order deportation from the United States of any alien deemed dangerous to the country. This unpopular provision was allowed to expire in two years after its enactment.

35. H.R. REP. NO. 82-1365 (1952) *reprinted in* 1952 U.S.C.C.A.N. 1653 [hereinafter *H.R. Rep. No. 82-1365*].

36. *See generally* Act of Mar. 3, 1875, 18 Stat. 477 (supplementing acts in relation to immigration).

37. *H.R. Rep. No. 82-1365, supra* note 35 (citing Immigration Fund Act, 22 Stat. 214 (1882)).

38. The legislative restrictions of 1882, 1885, and 1887 targeted foreign labor. *See H.R. Rep. No. 82-1365, supra* note 35, at 335 (citing Act of May 6, 1882, 22 Stat. 58; Alien Contract Labor Laws, 23 Stat. 332 (1885); Importation of Contract Labor Act, 24 Stat. 414 (1887)).

39. *See* Immigrant Fund Act, 22 Stat. 214 (1882).

40. *See* Act of Mar. 3, 1903, 32 Stat. 1213 (regulating the immigration of aliens into the United States).

41. *Id.* at 1214.

42. *See* Act of Feb. 20, 1907, 34 Stat. 898, 899 ("[P]ersons who have been convicted of or admit to having committed a felony or other crime or misdemeanor involving moral turpitude.").

b. Deportability Measures in the Early Twentieth Century and Codification of Immigration Law in the Immigration Act of 1917 – Legislative Origins of the Present Problem with the Multiple Conviction Clause

The new century introduced a novel method of dealing with undesirable foreign nationals. As illustrated above, before the early 1900s, the United States' immigration policy was centered on regulation and, only later, on restriction of immigration. Even then, the traditional exercise of sovereignty was to restrict entry of the undesired individuals. The new instrument of immigration policy was the deportability measure.

Although development of deportation measures mirrored excludability provisions,[43] the law continued to emphasize prevention of certain classes of unwanted foreign nationals from entering this country. In fact, Congress intended to keep out aliens defined inadmissible by the law, with deportation provisions designed only to supplement the excludability measures against inadmissible foreign nationals who unlawfully gained entry.[44] Even the first deportation measure, adopted on March 3, 1891, as part of immigration labor amendments, was intended to return unlawful immigrants back to their country of departure.[45]

On February 5, 1917, the Sixty-Fourth Congress enacted the first codification of the United States immigration law.[46] Commonly referred to as the Immigration Act of 1917, the newly codified immigration law provisions elaborated a list of causes for deportation and the limits of time within which the various classes of deportable aliens might be deported.[47] The Act codified the following classes of aliens which are deportable any time after entry:

1) aliens who entered or are found in the United States in violation of law;

43. *See* EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798-1965, 442 (Philadelphia Press, 1981).

44. *Id.* at 451.

45. *See H.R. Rep. No. 82-1365, supra* note 35 (citing Alien Labor Immigration Act, 26 Stat. 1084 (1891)).

46. *See* Immigration Act of 1917, 39 Stat. 874.

47. S. REP. NO. 81-1515 (1952) *reprinted in* OSCAR M. TRELLES II & JAMES F. BAILEY III, IMMIGRATION AND NATIONALITY ACTS, LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 338 (William S. Hein Co., 1979) [hereinafter *S. Rep. No. 81-1515*].

2) aliens found advocating the unlawful destruction of property or advocating the overthrow of the Government or all forms of law;
3) aliens who within 5 years after entry become public charges;
4) aliens sentenced to serve one or more years of imprisonment for commission in this country within 5 years of entry of crimes involving moral turpitude, or sentenced more than once to such a term of imprisonment for the commission of such crimes;
5) prostitutes or those connected with prostitution; and
6) aliens convicted or who admit the commission of, prior to entry, crimes involving moral turpitude.[48]

Focusing on the legal repercussions for criminal misconduct, the Act subjected foreign nationals to deportation provisions for commission of a crime involving moral turpitude under two circumstances. First, an alien who was convicted or who admits to commission of a crime involving moral turpitude prior to entry into the United States was deportable at any time after entry.[49] Second, where a crime of moral turpitude was committed subsequent to an alien's entry, the Act required deportation of the criminal only if the alien was (a) sentenced to imprisonment for a crime which occurred within five years after entry, or (b) *sentenced more than once* for commission of such a crime.[50]

It is remarkable to note that it was not until 1917 that the policies concerning aliens admitted into the country with criminal records was supplemented with legislation for the deportation of aliens convicted of crimes after their entry.[51]

48. *See id.* at 388-9. Section 19(a) of Immigration Act of 1917 provided for deportation of:

> Any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry . . . ." § 19(a), 39 Stat. at 889.

49. *S. Rep. No. 81-1515, supra* note 47, at 390.

50. *Id.* at 391.

51. HUTCHINSON, *supra* note 43, at 451.

c. Inconsistent Judicial Interpretations of Legislative Intent of Section 19(a) of the Immigration Act of 1917 – Advance Warning to Future Legislators and Foreboding of What Is to Come

As noted earlier, the new deportable class, created and defined by the 1917 Act,[52] provided two legal alternatives for deporting a foreign individual who commits crimes involving moral turpitude. The meaning of the first prong pertaining to commission of crimes subsequent to the alien's entry is quite obvious: the section provides for deportation of an alien who, after committing a crime of moral turpitude within five years after entry, is sentenced to imprisonment for at least one year.[53]

The courts found the second prong to be quite ambiguous.[54] Pursuant to section 19(a) of the 1917 Act,[55] a foreign national is deportable at any time subsequent to entry if *sentenced more than once* to imprisonment for a term of one year or more because of conviction in this country of crime involving moral turpitude committed after the entry.[56]

The federal courts struggled with providing a practical application of the term "sentenced more than once."[57] Because of the ambiguity presented by the Act,[58] the federal courts provided various interpretations of the provision that differed from circuit to circuit.[59] Nevertheless, much like the situation today, the federal courts of the time used the same rationale to justify their conflicting decisions.

The Ninth Circuit analyzed "sentenced more than once"[60] by interpreting the words of the statute to apply to a conviction where an alien is sentenced for more than one offense. In *Nashimoto v. Nagle*,[61] the court held that the statute is satisfied in the case where a single

52. *See* Immigration Act of 1917, § 19(a), 39 Stat. 874, 889.

53. *Id.*

54. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 8 (1948) ("The case is here on a petition for a writ of certiorari which we granted because of the contrariety of views among the circuits concerning the meaning of the statutory words, 'sentenced more than once.'").

55. § 19(a), 39 Stat. at 889.

56. *S. Rep. No. 81-1515, supra* note 47, at 391; *Fong Haw Tan*, 333 U.S. 6.

57. *Fong Haw Tan*, 333 U.S. at 9-10.

58. § 19(a), 39 Stat. at 889.

59. *Id.*

60. *Id.*

61. Nashimoto v. Nagle, 44 F.2d 304 (9th Cir. 1930).

sentence imposed concurrent imprisonment for several offenses.[62] The Circuit Court interpreted the legislative intent to mean that "the statute does not limit the power of deportation to a second conviction, but is based upon the commission of a number of offenses for which the alien has been sentenced . . . ."[63] The *Nashimoto* court continued, "[t]he purpose of Congress undoubtedly was to provide for the deportation of a man who committed more than one offense involving moral turpitude for which he had been convicted and upon which conviction sentence has been imposed . . . ."[64]

The Second Circuit concluded that consecutive sentencing of an alien warrants applicability of deportation measures under the statute. The court in *Johnson v. U.S.*[65] asserted that judicial administration of criminal prosecution cannot determine the outcome of deportation proceedings.[66] The *Johnson* court reasoned that the "natural and reasonable meaning [of] 'sentenced more than once . . .' refers to the number of separate crimes for which sentences are imposed, not to the form of the indictment or the procedure of a single trial."[67] In interpreting the language of the statute, the court asserted, "[i]t is reasonable to differentiate between an alien who has committed a single offense and one who has repeatedly offended. There would be no reason to make the classification turn on mere formalities of criminal procedure."[68] Writing for the majority in *U.S. ex Rel Magnozzi v. Day*[69], Judge Learned Hand in emphasizing the perceived statutory difference between concurrent and consecutive sentencing, understood the statute to emphasize "the duplication of penalties"[70] – stat-

62. *Id.* (sustaining a deportation order where an alien was convicted and sentenced on five counts of fraudulent issuance of five separate checks, with sentence to be executed concurrently).

63. *Id.* at 306.

64. *Id.*

65. Johnson v. United States, 28 F.2d 810 (2nd Cir. 1928).

66. *Id.* at 811-812 (finding alien to be *sentenced more than once* where an alien was sentenced to consecutive terms of at least one year for separate incidents of arsons, committed at different times and of different buildings, that it made no difference that the crimes were prosecuted in a single indictment although under the state law the successive sentences may be cumulated and treated as a single sentence or single term of imprisonment).

67. *Id.* at 811.

68. *Id*.

69. United States ex Rel Magnozzi v. Day, 51 F.2d 1019 (2nd Cir. 1931) (reversing the lower court's deportation order where the alien was convicted fraudulent procurement, possession and passing of four counterfeit twenty dollar bills, and sentenced to terms of imprisonment to run concurrently).

70. *Id.* at 1021.

ing that "the test of these is practical, not procedural. Any other construction leads to absurd results."[71]

The Fourth Circuit construed the so-called *sentenced more than once* provision of the statute[72] to apply when two or more crimes arise out of the same transaction, irrespective of whether the sentences imposed by the courts run concurrently or consecutively.[73] The court in *Tassari v. Schumucker*[74] considered the statute as part of the broad immigration policy asserting that "[t]he obvious policy of the statute is the protection of the American public from habitual criminals."[75] The court held that "where the crimes are separate and distinct and there is a separate sentence for each offense it must be held within the meaning of the act that the alien has been 'sentenced more than once' even though the separate sentences are made to run concurrently and not consecutively."[76] The court also elaborated on the legislative intent by asserting that if the alien is "such a habitual criminal [who] is not subject to deportation it would seem that the purpose of the act would be ineffective."[77]

On the other hand, the Fifth Circuit in *Wallis v. Tecchio*[78] decided that when an alien is actually sentenced more than once, the individual will be deportable. The Fifth Circuit used its distinguished line of precedents and lower court decisions[79] to interpret legislative intent to mean that Congress intended this provision to apply to foreign nationals who are "repeaters,"[80] that is to say "persons who commit a crime

71. *Id.*

72. Immigration Act of 1917, § 19(a), 39 Stat. 874, 889.

73. Tassari v. Schumucker, 52 F.2d 570 (4th Cir. 1931) (finding an alien to be deportable for the commission of two separate crimes in Philadelphia which resulted in two separate but concurrently running sentences because of the separate and distinct nature of the crimes. While the court only considered the immigration repercussions of the Pennsylvania convictions, the court also took into consideration crimes committed in Virginia).

74. *Id*.

75. *Id.* at 572 (interpreting that the legislative intent was to avail the statute's deportability provision to *habitual criminals* and to do otherwise will defy the purpose the Act, which is "the protection of the American public from habitual criminals.").

76. *Id.* at 573.

77. *Id.* at 574.

78. Wallis v. Tecchio, 65 F.2d 250 (5th Cir. 1933).

79. *Id.* at 251 (quoting United States v. Day, 51 F.2d 1019 (5th Cir. 1931)) ("[D]eportation was refused where there were two indictments and two sentences to be served concurrently."); *Id.* (quoting Clark, Inspector, v. Orabona, 59 F.2d 187 (5th Cir. 1932) ("[W]here the alien shot two men in the same brawl and was separately indicted for each shooting, the sentence pronounced on one indictment was served, but sentence was deferred on the other. After five years he became involved in another shooting, and was then sentenced on the second indictment about the first fight. Deportation was upheld.").

80. *Id.*

and are sentenced, and then commit another and are sentenced again."[81] The court interpreted the language of the statute as "not 'sentenced for two crimes' or for 'two terms in the penitentiary,' but 'sentenced more than one time,'" irrespective of how the trial court conducts its administration of the trial.[82] The court went on further to state that "one must have burdened the country's courts with his prosecution, and have been publicly branded as a criminal by his sentence on at least two occasions."[83]

While there was disagreement on judicial implementation of the *sentenced more than once* language of the deportability provision,[84] the Federal Circuit Courts, for the most part, appear to have understood that the basic principle behind the provision was meant to protect society from the real criminal, someone who repeatedly and habitually engages in criminal misconduct.[85]

d. Congress and the Legislative Intent Behind Section 19 of the 1917 Immigration Act – Punishing a "Real Criminal" and Giving Second Chances to First Offenders

At least part of the reason for discrepancies in adjudication based on section 19(a) of the 1917 Immigration Act[86] may have been the

81. *Id.* (holding that the alien was not sentenced more than once and reversing the deportation order where the alien was convicted of four counts for passing and attempting to pass counterfeit bill, and sentenced to imprisonment by one judgment to two years on each count, with two counts running concurrently). *See also id.* (taking the view that an alien is "sentenced once when, after a conviction or plea of guilty, he is called before the bar and receives judgment, whether for one or several crimes, with one or several terms of imprisonment. He is sentenced more than once when that happens again." (quoting Opolich v. Fluckey, 47 F.2d 950 (D. Ga. 1930)).

82. *Id.* at 252.

83. *Id.*

84. *See* Immigration Act of 1917, § 19(a), 39 Stat. 874, 889.

85. *See* Nashimoto v. Nagle, 44 F.2d 304, 306 (9th Cir. 1930) (expressing a distinct orientation towards the concept of an offense, or rather a mere commission of a crime, with sentence only complementing in determination of deportability) ("The purpose of Congress undoubtedly was to provide for the deportation of a man who committed more than one offense involving moral turpitude for which he had been convicted and upon which conviction and sentence has been imposed; whether the sentence run concurrently or consecutively is entirely immaterial from the standpoint of the purpose of the law."); Johnson v. U.S., 28 F.2d 810, 811 (2nd Cir. 1928) ("It is reasonable to differentiate between an alien who has committed a single offense and one who has repeatedly offended."); Tassari v. Schumucker, 52 F.2d 570, 572 (4th Cir. 1931) ("The obvious policy of the statute is the protection of the American public from habitual criminals."); Wallis v. Tecchio, 65 F.2d 250, 251 (5th Cir. 1933) (emphasizing the term *repeaters* in identifying the individuals subjected to the deportability provisions of the Immigration Act of 1917, 39 Stat. 874.).

86. Immigration Act of 1917, § 19(a), 39 Stat. 874, 889.

judicial inability to decipher the intent behind the provision. It was not that there was complete lack of legislative history behind the *sentenced more than once* provision of the Act.[87] It was the fact that although clear in its basic principle, the legislative history provided very little by way of practical guidelines. Indeed, there is little more than a trace of evidence of the purpose that can be found in the legislative history.[88]

During the Second Session of the 63rd Congress, Representative Burnett of Alabama introduced H.R. 6060.[89] On March 30, 1916, during the Second Session of the 64th Congress, Congressman Sabath of Illinois further proposed an amendment to H.R. 10384,[90] also sponsored by Representative Burnett.[91] The amendment was designed to remove the five-year limit on deportability after a second offense.[92] More importantly, according to Mr. Sabath, the provision was designed to punish "a real criminal," who has committed more than one offense and is convicted of a crime for the second time.[93] Congressman Sabath, whose amendments to strike out the literacy test and exempt political refugees from the test had just been defeated,[94] had this to say about his amendment of the Burnett bill,

> I have no desire to protect a real criminal, a man who is a criminal at heart, a man who is guilty of a second offense involving moral turpitude and for the second time is convicted. A man of that kind is a criminal and is not entitled to consideration on the part of any of the citizens of the United States.[95]

87. *See id.*

88. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 9 (1948) ("There is a trace of that purpose found in its legislative history.").

