

Lawyers, Lexicologists and Dancing Angels

U.S. immigration law calls a foreign national's arrival in the United States, without inspection by a border official, an "illegal entry."¹ The law refers to those who make an illegal entry as "illegal entrants."²

Having crossed the border, illegal entrants are said to be "unlawfully present" in our country.³

In other words, while the entry to our country by these individuals is *illegal*, their presence here in *unlawful*.⁴

Are "illegal" and "unlawful" two ways for saying the same thing, or did Congress in its wisdom see a meaningful difference between these terms?

Black's Law Dictionary defines "illegal" as follows:

"Not authorized by law; illicit; unlawful; contrary to law."⁵

"Unlawful" is defined:

"That which is contrary to law. 'Unlawful' and 'illegal' are frequently used as synonymous terms, but, in the proper sense of the word, 'unlawful,' as applied to promises, agreements, considerations, and the like, denotes that they are ineffectual in law because they involve acts which, although not illegal, i. e., positively forbidden, are disapproved of by the law, and are therefore not recognized as the ground of legal rights, either because they are immoral or because they are against public policy."⁶

Congress may have considered some deep philosophical difference between the definitions of "illegal" ("contrary to law; unlawful"); and "unlawful" ("that which is contrary to law") but in reality the difference between the terms appears negligible. Indeed, as evidenced below, resources such as the Foreign Affairs Manual ("FAM") tend to make no distinction whatsoever between "illegal" and "unlawful."

"Aliens"

¹ Illegal Immigration Reform and Immigration Responsibility Act of 1996, PL 104-208, Sec. 105.

² Immigration and Nationality Act (INA) INA 212(a)(6)

³ INA 212(a)(9)(B)(ii).

⁴ Legal entrants, like tourists, may also be unlawfully present if they remain in the country beyond the period of their unauthorized stay.

⁵ <http://thelawdictionary.org/illegal/>

⁶ <http://thelawdictionary.org/unlawful/>

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According to the FAM, aliens present in the U.S. without authorization are “illegal”:

“A key element of the new INA 212(a)(6)(E) provision is that the ‘smuggler’ must act ‘knowingly’ to encourage, induce, or assist an **illegal alien** to enter the United States.”⁷

But aliens present in the U.S. without authorization are also “unlawful”:

“The Immigration and Nationality Act, Section 274(a)(1), (2) provides for criminal penalties... for acts or attempts to bring unauthorized aliens to or into the United States, transport them within the United States, harbor **unlawful aliens**, encourage entry of illegal aliens, or conspire to commit these violations, knowingly or in reckless disregard of illegal status.”⁸

“Fraud”

Fraud committed by misrepresenting facts is illegal:

“Some applicants commit fraud to obtain travel documents through **illegal means**, such as... making false claims to an adjudicating officer.”⁹

And fraud committed by misrepresenting facts is unlawful:

“You will suspend action and return the petition to USCIS through NVC if... you know, or have reason to believe the petition approval was obtained by fraud, misrepresentation, or other **unlawful means**.”¹⁰

“Status”

Unauthorized status can be illegal:

“INA 212(a)(9)(B) went into effect on April 1, 1997, and the statute is not retroactive. Periods in **illegal status** prior to April 1, 1997, therefore, cannot be considered when calculating the period of unlawful presence accrued for purposes of 212(a)(9)(B)(i).”¹¹

⁷ 9 FAM 40.65 N4

⁸ *A Primer on Visas and Visa Fraud*, Human Smuggling and Trafficking Center, Department of Homeland Security Office of Intelligence and Analysis, Department of State Bureau of Consular Affairs, June 2008.

⁹ General Accountability Office, *State Could Enhance Visa Fraud Prevention by Strategically Using Resources and Training*, GAO-12-888 September 2012

¹⁰ 9 FAM 42.43 N2

¹¹ 9 FAM 40.92 N2

Unauthorized status can also be “unlawful”:

“There is no law or regulation which precludes experience gained by an alien while in **unlawful status** from being applied to fulfill job requirements for certification provided the experience was gained prior to filing the labor certification.”¹²

“Illegal entry” and “unlawful presence”

Even with regard to the two terms of our initial inquiry, “illegal entry” and “unlawful presence,” the distinction is blurry at best.

