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FEDERAL, STATE AND LOCAL GOVERNMENTS: PARTNERS IN THE FIGHT AGAINST VIOLENT CRIME*

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I. INTRODUCTION

The Preamble to the Constitution of the United States declares that:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Under our constitutional system, the federal government and the governments of each individual state work in partnership to accomplish the goals, and further the purpose set forth in the Preamble. With respect to the legislative branch of the federal government, its role is basically twofold.

First, Congress has certain powers which the Constitution declares to be within its exclusive jurisdiction. These include the power to coin money, to declare war, to control naturalization, and to regulate commerce.¹ Second, it has an interest in those particular state problems which transcend the local borders and exist on a national level, as well as a responsibility to act upon that interest.

In the Justice System Improvement Act of 1979,² the latest and most extensive amendment of the Omnibus Crime Control and Safe Streets Act of 1968,³ Congress reaffirmed its earlier finding that local

* The author wishes to express his gratitude for the invaluable contributions and suggestions made by Eric Warner, Assistant District Attorney, Bronx County, N.Y., Chief of Juvenile Offense Bureau, and Peter D. Coddington, Assistant District Attorney, Bronx County, N.Y., Appeals Bureau, Special Litigation Unit, who assisted Mr. Merola in the writing of this article.

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¹ U.S.CONST. art. I, § 8.

² Pub. L. No. 96-157, 93 Stat. 1167 (1979) (codified at 42 U.S.C. § 3701).

³ Pub. L. No. 90-351, 82 Stat. 197 (1968).

crime was, indeed, a matter of national import. Section 3701 states:

The Congress finds and declares that the high incidence of crime in the United States is detrimental to the general welfare of the Nation and its citizens, and that criminal justice efforts must be better coordinated, intensified, and made more effective and equitable at all levels of government. . . .

Congress further finds that although crime is essentially a local problem that must be dealt with by State and local governments, the financial and technical resources of the Federal Government should be made available to support such State and local efforts.⁴

Moreover, the Congress clearly recognized and declared its own responsibility to act upon that determination:

It is therefore the declared policy of the Congress to aid State and local governments in strengthening and improving their systems of criminal justice by providing financial and technical assistance with maximum certainty and minimum delay. It is the purpose of this chapter to (1) authorize funds for the benefit of States and units of local government to be used to strengthen their criminal justice system; (2) develop and fund new methods and programs to enhance the effectiveness of criminal justice agencies; . . . [and] (7) encourage the undertaking of innovative projects of recognized importance and effectiveness. . . .⁵

In light of this congressional commitment to lend active support and assistance to *worthwhile* projects in the field of criminal justice, and in view of the decreasing availability of resources to fund such projects because of presidential priorities and economic conditions, it is of paramount importance to all that proposals be carefully screened and that only the very best be implemented.

For the last nine years my office has employed a program whose concepts, policies and procedures have made dramatic impact upon the criminal justice system at large. Initially, this program was the beneficiary of federal funds. Without such funds the program probably could not have been implemented. Through independent analysis conducted over the years the wisdom of the investment has been established beyond question. In light of the past and present success of this program, its history and operation serves us well as an example for the future.

II. THE MAJOR OFFENSE BUREAU

The Major Offense Bureau, my response to the career criminal, was created in Bronx County because of certain intolerable conditions, and because of the inadequacy of available resources to deal with the volume

⁴ Pub. L. No. 90-351, Title I, § 100, 42 U.S.C. § 3701, as added, Pub. L. No. 96-157, § 2, 93 Stat. 1169 (1979). For an explanation of the legislative history of this section, and the use of the "as added" designation, see codification note 42 U.S.C. § 3701 (West Supp. 1981).

⁵ *Id.*

of crime. The imminent collapse of the criminal justice system was manifest in delay, backlogs, recidivism, inefficient prosecution and unreasonable plea bargaining. A reallocation of resources was necessary to prevent its complete destruction.

Perhaps the single greatest obstacle to effective prosecution has always been the factor of delay.⁶ The chief cause of delay was a rising crime rate, which generated a flow of indictments far beyond the capacity of the already overburdened court system to absorb and process them. The delay between apprehension and trial frequently exceeded two years.