89. *See* HUTCHINSON, *supra* note 43, at 164 (explaining that H.R. 10384, 64th Cong. (1st Sess. 1916), accompanied by H.R. Rep. No. 64-95 (1916), was the measure. The original bill was H.R. 6060, 63rd Cong. (2nd Sess. 1915), accompanied by H.R Rep. 63-140 (1915). A similar report was also generated in the Senate. *See* S. Rep. No. 64-352, at 15 (1916)). *See also* Fong Haw Tan, 333 U.S. 9.

90. H.R. 10384, 64th Cong. (1st Sess. 1916).

91. HUTCHINSON, *supra* note 43, at 164-5 (asserting that the proposal by Mr. Sabath was to amend the bill to include the *sentenced more than once* provision in addition to an already proposed provision of section 19 which provided for deportation for upon conviction of a crime involving moral turpitude where alien is sentenced for imprisonment of one year or more, if committed within 5 years after entry).

92. *Id.*

93. *Id.*

94. *See* HUTCHINSON, *supra* note 43, at 164-5. *See also* 53 CONG. REC. 4937, 4953-4954 (1916).

95. *See* 53 CONG. REC. at 5167.

This desire to punish *a real criminal* is clearly echoed by the sponsor of the bill. Congressman Burnett gave his full-hearted support in defending the Sabath amendment, stating that only "those [foreign nationals] who committed a second crime involving moral turpitude showed then a criminal heart and a criminal tendency and they should be deported . . . ."[96] The report of the Senate committee further clarified that the purpose of the provision was "to reach the alien who after entry shows himself to be a criminal of the confirmed type."[97]

The best explanation of the bill came from the opponent of the amendment, Representative Bennet, who criticized the Sabath amendment as being excessively lenient.[98] However, while expressing his negative attitude toward the amendment, Mr. Bennet elaborated on the essence of the Sabath amendment. According to Mr. Bennet, the amendment requires, as a prerequisite for deportation, for a foreign national to be convicted and punished for a crime committed, and then after release, be convicted of another crime.[99] In his careful analysis of the proposed legislation, Mr. Bennet inadvertently pointed to an underlying defect within the provision.[100]

While the House did not agree[101] with Mr. Bennet, his interpretation of the amendment was not challenged by an argument to the contrary. More importantly, it seems to have been adopted by the voting

96. *Id.* at 5168.

97. Fong Haw Tan v. Phelan, 333 U.S. 6, 9 (1948) (citing S. REP. NO. 64-352, at 15 (1916)).

98. *See* 53 CONG. REC. at 5168 (statement of Congressman Bennet) (expressing dissatisfaction with the bill by emphasizing that "a man who comes here and enjoys the privilege of being here and repays our kindness by violating our laws, by committing an act involving moral turpitude, should at the expiration of his sentence be deported.").

99. *See id.* at 5168 (statement of Congressman Bennet) (stating that:

> This amendment proposes that after a man has been convicted twice he shall be deported. In other words, as the gentleman from Alabama (Mr. Burnett) said with a great deal of gravity, they found in the prisons of New York a great many men who had been convicted and who had served out their sentence and then had been let out and committed other crimes and been convicted again, and because the men had been convicted twice he thought that they should be deported. Because the man had been convicted twice he thought that man should be deported. Now, why should he not be deported after been convicted once of a crime so grave as a felony?

However, the House expressly rejected Mr. Bennet's approach to the issue, by passing the amendment of Congressman Sabath and ultimately incorporating its provisions into the Immigration Act of 1917, 39 Stat. 874. It is also important to note that according to Mr. Bennet's own testimony in the Congressional Record, his own bill which espoused deportation upon commission of a single commission of a crime of moral turpitude, was not even allowed to be voted upon "seven or eight years ago . . . [when] the bill came under suspension of the rules and failed to secure a two-thirds vote and [Mr. Bennett] could never get it up for a vote after that.").

100. *Id.*

101. *See id.* at 5168-5169. The ultimate result after the vote clearly proves that the House either chose to ignore Mr. Bennet's explanation or voted notwithstanding of it.

members.[102] Shortly after hearing Mr. Bennet's challenge, the House was called for a vote. However, the House was not moved by Mr. Bennet's recital of the obvious consequences of the amendment, taking into consideration the favored outcome for the vote on the amendment.[103] Considering the legislative background, it is not a mere coincidence that Representative Bennet's interpretation of the *sentenced more than once* provision was actually taken up by at least one Circuit[104] and then followed by the Supreme Court.[105]

e. The Supreme Court and Deciphering Legislative Intent of Section 19 of the 1917 Immigration Act – Failed Judicial Attempt to Put an End to Inconsistencies within the System

In their momentous 1948 decision,[106] the Supreme Court resolved the controversy within the Federal Circuits as to the meaning of the statute.[107] In *Fong Haw Tan v. Phelan*,[108] a foreign national was found guilty on two counts of murder and sentenced for life imprisonment for each count.[109] Upon the alien's parole, the issue of deportability was raised.

In deciding a foreign national's release from detention, the Supreme Court held that the *sentenced more than once* language authorized deportation only in situations "where an alien having committed a crime involving moral turpitude and having been convicted and sentenced, once again commits a crime of that nature and is convicted and sentenced for it."[110] In other words, because the murders were tried in the same court, by the same proceedings, at the same time, the alien was able to avoid deportation. Arguably taking Mr. Bennet's arguments into consideration[111] in deciding the case, the Supreme Court

102. *Id.*

103. *See id.* (documenting that upon challenge from Mr. Bennet, Representative Sabath called for a vote, and the House approved the amendment by vote of 53 to 11. This closed the issue with the bill brought by Mr. Bennet).

104. *See* Wallis v. Tecchio, 65 F.2d 250, 252 (5th Cir. 1933).

105. *See* Fong Haw Tan v. Phelan, 333 U.S. 6 (1948).

106. *Fong Haw Tan* is a landmark decision not only because it redefines the legal principle at the issue, but also because it concerns interpreting legislative intent and defining a complex legal issue within immigration law, a rarity in itself. *See Fong Haw Tan*, 333 U.S. 6.

107. *See id.*

108. *See id.* at 9.

109. *See id.*

110. *See id.* at 10.

111. *See* 53 CONG. REC. 4937, 5168 (1916) (statement by Congressman Bennet) (showing that based on his comments during the debates on the floor of Congress, Congressman Bennet viewed commission of one crime involving moral turpitude as sufficient grounds for deportation.

did not look at the aggravated nature of the crime, but at the sequence of events and court procedure to decide whether the individual's case fell under the provision.

This is exactly what Congressman Bennet anticipated would occur.[112] Although legislated with good intentions, the provision was too poorly worded to allow consistent judicial interpretation, and was susceptible to inconsistent and, therefore, inequitable adjudication. While the main purpose of the provision was to protect society from *a real criminal*, this basic meaning of the statute got lost in the halls of justice. However, only one conclusion can be deduced: it was not this mere technicality that Congress was looking to institute, but a logical and equitable determination of whether the alien who committed a "second offense" was indeed "a criminal at heart" and "of the confirmed type."[113]

In following the Fifth Circuit's standard,[114] the Supreme Court based its decision on the trigger that is the second conviction.[115] Interpreting the *sentenced more than once* language in the strictest possible meaning, the Court had no other choice than to hold the *sentenced more than once* provision of the Act[116] to punish criminals of the confirmed type, of which "the plainest 'confirmed type' of criminal is the repeater."[117] In the last phrases of its *Fong Haw Tan* decision,[118] the Supreme Court elaborated on the rationale for such strict interpretation of the law. Never overruled even to this day, the Supreme Court asserted that the provision must be strictly construed; the Court stated that "since the stakes are considerable for the individual, we will not assume that Congress meant to trench on [alien's] freedom, beyond that which is required by the narrowest of several possible meanings of the words used."[119]

He also quite accurately noted that the plain language of the statute would require a foreign national to be convicted twice before deportation is instituted).

112. Based on Congressman Bennet's statements about plain language of the statute, it should not come as a surprise that this is what the Supreme Court upheld in *Fong Haw Tan*, 333 U.S. 6.

113. *See Fong Haw Tan*, 333 U.S. at 9.

114. *See id.*

115. The Supreme Court followed the Fifth Circuit's decision in *Wallis v. Tecchio* which affirmed that the provision of the statute authorizes deportation "only where an alien having committed a crime involving moral turpitude and having been convicted and sentenced, once again commits a crime of that nature and is convicted and sentenced for it." *See* Wallis v. Tecchio, 65 F.2d 250, 251 (5th Cir. 1933).

116. *See* Immigration Act of 1917, § 19(a), 39 Stat. 874, 889.

117. *See Fong Haw Tan*, 333 U.S. at 9.

118. *See id.* at 6.

119. *See id.* at 10.

B. Analysis of Legislative Intent of the Current Deportability Measure

a. Codification and Analysis of the Immigration Act of 1952 and Multiple Criminal Convictions Provision of the Act – Dire Necessity to Legislate a Comprehensive Set of Immigration Laws Leads to Yet Another Codification

Before enactment of the Immigration Act of 1952,[120] the basic immigration and naturalization laws of the United States were part of the Immigration Acts of 1917 and 1924.[121] However, the state of affairs of the immigration laws was far from ideal. The immigration laws of the United States were in dire need of revision and restructuring.[122] The legislation of those years rested on a complicated superstructure of amendments, substitutes and repeals which were added throughout the years.[123] Many of the obsolete legislative provisions remained on the statute books. Furthermore, inequities, gaps and loopholes as well as lax practices, had become more apparent through the years.[124]

After years of intensive studies, investigations, joint committee meetings and debates,[125] Congress enacted one of the most comprehensive immigration reforms in the history of this country. In fact, the Immigration Act of 1952[126] brought a new era to the immigration and nationality laws of the United States. The legislation added numerous substantive changes to the immigration and nationality laws. First, the legislation eliminated race as a bar to immigration and naturalization, as part of sections 201, 202 and 311, and discrimination between sexes in sections 101(a)(27) and 203(a)(3).[127] Second, the Act[128] introduced a revised system of selective immigration (quota system), giving preference to skilled foreign nationals in sections 101(a)(15)(H) and 203(a)(I).[129] Third, the legislation broadened the grounds for exclusion and deportation of criminal aliens in sections 212 and 241, and

120. *See generally* Immigration and Nationality Act of 1952, 66 Stat. 163, *amended by* Immigration Act of 1990, 8 U.S.C. §§ 1 - 1778 (1990)).

121. *See* 39 Stat. 874; Immigration Act of 1924, 43 Stat. 153.

122. *Id.*

123. *Id.*

124. *See H.R. Rep. No. 82-1365, supra* note 35.

125. *Id.*

126. *See generally* Immigration and Nationality Act of 1952, 66 Stat. 163, *amended by* Immigration Act of 1990, 8 U.S.C. §§ 1 - 1778 (1990).

127. *See H.R. Rep. No. 82-1365, supra* note 35.

128. *See generally* 8 U.S.C. §§ 1 - 1778.

129. *See H.R. Rep. No. 82-1365, supra* note 35.

prescribed thorough inspection of foreign nationals upon entry as provided in section 313.[130] Fourth, in order to increase efficiency, Congress provided for structural changes in the enforcement agencies in sections 103, 104, and 105.[131] Fifth, the legislation created safeguards for judicial review and provided for fair administrative practice and procedure in sections 235, 242 and 360.[132]

The influence of the 1952 Act[133] is so profound that many of its provisions continue to be part of the enforced legislation in the Immigration and Nationality Act.[134] One of the provisions carried over to the current immigration legislation is the multiple criminal convictions measure of the deportability provision of the Act[135] and was in fact enacted in the 1952 Immigration Act as section 241(a)(4).[136]

b. Distinctions in Legislative Construction between Section 19(a) of the Immigration Act of 1917 and Section 241(a)(4) of the Immigration Act of 1952 – Shifting Emphasis from Sentencing to Conviction as a Trigger for the Multiple Conviction Clause

While the changes enacted in the 1952 Immigration Act[137] were quite dramatic, the construction of the multiple conviction provision of the immigration law, enumerated in section 241(a)(4),[138] remained substantially unchanged. As reviewed above, where a crime of moral turpitude was committed subsequent to the alien's entry, section 19(a)

130. *Id.*

131. *Id.*

132. *See generally H.R. Rep. No. 82-1365, supra* note 35. The Immigration and Nationality Act of 1952 set forth the following grounds for deportation as follows: (1) violation of status, or of the terms of conditional entry; (2) entering without inspection or by fraud; (3) excludability at the time of entry because of improper documentation, conviction of a crime involving moral turpitude, membership or affiliation with certain subversive organizations, the advocacy of certain subversive doctrines, and mental, physical, economic, or educational disqualifications; and (4) acts or status after entry, such as becoming smuggler, a public charge, a criminal, or a subversive. *See* 8 U.S.C. §§ 1 - 1778.

133. *See* 8 U.S.C. §§ 1 – 1778.

134. *See id.*

135. *See id.* § 1227(a)(2)(A)(ii).

136. *See id.* § 1251(a)(4) ("[Any alien] convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefore in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of *a single scheme of criminal misconduct*, regardless of whether confined therefore and regardless of whether the convictions were in a single trial [will be deported].") (emphasis added).

137. 8 U.S.C. §§ 1 – 1778.

138. *See id.* § 1251(a)(4).

of the Immigration Act of 1917[139] demands deportation in two circumstances, one of which is when the alien is *sentenced more than once* to such a term and for such a crime.[140] On the other hand, section 241(a)(4) of the 1952 Immigration Act[141] provides for deportation of any alien who is convicted of at least two crimes involving moral turpitude, "not arising out of a single scheme of criminal misconduct," notwithstanding confinement or if administered in the same trial.[142]

Without a doubt, a major change has occurred in the language of the statute. The emphasis of the deportability statute[143] was intentionally shifted from sentencing to conviction for a crime involving moral turpitude. Under the Immigration Act of 1952,[144] removal is imminent for an alien convicted two or more times for illicit acts involving moral turpitude, whereas under previous deportability provisions,[145] the alien must have been sentenced more than once. However, Congress carefully constructed the statute, undoubtedly aiming to preserve the basic difference between the aliens who are continuously engaged in sustained criminal misconduct and the foreign nationals who commit only one crime, after entry into the country.

139. *See* Immigration Act of 1917, 39 Stat. 874, 889.

140. *See S. Rep. No. 81-1515, supra* note 47, at 391. Section 19(a) of the Immigration Act of 1917 demands deportation of an alien who commits a crime of moral turpitude when such an individual is either a) sentenced to imprisonment for at least one year because of conviction which occurred within 5 years after entry, or b) "sentenced more than once" to such a term and for such a crime. Specifically, section 19(a) provided for deportation of "any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry . . . ." *See* Immigration Act of 1917, § 19(a), 39 Stat. 874, 889.

141. *See* 8 U.S.C. § 1251(a)(4).

142. Section 241(a)(4) of the 1952 Immigration Act provides for deportation of an alien convicted of a crime involving moral turpitude who is either (a) convicted of a crime committed within 5 years of entry, either sentenced to confinement or actually confined, or (b) convicted of at least two such crimes, "not arising out of a single scheme of criminal misconduct," notwithstanding of confinement or if administered in the same trial. Specifically, section 241(a)(4) of the 1952 Immigration Act provided for any alien to be deported who "is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefore in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial." *See* 8 U.S.C. § 1251(a)(4).

143. *See* 8 U.S.C. §§ 1 – 1778.

144. *Id.*

145. *See* Immigration Act of 1917, § 19(a), 39 Stat. 874, 889.

c. General Overview of Legislative History of the 1952 Immigration Act – Codification Aimed at Strengthening the Immigration Law

After consecutive codifications of immigration law in 1917 and 1924,[146] and many amendments thereafter,[147] Congress commenced to prepare for an attempt to conduct a thorough revision and codification of the immigration laws.[148] With the initial impetus provided by the Committee on the Judiciary of the Senate, the Congress embarked on a three year journey, reported as one of the most intensive and searching study of the immigration and naturalization system.[149] Among other things, the conclusions reached by these investigations may have even been key reasons for revising immigration laws of the United States.

