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## ESSAY

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### DISTINGUISHING IMMIGRATION VIOLATIONS FROM CRIMINAL VIOLATIONS: A DISCUSSION RAISED BY JUSTICE SONIA SOTOMAYOR

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#### INTRODUCTION

In February 2014, United States Supreme Court Justice Sonia Sotomayor was interviewed at Yale Law School.<sup>1</sup> During the course of a wide-ranging discussion, Justice Sotomayor explained that “her use of the term ‘undocumented immigrants’ rather than the traditional illegal alien” label stemmed from her analysis of “the issue as a regulatory problem” and that she found it insulting to label immigrants as criminals.<sup>2</sup> This discussion would have gone largely unnoticed but for the fact that Fox News contributor and radio commentator Laura Ingraham took Justice Sotomayor to task, “suggesting that she has to choose between her ‘immigrant family background’ or the Constitution.”<sup>3</sup> Indeed, Ms. Ingraham further argued that there is no rule

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<sup>1</sup> *Sotomayor: Labeling Illegal Immigrants Criminals Is Insulting*, CBS (Feb. 4, 2014, 5:53 AM), <http://washington.cbslocal.com/2014/02/04/sotomayor-labeling-illegal-immigrants-criminals-is-insulting>.

<sup>2</sup> *Id.*; see also *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009) (using the term “undocumented immigrants”).

<sup>3</sup> Ellie Sandmeyer, *Laura Ingraham’s Attacks on Sonia Sotomayor Miss Her All-American Heritage*, MEDIA MATTERS FOR AMERICA (Feb. 4, 2014, 2:26 PM), <http://mediamatters.org/blog/2014/02/04/laura-ingrahams-attacks-on-sonia-sotomayor-miss/197915>.

of law in the United States if someone like Justice Sotomayor can pick and choose whether or not to follow certain laws.<sup>4</sup>

Of course, Ms. Ingraham's criticisms seemed to ignore the fact that Justice Sotomayor is an American citizen of Puerto Rican descent.<sup>5</sup> So not only was she born in the United States,<sup>6</sup> but as the child of Puerto Rican parents, she would also receive automatic American citizenship—a fact that has been true since 1917.<sup>7</sup> One hopes that Ms. Ingraham is aware that people of Puerto Rican descent, including those born on the island, are American citizens. However, what is clear is that she does not appreciate the subtleties underlying immigration status and federal criminal statutes.

Recently, former Florida governor Jeb Bush also discussed his views on immigration reform and similarly entangled himself in the issue:

“There are means by which we can control our border better than we have. And there should be penalties for breaking the law,” he added. “But the way I look at this -- and I'm going to say this, and it'll be on tape and so be it. The way I look at this is someone who comes to our country because they couldn't come legally, they come to our country because their families -- the dad who loved their children -- was worried that their children didn't have food on the table. And they wanted to make sure their family was intact, and they crossed the border because they had no other means to work to be able to provide for their family. Yes, they broke the law, but it's not a felony. It's an act of love. It's an act of commitment to your family. I honestly think that that is a different kind of crime that there should be a price paid, but it shouldn't rile people up that people are actually coming to this country to provide for their families.”<sup>8</sup>

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<sup>4</sup> Elias Isquith, *Laura Ingraham: Sotomayor's "Allegiance" Is to "Her Immigrant Family Background" and Not the Constitution*, SALON (Feb. 4, 2014, 4:33 PM), [http://www.salon.com/2014/02/04/laura\\_ingraham\\_justice\\_sotomayors\\_allegiance\\_is\\_to\\_her\\_immigrant\\_family\\_background\\_and\\_not\\_the\\_constitution](http://www.salon.com/2014/02/04/laura_ingraham_justice_sotomayors_allegiance_is_to_her_immigrant_family_background_and_not_the_constitution).

<sup>5</sup> See Sandmeyer, *supra* note 3 (“Sotomayor is a Puerto Rican American who is both an American citizen and the daughter of American citizens.”).

<sup>6</sup> See *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES (May 27, 2014), <http://www.supremecourt.gov/about/biographies.aspx> (stating that Justice Sotomayor “was born in Bronx, New York, on June 25, 1954”).

<sup>7</sup> See Act of Mar. 2, 1917, ch. 145, 39 Stat. 951, 953 (codified as amended at 8 U.S.C. § 1402 (2012)) (declaring that “all citizens of Porto Rico . . . shall be deemed and held to be, citizens of the United States”).

<sup>8</sup> Ed O'Keefe, *Jeb Bush: Many Illegal Immigrants Come out of an 'Act of Love'*, WASH. POST (Apr. 6, 2014, 2:44 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/04/06/jeb-bush-many-illegal-immigrants-come-out-of-an-act-of-love>.

