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## Sen. Kamala Harris's claim that an 'undocumented immigrant is not a criminal'

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*"The President's immigration actions and Muslim ban will make America less safe. As a prosecutor, I can tell you, it is a serious mistake to conflate criminal justice policy with immigration policy as if they are the same thing. They are not. I have personally prosecuted everything from low-level offenses to homicides. I know what a crime looks like. I will tell you: an undocumented immigrant is not a criminal. But that's what these actions do. They suggest all immigrants are criminals and treat immigrants like criminals."*

— **Harris, maiden speech in response to President Trump's immigration executive order, Feb. 16, 2017**

This tweet — one of several tweets published during her town hall — caught our attention, and we were curious about the context in which the junior senator from California made this claim. It turned out that Harris used this talking point regularly on the 2016 Senate campaign trail, and she often made the claim to draw a legal distinction in immigration and criminal law (as in the Feb. 16 speech).

We took a deeper look at the former California attorney general's claim.

### The Facts

The act of being unlawfully present in the United States is a civil violation, not a criminal offense. According to her staff, that is what Harris is referring to when she uses this line.

In 2012, the Supreme Court ruled that "as a general rule, it is not a crime for a removable alien to remain present in the United States." The majority opinion was issued in a lawsuit over a controversial 2010 Arizona law that required local police to determine the immigration status of someone who is detained or arrested, if police had a "reasonable suspicion" that the person was in the country illegally. This was the most controversial provision that opponents of the law said would open up room for rampant racial profiling. The Supreme Court upheld this provision but struck down most others that were challenged.

The undocumented population includes people who improperly entered the country, those who entered legally but overstayed the terms of their temporary entry (such as staying beyond the time authorized with a temporary visa), and those who have "quasi-legal" status, such as people who are granted deferred action status.

The federal immigration law imposes criminal penalties on some actions related to undocumented presence, according to the American Civil Liberties Union, which is a critic of

Trump's recent immigration actions. Illegally entering the country (for example, illegally crossing the border), re-entering the country after being removed or falsifying documents to enter the country are all criminally punishable.

It is unclear exactly how many people within the estimated 11 million undocumented population entered legally or illegally. Advocates on both sides use a statistic published in 2006, that about 55 to 60 percent of the undocumented population entered the country illegally.

Harris specifically uses the word "criminals," referring to people who violated criminal law. That further distinguishes between people who are unlawfully present (and have not been convicted of a crime) and noncitizens who are charged and convicted of criminal offenses (immigration or otherwise). The term "criminal aliens" is used for the latter group of noncitizens.

In summary: If you entered the United States without permission, you would be subject to criminal penalties, thus labeling you a "criminal" if you're convicted. But just the simple act of being in the country without permission doesn't make you a "criminal," because it's a civil offense.

"If you're looking at it from the pure legalistic perspective, then she is right to some extent, that simply being here without legal status is not a crime. It doesn't make you a criminal," said David Bier, immigration policy expert at the libertarian Cato Institute. "But many undocumented immigrants have committed criminal violations of immigration law, and there's nothing wrong with pointing that out. There's no discord between saying that, and that you think that we should provide a pathway to citizenship, in order to allow them to live here without having to break the law."

Opponents of illegal immigration say Harris's claim is a distinction without a difference, because you're still breaking the law — civil or criminal. David Ray, spokesman for the Federation for American Immigration Reform, which supports lower levels of legal and illegal immigration, said: "All illegal aliens have broken the law — that is undisputable. Unlawful border crossings are criminal offenses: misdemeanor for the first offense and a felony for repeat offenders. While overstaying a visa is a civil offense under immigration law, those who do it still break the law and are subject to removal."

Harris spokesman Tyrone Gayle said: "Senator Harris was referring to the fact that this Administration has painted all undocumented immigrants as criminals, when the reality is the vast majority of undocumented immigrants here are following the law, contributing to our economy and society. Labeling people as criminals solely because of their immigration status is inaccurate, strains the limited resources of local law enforcement, and makes our communities less safe."

Harris further explained her point to a Washington Post reporter, who asked her about her use of this talking point at a March 28 news conference with immigration advocates:

**Reporter:** "And to Senator Harris, I want to make sure that I understand what you said. You said an undocumented immigrant is not a criminal. With total respect to the stories we just heard, if they crossed the border illegally or if they overstayed a visa, are they not breaking the law and thus in violation of the law as criminals? Or are you distinguishing that and some other [inaudible]?"

*Harris: “Two obvious points. It is a civil violation, it’s not a crime. Period, full stop. And the second point is that there is a whole community that is being vilified because of this misinformed, misdirected term ‘illegal alien.’ And what is happening is you’re seeing then misguided and misinformed policies come from that. And it is not only just unfortunate, it’s irresponsible. It’s irresponsible to paint a whole population of people as rapists and murderers and ‘bad hombres.’ It’s actually ignorant and we can’t afford to run our country that way. So they are not criminals.”*

### The Pinocchio Test

The act of being in the United States without permission is not a criminal violation of the law, but a civil infraction. That is what Harris is referring to when she says “an undocumented immigrant is not a criminal.” But some undocumented people have violated criminal law in relation to their immigration status — for example, those who illegally entered the country or falsified documents.

Harris also uses this phrase to draw a distinction between unauthorized people who are living in the United States without having committed a crime, and those who are both unauthorized and have committed a crime (or “criminal alien”).

We hold politicians to a reasonable-person standard. The technical distinctions she makes are not immediately clear without additional context, especially to the layman who doesn’t understand the intricacies and nuances of criminal and immigration law.