It is not surprising that the Immigration Act of 1952[150] expanded the grounds for exclusion and deportation of criminal aliens mostly in accordance with recommendations made by the Senate Special Committee to Investigate Organized Crimes in Interstate Commerce.[151] This is most evident in the Congressional Record, as follows. On August 27, 1951, while introducing one of the final revisions to his Senate Bill 2055[152] on the floor of the Senate, Senator McCarran of Nevada, emphasized the bill's compliance with the recommendations of the Special Committee. The senator stated that the proposed legislation involved: tightening the immigration and naturalization laws to permit deportation of foreign criminal who are smuggled, and plugging the loopholes which enable alien criminals to gain citizenship.[153] According to the Senator, his bill which later was enacted, broadened the grounds for exclusion of aliens, and strengthened the law by broadening the grounds for the deportation of aliens in sections 241(a)(1), (2), (4), (11) and (12).[154]

However, it is not the findings of the Committee, but the effect thereof that is of importance here. The basic findings associated with

146. *See generally H.R. Rep. No. 82-1365, supra* note 35.

147. *Id.*

148. *See* HUTCHINSON, *supra* note 43, at 301-2.

149. *See H.R. Rep. No. 82-1365, supra* note 35.

150. *See generally* Immigration and Nationality Act of 1952, 66 Stat. 163, *amended by* Immigration Act of 1990, 8 U.S.C. §§ 1 - 1778 (1990)).

151. *See H.R. Rep. No. 82-1365, supra* note 35.

152. *See* HUTCHINSON, *supra* note 43, at 302.

153. *See H.R. Rep. No. 82-1365, supra* note 35.

154. *Id.*

the three year intensive study[155] were incorporated into a report to the Senate,[156] which ultimately resulted in an initial attempt to revise Senate Bill 3455,[157] introduced by Senator McCarran, chairman of the Senate Judiciary Committee, in the Eighty-first Congress. What followed was the bureaucratic flurry of events that continued into the second session of the Eighty-Second Congress which was mostly spent on revision and codification of immigration law.[158]

On April 25, 1952, the House passed its version of the bill entitled H.R. 5678,[159] sponsored by Representative Walter of Pennsylvania, chairman of the House subcommittee on Immigration and Nationality. After the joint conference committee established to resolve minor differences between the Walter and the McCarran bills, the conference committee accepted the House bill with minor corrections made, and it was submitted to President Truman on June 16, 1952. Upon receipt of a negative response from the President, both houses of Congress quickly overrode the veto and passed the bill,[160] popularly known as McCarran-Walter Act, the Immigration Act of June 27, 1952.[161] The new Act was reported to broaden the definition of subversive classes of aliens subject to exclusion and deportation and also expand provisions for the exclusion and deportation of other classes of aliens.[162]

155. *See id.*

156. *See generally S. Rep. No. 81-1515, supra* note 47.

157. *See* S. 3455, 82nd Cong. (1950).

158. Thereafter, the immigration bills were submitted to the government for analysis, namely to the Departments of Justice and State. These were followed by revised versions of the immigration bills being submitted to the House and Senate in the first session of Eighty-second Congress. *See* S. 5716, 82nd Cong. (1951); H.R. 2374, 82nd Cong. (1951); H.R. 2816, 82nd Cong. (1951). The House and Senate Subcommittees on Immigration of the respective Judiciary Committees held joint hearings on the bills between March 6 and April 9, 1951. The second session of the Eighty-second Congress, from January 2 to July 5, 1952 used most of its time for revision and codification of the immigration law. Following the joint hearings, this session of Congress commenced with Senator McCarran introduction of a new bill, S. 2550, 82nd Cong (1952), a modified version of another of his bills from the first session, S. 2055, 82nd Cong (1951). The House was working on its own modified version of the previously introduced bill.

159. H.R. 5678, 82nd Cong. (1952). *See also* 98 CONG. REC. 4444 (1952).

160. HUTCHINSON, *supra* note 43, at 307.

161. Immigration and Nationality Act of 1952, 66 Stat. 163, *amended by* Immigration Act of 1990, 8 U.S.C. §§ 1 - 1778 (1990)). *See also* HUTCHINSON, *supra* note 43, at 301-307; *H.R. Rep. No. 82-1365, supra* note 35.

162. *See* HUTCHINSON, *supra* note 43, at 311.

d. Legislative Intent Behind Section 241(a)(4) of the Immigration Act of 1952 – Unclear and Murky Legislative Beginnings Seal the Fate of the Revised Multiple Conviction Clause of the Deportability Provision

It is common to see the following exclamations in recent judicial opinions, "[t]he legislative history of the 1952 Immigration and Nationality Act[163] offers no illumination as to congressional intent regarding what constitutes a single scheme of criminal misconduct for purposes of the exception to deportation."[164] While it is true that the Congress did not provide much by way of its intent behind inclusion of the language within section 241(a)(4),[165] the legislative history does promote a certain interpretation of the statute.

i. Analysis of Legislative Intent Behind Section 241(a)(4) of the Immigration Act of 1952 as Provided in House Report 1365 and Final Version of the Immigration Act within House Resolution 5678 – Mere Restatement of the Law Seems Adequate Ground for Legislative Intent Behind the House Bill

The Immigration Act of 1952[166] expanded the definition of subversive classes of aliens subject to exclusion and deportation and also expanded provisions for the exclusion and deportation of other classes of aliens.[167] In order to decipher the meaning of its provisions, the legislative materials accompanying the Act[168] constitute the analytical framework for deciphering Congressional Intent.

House Report 1365[169] was published to accompany House Resolution 5678[170] which was passed by the House of Representatives to become the Immigration Act of 1952.[171] The Report[172] contains explanatory notes to the enacted legislation. Specifically, the pertinent

163. *See* 8 U.S.C. §§ 1 – 1778.
164. Nguyen v. INS, 991 F.2d 621, 624 (10th Cir. 1993).
165. *See* 8 U.S.C. § 1251(a)(4).
166. *Id.*
167. *See* HUTCHINSON, *supra* note 43, at 311.
168. 8 U.S.C. §§ 1 - 1778.
169. *See generally H.R. Rep. No. 82-1365, supra* note 35.
170. *Id.*
171. *H.R. Rep. No. 82-1365, supra* note 35.
172. *Id.*

deportability provisions of the report, explaining section 241(a) of the Act,[173] are the focus of this analysis.

Unfortunately, the Report[174] does not provide any further insight into legislative intent, beyond that which is plainly memorialized in the statute itself. According to the Report,[175] the principal classes of aliens who are subject to deportation, as contained in the final version of the bill, are "[a]liens, who within 5 years of entry are convicted of a crime involving moral turpitude and sentenced to confinement for a year or more; or who at any time after entry, are convicted of two such crimes whether or not confined."[176] Notably, the House Report[177] makes the following distinction pertaining to the multiple criminal convictions clause, by asserting that "an alien who at any time after entry is convicted of 2 or more crimes involving moral turpitude is deportable, regardless of whether confined therefore, whereas under existing law the alien must have been sentenced more than once to a term of a year or more because of such convictions."[178] This is a mere restatement of the law, which provides for deportation upon conviction of the alien and not sentencing, as the 1917 Act[179] required.

ii. Analysis of Congressional Intent of Section 241(a)(4) within the Framework of Senate Report 1515 – Switching the Standard While Maintaining Overall Structure

The Immigration Act of 1952[180] was the result of substantial investigation into the immigration law. After several years of studying the problems within the immigration law, and responding to recommendations by the Senate Special Committee to Investigate Crime in Interstate Commerce, the Congress passed the Immigration and Nationality Act of 1952.[181] One of the specific objectives of the legislation was to broaden the provisions governing deportation particularly

173. *See* 8 U.S.C. § 1251(a).

174. *See generally H.R. Rep. No. 82-1365, supra* note 35.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *See* Immigration Act of 1917, 39 Stat. 874.

180. *See generally* Immigration and Nationality Act of 1952, 66 Stat. 163, *amended by* Immigration Act of 1990, 8 U.S.C. §§ 1 - 1778 (1990)).

181. *Id.*

those referring to criminal and subversive aliens.[182] The results of one of the most intensive legal studies on immigration laws, as conducted by both legislative houses of Congress,[183] were reported in a voluminous report to the Congress.

Without a doubt, this report,[184] has had an enormous influence on the Immigration Act of 1952.[185] The findings and analyses of the law, compiled in Senate Report 1515,[186] were the driving force behind Congressional efforts to revise the Immigration Act of 1917.[187] The profound effect of the Report[188] is self evident. Certain parts of the Senate Report[189] were integrated and incorporated into House Report 1365[190] which accompanied the final version of the bill which was to become Immigration Act of 1952,[191] namely H.R. 5678.[192] Furthermore, in the House bill[193] itself, the legislators followed the Report's[194] recommendations almost to the letter in constructing the provisions of section 241(a).[195]

Consequently, it is not a coincidence that the transition – from *sentenced more than once* to conviction of two crimes not arising out of a *single scheme of criminal misconduct* – within the deportability provisions is reported for the first time in the recommendations of Senate Report 1515,[196] as part of legislative consequences of recommendations by the Senate Special Committee. Because the analysis of legislative intent must be conducted at the origination point of the language in the statute and any other pertinent legislative materials, Senate Report 1515[197] seems like the best place to find legislative rationale for the *single scheme of criminal misconduct* language in section 241(a)(4) of the Immigration Act of 1952.[198]

182. Costello v. INS, 311 F.2d 343, 345 (2nd Cir. 1962), *rev'd*, 376 U.S. 120 (1964).
183. *See H.R. Rep. No. 82-1365, supra* note 35.
184. *See S. Rep. No. 81-1515, supra* note 47.
185. *See generally* 8 U.S.C. §§ 1 - 1778.
186. *See generally S. Rep. No. 81-1515, supra* note 47.
187. *See* Immigration Act of 1917, 39 Stat. 874.
188. *See S. Rep. No. 81-1515, supra* note 47.
189. *See generally S. Rep. No. 81-1515, supra* note 47.
190. *See H.R. Rep. No. 82-1365, supra* note 35.
191. *See generally* 8 U.S.C. §§ 1 – 1778.
192. *See H.R. Rep. No. 82-1365, supra* note 35.
193. *Id.*
194. *See generally S. Rep. No. 81-1515, supra* note 47.
195. *Id.*
196. *Id.*
197. *Id.*
198. *See* 8 U.S.C. § 1251(a)(4).

The Report[199] provides analysis and recommendations regarding the then-current immigration law. After analyzing the judicial interpretation of section 19(a) of the Immigration Law of 1917,[200] the Report recommends retention of the pertinent deportability provisions while recommending "some modification."[201] However, there is more than just *some modification* in the Report's[202] recommendations to amend. This modification is the change in the statutory language, creating a brand new threshold for adjudicating deportability by shifting the emphasis from sentencing to conviction of crimes involving moral turpitude.

The Report[203] gives the following recommendation pertaining to the second prong of deportability based on multiple convictions: "[i]n the case of an alien convicted of two such crimes at any time after entry not arising out of a single scheme of criminal misconduct, the alien is deportable regardless of whether sentenced to confinement."[204] Analytically, there is a two-fold purpose for recommendations to revise the pertinent provisions. The first reason for the recommendations is to clarify and focus the multiple criminal convictions provision to allow for deportation of aliens who are indeed criminals. The second rationale for the recommendations was to account for administrative details and make them irrelevant within the meaning of the statute.

In its analysis of the provision which authorizes deportation for commission of crimes involving moral turpitude, the Report[205] makes the following observation about the judicial interpretation of the *sentenced more than once* language of the section 19(a) of 1917 Immigra-

199. *See generally S. Rep. No. 81-1515, supra* note 47.

200. *See* Immigration Act of 1917, § 19(a), 39 Stat. 874, 889.

201. *See S. Rep. No. 81-1515, supra* note 47, at 391-392 (recommending, first, the retention with some modification of "the deportation provisions with respect to aliens who have been convicted of a crime involving moral turpitude." Second, "[a]s to such crimes committed subsequent to the time of the alien's entry, it is held that deportation should be required, in the case of a single conviction, only if the conviction occurred within 5 years after entry and resulted in confinement in a prison or corrective institution for a year or more." Third,"[i]n the case of an alien convicted of two such crimes at any time after entry not arising out of a single scheme of criminal misconduct, the alien is deportable regardless of whether sentenced to confinement." Last, recommending that "any alien who at any time after entry is convicted in this country of a criminal offense not comprehended within the other categories shall be deportable if the Commissioner concludes that the alien is an undesirable.").

202. *See generally S. Rep. No. 81-1515, supra* note 47.

203. *Id.*

204. *Id*. at 391-392.

205. *Id.*

tion Act.[206] The Report[207] observes that "'sentenced more than once' requires a conviction or plea of guilty with consequent sentence on two separate occasions."[208] Notice must be afforded to the fact that the Report[209] is referring to one specific interpretation of the statutory language. This is an implicit reference to the Supreme Court's 1948 decision in *Fong Haw Tan*,[210] which renders such interpretation of the statutory language in the 1917 Act.[211]

However, the meaning of this recommendation should not be taken on its own, but in the context of the case law discussion. In analyzing section 19(a) of the 1917 Immigration Act,[212] predecessor to section 241(a)(4) of the 1952 Immigration Act,[213] the Report[214] chooses to analyze a problem with the statutory language by discussing the Fifth Circuit Court of Appeals case of *Wallis v. Tecchio*.[215] While seemingly neutral to the findings of the *Wallis* court, the Report[216] suggests that the law warrants "some modification,"[217] while plainly suggesting that "[i]t is the opinion of the subcommittee that the deportation provisions with respect to aliens who have been convicted of a crime involving moral turpitude should be retained in the law . . . ."[218]

It is quite clear that the major recommendations of the Report[219] were aimed at re-focusing the statute from sentencing to conviction, as a consequence of problems facing the interpretation of the *sentencing more than once* language. Furthermore, with recommendations regarding the Fifth Circuit's *Wallis* decision,[220] the Report[221] tacitly questions the Supreme Court decision in *Fong Haw Tan*,[222] which used the *Wallis*[223] rationale. As mentioned above, the *Wallis* court,[224]

206. *See* Immigration Act of 1917, § 19(a), 39 Stat. 874, 889.
207. *See S. Rep. No. 81-1515, supra* note 47.
208. *Id.* at 391.
209. *See generally S. Rep. No. 81-1515, supra* note 47.
210. Fong Haw Tan v. Phelan, 333 U.S. 6 (1948).
211. *See* § 19(a), 39 Stat. at 889.
212. *See id.*
213. *See* Immigration and Nationality Act of 1952 § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1990).
214. *S. Rep. No. 81-1515, supra* note 47, at 391.
215. Wallis v. Tecchio, 65 F.2d 250 (5th Cir. 1933).
216. *See generally S. Rep. No. 81-1515, supra* note 47.
217. *Id.* at 391.
218. *Id.*
219. *See generally id.*
220. *See Wallis*, 65 F.2d 250.
221. *See S. Rep. No. 81-1515, supra* note 47.
222. *See* Fong Haw Tan v. Phelan, 333 U.S. 6 (1948).
223. *Wallis*, 65 F.2d 250.

as well as the Supreme Court in *Fong Haw Tan*[225] interpreted the statute to be designed to punish "persons who commit a crime and are sentenced, and then commit another and are sentenced again."[226] While discussing the topic, it is important to note the significance of the Report's[227] choice of case law to discuss the issue of interpreting *sentenced more than once* language of the provision.[228]

The Fifth Circuit court in *Wallis*[229] concluded that it did not matter that the trial court, in the name of efficiency, combined different counts into one trial or rendered verdicts with concurrent sentences. According to the *Wallis*[230] court, deportation rests on a conviction and "[a]fter five years' residence [alien's] ties here may not be broken unless he has thus been . . . 'sentenced more than one time.'"[231] The Circuit court then defined the meaning of sentencing, by stating, "[t]he alien is sentenced once when, after a conviction or plea of guilty, he is called before the bar and receives judgment, whether for one or several crimes, with one or several terms of imprisonment. He is sentenced more than once when that happens again."[232]

More important is the Report's[233] interpretation of the *Wallis* case.[234] The Report[235] correctly understood the *Wallis* decision[236] to hold "that being sentenced more than once meant a conviction or plea of guilty with consequent sentence on two separate occasions."[237] The Report's[238] language of emphasizing the "convictions," completely ignoring and devaluing sentencing, by stating "regardless of whether sentenced or confined,"[239] effectively puts aside the *Wallis* decision[240]

224. *See id.*

225. *See Fong Haw Tan*, 333 U.S. 6.