Inability to focus on the serious offender because of the sheer volume of cases resulted in less than effective prosecution. An enormous amount of time and energy was being invested, while only a minimal reduction in criminal activity was achieved. It also seemed clear to me that when an individual was arrested, the police department and related law enforcement agencies' initial investigation was often insufficient. This could be attributed in part to the failure of the District Attorney's Office to become immediately involved in the investigation. An assistant district attorney's prompt participation seemed essential to successful prosecution.

With respect to the backlog which had accrued, the problem had reached crisis proportions. I found it totally unacceptable that a person who was indicted in Bronx County might wait twenty-four months or more in prison before the question of his guilt or innocence could be litigated. This situation, repugnant as it was to our democratic system of justice, frequently resulted in the setting of unreasonably low bail, or no bail at all. Prosecution necessarily suffered and frequently was ineffective.

When a trial commenced two years after arrest, the probability of conviction substantially diminished. Recollection of the facts by witnesses became vague, or the witnesses themselves re-located without a trace, became reluctant to testify, or simply lost interest in the case. The handling of the case by a number of different prosecutors also resulted in a decline in the quality of prosecution. As each different assistant district attorney acquired the case, he had to rework the contents of the file he received, and re-interview the witnesses (assuming they could be found). This duplication of effort was a luxury that an already overburdened criminal justice system could ill afford.

⁶ Notwithstanding the guarantee of the sixth amendment to the Constitution of the United States that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . .," U.S. Const. amend. 6, the fact remains that delay is consistently helpful to the defense case, while speed is of the essence for a successful prosecution. Paradoxically, it has thus become essential for prosecutors to assert the defendant's right to a speedy trial.

Furthermore, this overloaded system had become almost unworkably bureaucratic. Formal motion practice became inefficient and ritualistic. Lawyers sought material that did not exist or to which they were not entitled, or worse, that they had already received. Prosecutors had to respond to these "boilerplate" motions, and the courts, in turn had to expend the time and effort required to render a decision. Once again, valuable resources were frittered away.

While the pretrial delay decreased the probability of conviction, the sheer volume imposed upon the courts eliminated the certainty of punishment. In order for the system to survive, more than ninety percent of all matters had to be disposed of by plea or dismissal.⁷ Procrastinating until the "right" plea offer was made available became a common strategem for the experienced defendant. Under the circumstances, a plea offer which was "right" for the defendant was often wrong for society. The public became distrustful of the practice of "copping out." Plea bargaining, a necessary and judicious tool of our system of justice when properly applied, had become a symbol of its impotence. To beat the system, one simply gave it enough time to beat itself.

When I first conceptualized the Major Offense Bureau, I realized that the fundamental obstacle to its successful implementation was a lack of money and manpower. My experience as Chairman of the Finance Committee of the City Council of the City of New York had taught me the value of properly allocating and distributing resources.

In 1973 I applied to the Law Enforcement Assistance Administration of the United States Department of Justice (L.E.A.A.) for a grant to establish a Major Offense Bureau.⁸ Shortly thereafter, I received approximately \$450,000 to implement the program. On July 2, 1973, after three months of preparation, the Major Offense Bureau became operational, and on September 1, 1973 the Appellate Division of the New York State Supreme Court, First Department, designated two trial parts for the exclusive litigation of Major Offense Bureau cases. Since that time an additional three parts have been so designated.

Soon after the grant was received, I engaged the services of the National Center for Prosecution Management. The Center developed a numerical case evaluation system specifically for the Major Offense Bu-

⁷ MAJOR OFFENSE BUREAU, OFFICE OF THE DISTRICT ATTORNEY OF BRONX COUNTY, N.Y. FIRST ANNUAL REPORT, (1974).