Arguably, people who cross into the United States through the Arizona desert or the Rio Grande violate federal criminal law because of their failure to go through immigration inspections. However, unless they were previously removed or deported from the United States, they are likely subject only to petty offense charges that carry a maximum potential penalty of six months incarceration—charges which definitely are not felony charges.<sup>9</sup> As a United States Magistrate Judge for the United States District Court for the Southern District of Texas, I routinely took pleas and sentenced defendants for such charges.

I do not presume to explain Justice Sotomayor's thoughts on the issue. Moreover, she clearly does not need me to defend her. Still, I appreciate the distinction she was trying to make. Similarly, Governor Bush is more than capable of explaining his views. Nonetheless, after serving for eight years as a United States Magistrate Judge in Corpus Christi, Texas, I am all too familiar with the misnomer, applied to people here in the United States without legal immigrant status, which suggests they are criminals. However, the issue is much more subtle than that. Not only are federal criminal statutes regarding improper entry nuanced, but there also exist multiple ways to enter the United States without legal status while not violating a criminal statute.

#### I. EXISTING FEDERAL CRIMINAL STATUTES REGARDING IMPROPER ENTRY OR REENTRY INTO THE UNITED STATES

To better understand this issue's nuances, one must first understand the applicable statutes. Fortunately, for our purposes there are only two with which we must grapple: the statutes governing improper entry by an alien into the United States<sup>10</sup> and the reentry of removed aliens.<sup>11</sup> I start by discussing the latter because these defendants often have been convicted of some state or federal criminal felony, which provides the basis for the reentry felony charge. Seemingly, these felony defendants are the ones that commentators like Ms. Ingraham reference.

##### A. 8 U.S.C. § 1326: *Reentry of Removed Aliens*

The reentry statute bars any alien who had been previously "denied admission, excluded, deported, or removed or has departed the United

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<sup>9</sup> See 8 U.S.C. § 1325(a) (2012) (prescribing potential imprisonment of "not more than 6 months" for an alien who "eludes examination or inspection by immigration officers").

<sup>10</sup> See *id.* § 1325 (governing situations involving "[i]mproper entry by alien").

<sup>11</sup> See *id.* § 1326 (governing "[r]eentry of removed aliens").

States while an order of exclusion, deportation, or removal is outstanding” from then entering, attempting to enter, or being found in the United States without the Attorney General’s express consent.<sup>12</sup> In other words, the statute targets people who have already been deported from the United States and who then return to the United States without permission to return from a federal official. Those individuals who do return and are convicted face up to two years in prison.<sup>13</sup> However, those persons who were deported after a felony conviction, or after three misdemeanor convictions involving narcotics, can face an enhanced penalty of up to ten years in prison.<sup>14</sup> Similarly, people who are deported following a conviction for an aggravated felony can face up to twenty years in prison simply for returning to the United States.<sup>15</sup>

A charge brought under § 1326 is subject to a five-year statute of limitations.<sup>16</sup> However, because the statute also criminalizes being “found” in the United States, courts have concluded that the statute of limitations begins to run only once a defendant has violated the statute’s exact terms; thus, the statute of limitations begins to run not when the defendant reentered but when the defendant’s presence was actually discovered in the United States.<sup>17</sup>

When people equate lack of legal status with criminality, they likely have in mind the felony charge for illegal reentry, which carries a higher maximum prison term. For our purposes, however, this statute is the less interesting of the two.

### B. 8 U.S.C. § 1325: *Improper Entry by an Alien*

Regarding the statute concerning improper entry (not reentry) into the United States, an alien may be convicted one of three ways:

<sup>12</sup> *Id.* § 1326(a).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* § 1326(b)(1).

<sup>15</sup> *Id.* § 1326(b)(2).

<sup>16</sup> See 18 U.S.C. § 3282(a) (2012) (“[N]o person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.”); see also *United States v. Williams*, 733 F.3d 448, 452-53 (2d Cir. 2013) (applying the five-year statute of limitations in an illegal reentry case); *United States v. Gunera*, 479 F.3d 373, 376 (5th Cir. 2007) (same).

<sup>17</sup> See *United States v. Acevedo*, 229 F.3d 350, 356 (2d Cir. 2000) (“[T]he statute of limitations began to run not at the time of Acevedo’s reentry, but only upon the INS’ subsequent discovery of his presence in the United States.”); see also *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996) (“[I]n instances where the deported alien surreptitiously enters the country, and is later discovered by the INS, the statute of limitations does not begin to run until his presence as well as the illegal status of that presence is discovered by the INS.”).