226. *See id.* at 9*; Wallis*, 65 F.2d at 251.

227. *See generally S. Rep. No. 81-1515, supra* note 47.

228. Congress clearly took great care to avoid direct assault on the Supreme Court's decision in *Fong Haw Tan*. One possible reason for doing so is out of the respect for the judicial branch of the federal government. The existence of any other possible reasons remains to be explored. *See Fong Haw Tan*, 333 U.S. 6.

229. *See Wallis*, 65 F.2d 250.

230. *See id.*

231. *See id.* at 252.

232. *See id.*

233. *See generally S. Rep. No. 81-1515, supra* note 47.

234. *See Wallis*, 65 F.2d 250.

235. *See generally S. Rep. No. 81-1515, supra* note 47.

236. *See Wallis*, 65 F.2d 250.

237. *S. Rep. No. 81-1515, supra* note 47, at 391-2.

238. *See generally S. Rep. No. 81-1515, supra* note 47.

239. *Id.* at 391-2.

240. *See Wallis*, 65 F.2d 250.

and with it the Supreme Court's holding in *Fong Haw Tan*.[241] It is understandable why the Report[242] provides such recommendations. The *sentenced more than once* language within the Immigration Act of 1917,[243] made it possible to avoid deportation after committing multiple crimes in the span of many years when sentenced only once. The Congress found this simply unacceptable.

However, recommending excising the *sentence requirement* and replacing it with the *conviction requirement*,[244] maintains the general construction of the provision, which has some meaning on its own. Furthermore, the Report[245] itself recommends retention of the basic principle behind the law, although changing the stringencies of the provision. This means that while the holding of the Supreme Court decision in *Fong Haw Tan*[246] is overturned by the legislature, the basic rationale behind it still remains in force.

C. Reconstructing Legislative Intent of the Multiple Conviction Clause within the Deportability Statute of the Immigration and Nationality Act of 1952

a. Turning to the Underlying Public Policy to Reconstruct Legislative Intent of the 1952 Immigration Act

By lowering the threshold to achieve deportation, the legislators for the Immigration Act of 1952[247] attempted to strengthen the deportability provision within section 241(a)(4).[248] Moreover, by maintaining the same construction of the statute as its predecessor, the legislators of the 1952 Act[249] attempted to maintain the purpose behind the provision. Therefore, it is not incidental that the statutory construction of the 1917 Act[250] was carried over to the 1952 deportability provisions.[251]

241. *See* Fong Haw Tan v. Phelan, 333 U.S. 6 (1948).

242. *S. Rep. No. 81-1515, supra* note 47, at 391-2.

243. *See* Immigration Act of 1917, § 19(a), 39 Stat. 874, 889.

244. *See S. Rep. No. 81-1515, supra* note 47, at 391-2 (citing § 19(a), 39 Stat. at 889; Immigration and Nationality Act of 1952 § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1990)).

245. *Id.*

246. *See Fong Haw Tan*, 333 U.S. 6.

247. *See generally* Immigration and Nationality Act of 1952, 66 Stat. 163, *amended by* Immigration Act of 1990, 8 U.S.C. §§ 1 - 1778 (1990)).

248. *Id.* § 1251(a)(4).

249. *Id.*

250. Immigration Act of 1917, § 19(a), 39 Stat. 874, 889.

251. 8 U.S.C. § 1227(a)(2)(A)(ii).

The legislative intent behind the original deportability provision of the 1917 Act[252] attempted to punish repeaters by allowing for deportation beyond five years of residence in this country. As noted earlier, the 1917 Act's[253] rationale for enacting the multiple crimes provision was to punish "a man who is a criminal at heart,"[254] and stated that "those who committed a second crime involving moral turpitude showed then a criminal heart and a criminal tendency and they should be deported."[255]

The judicial interpretation of the legislative intent behind the 1917 Act[256] is also crucial. The Supreme Court in their *Fong Haw Tan*[257] decision interpreted the intent of the legislature as being to punish repeating criminals of the confirmed type and "perhaps the plainest 'confirmed type' of criminal is the repeater."[258] Who is the *repeater*? The Webster's Ninth New Collegiate Dictionary defines the person as "a habitual violator of the laws."[259] The obvious form of this confirmed type of a criminal is a recidivist. The word *recidivist* comes from the word *recidivism* which means relapse or return (go back).[260] Some of the courts have indeed held that Congress in its multiple conviction clause of the deportability provision meant to punish a recidivist, while giving a second chance to a law abiding foreign national.[261]

Therefore, this individual who is a criminal of a confirmed type is a recidivist, or someone who repeatedly and habitually engages in a criminal misconduct. This is the basic rationale behind judicial decisions of the early 1900s and it is the rationale that the Congress struggled to preserve within the deportability provisions of the Immigration Act of 1952.[262]

252. § 19(a), 39 Stat. at 889.

253. *Id.*

254. *Id. See also* 53 CONG. REC. 4937, 5167 (1916) (statement of Congressman Sabath).

255. 53 CONG. REC. at 5168 (statement of Congressman Burnett).

256. *See generally* 39 Stat. 874.

257. *See* Fong Haw Tan v. Phelan, 333 U.S. 6 (1948).

258. *See id.* at 9.

259. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 999 (1st ed. 1983).

260. WILLIAM C. BURTON, LEGAL THESAURUS 430 (Macmillan Publishing 1980).

261. Nason v. INS, 394 F.2d 223, 227 (2nd Cir. 1968).

262. *See* Immigration and Nationality Act of 1952 § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1990).

b. Combined Effect of Evolution and Legislative History of the Multiple Criminal Convictions Clause of the Deportability Provision

Although enacted to cure inconsistencies in the application of the 1917 Immigration Act,[263] the 1952 Immigration Act[264] did nothing of the sort. The federal judiciary continues to struggle[265] with interpreting the multiple conviction clause of the deportability provisions within the Immigration and Nationality Act of 1952.[266] One way to resolve this issue would be for the Supreme Court to take it up on appeal from the Federal Circuits. This is very unlikely, considering how the Congress treated the Supreme Court's interpretation of the law in their *Fong Haw Tan* decision.[267] The legislative solution is the other alternative. However, it is also unlikely that this problem of unequal judicial interpretation will even reach the halls of Congress. The solution to this inequity in judicial interpretation and application lies with clarifying the ambiguous statutory language. Because the resolution of a multiplicity of legal interpretations cannot be found in the plain language, the analysis must be directed to the rationale for creating such language.

Legislative history of the Immigration Act of 1952[268] is unclear as to the origin of the particular language within the multiple conviction clause of the deportability provision. However, while the *single scheme of criminal misconduct* language within section 241(a)(4)[269] is not explained and seems to appear out of nowhere, the premise behind it is quite rational. The target of the multiple crimes clause is someone who is convicted of two or more crimes involving moral turpitude. The unambiguous rationale behind the deportation provision is to punish such a foreign national who is a repeater, someone who by his misdeeds continually violates this country's laws. In order for the individual to be such a habitual violator of the law, a true recidivist will need to subject himself to this country's court systems on more than one occasion. This is the basic foundation behind the multiple convictions clause of the deportability provisions within the 1917

263. *See generally* Immigration Act of 1917, 39 Stat. 874.

264. *See generally* 8 U.S.C. §§ 1 - 1778.

265. *See supra* Part II.

266. *See generally* 8 U.S.C. §§ 1 - 1778.

267. The general effect of the Immigration and Nationality Act of 1952 was to overrule the Supreme Court's decision in *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948). *See* 8 U.S.C. §§ 1 – 1778.

268. *See generally*, 8 U.S.C. §§ 1 - 1778.

269. *Id.* § 1251(a)(4).

Act.[270] This deeply rooted rationale has guided American policies on immigration ever since this country's very inception. Thus, even if the 1952 Act[271] lowered the threshold for deportation to the conviction level, the rudimentary meaning of the statute remains one and the same. Therefore, this longstanding public policy which finds its structural roots in the legislative history of the 1917 Act[272] continues to affect judicial decision-making to this day.

It is clear that the holding of *Fong Haw Tan*[273] has been legislatively overturned by the Immigration Act of 1952.[274] With lowering of the threshold to the conviction level, Congress intended to avoid the judicial results of *Fong Haw Tan.*[275] Nevertheless, maintaining the same structure of the provision while placing a clear restriction on deportability, in the context of the legislative history and public policies surrounding the immigration law, creates continuity of legislative purpose. This continuity originates in the early immigration provisions and is fully elaborated in the legislative history behind the 1917 Act.[276] Thus, the intent behind the 1917 Act[277] is even more important because, as noted earlier, the statutory construction of the multiple conviction clause remained generally undisturbed in the Immigration Act of 1952 and its subsequent amendments.[278]

It is then only logical that whatever test the Federal Circuits prefer to use, the courts have to keep in mind the Congressional debates prior to enactment of the 1917 Immigration Act,[279] which espouse the basic principle behind the deportability provision. This rudimentary principle that permeates the deportability statute is clearly expressed by Congressman Sabath, who introduced his amendment to the immigration law bill aiming it at "a real criminal."[280] As further refined by Congressman Burnett, deportation is designed to punish a foreign national with "a criminal heart and a criminal tendency."[281] While referring to such an individual as someone who is not entitled "to consideration," Congressman Sabath amendment allowed for some

270. *See* Immigration Act of 1917, § 19(a), 39 Stat. 874, 889.
271. *See* 8 U.S.C. §§ 1 - 1778.
272. *See generally* 39 Stat. 874.
273. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 9 (1948).
274. *See* 8 U.S.C. § 1251(a)(4).
275. *See Fong Haw Tan*, 333 U.S. at 9.
276. *See generally* 39 Stat. 874.
277. *Id.*
278. *See* 8 U.S.C. §§ 1 – 1778.
279. *See generally* 39 Stat. 874.
280. HUTCHINSON, *supra* note 43, at 164-5.
281. *See* 53 CONG. REC. 4937, 5168 (1916).

foreign nationals to avoid deportation, but only those who are entitled to such "consideration."[282] The trigger was based on the sentencing requirement. However, the protection enacted in the 1917 Act[283] language of *sentenced more than once* was replaced by the *single scheme* language of the 1952 Act.[284] The current multiple convictions clause allows for deportation of a criminal irrespective of number of criminal proceedings or sentences imposed on the criminal. The trigger that has been implanted into the statute is based on the relationship between the crimes for which the alien was convicted.

The undisputed statutory purpose aims at punishing those who commit multiple criminal offenses. The only reason for the built-in exception is to spare those individuals who commit offenses that are inherently related to the ultimate purpose. Aligned with the defendant's ultimate purpose, these related criminal convictions cease to possess their separate and independent identities. Such inherently related offenses that merge into one single and ultimate purpose can no longer be considered separate and distinct crimes for the purpose of multiple conviction clause. Under such circumstances, the crimes cease their independent existence and merge into one separate yet related criminal conduct. Thus, an individual who has committed such offenses will not be deemed deportable for multiple convictions because such crimes arose under *single scheme of criminal misconduct*. This legislative exception can be analogized to a legal principle generally referred to as *Merger Doctrine*, whereby the lesser included offenses cease to exist by merging into one resulting offense.[285]

Therefore, a more equitable standard for protecting the society from *a real criminal* and someone who does not deserve our *consideration* for leniency is a test that emphasizes the criminal behavior as it relates to the defendant's ultimate purpose. The important analysis should focus on whether the convicted behavior was done in furtherance of the ultimate purpose, narrowly construed. The balancing principle here is whether such criminal acts are that of a true repeat criminal, taking into consideration not just gravity of such acts, but also their repetitious nature and the type of (close or distant) association to the ultimate purpose. The stronger the relationship between

282. *Id.*

283. *See* § 19(a), 39 Stat. at 889.

284. *See generally* Immigration and Nationality Act of 1952, 66 Stat. 163, *amended by* Immigration Act of 1990, 8 U.S.C. §§ 1 - 1778 (1990)).

285. *See* ROLLIN M. PERKINS AND ROLLAND N. BOYCE, CRIMINAL LAW, 649-50 (Foundation Press, Third Edition, 1982).

convictions, the greater the likelihood such convictions arose from *single scheme*. The factors to consider in evaluating the strength of the relationship between convictions should focus on qualitative and quantitative differences between convicted offenses. A clearly inexhaustible list includes foreseeability of the crimes in relationship to the criminal purpose, gravity of the behavior, as well as the temporal relationship between the acts.

IV. Conclusion

Reconstructing the legislative history behind the Immigration Act of 1952[286] reveals the Congressional intent to maintain the structural posture of the provision, while changing it to avoid *Fong Haw Tan*[287] consequences. This statutory continuity allows for application of legislative history behind Immigration Act of 1917.[288] In fact, the purpose of Immigration Act of 1952[289] is the same as it was in the Immigration Act of 1917.[290] Thus, while the legislative history behind the 1952 Act[291] does not provide much explanation behind the newly created language in the multiple convictions clause, the explanation to this language can be easily derived from the pre-1917 legislative history,[292] taken in conjunction with the overall immigration policies espoused by the American people. Based on this determination, this article articulated a test that should aid judicial entities in rendering appropriate decisions in applying the language of the multiple conviction clause of the deportability provision within the Immigration and Nationality Act.[293]

So, what should really happen to Alice? A better question would be – is Alice a criminal at heart. To prevent an illogical conclusion, the court must construe the defendant's ultimate purpose narrowly. If not, then the hardened criminal can avoid statutory applicability by blaming *his life of crime* as the ultimate purpose. Such conclusion would obviously defeat the legislative purpose of protecting society from the recidivist. Although we are not dealing with criminal acts spread across a lifetime, in the case of Alice, we nevertheless are faced with

286. *Id.*
287. *See* Fong Haw Tan v. Phelan, 333 U.S. 6 (1948).
288. *See generally* 39 Stat. 874.
289. *See* 8 U.S.C. §§ 1 – 1778.
290. *See generally* 39 Stat. 874.
291. *See* 8 U.S.C. §§ 1 - 1778.
292. *See supra* Part III.A.d for complete discussion of legislative history preceding Immigration Act of 1917.
293. *See* 8 U.S.C. § 1227(a)(2)(A)(ii).

the same issue. As you can recall, Alice is preparing for her Friday party by "shopping around" at different locations and different stores, at different times. In order to come under the exception, the criminal acts must not only be related to each other, but must also occur within a relatively short period of time. This is due to the fact that the longer the time that passes between instances of criminal behavior, the greater the likelihood that such acts are product of a hardened criminal. Alice's criminal behavior occurred throughout an entire week. In committing such acts, Alice visited the mall on Monday. She then methodically determined and engaged in another instance of criminal behavior on Wednesday. She repeated her conduct yet again on Friday of the same week. Every time that Alice engaged in misconduct, it involved a specific plan of entry into the victim's business premises, a deliberate target, and a specific, if not unique, method of execution.

While the reflecting back by the defendant is a first point of analysis, the adjudicator must go beyond determining whether the individual could take a step back and ponder his actions. It is also not necessary that criminal acts be part of a temporal episode, as it is possible for such acts to be separate and independent from the ultimate purpose. Such distinct criminal behavior is indicative of either a hardened criminal, or a person who shows complete indifference to the rule of law by methodically repeating criminal behavior – a recidivist. In the case of Alice, her actions are methodical and planned enough to be considered part of a distinct and independent purpose, being the commission of one particular act. Put together, Alice's behavior is far too remote in time and space to be considered part of *single scheme of criminal misconduct*. Alice acted as a hardened criminal and that is how Alice should be treated. Please note that the statute and the test would probably protect Alice, if the issue at hand was a single trip that she made to the mall. However, the exception would be powerless to protect her if stealing an article of clothing was complicated further by Alice grabbing cash from an open register on the way in or out of the mall.