⁸ Since the administration requested no budgetary provision for L.E.A.A. and Congress has not allocated any funds for it, L.E.A.A. will cease to function on April 15, 1982. That event, should it occur, would be inconsistent with the aforesaid congressional declaration of policy, and with the best interests of the nation at large. There are bills presently pending before the 97th Congress, S. 953 and S. 1997 for example, which would reestablish the spirit of L.E.A.A. under an agency with a different name.

reau.⁹ This system utilizes a mathematical formula which gives numerically weighted values to certain criteria which reflect the policies and priorities of the Bronx District Attorney's Office. Under this system, a case is evaluated in four essential respects:

- (1) the nature of the crime charged — determined by the grade of felony involved;
- (2) the gravity of the particular offense — primarily determined by the extent of personal injury and property loss or damage;
- (3) the propensity of the defendant to commit crimes of violence — primarily determined by the nature of his background and prior criminal record;
- (4) the strength of the case — primarily determined by the facts, circumstances and available evidence.

This case evaluation system is essentially adaptable to any prosecutor's office¹⁰ and is an effective method for screening those cases in which selective prosecution might be appropriate.

The concept of selective prosecution has long been a part of the American system of criminal justice. It is an efficient method of reducing backlog and controlling caseload by limiting intake to serious cases.¹¹ It is, above all, a fair and widely publicized statement of the priorities of the individual prosecutor in recognition of the needs of his community. Selective prosecution, when fairly administered, does not limit or deny any rights enjoyed by an accused, but rather renders broad and meaningful those rights guaranteed by the Constitution for enjoyment by all. The effectiveness of selective prosecution can be seen by examining the operations of the Major Offense Bureau.

An assistant district attorney must be notified whenever an arrest is made in Bronx County for a serious crime.¹² Consequently, there is an assistant district attorney on duty twenty-four hours a day, every day of the year, to receive notifications and commence the screening (or selection) process. The assistant on duty carries an electronic signal receiver to insure that he can be notified immediately of any case which merits his attention.

A great deal of attention is thus focused on the case at the precise

⁹ See NATIONAL CENTER FOR PROSECUTION MANAGEMENT, REPORT TO THE BRONX COUNTY DISTRICT ATTORNEY ON THE CASE EVALUATION SYSTEM (1974) [hereinafter cited as NATIONAL CENTER FOR PROSECUTION MANAGEMENT].

¹⁰ *Id.* at 4-5. See A. Albright, National Institute Host Program Assessment Report (Under L.E.A.A. Grant, Number 76-TA-99-1000) (May, 1978) 56 [hereinafter cited as Albright].

¹¹ NATIONAL CENTER FOR PROSECUTION MANAGEMENT, *supra* note 9, at 9.

¹² To insure that this would be done, orders were drafted by the New York City Police Department (Bronx Area Order #2, January 3, 1974), the New York Housing Authority Police Department (Memorandum #8, February 22, 1974), and the New York City Transit Police (Circular 1.6, April 11, 1974), which require the members of the respective departments to make the appropriate notification.

moment when it becomes part of the system. A number of important benefits attach by concentrating the effort at that time. First and foremost, the recidivist is isolated. Second, full control over all aspects of the case is acquired and maintained through final disposition, thereby insuring the integrity and consistency of office policy. Third, a full and complete investigation, utilizing the latest scientific and technological advances, may be instituted immediately for most effective results. Finally, since all necessary witnesses are present or available, case preparation can be completed on the spot.

Whenever assistant district attorneys are notified of the occurrence of a serious crime which requires their presence to assist in the investigation, they immediately contact the special stenographer and the office video technician on duty, who then meet the assistant district attorney at the appropriate precinct. Upon arrival, the assistant district attorney interviews all witnesses, reviews all police documents, and ascertains that all evidence has been legally obtained and is secured. Depending upon the circumstances, such assistant may direct the police to take certain necessary and appropriate action or the assistant may direct the video technician to preserve particular evidence on videotape. If identification is in issue, proper constitutional procedures are utilized to determine if the defendant can, in fact, be identified in connection with the incident.

After disposal of the above matters, the assistant district attorneys are required to meet with defendants, advise them of their constitutional rights, and determine if they wish to make a statement. The assistant must inform defendants that their statements will be recorded both on videotape and by a stenographer. If the defendant declines to make a statement the interview is concluded. If a statement is given it will, of course, be recorded in its entirety. Thereafter, the defendants are fingerprinted and their criminal record, if any, is reviewed. If the facts and circumstances revealed during the screening process so indicate, the case is immediately referred to the Major Offense Bureau for investigation and trial.