“Unlawful presence”

Illegal entrants are said to be “**unlawfully present**” in our country.¹³ But these same illegal entrants are also said to be “illegally present” in the U.S.:

“Over two hundred applicants applied for visas under this scheme, and 95 were issued. Thirty-eight of those applicants are confirmed overstays who are currently **illegally present** in the United States.”¹⁴

“Illegal entry”

In the context of Violence Against Women Act (VAWA) self-petitioners, USCIS writes that the petitioner:

“...will not need to show that his or her **illegal entry** into the United States had a substantial connection to the domestic violence, battery or extreme cruelty.”¹⁵

The above statement is based on the text of INA 212(a)(6)(A), which speaks of the “substantial connection between the battery or cruelty and the alien's **unlawful entry** into the United States.”

The fact that 8 U.S. Code § 1325 refers to this same event as “**improper entry**”¹⁶ strengthens the perception that the lexicology of our immigration laws is one big mud soup.

Most significantly, he who commits an illegal entry and she who is unlawfully present are both subject to lengthy banishment from the United States.¹⁷ For the

¹² 9 FAM 40.51 N7.2

¹³ INA 212(a)(9)(B)(ii).

¹⁴ 2009 *India Biannual Fraud Update*.

¹⁵ USCIS Fact Sheet: *USCIS Issues Guidance For Approved Violence Against Women Act (VAWA) Self-Petitioners*. <http://www.uscis.gov/archive/archive-news/fact-sheet-uscis-issues-guidance-approved-violence-against-women-act-vawa-self-petitioners>

¹⁶ <http://www.law.cornell.edu/uscode/text/8/1325>

individuals involved, these banishments can have the exact same “crushing effect of destroying the hopes and aspirations of a lifetime.”¹⁸

Words do matter, and it’s possible that the best way to achieve a more focused understanding of our immigration laws is to encourage more Lexicologists to participate in the national immigration debate. But until Martha and Grant¹⁹ quit their day jobs, we suggest reading this animated exchange²⁰ between members of the U.K. Parliament; you may just start thinking that the only difference between “illegal” and “unlawful” is the amount of change jangling in your lawyer’s pocket.



Mr. Nick Hawkins (Surrey Heath): I beg to move the amendment to leave out 'criminal' and insert 'unlawful'.

Mr. Paul Stinchcombe (Wellingborough): As a matter of clarification, may I ask what the amendment would add? What are the differences between unlawful conduct and criminal conduct?

Norman Baker: I do not want to flog this subject to death, but the Minister did not answer the points made by his hon. Friend the Member for Wellingborough. Will he answer a simple question? Does he understand the word "criminal" to mean the same as the word "unlawful", or is it different?

Mr. Ainsworth: We do not believe that changing the word would make a material difference. It would certainly not make the issue clearer. I believe that that is clear, and I do not think that the amendment would make an improvement.

Mr. Stinchcombe: I am afraid that I simply do not understand why we use two terms with different definitions to define the same kind of conduct.

¹⁷ Foreigner citizens who have entered the U.S. illegally are subject to deportation. 8 U.S. Code § 1227 . The penalty for unlawful presence can be a ten-year bar on inadmissibility to the country. INA 212(a) (9)(B)(1)(ii).

¹⁸ Remarks of Attorney General cited in *Matter of S- and B-C*, 9 I & N Dec. 436, at 447: "Shutting off the opportunity to come to the United States actually is a crushing deprivation to many prospective immigrants. Very often it destroys the hopes and aspirations of a lifetime, and it frequently operates not only against the individual immediately but also bears heavily upon his family in and out of the United States." www.justice.gov/eoir/vll/intdec/vol09/1168.pdf

¹⁹ If you’ve never listened to *A Way with Words* with Martha Barnette and Grant Barrett, do yourself a huge favor and click here: <http://www.waywordradio.org/about/>

²⁰ The text is edited and condensed, and the order slightly changed. <http://www.publications.parliament.uk/pa/cm200102/cmstand/b/st020115/am/20115s02.htm>

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Mr. Hawkins: I suggest that there is a philosophical difference, which my hon. Friend the Member for Beaconsfield has sought to advance.