The threshold set by Congress is high. To prove the individual has a defense under the multiple convictions clause of the deportability provision requires a strong criminal relationship between individual convictions. Where such relationship is not in existence, a foreign national who is convicted on multiple criminal counts is a *real criminal* who must be deported.

NOTE

Rest Easy: *Zamos v. Stroud* Will Not Increase the Use of the Wrongful Civil Proceedings Suit

DAVID RUIZ RIERA

I. INTRODUCTION

Frivolous litigation has been a problem for the judicial system since early legal times.[1] This kind of litigation harms the individuals against whom it is brought and the court system that sees its effectiveness as a dispute-solving forum impaired.[2] Wrongful use of civil proceedings and its homologue in the criminal prosecution field, wrongful use of civil proceedings, were initially intended to deter the proliferation of baseless and harassing lawsuits.[3] The interest in deterring frivolous litigation has traditionally collided with the idea that access to the court system should be completely open to the public for solving its

1. *See* Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1218 (1979) ("The problem of frivolous suits bothered early legal systems just as it troubles modern jurisprudence . . . .").

2. *See* John W. Wade, *Frivolous Litigation: On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 433 (1986) ("Frivolous lawsuits cause appreciable harm to many persons, and in many ways. The person against whom the groundless suit is brought is subjected to serious harassment and inconvenience, pecuniary loss through necessary attorney's fees, deprival of time from his business or profession, and, in some cases, harm to reputation and even physical damage to person or property. The court system itself becomes more clogged, disrupted, and delayed, thus affecting the taxpayers in general, and other litigants who have their suits delayed. The situation cries out for remedies to avert these harms.").

3. *See* Cynthia Grant Bowman & Elizabeth Mertz, *Attorneys as Gatekeepers to the Court: the Potential Liability of Attorneys Bringing Suits Based on Recovered Memories of Childhood Sexual Abuse*, 27 HOFSTRA L. REV. 223, 248-249 (1998) ("The malicious prosecution tort, which may be brought against the opposing party, his or her attorney, or both, developed early in the history of the common law and was intended to prevent the bringing of groundless and harassing actions.").

disputes.[4] This conflict has resulted in courts traditionally considering malicious prosecution and wrongful use of civil proceedings as disfavored causes of action.[5] Because this situation has undermined the efficacy of these torts,[6] the judicial and the legislative systems have preferred other means to combat the harmful effects of groundless litigation.[7]

A recent decision of the California Supreme Court seems to have begun to favor the use of wrongful use of civil proceedings as a means to deter baseless litigation. On April 19, 2004, the Court decided *Zamos v. Stroud*.[8] In this case, the Court upheld a decision of Division Five of the Second Appellate District of the Court of Appeal of California stating that an attorney might be held liable under the tort of wrongful use of civil proceedings for continuing to prosecute a lawsuit discovered later to lack probable cause.[9] The previous decision of Division Five and the decision of the California Supreme Court upholding it generated some concern among the legal community because of the seemingly enhanced likelihood of attorneys being sued for wrongful use of civil proceedings whenever they did not prevail in a lawsuit.[10]

4. *See* Wade, *supra* note 2, at 433-434 ("The Courts have always regarded themselves as open to the public for the purpose of letting parties learn whether a disputed claim is valid; and they have jealously preserved and guarded this significant function.").

5. *Id.* at 434 ("Because of their jealous protection of the position that they should always be open for the public to use, the courts have frequently declared that they do not favor the action.").

6. *Id.* ("All of this has made the use of the tort action rather spotted and its effectiveness quite doubtful.").

7. *See, e.g.*, Sheldon Appel Company v. Albert & Oliker, 765 P.2d 498, 503 (Cal. 1989) (indicating that legislative measures facilitating a fast solution for a lawsuit and authorizing the courts to impose sanctions for frivolous conduct seem to be more effective remedies to combat frivolous litigation); Stephen Glassman, Commentary, *The Modified American Plan: Eliminating the Tort of Malicious Prosecution*, 29 U. WEST. L.A. L. REV. 179, 182 (1998) (advocating for making of malicious prosecution a defense rather than a tort); Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671, 672 (1997) (offering a theoretical framework for rules that limit lawyer zealousness and a critical perspective on those rules).

8. Zamos v. Stroud, 87 P.3d 802 (Cal. 2004).

9. *See Id.* at 810.

10. *See, e.g.*, The Weekly Law Resume, *Malicious Prosecution – Elements: Jerome Zamos v. James T. Stround* [sic] (April 19, 2004), *available at* www.lowball.com/WEEKLY/04-29-04.htm (discussing that the tort of wrongful use of civil proceedings has been greatly expanded); Mike McKee, *Court Says Failure to Drop Case Puts Lawyer on Hook*, THE RECORDER (July 03, 2003), *available at* www.peerreview.org/experts/new_page_1.htm ("Lawyers who discover they're pressing a meritless suit now have a stronger reason than ever to pull out while they can."); Mike McKee, *Pursue a Bad Case, Risk Getting Sued for Malicious Prosecution*, THE RECORDER (Apr. 21, 2004), *available at* www.overhauser.com/dtv/articles/law%20dot%20com.htm ("If a California attorney has good reason to suspect that a lawsuit has no merit after it has been filed, he

Notwithstanding *Zamos*,[11] a comprehensive analysis of all the elements of the tort of wrongful use of civil proceedings demonstrates that the probabilities of succeeding in this claim are still very limited. This is because the Court did not decrease the impact of the required elements. Therefore, it cannot be said that the tort has seen a major alteration of its disfavored status. Although the Court seemed to begin favoring the tort of wrongful use of civil proceedings, all it did was expand the scope of its liability once established. Thus, the tort continues to be a disfavored tort.[12] The Court has technically increased the potential of liability under wrongful use of civil proceedings, but the likelihood of proving all the elements of the tort is still very limited.

This note first discusses the background of wrongful use of civil proceedings. The discussion begins by analyzing the differences between wrongful use of civil proceedings and wrongful use of civil proceedings. It also provides a description of the status of wrongful use of civil proceedings before the Court's decision in *Zamos*.[13] Secondly, this note contains a summary of the Court's decision in *Zamos*.[14] Thirdly, this note analyzes *Zamos.*[15] The analysis begins with an explanation of why wrongful use of civil proceedings is considered a disfavored tort. Then, the analysis considers the effect that being a disfavored tort has had on the utility of wrongful use of civil proceedings. After this, the analysis explores how *Zamos*[16] has broadened the scope of liability of wrongful use of civil proceedings. Lastly, the analysis discusses the extent to which the ruling of *Zamos*[17] increases the likely use of wrongful use of civil proceedings. This note will demonstrate that the tort of wrongful use of civil proceedings continues to be a disfavored tort.

II. Background

The impact of *Zamos*[18] in the configuration of the tort of wrongful use of civil proceedings in California needs to be seen from a his-

would be wise to get out while the getting's good."); Charles Delafuente, *At the Corner of Caution and Zeal*, 3 ABA JOURNAL EREPORT 17 (April 30, 2004).

11. *Zamos*, 87 P.3d at 802.

12. *See* Wade, *supra* note 2, at 434 ("Because of their jealous protection of the position that they should always be open for the public to use, the courts have frequently declared that they do not favor the action.").

13. *Zamos*, 87 P.3d at 802.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

torical and legal perspective to be fully understood. In this section, the tort of wrongful use of civil proceedings is contrasted with the tort of malicious prosecution, its homologue in the field of criminal prosecution. This contrast includes a clarification regarding the nomenclature used to refer to wrongful use of civil proceedings. This is followed by a discussion of the status of wrongful use of civil proceedings in California prior to *Zamos*.[19]

A. Historical Perspective of Malicious Prosecution and Wrongful Use of Civil Proceedings

The tort of wrongful use of civil proceedings originates from the common law tort of malicious prosecution.[20] Malicious prosecution has a long history in the common law[21] as a legal means to impede the proliferation of frivolous litigation.[22] In fact, wrongful use of civil proceedings did not develop until malicious prosecution had developed as a means to prevent the instigation of groundless criminal prosecution.[23] As the California Supreme Court expressed, "malicious prosecution originated as a remedy for an individual who had been subjected to a maliciously instituted criminal charge, but in California, as in most common law jurisdictions, the tort was long ago extended to afford a remedy for the malicious prosecution of a civil action."[24] As shown, although there may still be some connection between malicious prosecution and wrongful use of civil proceedings,[25] the latter

19. *Id.*

20. RESTATEMENT (SECOND) OF TORTS § 653 (1977) ("A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and (b) the proceedings have terminated in favor of the accused.").

21. For a detailed history of the tort of malicious prosecution from its inception, see *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, *supra* note 1.

22. *See* Bowman & Mertz, *supra* note 3, at 248 ("The malicious prosecution tort, which may be brought against the opposing party, his or her attorney, or both, developed early in the history of the common law and was intended to prevent the bringing of groundless and harassing actions.").

23. *See* Wade, *supra* note 2, at 437-438 ("[wrongful use of civil proceedings] developed after the tort of malicious prosecution had been established and had acquired certain attributes.").

24. Sheldon Appel Company v. Albert & Oliker, 765 P.2d 498, 501 (Cal. 1989) (citing Eastin v. Bank of Stockton, 4 P. 1106, 1108-1110 (Cal. 1884); Grant v. Moore, 29 Cal. 644 (Cal. 1866)).

25. As an example of this dependency, in the Comments and Illustrations section of Section 674 of RESTATEMENT (SECOND) OF TORTS, which establishes the general principles applicable to wrongful use of civil proceedings, there are constant references to the sections regarding malicious prosecution, which are applicable to wrongful use of civil proceedings so long as they are pertinent. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 674 cmt. C (1977) ("*Continuation of*

may be analyzed as an independent tort involving the malicious institution of civil proceedings.

A possible consequence of the historical interrelation between malicious prosecution and wrongful use of civil proceedings is that the latter lacks a generally accepted name.[26] The Court in *Zamos*[27] discusses this tort under the name of "malicious prosecution."[28] In other decisions, however, the same Court has referred to this tort as "malicious prosecution of a civil proceeding."[29] In any event, the use of the word "prosecution" in the name of this tort may not be the best choice to describe the civil nature of the underlying action.[30] Witkin[31] uses the expression "malicious institution of a civil proceeding"[32] and Restatement (Second) of Torts[33] names it "wrongful use of civil proceedings."[34] For purposes of consistency, this note will follow the Restatement[35] and refer to this tort as "wrongful use of civil proceedings."[36]

civil proceedings. As in the case of criminal prosecutions (see § 655), one who continues a civil proceeding that has properly been begun or one who takes an active part in its continuation for an improper purpose after he has learned that there is no probable cause for the proceeding, becomes liable as if he had then initiated the proceeding. The Comments under § 655 are applicable here so far as they are pertinent.").

26. *See* Wade, *supra* note 2, at 437 ("The tort action developed by the common law to provide a remedy for the bringing of a baseless or unjustifiable civil action is unlike most torts in that it has not acquired a name commonly used to identify it.").

27. Zamos v. Stroud, 87 P.3d 802 (Cal. 2004).

28. Throughout this note, the California Supreme Court's denomination of "malicious prosecution" to refer to the initiation or continuation of civil proceedings with malice and without probable cause has been substituted for the Restatement (Second) of Torts denomination of "Wrongful Use of Civil Proceedings." *See* RESTATEMENT (SECOND) OF TORTS § 674 (1977).

29. *See* Bertero v. National General Corporation, 529 P.2d 608, 613 (Cal. 1974).

30. *See* 5 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW § 431 (9th ed. 2003) ("Although the tort is usually called 'malicious prosecution,' the word 'prosecution' is not a particularly apt description of the underlying civil action.").

31. Id.

32. *Id.*

33. RESTATEMENT (SECOND) OF TORTS § 674 (1977) ("One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and (b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.").

34. *Id.*

35. *Id.*

36. *Id.*

B. Wrongful Use of Civil Proceedings in the State of California Prior to Zamos v. Stroud[37]

A discussion of the status of the tort of wrongful use of civil proceedings in the state of California, prior to the decision in *Zamos*,[38] requires examining the elements of the tort as established by California courts. Although wrongful use of civil proceedings has been evolving in California since the incorporation of this state into the Union,[39] California courts have established well-defined elements for the tort of wrongful use of civil proceedings.

Before[40] *Zamos*,[41] the California Supreme Court[42] had listed the elements of this tort in 1974, in *Bertero v. National General Corporation.*[43] To establish a cause of action for wrongful use of civil proceedings, "plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in plaintiff's favor;[44] (2) was brought without probable cause;[45] and (3) was initiated with malice."[46] Since 1974, wrongful use of civil proceedings remained unchanged until the California Supreme Court's decision in *Zamos*.[47]

Although the elements of wrongful use of civil proceedings[48] remained unchanged since 1974, in 2002 the different divisions of the

37. Zamos v. Stroud, 87 P.3d 802 (Cal. 2004).

38. *Id.*

39. The State of California was admitted into the Union in 1850, and the first case in which the California Supreme Court addressed the issue of wrongful use of civil proceedings was decided in 1866. *See* Grant v. Moore, 29 Cal. 644 (Cal. 1866).

40. It should be noted that after *Zamos*, 87 P.3d at 802, some courts have continued to use the statement of *Bertero v. National General Corporation*, 529 P.2d 608 (Cal. 1974). *See, e.g.,* Siebel v. Mittlesteadt, 12 Cal. Rptr. 3d 906, 913 (Cal. Ct. App. 2004).

41. *Zamos*, 87 P.3d at 802.

42. The elements of the tort of wrongful use of civil proceedings established by *Bertero v. National General Corporation*, 529 P.2d 608 (Cal. 1974) have been widely used by the California Supreme Court and by the Court of Appeal of California. *See, e.g., Zamos*, 87 P.3d at 807; Crowley v. Katleman, 881 P.2d 1083, 1087 (Cal. 1994); Brennan v. Tremco Inc., 20 P.3d 1086, 1088 (Cal. 2001); Sheldon Appel Company v. Albert & Oliker, 765 P.2d 498, 502 (Cal. 1989); Coleman v. Gulf Insurance Group, 718 P.2d 77, 82 (Cal. 1986); Vanzant v. DaimlerChrysler Corp., 118 Cal. Rptr. 2d 48, 52 (Cal. Ct. App. 2002); Merlet v. Rizzo, 75 Cal. Rptr. 2d 83, 85 (Cal. Ct. App. 1998).

43. *Bertero*, 529 P.2d at 613.

44. *Id.* (citing Babb v. Superior Court, 479 P.2d 379 (Cal. 1971); White Lighting Co. v. Wolfson, 438 P.2d 345 (Cal. 1968); and, Hurgren v. Union Mutual Life Ins. Co., 75 P. 168 (Cal. 1904)).

45. *Id.* (citing Grant v. Moore, 29 Cal. 644 (Cal. 1866); Masterson v. Pig'n Whistle Corp, 326 P.2d 918 (Cal. Ct. App. 1958); Metzenbaum v. Metzenbaum, 262 P.2d 596 (Cal. Ct. App. 1953)).

46. *Id.* at 613-614 (citing Albertson v. Raboff, 295 P.2d 405 (Cal. 1956); Baker v. Gawthorne, 186 P.2d 981 (Cal. Ct. App. 1947)).

47. Zamos v. Stroud, 87 P.3d 802 (Cal. 2004).

48. *See Bertero*, 529 P.2d at 608.