(1) [by] enter[ing] or attempt[ing] to enter the United States at any time or place other than as designated by immigration officers, or (2) [by] elud[ing] examination or inspection by immigration officers, or (3) [by] attempt[ing] to enter or obtain[ing] entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact.<sup>18</sup>

As a U.S. Magistrate Judge, the charges that I encountered most were subsection (1) charges, where a person crossed the Rio Grande River instead of appearing before a customs officer at a Border Patrol checkpoint. Subsection (3) charges were also common, and they typically involved the person presenting counterfeit documents to an immigration official while attempting to gain entry into the United States. Regardless of the manner of the violation, anyone convicted of a first offense faced a maximum of six months imprisonment, while anyone convicted of a second or subsequent offense would face a maximum of up to two years in prison.<sup>19</sup>

In contrast to § 1326's provision for illegal reentry, § 1325 does not contain a "found in" provision.<sup>20</sup> Consequently, defendants prosecuted for illegal entry are covered by a five-year statute of limitations, which runs starting on the date of their entry, and no later.<sup>21</sup>

## II. THE NUMEROUS WAYS TO BE IN THE UNITED STATES WITHOUT LEGAL IMMIGRANT STATUS AND WITHOUT VIOLATING A FEDERAL CRIMINAL STATUTE

Based on § 1325's language and the various ways that people enter the United States, an individual could be in the United States without legal immigrant status but also without violating any criminal law. A person could enter the United States legally on a tourist visa and then overstay the visa.<sup>22</sup> Indeed, many such people land at airports throughout the United

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<sup>18</sup> 8 U.S.C. § 1325(a) (2012).

<sup>19</sup> *Id.*; accord *United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1158 (9th Cir. 2004) (citing the "maximum six-month sentence for a first illegal entry," and the "maximum of twenty-four months for a subsequent commission" (internal quotation marks omitted)).

<sup>20</sup> See *United States v. Cavillo-Rojas*, 510 F. App'x 238, 249 (4th Cir. 2013) (comparing § 1325 with § 1326, and holding that "a § 1325(a) offense is completed at the time of the defendant's illegal entry, and the statute of limitations begins running at that point"); *United States v. Rincon-Jimenez*, 595 F.2d 1192, 1194 (9th Cir. 1979) (barring an illegal entry prosecution because five years had passed since the time of illegal entry).

<sup>21</sup> See *supra* notes 18, 20 and accompanying text.

<sup>22</sup> See ALISON SISKIN ET AL., CONG. RESEARCH SERV., IMMIGRATION ENFORCEMENT WITHIN THE UNITED STATES 8 (2006), available at <http://fpc.state.gov/documents/organization/64931.pdf> ("[A] lawfully admitted nonimmigrant alien may become deportable if his visitor's visa expires.").

States, go through an immigration inspection, and receive approval to enter the country. Instead of departing within the time allotted by their visa, they disappear into communities where they have national or ethnic ties, find jobs, raise families, and otherwise begin building a life in the United States.

For example, Michael Schmitt, a German national, entered the United States legally on April 14, 1999, as a “visitor for pleasure” through the Visa Waiver Program<sup>23</sup> with authorization to stay for up to ninety days.<sup>24</sup> Mr. Schmitt overstayed his visa and later married a United States citizen with whom he had a child.<sup>25</sup> In 2004, the couple divorced; Mr. Schmitt claimed that his spouse had become abusive and sought classification as a permanent resident on that basis.<sup>26</sup> Later that year, Immigration and Customs Enforcement, an agency of the Department of Homeland Security, ordered his removal.<sup>27</sup> After being taken into custody, Mr. Schmitt filed a habeas petition seeking a stay of his removal, but he was nonetheless removed. Thereafter, the district court dismissed the habeas petition as moot.<sup>28</sup> The Tenth Circuit affirmed the decision and found that, notwithstanding his asylum request, removal was proper based on his abuse of the Visa Waiver Program.<sup>29</sup>

Foreign students may enter the United States legally on the proper visa, which permits them to reside and study for a certain period.<sup>30</sup> However, some students overstay their visas, work without authorization, or do both. For example, Anthony Crocock, a citizen of Ireland, entered the United States in January 2004 on a nonimmigrant student visa to participate in a paramedic certification program.<sup>31</sup> After completing the course and after his student visa expired, Mr. Crocock took a job with a fire department in Maine, based in part on his representation that he was a United States citizen.<sup>32</sup> After discovering that Mr. Crocock was not a United States citizen and lacked authorization to work in the United States, the Department

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<sup>23</sup> 8 U.S.C. § 1187 (2012).

<sup>24</sup> Schmitt v. Maurer, 451 F.3d 1092, 1093-94 (10th Cir. 2006).

<sup>25</sup> *Id.* at 1094.

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

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

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* at 1096-97 (noting that, recognizing the potential for abuse, “Congress established expedited procedures that rendered aliens who overstay their visa deportable” (internal quotation marks omitted)); *see also* Lacey v. Gonzales, 499 F.3d 514, 517 (6th Cir. 2007) (describing how the petitioner, a British citizen, was deportable for overstaying his visa under the Visa Waiver Program).