Once acquiring a case, an assistant district attorney in the Bureau presents the matter to a Grand Jury within twenty-four hours, if possible. At this point, as a result of intense preparation, the case is basically ready for trial. This same assistant will now handle every court appearance up to and including trial. At the first court appearance the defense attorney is informed of the plea offer¹³ and is invited to participate in an

¹³ The Major Offense Bureau has not sought to eliminate all "plea bargains," nor would it be wise to do so. When properly utilized, the practice of negotiating a plea is indispensable to the fair administration of justice. The evil arises when the bargain is dictated by the weaknesses of the system rather than by its strength.

open and candid conference concerning the evidence in the case. Through this Voluntary Disclosure Policy defense attorneys are provided with all information to which they are entitled before trial, without formal motion practice. If an appropriate plea is thereafter negotiated, the case will thus be disposed. If not, the matter will proceed to trial.

The structure and operation of the Major Offense Bureau is designed to avoid inefficient practices and unnecessary delay.¹⁴ Its effectiveness in this regard is best reflected in the following statistics: the median time between arrest and case disposition was found to be ninety-seven days, compared with a median time of 400 days for all other felony cases prosecuted by my office.¹⁵

A. ILLUSTRATIONS OF THE EFFECTIVENESS OF THE MAJOR OFFENSE BUREAU

Two cases drawn from the files of the Major Offense Bureau will be useful to illustrate its effectiveness and efficiency in terms of actual prosecutions.

On three separate occasions between January 10 and May 8, 1979, William Williams forcibly entered the Bronx apartments of young women with very young children. Then, at knife or gunpoint, he stole whatever money and jewelry the women had, and proceeded to rape and sodomize the victims while their children were forced to watch.

On July 20, 1979, after an intensive investigation, Williams was arrested and placed in a line-up. He was promptly identified by each of the three victims.

Crime, as it turned out, was not an unusual pastime for this defendant. His criminal record reflected a score of prior conflicts with the law.¹⁶ At the time William Williams committed the 1979 rapes, he had

¹⁴ Certain delay, such as the need for treatment by the mentally incompetent or physically ill defendant, cannot and should not be avoided. Fairness requires that an accused be afforded a reasonable opportunity to prepare a defense. An experienced defendant who feigns mental or physical illness, or who tactically hires and fires attorneys at will can prolong a case for years.

¹⁵ D. McGillis, Bronx County District Attorney's Office, *An Exemplary Project: The Major Offense Bureau* 53 (1977) [hereinafter cited as McGillis].

¹⁶ In early 1942, Williams killed a person, allegedly by accident. He pled guilty to the felony of criminally carrying a loaded pistol concealed upon his person; he received a suspended sentence, and was placed on seven years probation. Following his conviction for unlawful entry, he was incarcerated in the New York County Penitentiary for that crime, as well as for the violation of his probation. In 1946 he was indicted and convicted in connection with the armed burglary, robbery and rape of five women, four of whom had children in the house. He was sentenced as a second felony offender to a term of imprisonment of from thirty to sixty years. In 1968, after serving twenty-two years, the defendant was paroled. In 1972 he violated his parole and was sent back to prison. He was paroled again in late 1973. In 1974

been free on parole for his latest offense for more than a year. The Major Offense Bureau, which had assumed control of the prosecution of the rapes, was now determined to close the door forever.

On February 20, 1980, exactly seven months after arrest, Williams was convicted by a jury on all counts of robbery, sodomy and rape. The court then found Williams to be a persistent violent felony offender¹⁷ and he was sentenced to thirteen concurrent terms of from twenty-five years to life imprisonment — the maximum term permitted by law. On February 25, 1982, the Appellate Division of New York State Supreme Court, First Department, without opinion, unanimously affirmed each conviction. William Williams is now serving his sentence.¹⁸

In addition to being extraordinarily effective, the Major Offense Bureau is extremely efficient. On February 27, 1981, at approximately 7:00 p.m., thirty-four-year-old Hector Ortiz lured a seven-year-old girl into his Bronx apartment. Once inside, she was undressed, beaten and raped. The defendant then attempted to throw the child out of a window. During her ordeal the young victim suffered bruises and extensive lacerations of the genitals, as well as bite and choke marks. Although the little girl lived in the same building, she did not know the defendant. Ortiz was arrested in the early morning hours of February 28.