California Court of Appeal interpreted the first element of this tort in a different manner. This first element, as stated in *Bertero*,[49] applies to situations where a lawsuit was initiated by defendant or at his direction.[50] Some courts interpreted the language of the decision literally, while some others made an interpretation based on the Restatement (Second) of Torts.[51]

Among the first group of courts interpreting *Bertero*[52] in a literal sense, there are Division Seven of the Second Appellate District and Division Three of the Fourth Appellate District of the Court of Appeal of California. In *Vanzant v. Daimlerchrysler Co.*,[53] Division Seven established that courts in California had traditionally not allowed claims based on the continuation of a lawfully commenced action.[54] In *Swat-Fame, Inc. v. Goldstein*,[55] Division Seven rejected plaintiff's contention that malicious prosecution liability extends to situations in which a party discovers facts that negate its own claim once the litigation has already begun.[56] In *Morrison v. Rudolph*,[57] Division Three relies on the decisions of Division Seven to hold that the relevant question is to determine if the lawyer had probable cause at the initiation of the action.[58] All these decisions maintain the position that wrongful use of civil proceedings can only be established if there is a lack of probable cause at the moment in which the lawsuit is initiated.

Disagreeing with the literal interpretation of *Bertero*,[59] Division Five of the Second Appellate District of the Court of Appeal of California broadened the scope of the first element of wrongful use of civil proceedings and found liability in situations where the action was either initiated or continued without probable cause. In *Zamos*,[60] Division Five held that attorneys may be held liable for wrongful use of

49. *Id.*

50. *Id.* at 613.

51. RESTATEMENT (SECOND) OF TORTS § 674 (1977).

52. *Bertero*, 529 P.2d at 608.

53. Vanzant v. DaimlerChrysler Corp., 118 Cal. Rptr. 2d 48 (Cal. Ct. App. 2002) *overruled by* Zamos v. Stroud, 87 P.3d 802 (Cal. 2004).

54. *Id.* at 53.

55. Swat-Fame, Inc. v. Goldstein, 124 Cal. Rptr. 2d 556 (Cal. Ct. App. 2002) *overruled by Zamos*, 87 P.3d at 802.

56. *Id.* at 566.

57. Morrison v. Rudolph, 126 Cal. Rptr. 2d 747 (Cal. Ct. App. 2002) *overruled by Zamos*, 87 P.3d at 802.

58. *Id.* at 753.

59. Bertero v. National General Corporation, 529 P.2d 608 (Cal. 1974).

60. Zamos v. Stroud, 1 Cal. Rptr. 3d 484 (Cal. Ct. App. 2003) *affirmed by Zamos*, 87 P.3d at 802.

civil proceedings if they continue to pursue an action once they have discovered facts establishing that the action does not have merit.[61] The Court in *Zamos*[62] preferred to follow Restatement (Second) of Torts[63] rather than the decisions of Division Seven and Division Three. However, Justice Grignon dissented from the majority opinion determining that wrongful use of civil proceedings should not extend to continuing a lawsuit without probable cause if it was initiated with probable cause.[64]

The split of authority in the appellate level regarding the different interpretations of the first element of wrongful use of civil proceedings was resolved by the California Supreme Court in *Zamos*,[65] after defendant Stroud appealed the decision of Division Five.

III. Zamos v. Stroud[66]

A. Factual and Procedural Background

The decision in *Zamos*[67] is the last stage in a succession of lawsuits in which attorney Jerome Zamos switched roles as plaintiff and defendant with attorney James T. Stroud and client, Patricia Brookes. In order to understand the circumstances that brought this chain of lawsuits to the California Supreme Court, three lawsuits need to be differentiated.

First, in 1995, attorney Zamos represented Brookes as plaintiff in a foreclosure lawsuit regarding her house.[68] In this lawsuit, Brookes settled the lawsuit against some defendants pursuant to a settlement agreement in which Brookes received $250,000 for expressly releasing all claims to her house. Out of the $250,000 paid to Brookes, Zamos received one third ($83,333.33) as a contingency fee.[69] The terms of this agreement were stated on the record before the trial court at two separate hearings held on October 27, 1995, and on October 30, 1995.

61. *Id.* at 491.

62. *Id*. at 484.

63. Restatement (Second) of Torts, § 674 (1977) (establishing liability for wrongful use of civil proceedings in the initiation or continuation of civil proceedings with malice and without probable cause).

64. *Zamos*, 1 Cal. Rptr. 3d at 500-501.

65. Zamos v. Stroud, 87 P.3d 802 (Cal. 2004).

66. *Id.*

67. *Id.*

68. *Id.* at 804.

69. *Id.*

Second, in 1997, Brookes sued attorney Zamos for fraud. Attorney Stroud represented Brookes as a plaintiff in this lawsuit.[70] The claim of fraud was based on the alleged representations that Zamos made to Brookes to induce her to settle the foreclosure lawsuit. According to Brookes, attorney Zamos promised that (1) he would continue to represent her against the defendants that had not settled in the foreclosure lawsuit, (2) he would represent Brookes in a malpractice lawsuit against her former attorneys, (3) he would make sure that Brooke's house was returned to her, and (4) he would no longer represent her in the foreclosure lawsuit if Brookes did not accept the settlement. According to Brookes, however, attorney Zamos never intended to keep his promises.[71] In fact, Zamos withdrew from representing her against those defendants that had not settled in the foreclosure lawsuit. Also, he neither represented Brookes in the malpractice lawsuit nor had her house returned to her.

Immediately after being served with the complaint for fraud, attorney Zamos sent the reporter's transcripts of three hearings in the foreclosure lawsuit to attorney Stroud contending they proved Brookes' claim of fraud was without merit.[72] The transcripts showed that (1) Brookes understood and agreed that she was releasing all claims to her house, (2) attorney Zamos would not represent Brookes into the malpractice lawsuit, and that (3) Zamos was properly relieved as counsel in the foreclosure lawsuit. Although they received the transcripts, Brookes and attorney Stroud did not dismiss the fraud lawsuit against Zamos. Thereafter, Zamos moved for summary judgment.[73] Stroud opposed this motion by submitting Brookes' declaration that she agreed to settle the foreclosure lawsuit in reliance on Zamos' promises. The trial court denied the motion for summary judgment because it found that whether Zamos made the alleged promises was a triable issue of fact.[74] Therefore, the lawsuit proceeded.

Before the trial began, the judge informed the parties that he had read the transcripts of the three hearings.[75] The judge warned attorney Stroud that if Brookes' testimony contradicted the transcripts, the testimony would be perjurious. However, Brookes was unable to testify due to health reasons. The trial court granted Zamos a motion for

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 804-805.
75. *Id.* at 805.

a nonsuit finding that (1) even if Brookes had testified, no reasonable jury would have provided for her, and (2), based on the transcripts, Brookes' settlement of the foreclosure lawsuit was a bar to the fraud lawsuit.[76]

Third, after defeating Stroud and Brookes in the fraud lawsuit, Zamos filed a wrongful use of civil proceedings action against Brookes, Stroud, and others.[77] Among other things, plaintiff Zamos alleged that defendants Stroud and Brookes prosecuted the fraud lawsuit to extort an unwarranted settlement by Zamos. Defendants filed an anti-SLAPP motion[78] arguing that Zamos could not prove that the fraud lawsuit was brought without probable cause. Although Zamos introduced evidence proving that Stroud received the transcripts of the hearings, which proved that the fraud lawsuit had no merit, immediately after filing the fraud lawsuit, the trial court granted the anti-SLAPP motion as to all of the moving parties.[79] The trial court found that Stroud had probable cause to bring the lawsuit based upon Brookes' representations which were corroborated by several witnesses. Zamos appealed the trial court's order dismissing the entire action against Stroud and others.[80]

Division Five affirmed the dismissal of Zamos' wrongful use of civil proceedings action as to all the defendants except for Stroud.[81] The Court of Appeal reversed the dismissal as to Stroud concluding that Zamos met his burden with respect to Stroud because the Court considered that "an attorney may be liable for wrongful use of civil proceedings if the attorney continues to prosecute a lawsuit after discovery of facts showing the lawsuit has no merit."[82]

Plaintiff Zamos and defendant James Stroud petitioned the California Supreme Court for review.[83] While defendants' petition was granted, plaintiffs' petition was denied. The following segment of this section presents the discussion of the California Supreme Court regarding this case.

76. *Id.*

77. *Id.*

78. CAL. CIV. PROC. CODE § 425.16 (Deering 2004).

79. *Zamos*, 87 P.3d at 806.

80. *Id.*

81. Zamos v. Stroud, 1 Cal. Rptr. 3d 484 (2003) *affirmed by Zamos*, 87 P.3d at 802.

82. *Zamos*, 87 P.3d at 806.

83. *Id.*

B. Discussion

The California Supreme Court divided the discussion of this case into different parts. First, the Court analyzed the interface between the Anti-SLAPP Statute[84] and wrongful use of civil proceedings. Second, the Court discussed whether liability for continuing to prosecute a lawsuit had merit. Finally, it discussed defendants Brookes' and Stroud's liability.

1. Relationship Between Anti-SLAPP Statute[85] and Wrongful Use of Civil Proceedings[86]

In the first part of the discussion, the California Supreme Court established the standard that will govern the relationship between the Anti-SLAPP statute established in Subdivision (b)(1) of Section 425.16 of the California Code of Civil Procedure and the tort of wrongful use of civil proceedings. This statute[87] creates a specific motion to strike "cause[s] of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue."[88] In applying this section to the facts of the case, the Court established that in order for plaintiff Zamos' claim not to be stricken under the Anti-SLAPP motion[89] presented by defendant Stroud, plaintiff Zamos had to present enough evidence that, if considered true by the trier of fact, would support a judgment for plaintiff.[90]

2. Liability for Continuing to Prosecute a Lawsuit Without Merit[91]

In the second part of its discussion, the Court discussed whether liability for continuing to prosecute a lawsuit had merit. The Court

84. CAL. CIV. PROC. CODE § 425.16 (Deering 2004).

85. *Id.*

86. *Zamos*, 87 P.3d at 806.

87. § 425.16.

88. § 425.16 subd. (b)(1) ("A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.").

89. § 425.16.

90. *Zamos*, 87 P.3d at 806 (citing Jarrow Formulas, Inc. v. Lamarche, 74 P.3d 737 (Cal. 2003); Equilon Enterprises, LLC v. Consumer Cause, Inc., 52 P.3d 685 (Cal. 2002); Wilson v. Parker, 50 P.3d 733 (Cal. 2002)).

91. *Id.* at 807.

began this discussion by stating the elements of wrongful use of civil proceedings set forth in *Bertero*.[92] As already indicated in the background section of this note,[93] the Court established that to succeed in a claim for malicious prosecution, plaintiff must establish that the prior action (1) was initiated by the defendant or at the direction of the defendant and was pursued to a legal termination in the plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice.[94] Following this statement, the Court discussed defendants' argument that the tort of wrongful use of civil proceedings is limited to the initiation of civil proceedings and does not extend to the continuation of a civil proceeding lacking probable cause because it is a disfavored cause of action.[95]

The Court acknowledged that wrongful use of civil proceedings is a disfavored tort due to two basic reasons.[96] First, this tort has a significant "potential to impose an undue 'chilling effect' on the ordinary citizen's willingness to report criminal conduct or to bring a civil dispute to court."[97] Second, although it is intended to deter "excessive and frivolous lawsuits, it has the disadvantage of constituting a new round of litigation itself."[98] Although these reasons have prevented the Court from extending the scope of wrongful use of civil proceedings, the Court mentioned that in *Bertero*,[99] it already cautioned that portraying wrongful use of civil proceedings as a disfavored tort, "should not be employed to defeat a legitimate cause of action"[100] or to "invent . . . new limitations on the substantive right, which are without support in principle or authority."[101]

Following its warnings about excessively limiting the tort of wrongful use of civil proceedings, the Court established that there is no support in authority or principle to limit the tort of wrongful use of civil proceedings to the commencement of an action without probable

92. Bertero v. National General Corporation, 529 P.2d 608 (Cal. 1974).

93. *See* discussion *supra* section II.B.

94. *Bertero*, 529 P.2d at 613-614.

95. *Zamos*, 87 P.3d at 807.

96. *Id.*

97. *Id.* (quoting Sheldon Appel Company v. Albert & Oliker, 765 P.2d 498, 502 (Cal. 1989)).

98. *Id.* (quoting Sheldon Appel Company v. Albert & Oliker, 765 P.2d 498, 502-503 (Cal. 1989); Wilson v. Parker, 50 P.3d 733, 736 (Cal. 2002)).

99. *Bertero*, 529 P.2d at 608.

100. *Zamos*, 87 P.3d at 807 (quoting *Bertero*, 529 P.2d at 615).

101. *Id.* (quoting *Bertero*, 529 P.2d at 616).

cause.[102] Then, the California Supreme Court proceeded to analyze the lack of support in authority and in principle.

a. Authority[103]

In its discussion regarding the lack of authority justifying the defendant's assertions that the tort of wrongful use of civil proceedings should be limited to the initiation of lawsuits without probable cause, the Court began by acknowledging that this was a question of first impression first addressed by a California Court of Appeal in 2002.[104] Therefore, the Court based its discussion in both persuasive authority and the decisions of the California Court of Appeal.

In its analysis of persuasive authority, the Court began by stating that Restatement (Second) of Torts,[105] Corpus Juris,[106] Corpus Juris Secundum,[107] and American Jurisprudence[108] agree that wrongful use of civil proceedings applies both to situations in which the proceedings are initiated without probable cause and to situations in which the proceedings, although initiated with probable cause, are continued after discovering they lack probable cause. Then, the Court mentioned that a substantial number of states[109] have adopted the same or simi-

102. *Id.* (quoting *Bertero*, 529 P.2d at 615; Crowley v. Katleman, 881 P.2d 1083, 1089 (Cal. 1994)).

103. *Id.*

104. *Id.* (citing Morrison v. Rudolph, 126 Cal. Rptr. 2d 747 (Cal. Ct. App. 2002); Swat-Fame, Inc. v. Goldstein, 124 Cal. Rptr. 2d 556 (Cal. Ct. App. 2002); and Vanzant v. DaimlerChrysler Corp., 118 Cal. Rptr. 2d 48 (Cal. Ct. App. 2002)).

105. *See* RESTATEMENT (SECOND) OF TORTS, § 674 (1977) ("One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either (a) correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or (b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.").

106. *See* 38 C.J. *Malicious Prosecution* (1925) (stating the first element for an action for malicious prosecution as the "commencement *or continuance* of an original criminal or civil judicial proceeding.").

107. *See* 54 C.J.S. *Malicious Prosecution or Wrongful Litigation* § 17 (1988) ("The commencement or continuation of the original proceeding by defendant against plaintiff is essential to an action for malicious prosecution.")

108. *See* 52 AM. JUR. 2D *Malicious Prosecution* § 8 (1977) ("To authorize the maintenance of an action for malicious prosecution, the following elements must be shown . . . the institution or continuation of original judicial proceedings by, or at the instance of, the defendant.").

109. *Zamos*, 87 P.3d at 808 (citing Laney v. Glidden Co., Inc., 194 So. 849, 851-852 (Ala. 1940); Smith v. Lucia, 842 P.2d 1303, 1308 (Ariz. 1992); McLaughlin v. Cox, 922 S.W.2d 327, 331-333 (Ark. 1996); Slee v. Simpson, 15 P.2d 1084, 1085 (Colo. 1932); Badell v. Beeks, 765 P.2d 126, 128 (Idaho 1988); Wilson v. Hayes, 464 N.W.2d 250, 264 (Iowa 1990); Nelson v. Miller, 607 P.2d 438, 447-448 (Kan. 1980); Benjamin v. Hooper Electronic Supply Co., Inc. 568 So. 2d 1182, 1189,

lar position as the mentioned persuasive authority. The Court went further by stating that defendants have not discussed any state adopting a position other than the mentioned persuasive authority. All these elements led the California Supreme Court to conclude that persuasive authority did not support defendants' position.