<sup>30</sup> *See generally Students and Employment*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment> (last updated July 29, 2013) (discussing the F-1 and M-1 student visas).

<sup>31</sup> Crocock v. Holder, 670 F.3d 400, 401-02 (2d Cir. 2012) (*per curiam*).

<sup>32</sup> *Id.* at 402.

of Homeland Security initiated deportation proceedings, and the Second Circuit upheld his deportation.<sup>33</sup>

Overstaying one's visa is not the only way an individual can lack the legal status to be in the United States without the threat of conviction under a criminal statute. Imagine a person who crosses the Rio Grande River from Mexico. Such a crossing would violate 8 U.S.C. § 1325 if the person is apprehended. Instead, suppose this person avoids apprehension, finds a community in which to disappear, and begins a new life in this country. Unfortunately for this individual, an encounter with law enforcement officials occurs, let's say, some six years after crossing the Rio Grande. The bad news for this individual is that these law enforcement officials have learned that the person has no legal authority to be in the United States. Consequently, it is quite likely that the person will be turned over to Immigration and Naturalization Service's custody and processed for deportation and removal. However, the good news for this person is that the time of apprehension is beyond the five-year statute of limitations for § 1325, so the person cannot be charged under that law. One may question the likelihood that people will avoid detection and apprehension for longer than five years, but it happens quite regularly.<sup>34</sup>

Consider a variation on the above hypothetical. Suppose some people have already crossed into the United States and have established a life here, but they then want the rest of their family with them, including their children. (For families like these, often the children's parents are already living in the United States with every intention of staying, and they want to be reunited with their children.) So they contract with smugglers, who agree to undertake the arduous and risky task of smuggling the children into the United States. As a magistrate judge, I learned that often the smuggler is a woman posing as a mother or an aunt to the child, and holding some counterfeit birth certificate that she has brought with her or which was provided to her. Similarly, it is not uncommon to find the child sleeping in the car while encountered at the checkpoint. Sometimes the children are given cough syrup or other medications that cause them to sleep or to be very drowsy, to maximize the probability that the Border Patrol agents at the checkpoint will not question them.

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<sup>33</sup> *Id.* at 402-03.

<sup>34</sup> *See, e.g.,* *United States v. Cavillo-Rojas*, 510 F. App'x 238, 248 (4th Cir. 2013) (holding that because the defendant "was in the United States more than five years before he was charged with illegal entry, the illegal-entry charge was barred by the applicable statute of limitations"); *United States v. Rincon-Jimenez*, 595 F.2d 1192, 1194 (9th Cir. 1979) (same).

Once these children are settled into the United States, they often start attending school and otherwise pursuing the American dream. For some, they were so young at the time of their crossing that this country is the only one they know. Regardless, when they are discovered, either (1) they are still minors and thus unlikely to be prosecuted by the federal government, or (2) they have likely been in the United States much longer than the five-year statute of limitations. Again, they can be deported subject to civil immigration proceedings, but they cannot be prosecuted criminally:

The [Immigration and Nationality Act (INA)] includes both criminal and civil components, providing both for criminal charges (e.g., alien smuggling, which is prosecuted in the federal courts) and for civil violations (e.g., lack of legal status, which may lead to removal through a separate administrative system in the Department of Justice). *Being illegally present in the U.S. has always been a civil, not criminal, violation of the INA*, and subsequent deportation and associated administrative processes are civil proceedings. For instance, a lawfully admitted nonimmigrant alien may become deportable if his visitor's visa expires or if his student status changes.<sup>35</sup>

Though the distinction is pretty straightforward, many people fail to appreciate it.

#### CONCLUSION

One can see how confusing this issue can be. It is easy to understand why people like Governor Bush and Ms. Ingraham misspeak about this topic. Moreover, it becomes clear why Justice Sotomayor declines to label as criminals people who lack legal status to be in the United States. Often these people have not been convicted of anything, and there is nothing for which the Government can charge them. This gap in the criminal code criminalizes the serious offenders, including those defendants that have been convicted of violent state felonies or serious federal charges, such as narcotics trafficking or child pornography. However, the gap also protects those that were brought into the United States by their parents, or who have been here a long time without violating any criminal statute. Given this legal framework, commentators would be well advised to refine their language to properly distinguish civil immigration violations from criminal violations of federal law.

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<sup>35</sup> SISKIN, *supra* note 22, at 8 (emphasis added) (footnotes omitted).

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Preferred Citation: Brian L. Owsley, *Distinguishing Immigration Violations from Criminal Violations: A Discussion Raised by Justice Sonia Sotomayor*, 163 U. PA. L. REV. ONLINE 1 (2014), <http://www.pennlawreview.com/online/163-U-Pa-L-Rev-Online-1.pdf>.