A check of Ortiz' prior criminal record revealed that this was not an isolated incident. In 1972, he was convicted of first-degree rape, and served less than four years in prison. For his latest crime Hector Ortiz clearly needed harsher treatment.

Within a short time of arrest, the entire case against the defendant was presented to the Grand Jury, which on March 10, indicted him for the crimes of rape, attempted murder, unlawful imprisonment and assault. On March 31, the defendant was arraigned, entered a plea of not guilty, and was informed of the plea offer. The terms of the offer required that he plead guilty to first degree rape, whereupon the prosecution would recommend that a maximum sentence of sixteen years be imposed. Subsequently, the prosecution and defense met to discuss the

the defendant was indicted, convicted and sentenced in connection with a robbery and burglary which he committed during his latest parole. He received an indeterminate sentence of from seven to fourteen years.

¹⁷ N.Y. PENAL LAW § 70.08, N.Y. CRIM. PROC. LAW § 400.16 (McKinney Supp. 1980-81). In determining whether an individual is a persistent violent felony offender, the People must prove that the defendant has been convicted previously of two or more violent felony offenses (e.g., crimes involving physical injury to the victim or use of a dangerous instrument). If the court finds that the allegations have been proven beyond a reasonable doubt, it must find that the defendant is a persistent violent felony offender.

¹⁸ The problems inherent in our system of sentencing and parole, as suggested by this case history, deserve a scrutiny which is beyond the scope of this paper.

case. Full disclosure without formal motion papers was provided. The nature of the case against the defendant was candidly revealed.

On April 22, fifty-four days after the commission of the crime, Hector Ortiz accepted the terms of the prosecution's offer and pleaded guilty to the crime of rape in the first degree. On May 13, 1981, the court ordered that the defendant spend a maximum of sixteen years in prison, and further stipulated that for at least eight years he would not be eligible for parole. Hector Ortiz is presently serving that sentence.¹⁹

This case is not unusual. An analysis of the cases the Bureau prosecuted reveals that the median disposition is obtained in just slightly over three months. The speed and quality of disposition is evidenced by an overall conviction rate for Major Offense Bureau cases of ninety-six percent, in contrast to the eighty-four percent conviction rate of a control group.²⁰ The conviction rate after trial for the Bureau was found to be ninety-two percent. The control group conviction rate after trial was fifty-two percent.²¹ Of those convicted by the Major Offense Bureau, ninety-four percent were incarcerated, as compared to a seventy-nine percent incarceration rate in control group cases.²² In 1975, an average maximum sentence of ten years was imposed for Bureau cases, in contrast to the control group average of 3.5 years.²³ The court imposed a minimum sentence in fifty-eight percent of the Major Offense Bureau cases, with an average length of 3.3 years. By contrast, the court imposed a minimum in only twenty-one percent of the control group's cases, having an average length of seven months.²⁴ During 1981, the Bureau obtained 253 convictions, including sixty-two after trial. The average maximum sentence was 13.5 years with an average minimum of 5.3 years. Since its inception in 1973 through the end of 1981 the Major Offense Bureau has prosecuted more than 2800 defendants.

B. ATTACKS UPON THE MAJOR OFFENSE BUREAU

In spite of this success, or perhaps as a result of it, the basic concepts, policies and procedures of the Major Offense Bureau have been the subject of legal attack. In *People v. William Peterson*,²⁵ however, a justice of the New York Supreme Court effectively silenced the Bureau's opponents.

¹⁹ An extremely significant aspect of the prosecution and disposition of this case was that the seven-year-old child was saved the ordeal of testifying at any public hearing or trial.

²⁰ McGillis, *supra* note 15, at 55.

²¹ *Id.* at 57.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ 91 Misc. 2d 407, 398 N.Y.S.2d 24 (1977).