After analyzing the different sources of persuasive authority, the California Supreme Court discussed the decisions of Division Seven of the Second Appellate District of the Court of Appeal of California in which the defendants argue that wrongful use of civil proceedings should be limited to the initiation of proceedings without probable cause.[110] Defendants relied on *Swat-fame*[111] and *Vanzant*,[112] which rejected the idea that wrongful use of civil proceedings could be based on the continuation of a proceeding that although properly initiated, it is later discovered to lack probable cause.

The California Supreme Court stated that *Swat-fame*[113] reiterates the position of *Vanzant*,[114] which relied on the Court's decision in *Coleman v. Gulf Ins. Group*.[115] However, the Court distinguished *Coleman*[116] from the situation in *Zamos*[117] because it considered that *Coleman*[118] was the continuation of a defense whereas *Zamos*[119] was the continuation of a prosecution.[120] According to the Court, "[i]n *Coleman*, the defendant in the malicious prosecution action had merely continued its defense of the underlying wrongful death action by causing the filing of the appeal in that action."[121] However, in *Zamos*,[122] "defendants in the malicious prosecution action continued their prosecution of the underlying fraud action after learning it was

fn. 6 (Miss. 1990); Broughton v. State of New York, 335 N.E.2d 310 (N.Y. 1975); Siegel v. O.M. Scott & Sons Co., 56 N.E.2d 345, 347 (Ohio Ct. App. 1943); Wroten v. Lenske, 835 P.2d 931, 933-934 (Or. 1992); Wenger v. Philips, 45 A. 927 (Pa. 1900); and Banks v. Nordstrom, Inc., 787 P.2d. 953, 956-957 (Wash. Ct. App. 1990)).

110. *Id.* at 808.

111. Swat-Fame, Inc. v. Goldstein, 124 Cal. Rptr. 2d 556 (Cal. Ct. App. 2002) *overruled by Zamos*, 87 P.3d at 802.

112. Vanzant v. DaimlerChrysler Corp., 118 Cal. Rptr. 2d 48 (Cal. Ct. App. 2002) *overruled by Zamos*, 87 P.3d at 802.

113. *Swat-Fame*, 124 Cal. Rptr. 2d at 556.

114. *Vanzant*, 118 Cal. Rptr. 2d at 48.

115. Coleman v. Gulf Insurance Group, 718 P.2d 77 (Cal. 1986).

116. *Id.*

117. Zamos v. Stroud, 87 P.3d 802 (Cal. 2004).

118. *Coleman*, 718 P.2d at 77.

119. *Zamos*, 87 P.2d at 802.

120. *Id*. at 809 (citing *Coleman*, 718 P.2d at 77).

121. *Id.*

122. *Id.* at 802.

baseless."[123] Consequently, the California Supreme Court decided that the authority mentioned by defendants Brookes and Stroud did not support defendants' position in limiting the tort of wrongful use of civil proceedings to the initiation of civil proceedings without probable cause.[124]

b. Principle[125]

After determining that authority did not support defendants' position, the California Supreme Court also determined that defendants' position did not have support in principle.[126] The reasons the Court gave for denying support in principle to defendants' position varied from the purpose of the tort of wrongful use of civil proceedings to the effects of this tort for attorneys.

First, the Court determined the purpose of the tort of wrongful use of civil proceedings. The Court reinstated its opinion in *Bertero*[127] and established that wrongful use of civil proceedings is justified because it is a means to prevent the harmful effects of baseless claims.[128] Unfounded claims not only are harmful for the specific persons against whom they are brought, but they also jeopardize the efficient administration of justice.[129] The Court further considered that continuing a baseless action has the same harmful effects as commencing an action that is baseless from the outset.[130] In this point, the Court mentioned the opinion of the Court of Appeal in *Zamos*[131] in saying that "[i]t makes little sense to hold attorneys accountable for their knowledge when they file a lawsuit, but not for their knowledge the next day."[132]

Second, the Court considered the deterrent effect that increasing the scope of wrongful use of civil proceedings will have.[133] The Court

123. *Id.* at 809.
124. *Id.*
125. *Id.*
126. *Id.*
127. Bertero v. National General Corporation, 529 P.2d 608, 613 (Cal. 1974).
128. *Zamos*, 87 P.3d at 809.
129. *Id.* (citing *Bertero*, 529 P.2d at 614; Crowley v. Katleman, 881 P.2d 1083, 1087 (Cal. 1994)).
130. *Id.* (quoting 1 HARPER ET AL., THE LAW OF TORTS (3d ed. 1996) § 4.3, p. 4:13) ("Clearly, it is as much a wrong against the victim and as socially or morally unjustifiable to take an active part in a prosecution after knowledge that there is no factual foundation for it, as to instigate such a proceeding in the first place.").
131. Zamos v. Stroud, 1 Cal. Rptr. 3d 484 (Cal. Ct. App. 2003) *affirmed by Zamos*, 87 P.3d at 802.
132. *Id.* at 494.
133. *Zamos*, 87 P.3d at 810.

referred to the opinion of the Court of Appeal in *Zamos*[134] indicating that imposing liability on attorneys for the damages a party incurs due to the attorney's pursuit of civil claims after discovering they are meritless will promote the voluntary dismissal of groundless lawsuits at the earliest stages of litigation.[135] The Court of Appeal considered that "[t]his will assist in the efficient administration of justice and reduce the harm to individuals targeted by meritless claims."[136]

Third, the Court considered that increasing the scope of wrongful use of civil proceedings would not interfere with attorneys' zealous representation of their clients.[137] The Court stated that the applicable liability standard for wrongful use of civil proceedings for continuing a proceeding without probable cause is going to be the same as the one applied for initiating a proceeding without probable cause. The Court mentioned that "[o]nly those actions that any reasonable attorney would agree are totally and completely without merit may form the basis for a [wrongful use of civil proceedings] suit."[138]

3. Defendants Brookes and Stroud's Prima Facie Liability.[139]

As mentioned above,[140] in order for plaintiff Zamos' claim not to be stricken under the Anti-SLAPP motion[141] presented by defendant Stroud, plaintiff Zamos had to present enough evidence that, if considered true by the trier of fact, will support a judgment in his favor.[142] The California Supreme Court concluded that plaintiff Zamos presented enough evidence to support a judgment in his favor because he proved that Stroud had the transcripts showing the fraud lawsuit was meritless.

C. Decision of the Court.[143]

The Court upheld the decision of Division Five[144] by holding that wrongful use of civil proceedings "includes continuing to prosecute a

134. *Zamos*, 1 Cal. Rptr. 3d at 484.
135. *Id.* at 494.
136. *Id.*
137. *Zamos*, 87 P.3d at 810.
138. *Id.* (quoting Wilson v. Parker, 50 P.3d 733, 736 (Cal. 2002); Sheldon Appel Company v. Albert & Oliker, 765 P.2d 498, 511 (Cal. 1989)).
139. *Id.*
140. *See* discussion *supra* section III.B.1.
141. CAL. CIV. PROC. CODE § 425.16 (Deering 2004).
142. *Zamos*, 87 P.3d at 806.
143. *Id.* at 811-812.
144. Zamos v. Stroud, 1 Cal. Rptr. 3d 484 (2003) *affirmed by* Zamos v. Stroud, 87 P.3d at 802.

lawsuit discovered to lack probable cause."[145] Therefore, it disapproved the opinions of Division Seven[146] that did not consider continuing a civil proceeding without probable cause within the scope of the tort of wrongful use of civil proceedings when inconsistent with *Zamos*.[147]

By affirming the judgment of the California Court of Appeal, the California Supreme Court is increasing the scope of the tort of wrongful use of civil proceedings. Specifically, after *Zamos*,[148] liability for wrongful use of civil proceedings may arise in situations in which a civil proceeding is initiated with malice and without probable cause and in situations where an action initiated with probable cause is continued after discovery that it lacks probable cause.

IV. Analysis

Although in *Zamos*[149] the California Supreme Court expanded the scope of wrongful use of civil proceedings to situations where plaintiffs continue to pursue a case although knowing that probable cause is lacking, the tort of wrongful use of civil proceedings continues to be a disfavored tort. To understand why the tort of wrongful use of civil proceedings continues to be a disfavored tort, although the ruling in *Zamos*[150] modified this tort, some elements must be considered in this analysis. First, the characterization of wrongful use of civil proceedings as a disfavored tort must be justified. Second, the effect that being a disfavored tort has on the utility of wrongful use of civil proceedings needs to be analyzed. Third, the manner in which *Zamos*[151] broadens the scope of liability of wrongful use of civil proceedings should be determined. Fourth, the extent to which the ruling in *Zamos*[152] increases the likely use of wrongful use of civil proceedings needs to be ascertained. An analysis of these four points will lead to the conclusion that although the California Supreme Court has increased the potential liability under wrongful use of civil proceedings,

145. *Zamos*, 87 P.3d at 812.

146. The decisions overruled by *Zamos*, 87 P.3d at 802 include *Swat-Fame, Inc. v. Goldstein*, 124 Cal. Rptr. 2d 556 (Cal. Ct. App. 2002); *Vanzant v. DaimlerChrysler Corp.*, 118 Cal. Rptr. 2d 48 (Cal. Ct. App. 2002); and *Morrison v. Rudolph*, 126 Cal. Rptr. 2d 747 (Cal. Ct. App. 2002).

147. *Zamos*, 87 P.3d at 802.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

the likelihood of proving all the elements of this tort is still very limited.

A. Wrongful Use of Civil Proceedings as a Disfavored Tort

The California Supreme Court has portrayed wrongful use of civil proceedings as a disfavored action on numerous occasions.[153] In fact, wrongful use of civil proceedings shares this portrayal as a disfavored tort with its homologue in criminal prosecution,[154] malicious prosecution.[155] There are three main reasons why both torts have been considered disfavored.[156]

First, although it tries to prevent excessive and frivolous lawsuits, wrongful use of civil proceedings encourages litigation. As shown in the case statement section of this note, defendant Stroud in *Zamos*[157] set out this argument by quoting the California Supreme Court's decisions in *Sheldon Appel Company v. Albert & Oliker*[158] and *Wilson v. Parker*,[159] which stated that the main problem with wrongful use of civil proceedings as a tool to deter groundless litigation is that it entails a "new round of litigation itself."[160] In fact, the tort of wrongful use of civil proceedings looks for redressing the problems that an ill-conceived lawsuit sets out by bringing forth a new lawsuit.[161] By implying this tort recreates the problem that it is trying to avoid, wrongful use of civil proceedings has been considered a disfavored tort.

153. The California Supreme Court has considered wrongful use of civil proceedings as a disfavored tort in a large group of cases such as *Zamos*, 87 P.3d at 802; *Wilson v. Parker*, 50 P.3d 733 (Cal. 2002); *Brennan v. Tremco Inc.*, 20 P.3d 1086 (Cal. 2001); *Crowley v. Katleman*, 881 P. 2d 1083 (Cal. 1994); *Sheldon Appel Company v. Albert & Oliker*, 765 P.2d 498 (Cal. 1989); *Bertero v. National General Corporation*, 529 P.2d 608 (Cal. 1974); *Babb v. Superior Court*, 479 P.2d 379 (Cal. 1971).

154. *See supra* section II for a discussion regarding the historical relationship between both torts.

155. *See* 5 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW § 420 (9th ed. 2003) (citing Ball v. Rawles, 28 P. 937 (Cal. 1892); Haydel v. Morton, 48 P.2d 709 (Cal. 1935); and Sebastian v. Crowley, 101 P.2d 120 (Cal. 1940) to prove that malicious prosecution has been traditionally considered a disfavored tort).

156. The purpose of this section is to present the reasons why wrongful use of civil proceedings is considered a disfavored tort; therefore, the counterarguments to these propositions are not being discussed. For a discussion of the reasons the tort of wrongful use of civil proceedings is disfavored including counterarguments, see Wade, *supra* note 2, at 434.

157. *Zamos*, 87 P.3d at 802.

158. *Sheldon*, 765 P.2d at 498.

159. *Wilson*, 50 P.3d at 733.

160. *Zamos*, 87 P.3d at 807 (quoting *Sheldon*, 765 P.2d at 502; *Wilson*, 50 P.3d at 736).

161. Wade, *supra* note 2, at 455 ("One objection made to the action is that it contends that the first suit should not have been brought, and then seeks to cure one unnecessary suit clogging the courts by the bringing of another suit, clogging them even further.").

Second, wrongful use of civil proceedings may impose an excessive "chilling effect" on the individual's willingness to bring civil disputes to court. As the California Supreme Court mentioned in *Zamos*,[162] wrongful use of civil proceedings has the "potential to impose an undue 'chilling effect' on the ordinary citizen's willingness . . . to bring a civil dispute to court."[163] In other words, if prospective plaintiffs and attorneys may be subject to tort liability under malicious use of civil proceedings for bringing a civil action that turns out to be groundless, this tort liability will chill their willingness to look for relief in the court system "and thus acts as a deterrent to bringing suit at all."[164] Summarizing, the problem with wrongful use of civil proceedings is not that it has a similar deterrent effect on tortius conduct as other torts,[165] but that this effect may be excessive.

Third, wrongful use of civil proceedings may originate a retaliatory chain of wrongful use of civil proceedings lawsuits between original plaintiffs and defendants. In *Brennan v. Tremco*,[166] the California Supreme Court called this possible effect of wrongful use of civil proceedings "an unending roundelay of litigation."[167] This may mean that after the original defendant loses in an action for wrongful use of civil proceedings against the original plaintiff, the original plaintiff may seek revenge by bringing another action, "and the shuttlecock would be passed back and forth indefinitely."[168] Although this factor seems to be an echoed version of the first factor mentioned in this section, it has been treated separately for two basic reasons. First, the effect of an "unending roundelay of litigation"[169] would be much more harmful to the legal system than just one extra action. Second, the probabilities of this third factor actually happening seems to be much more remote than just one lawsuit for wrongful use of civil proceedings.[170]

The combination of all these factors has led the California Supreme Court to consider, on numerous occasions, that there may be other methods for deterring frivolous litigation much more appropriate than wrongful use of civil proceedings. In *Sheldon*,[171] the Court

162. *Zamos*, 87 P.3d at 802.

163. *Id.* at 807 (quoting *Sheldon*, 765 P.2d at 502).

164. Wade, *supra* note 2, at 455.

165. *Id.*

166. Brennan v. Tremco Inc., 20 P.3d 1086 (Cal. 2001).

167. *Id.* at 1088 (quoting Silberg v. Anderson, 786 P.2d 365, 370 (Cal. 1990)).

168. Wade, *supra* note 2, at 455.

169. *Brennan*, 20 P.3d at 1088 (quoting Silberg v. Anderson, 786 P.2d 365, 370 (Cal. 1990)).

170. Wade, *supra* note 2, at 455 ("[I]t hardly seems a serious danger that should have the effect of eliminating the availability of a suitable remedy for a true tort injury.").

171. Sheldon Appel Company v. Albert & Oliker, 765 P.2d 498 (Cal. 1989).

considered that imposing sanctions for frivolous conduct in the first action[172] might be a better means for combating frivolous litigation than the tort of wrongful use of civil proceedings which increases the opportunity of bringing additional litigation after the conclusion of the first action.[173] Scholars have also proposed alternatives to malicious prosecution due to the reasons that make it a disfavored tort. Some scholars have proposed eliminating the tort of wrongful use of civil proceedings and substituting it with an affirmative defense of malicious prosecution.[174] Others have considered limiting malicious prosecution to those cases in which the courts cannot impose sanctions.[175] In any event, all these factors and opinions convey the idea that wrongful use of civil proceedings is a disfavored tort.

B. The Utility of Wrongful Use of Civil Proceedings Before Zamos v. Stroud[176]

The consideration of wrongful use of civil proceedings as a disfavored tort has had some effect on its utility as a legal means to reduce frivolous litigation. For purposes of this note, utility refers to the likelihood of success in proving all the elements of a tort. Utility is not predicated upon the degree of difficulty in producing evidence, but upon the standards that must be satisfied in order to satisfy each of the elements of the tort. An analysis of the elements of wrongful use of civil proceedings will show that the main consequence[177] resulting from wrongful use of civil proceedings being a disfavored tort has been a very limited utility of the tort.[178]

As mentioned in the background section,[179] the statement of the elements of wrongful use of civil proceedings remained unchanged since *Bertero,*[180] which set forth the most accepted statement of the

172. *Id.* at 503.