Mr. Mark Field (Cities of London and Westminster): Given the dancing on a pinhead that we have done about the meaning of words "unlawful" and "criminal", will the Minister tell the Committee the distinction between criminal conduct and unlawful conduct?

Mr. Ainsworth: I have already said that we cannot find any material difference. I have nothing to add to that.

Mr. David Tredinnick (Bosworth): I am not a lawyer, but I find the debate confusing and disturbing. It seems that we are using different terminology to mean the same thing in different parts of the Bill. Why do we use different terminology? In the interests of elucidation, we should use one simple term for one condition.

Mr. Boris Johnson (Henley) rose—

Mr. Ainsworth: I give way to the hobbit.

Mr. Johnson: I am grateful to the elf—or the orc, or however the Minister styles himself. There is an elementary difference between the words "criminal" and "unlawful". "Unlawful" is surely synonymous with illegal. It is possible to imagine something that is illegal but not criminal. I am not a lawyer, but you guys are meant to be able to work out that sort of thing.

Mr. Ainsworth: I do not know what else I can do, other than repeat myself.

Mr. Tredinnick: I am sorry to press the Minister, but we have still not resolved the issue of whether the two terms mean something different. I understand the Minister's point. The phrase is convenient, perhaps the flow of English is better this way, and it is, perhaps, more meaningful to a lay person. However, learned counsel all over the Room are expressing anxieties about the definition, so it behoves him to tell the Committee that he will consider the matter. The Committee's purpose is to find such issues, which some clever Mr. Carman, for example, will light on in a trial, make much fun of and use to mock everyone and tie the jury up in knots because he is so clever with words, as are many hon., and learned, Gentlemen—who are cleverer than those of us who are not learned—

The Chairman: Order. This is a long intervention.

Mr. Tredinnick: I do not want to pursue the matter further, but the issue is of paramount importance, and the Minister has not yet convinced me. He should generously say that he will reconsider it.

Mr. Stinchcombe: We need to get the wording of the legislation right to prevent lawyers from being able to have such discussions, at great expense. It is bad practice to use different words to define the same conduct. I am a lawyer, and if I see two different words in a Bill, I automatically assume that they are intended to mean two different things. If it were appropriate, I would dedicate much time and argument to persuading a judge that that was the case.

Mr. Tredinnick: If we go down the route that the Minister proposes, the tills will be ringing in the chambers of the Inns of Court. I foresee endless complications and arguments about what is and is not lawful, criminal, and so on. What is an appropriate definition? To a layman, rather than a lawyer, an appropriate definition is a simple one. Currently, the Bill contains exchangeable, interchangeable definitions, which can mean the same in one place but not in another. It may make sense to the Minister, and I can understand the idea that it may be convenient to have two definitions, but in the world we live in, criminals can hire expensive lawyers—such as my hon. Friend the Member for Beaconsfield, who may well be jangling the change in his pocket now.

Mr. Field: I endorse my hon. Friend's comments. I was also interested in what was said by the hon. Member for Wellingborough. I can only assume that, unlike Samson, after the shaving of his facial hair, he now has more energy to debate the Bill.

Mr. Grieve: Does the Minister not agree that if the point made by the hon. Member for Wellingborough—which I, too, tried to express—were correct, that in itself would be a good reason to alter the wording and thus improve the Bill?

Mr. Ainsworth: I do not accept that. If I did, our discussion would have been a lot shorter.

Mr. Ian Davidson (Glasgow, Pollok): Does the Minister agree that this is one of those debates about how many angels can dance on the head of a pin, and that although it is a criminal waste of the Committee's time, it is not, unfortunately, unlawful?

Mr. Ainsworth: That says it all.

<http://www.publications.parliament.uk/pa/cm200102/cmstand/b/sto20115/am/20115s04.htm>
