Probation Supervision of Legal and Illegal Aliens: A Study

When non-citizens, visa-holders or immigrants, are convicted of committing a crime in this country, they are subject to the same penalties as a United States citizen who committed the same offense. Unlike citizens, however, they may also be deported. The Immigration and Naturalization Service (INS) is using the deportation option with greater frequency. In 1999, more than 69,000 “aliens” were deported because of a criminal conviction, 13% more than the year before and up 24% from 1997. Despite the large number of deportations, many aliens with criminal convictions remain in the United States, at least while their deportation is being litigated. Others are released with no INS action against them, either because INS does not have the resources to deal with them or because they fell through the bureaucratic cracks.

Unfortunately, little is known about how these aliens fare back in the community. If they redeem themselves by being law abiding, finding jobs, paying taxes, and supporting their dependants, then allowing them back into the community is a sound practice. However, if they continue to violate the law, burden social programs, and undermine the fabric of our society, their release is unreasonable, and they should be deported. This article discusses an initial attempt to ascertain how some of these aliens are doing in the community. Ultimately, larger scale studies will be needed.

When aliens are convicted of a crime, they are required to serve out any prison term ordered. Theoretically, if they are to be deported, deportation is to occur immediately upon their release from incarceration; otherwise, INS will detain them. If the alien is neither immediately deported nor detained by INS, the alien must actively serve out whatever term of probation, parole or supervised release was imposed at sentencing.

In the Eastern District of New York, which covers part of New York City and all of Long Island, nearly a quarter of the probation office’s clientele are aliens. Of those, 41% were “illegal,” meaning that they either entered the United States illegally or overstayed a temporary visa. In an attempt to take an initial step toward assessing how aliens fare under supervision, the Probation Department in the Eastern District of New York surveyed its officers and collected information from cases in which supervision was completed in 2001.

I. The Hypothesis

The first step was an informal survey, in which probation officers were asked their impressions of how aliens fared under supervision. Most of the officers believed that aliens were less successful under supervision than citizens, largely because aliens face unique obstacles which inhibit their chances of success. For example, aliens often have to contend with problems of cultural assimilation and with language barriers. In addition, INS restricts the employment options of non-immigrant foreigners; technically illegal aliens are prohibited from working altogether. Aliens are also often specifically precluded from public welfare and education programs. Finally, it is harder for them to establish roots in the community because of the residual threat of deportation due to their conviction or illegal alien status.

II. The Study

A. Closing Cases

All readily available information was examined from the cases “closed” in the district during 2001. The cases were categorized based on the reason why they were closed and the citizenship/alien status of the offender. In the statistical program currently used in the district, probation staff is required to select from a menu of seven different “closing codes.” Two of them are considered to reflect positive outcomes, three reflect neutral outcomes, and the remaining two are deemed negative.

The positive closing codes are “early termination” and “expiration.” In our jurisdiction, early termination is limited to those offenders who do exceptionally well under supervision. An example would be an offender who not only complies with all the supervision conditions but does more, such as extra community service. When cases close upon expiration, it means the supervision term had not been revoked by the court, nor had the offender been taken into custody on another charge at the time of the scheduled expiration date. The neutral results were cases closed because the offender died, moved to another jurisdiction, or another change in circumstance, such as the offender’s conviction being overturned. Negative outcomes include cases closed upon revocation, meaning the court found the offender violated the conditions of supervision and ordered the offender incarcerated, and cases where supervision was
extended because revocation proceedings were pending, or because the offender needed additional time to satisfy a condition imposed by the court, such as a fine or restitution.

B. Imposition of Special Conditions

Based on the closing codes, aliens did better under supervision than citizens. That data, however, may be deceptive. Judges aware of the additional obstacles faced by aliens may impose fewer arduous supervision conditions, which makes it easier for aliens to succeed. To test that theory, information was collected as to the type and frequency of the supervision conditions imposed on the respective groups.

The data indicates that citizens are subject to more supervision conditions than aliens, with the difference being the greatest between citizens and illegal aliens. The significance of that disparity is debatable, however.

The special conditions imposed can be divided into three categories. The first is rehabilitative, as it attempts to correct underlying problems that contribute to criminality. Treatment for substance abuse or mental health is rehabilitative. The second category of conditions is punitive, seeking to punish offenders for their crimes by constraining their liberty or taking their property. Home confinement or placement in a Community Confinement Center fall into this category, as do fines. The last category is restorative: Restitution and community service seek reparations.

While citizens face all three categories of conditions more often than aliens, the most marked difference is found with rehabilitative conditions. A citizen is twice as likely to be subject to a rehabilitative condition than a legal alien; the difference is more than fourfold between citizens and illegal aliens. The reason for the disparity is not clear. It could be that citizens simply have higher instances of drug use and mental health problems. That would also explain why they have lower success rates under supervision: they are struggling with addiction and mental illness whereas aliens are not. However, the disparity may also be attributed to the criminal justice system being able to detect those problems more effectively among citizens than aliens. Criminal justice administrators usually have fewer communication barriers with citizens than with aliens. In addition, aliens have more of a reason to conceal a substance abuse or mental health problem. Since a conviction may be grounds for deportation, they may fear that an additional substance abuse or mental health problem would assure their removal.