173. *Id.*

174. *See e.g.* Glassman, *supra* note 7, at 179 (advocating for making malicious prosecution a defense rather than a tort).

175. *See e.g.* Crystal, *supra* note 7, at 671 (offering a theoretical framework for rules that limit lawyer zealousness and a critical perspective on those rules).

176. Zamos v. Stroud, 87 P.3d 802 (Cal. 2004).

177. The California Supreme Court in *Sheldon Appel Company v. Albert & Oliker* considered that because of all the factors mentioned in the precedent section, it was not "advisable to abandon or relax the traditional limitations" on wrongful use of civil proceedings. Sheldon Appel Company v. Albert & Oliker, 765 P.2d 498, 503 (Cal. 1989).

178. Wade, *supra* note 2, at 438 (stating that the effectiveness of the tort is doubtful because of the restrictions placed by courts on the action).

179. *See* discussion *supra* section II.B.

180. Bertero v. National General Corporation, 529 P.2d 608 (Cal. 1974).

elements of wrongful use of civil proceedings in California courts.[181] According to *Bertero*,[182] to establish a cause of action for wrongful use of civil proceedings, the plaintiff must establish that the prior action (1) was initiated by the defendant or at his direction and was pursued to a legal termination in the plaintiff's favor; (2) was brought without probable cause; and (3) was commenced with malice.[183] An analysis of the tort's utility requires scrutinizing each of the elements of the tort separately.

The first element of the tort is that the action must have been commenced by the defendant or at his direction, but it was pursued to a legal termination in the plaintiff's favor.[184] Two parts need to be differentiated in this first element. First, the prior action must have been commenced by the defendant (or at his direction) in the wrongful use of civil proceedings action. Regarding this first part of the element, California courts interpreted this requirement to be restricted to the initiation of a civil proceeding[185] until the ruling in *Zamos*.[186] By restricting this element to just the initiation of a civil proceeding, California courts applied a more restrictive view of this element than the courts of other states that were following the Restatement (Second) of Torts[187] version of this first requirement.[188] Second, the prior action must terminate in favor of the plaintiff in the wrongful use of civil proceedings' action. In *Babb v. Superior Court of Sonoma*,[189] the California Supreme Court stated that "it is hornbook law" that the plaintiff in a claim for wrongful use of civil proceedings establishes that the prior action terminated in his favor.[190] Therefore, if there is not a favorable determination in the prior action, the plaintiff cannot bring a wrongful use of civil proceedings' action. The purpose of this element is to prevent individuals from bringing an action for wrongful use of civil proceedings if the lack of probable cause appeared after

181. *See supra* note 42.

182. *Bertero*, 539 P.2d at 608.

183. *Id.* at 613.

184. *Id.*

185. *See*, *e.g.*, Swat-Fame, Inc. v. Goldstein, 124 Cal. Rptr. 2d 556 (Cal. Ct. App. 2002) *overruled by* Zamos v. Stroud, 87 P.3d 802 (Cal. 2004); Vanzant v. DaimlerChrysler Corp., 118 Cal. Rptr. 2d 48 (Cal. Ct. App. 2002) *overruled by Zamos*, 87 P.3d at 802; and Morrison v. Rudolph, 126 Cal. Rptr. 2d 747 (Cal. Ct. App. 2002) *overruled by Zamos*, 87 P.3d at 802.

186. *Zamos*, 87 P.3d at 802.

187. RESTATEMENT (SECOND) OF TORTS § 674 (1977).

188. *See supra* note 105.

189. Babb v. Superior Court, 479 P.2d 379 (Cal. 1971).

190. *Id*. at 381.

the initiation of the action, and if they were not the party favored in the decision in the underlying claim.

The second element of wrongful use of civil proceedings is that the prior action was brought without probable cause.[191] The features of this element make it the most restrictive.[192] In *Wilson*,[193] the California Supreme Court includes all the features that make this element the most restrictive one. First, according to the Court, the existence of probable cause is an issue of law to be decided by the court and not by a jury.[194] The Court considered that by doing this, the litigants would be protected against the possibility that a jury would confound "a merely unsuccessful claim for a legally tenable one."[195] Second, probable cause is determined objectively. According to the Court, the determination is made without considering the attorney's belief regarding the tenability of the case.[196] In fact, the Court points out that there is probable cause if "any reasonable attorney would have thought the claim tenable."[197] The Court concludes by stating that "only those actions that 'any reasonable attorney would agree [are] totally and completely without merit' may form the basis for a [wrongful use of civil proceedings] suit."[198]

The reason all the factors stated in *Wilson*[199] make probable cause the most restrictive element of wrongful use of civil proceedings is twofold. First, the plaintiff in a wrongful use of civil proceedings claim must prove that there was not probable cause to bring the prior action. This requirement places the burden "to prove a negative,"[200] i.e. the lack of probable cause, on the plaintiff. Second, the defendant in the wrongful use of civil proceedings action needs only to have brought a tenable claim in the prior action, even if the lawyer herself does not believe that the claim is tenable. In fact, as the California Supreme Court pointed out in *Sheldon*,[201] "a plaintiff may prove a

191. Bertero v. National General Corporation, 529 P.2d 608, 613 (Cal. 1974).

192. Wade, *supra* note 2, at 444 ("Perhaps [lack of probable cause is] the most vital single requirement . . . to identify the real "sting" of the tortuous conduct.").

193. Wilson v. Parker, 50 P.3d 733 (Cal. 2002).

194. *Id.* at 736.

195. *Id.* (citing Sheldon Appel Company v. Albert & Oliker, 765 P.2d 498, 503-505 (Cal. 1989)).

196. *Id.* (citing Sheldon Appel Company v. Albert & Oliker, 765 P.2d 498, 505-509 (Cal. 1989)).

197. *Id.* (quoting Sheldon Appel Company v. Albert & Oliker, 765 P.2d 498, 506 (Cal. 1989)).

198. *Id.* (quoting In re Marriage of Flaherty, 646 P.2d 179 (Cal. 1982)).

199. *Id.* at 733.

200. Wade, *supra* note 2, at 444.

201. Sheldon Appel Company v. Albert & Oliker, 765 P.2d 498 (Cal. 1989).

lack of probable cause by showing that the attorney had failed to conduct 'a reasonable investigation and industrious search of legal authority . . .' before instituting the prior action."[202] In view of these two factors, probable cause becomes the most restrictive element in wrongful use of civil proceedings.

The third element of wrongful use of civil proceedings is that the prior action was initiated with malice.[203] There are two important features of this element to consider in order to understand its function. First, malice is the subjective element of the tort. As the California Supreme Court pointed out in *Sheldon*,[204] malice is directly related to defendant's mental state when instituting the prior proceeding.[205] However, this idea of subjective mental state needs to be put in the appropriate perspective. As Division Three of the Fourth Appellate District of the Court of Appeal of California pointed out, malice not only includes "actual hostility or ill will" against the plaintiff, but it also extends to actions filed with the goal of compelling a settlement unrelated with the merits of the action.[206] Second, malice is a question of fact to be determined by a jury. The California Supreme Court, in considering that malice is related to the defendant's motivation, pointed out in *Sheldon*[207] that defendant's motivation is a question of fact to be determined by the jury.[208] Although this element may not seem very restrictive, it should be considered that the California Supreme Court has subordinated this element to probable cause. In *Sheldon*,[209] the Court established that having found probable cause in the prior action, the claim for wrongful use of civil proceedings will fail even if the prior claim was maliciously motivated.[210] Therefore, the malice element needs to be seen as subordinated to the probable cause element.

From the analysis of each of the elements of wrongful use of civil proceedings, it appears that the utility of the tort is very limited. The first element limits the scope of liability of the tort to the commencement of actions that were pursued to a legal termination in plaintiff's

202. *Id.* at 509 (quoting Tool Research & Engineering Corp. V. Henigson, 120 Cal. Rptr. 291, 297 (Cal. Ct. App. 1975)).

203. Bertero v. National General Corporation, 529 P.2d 608, 613-614 (Cal. 1974).

204. *Id.* at 498.

205. *Id.* at 506.

206. HMS Capital, Inc. v. Lawyers Title Co., 12 Cal. Rptr. 3d 786, 796 (Cal. Ct. App. 2004) (quoting Sierra Club Foundation v. Graham, 85 Cal. Rptr. 2d 726, 739-740 (Cal. Ct. App. 1999)).

207. *Sheldon*, 765 P.2d at 498.

208. *Id.* at 503.

209. *Id.* at 498.

210. *Id.* at 503.

favor. The second element requires the plaintiff in the wrongful use of civil proceedings action to plead and prove that the plaintiff in the prior action brought an action that no attorney would consider having merit. The third element requires the plaintiff in the wrongful use of civil proceedings action to plead and prove that the prior action was initiated with malice. However, unless the prior action lacked probable cause, the malice element by itself will not support a wrongful use of civil proceedings claim. From this analysis, it appears that the element that most impairs the utility of wrongful use of civil proceedings is the probable cause element.

C. Potential Liability Under Wrongful Use of Civil Proceedings After Zamos v. Stroud.[211]

Although the tort of wrongful use of civil proceedings has been traditionally considered a disfavored one,[212] the California Supreme Court had cautioned in *Bertero*[213] that this fact should not be used to strike a founded and legitimate action or to create new limitations not supported by authority or principle.[214] In *Zamos*,[215] the Court decided to solidify this principle and modified the tort of wrongful use of civil proceedings. Specifically, the Court in *Zamos*[216] broadened the first element of the tort by including situations in which a claim was initiated with probable cause, but later in the proceedings it is discovered that the action lacks probable cause and, the plaintiff continues to pursue it.[217] By broadening the first element of wrongful use of civil proceedings, the California Supreme Court has increased the potential for liability under the tort.

For purposes of this note, "potential for liability" should be defined as the likelihood of being sued under a specific legal theory. Before *Zamos*,[218] the potential for liability for wrongful use of civil proceedings was limited to situations in which a plaintiff initiated a lawsuit without probable cause and with malice, and the action was pursued to a legal determination in defendant's favor.[219]

211. Zamos v. Stroud, 87 P.3d 802 (Cal. 2004).

212. *See* discussion *supra* section IV.A.

213. Bertero v. National General Corporation, 529 P.2d 608 (Cal. 1974).

214. *Zamos*, 87 P.3d at 807 (quoting *Bertero*, 529 P.2d at 616).

215. *Id.* at 802.

216. *Id.*

217. *Id.*

218. *Id.*

219. As the Court of Appeals of California set forth in *Vanzant v. DaimlerChrysler Co.*, "courts have typically refused to permit malicious prosecution claims where . . . the claim is

Zamos[220] expanded the potential liability in the tort of wrongful use of civil proceedings. The potential liability has been extended to situations in which an action is initiated with probable cause,[221] but after it is discovered that it lacks probable cause, the plaintiff continues pursuing it. This implies that the scope of liability has expanded from mere commencement to initiation and continuation of an action. Although this modification may have some liability consequences for attorneys,[222] it has to be seen as a logical extension of the scope of liability of the tort. As the California Court of Appeal stated, "[i]t does not make sense to hold attorneys accountable for their knowledge when they file a lawsuit, but not for their knowledge the next day."[223] The main point is focused on when the attorney becomes aware the action lacks probable cause. From this idea, it could be understood that an action may lack probable cause despite the lawyer's lack of awareness of this fact. Therefore, it will be contrary to logic not to impose liability for wrongful use of civil proceedings on attorneys merely because they think there is probable cause when they file the lawsuit if later they discover that the action lacks merit, but they continue pursuing it.[224]

By expanding the tort of wrongful use of civil proceedings, the California Supreme Court has broadened its scope of liability. Although supported by logical reasons, this expansion will increase the potential for liability on attorneys or litigants in general. After *Zamos*,[225] it is not enough to initiate actions with probable cause. Litigants will also be required to have probable cause during the continuation of the action.

based on the continuation of a properly initiated existing proceeding." Vanzant v. Daimler-Chrysler Corp., 118 Cal. Rptr. 2d 48, 53 (Cal. Ct. App. 2002) *overruled by* Zamos v. Stroud, 87 P.3d 802 (Cal. 2004).

220. *Zamos*, 87 P.3d at 802.

221. Note that as mentioned in the beginning of this section, once there is probable cause, liability for wrongful use of civil proceedings will not arise whether or not there is malice.

222. According to Bowman and Mertz, increasing scope of liability to continuation "would impose liability on the attorney in essence for not withdrawing from the case prior to trial if it is not possible to persuade his or her client to dismiss the action." Bowman & Mertz, *supra* note 3, at 249.

223. Zamos v. Stroud, 87 P.3d 802, 809 (Cal. 2004) (citing Zamos v. Stroud, 1 Cal. Rptr. 3d 484, 494 (Cal. Ct. App. 2003) *affirmed by Zamos*, 87 P.3d at 802).

224. *Zamos v. Stroud*, 1 Cal. Rptr. 3d 484, 494 (Cal. Ct. App. 2003) *affirmed by Zamos*, 87 P.3d at 802.

225. *Zamos*, 87 P.3d at 802.

D. Utility of Wrongful Use of Civil Proceedings After Zamos v. Stroud[226]

As shown in the previous section, *Zamos*[227] increases the potential liability under the tort of wrongful use of civil proceedings. This modification in the tort has broadened its scope of liability, which means that more litigants may be sued for wrongful use of civil proceedings. Although it increases the potential liability under this tort, the increased potential liability does not affect its utility in a relevant manner.

As mentioned above, the utility of wrongful use of civil proceedings depends on the degree of restriction of its elements.[228] The only effect of *Zamos*[229] on the tort of wrongful use of civil proceedings was to extend liability for this tort to attorneys that prosecute a lawsuit later discovered to lack probable cause.[230] In fact, the California Supreme Court did not alter any other element of the tort. The most restrictive element of wrongful use of civil proceedings, the probable cause element, remains unmodified. Moreover, the California Supreme Court established that the standard that would apply to initiation and continuation of an action will be the same.[231]

Therefore, because the most restrictive element of wrongful use of civil proceedings remains untouched after *Zamos*,[232] it cannot be said that the utility of this tort has substantially changed. True, by increasing the potential liability of the tort, more litigants may be sued under a theory of wrongful use of civil proceedings; however, likelihood of success, in an action for wrongful use of civil proceedings is still as low as it was before *Zamos*.[233]

V. Conclusion

Although the California Supreme Court has recently expanded the scope of wrongful use of civil proceedings to the continuation of civil proceedings after discovering that they lack probable cause,[234]

226. *Id.*
227. *Id.*
228. *See* discussion *supra* section IV.B.
229. *Zamos*, 87 P.3d at 802.
230. *Id.* at 810.
231. *Id.*
232. *Id.*
233. *See* Daniel W. Hager, *Attorney Conduct: Reduce Your Malicious Prosecution Exposure*, 2002 San Francisco Att'y 19 (2002) (stating that wrongful use of civil proceedings claims are difficult to prove against lawyers).
234. *Zamos*, 87 P.3d at 802.

the tort of wrongful use of civil proceedings continues to be a disfavored tort. The Court has increased the potential liability under wrongful use of civil proceedings, but the likelihood of proving all the elements of the tort is still very remote.

The main consequence of disfavoring the tort of wrongful use of civil proceedings is that its elements are very restricted. Because satisfying the standards of the tort is very difficult, the utility of the tort is very limited. Although *Zamos*[235] increased the potential liability of the tort, its utility is still as reduced as it was before the case was decided.[236] Therefore, the likelihood that attorneys will be sued for wrongful use of civil proceedings every time they do not prevail in a case is still very limited. Even though the California Supreme Court has modified the first element of the tort, this modification affects the development of the first element of the tort more than the success of the application of wrongful use of civil proceedings.

235. *Id.*
236. *Id.*