The possibility of deportation may also partially explain the difference in the imposition rate for rehabilitative conditions. Judges are reluctant to impose conditions that will not be enforced. If it appears the offender will be deported, therefore, it is less likely a court will impose a rehabilitative condition. In most instances, judges are aware when a defendant is subject to possible deportation, as it is usually mentioned in the plea agreement or the presentence report and is frequently used by defense attorneys at sentencing to argue for reduced custody and supervision terms. While the likelihood of deportation does not normally serve as a basis for a reduced sentence, it may impact the amount and type of supervision conditions imposed.

Based on the nature and objective of rehabilitative conditions, their existence does not necessarily make a supervision term more difficult or increase the likelihood of a negative outcome. Quite to the contrary, their goal is to increase the likelihood of a positive outcome. However, any additional condition, regardless of its form or intent, creates more obligation on the offender, and increases the potential for violation.

While not as pronounced as with rehabilitative conditions, there is also a difference in the imposition of punitive and restorative conditions. The difference is again greatest between citizens and illegal aliens. In contrast, the variation between citizens and legal aliens is much smaller than it was for rehabilitative conditions. It is unclear why there would be less of a distinction in terms of punitive and restorative conditions. It might be attributed to the nature of the offenses committed by the different groups. Unfortunately, data as to the types of offenses committed by the groups was not readily available. The statutory rating—felony or misdemeanor—was obtained but proved not probative, neither was the average offense level rating under the guidelines, which was slightly higher for aliens but otherwise equivocal.
The data show that citizens are subject to more conditions of all types—rehabilitative, punitive and restorative. As more conditions correlate with more opportunities to fail, this may explain why citizens have a higher failure rate under supervision than aliens.

C. Satisfaction of Special Conditions
Putting aside the difference in the imposition rate, the question remains whether there is a difference in success rates between aliens and citizens when they are subject to the same conditions.

<table>
<thead>
<tr>
<th>Condition</th>
<th>U.S. Citizens</th>
<th>Legal Aliens</th>
<th>Illegal Aliens</th>
</tr>
</thead>
<tbody>
<tr>
<td>Substance Abuse Treatment Satisfied</td>
<td>47%</td>
<td>43%</td>
<td>64%</td>
</tr>
<tr>
<td>Mental Health Treatment Satisfied</td>
<td>32%</td>
<td>60%</td>
<td>Not Available</td>
</tr>
<tr>
<td>Fine Satisfied</td>
<td>68%</td>
<td>67%</td>
<td>50%</td>
</tr>
<tr>
<td>Restitution Satisfied</td>
<td>32%</td>
<td>28%</td>
<td>50%</td>
</tr>
<tr>
<td>Community Service Satisfied</td>
<td>79%</td>
<td>78%</td>
<td>75%</td>
</tr>
<tr>
<td>Home Confinement Satisfied</td>
<td>86%</td>
<td>89%</td>
<td>60%</td>
</tr>
<tr>
<td>Community Confinement Satisfied</td>
<td>54%</td>
<td>66%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Statistically, the groups had surprisingly comparable overall compliance rates. Illegal aliens had the highest success rate in substance abuse treatment and community confinement; legal aliens were the most successful in mental health treatment and home confinement; citizens were the top performers in payment of fines and restitution and the performance of community service. Since the success rates in the different conditions essentially off-set each other, there must be some other reason why citizens have proportionally more supervision terms end in revocation and extension.

Similar to the possible explanation that judges take the extra obstacles faced by aliens into account when imposing supervision terms, probation officers may also take them into account when enforcing supervision conditions. This theory is supported by the fact that citizens did better in objectively measurable conditions, such as payment of fines and restitution and performance of hours of community service. The aliens did best in those conditions where probation officers have to determine subjectively if offenders complied to the best of their ability. For example, progress in mental health and drug treatment is often measured subjectively, and in those categories aliens had the highest success rate.

If probation officers apply different standards to citizens than to aliens, their familiarity with the obstacles aliens confront while under supervision may lead them to curtail expectations accordingly. For example, an officer supervising an illegal alien will be inclined to allow the offender to work “off the books” since the alien is precluded from any other type of employment because of his immigration status, and off the books employment is considered better than no work or resumed criminal activity. As citizens have the option of more traditional “on the books” employment, possible tax evasion and other complications could justify revocation of supervision if they refused to secure such legal employment.

III. Conclusion
A large number of aliens convicted of crimes are allowed to stay in the United States. Many remain here under the supervision of a federal probation officer. Data from the Eastern District of New York indicate that a comparison of the success of aliens and U.S. citizens on probation, parole or supervised release is insufficient as the groups are subject to different types of supervision, and the criminal justice system seems to hold them to different standards.

The probation department for the Eastern District of New York is already planning studies to develop more reliable gauges for success and risk factors for aliens under supervision. Hopefully, others will also join in this effort so as to allow us to determine whether our current policies and practices relating to criminal aliens are effective and sensible. After all, the decision to let aliens convicted of crimes remain in this country is significant.

Notes
2. See United States v. Medina, 17 F. Supp.2d 245, 247 (S.D.N.Y. 1998) (“While [the offender’s] post-incarceration conduct is apparently unblemished, this alone cannot be sufficient reason to terminate [supervision early].”).