Responding to the defendant's vague claim that he had been denied a fundamental right by being selected for prosecution as a major offender, the court held: "[s]uch vagueness is due, no doubt, to the difficulty he has in recognizing just what right it is that he is being denied. He certainly cannot claim that he is being denied the right to a speedy trial. If anything, the program augments that right."²⁶

In holding that the defendant was not denied equal protection of law, and that what was involved was selective prosecution, not selective enforcement, the court declared:

The District Attorney of Bronx County is charged by statute to prosecute diligently and fairly every crime committed by an adult within his jurisdiction (County Law § 700, et seq.). He is an agent of the People, independent of the judiciary. Of necessity, he must be free to allocate his resources, in terms of manpower and finances, to discharge the duties of his office to the best of his ability. That includes the right to focus greater attention upon the prosecution of those charged with serious crimes and the career criminal.²⁷

With respect to the claim that a prosecutorial priority system should be based purely on chronological order, the court recalled the language of the New York Court of Appeals in *People v. Johnson*: "[s]uch an unrefined priority system, taking into account only the date of the indictment and the incarceration of the accused, falls short of demonstrating that the delay in reaching this particular case for trial was due to a shortage, rather than a mismanagement of personnel."²⁸

While the court recognized that "the line between selective enforcement and selective prosecution (or selective procedure, to be more precise) is often a thin one,"²⁹ it determined that such line had not been crossed by the Major Offense Bureau's concept, policies or procedures in that:

- (1) There has been no claim nor showing that this or any major offense prosecution was motivated by a desire to chill or in any way curtail the exercise of a defendant's constitutional rights.³⁰
- (2) There is no claim that the prosecution of this or any case under the major offense program deprives a defendant of sufficient time for the preparation of an adequate defense.³¹
- (3) The fact that ninety-nine percent of the Major Offense Bureau's indictments are returned within three days of arrest, thereby averting the felony hearing which is mandated within seventy-two hours of arraignment by

²⁶ *Id.* at 410, 398 N.Y.S.2d at 26.

²⁷ *Id.* at 411, 398 N.Y.S.2d at 27.

²⁸ 38 N.Y.2d 271, 278, 342 N.E.2d 525, 530, 379 N.Y.S.2d 735, 742 (1975).

²⁹ 91 Misc. 2d at 415, 398 N.Y.S.2d at 30.

³⁰ *Id.* at 416, 398 N.Y.S.2d at 30.

³¹ *Id.* at 417, 398 N.Y.S.2d at 31.

C.P.L. § 180.80 does not offend due process.³²

(4) The fact that special parts have been set aside for Major Offense Bureau cases or that judges have knowledge of the defendant's background does not offend due process.³³

The motion was thereafter denied in its entirety.

The impact which the Major Offense Bureau as a concept has had on the criminal justice system is well-documented and dramatic. Under the National Institute Host Program, which seeks to acquaint senior law enforcement officials from jurisdictions around the country with successful law enforcement projects, my office was selected to host such officials and to acquaint them with the Major Offense Bureau Project. Of the first four officials³⁴ to visit, all reported major adaptation of the project components and techniques.³⁵

In 1976, the Bronx Major Offense Bureau was declared to be one of this nation's twenty "Exemplary" Projects by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice.³⁶ This "Exemplary" rating reflects independent verification of the Major Offense Bureau's overall effectiveness in reducing crime or improving criminal justice; of adaptability to other jurisdictions; objective evidence of achievement; and demonstrated cost effectiveness.

In 1978, the New York State Legislature provided for the establishment of a major violent offense trial program.³⁷ The avowed purpose of this program is to provide additional resources to the courts and local criminal justice agencies. These resources insure swifter and more effective processing of actions involving crimes of violence, vulnerable victims, recidivist defendants and long term detainees, and reduce the administrative pressures for inappropriate plea-bargaining in such cases.³⁸

Finally, in a letter to the Bronx District Attorney in which he assessed the impact of the Major Offense Bureau, Mr. Charles M. Hollis, the Career Criminal Program Manager of the L.E.A.A. declared, "The concepts and techniques that began as a distinct effort in the Bronx District Attorney's Major Offense Bureau in 1973 have been substantially responsible, as a prototype, for the development and implementation of similar prosecutorial programs in local prosecutor's offices in some sev-

³² *Id.*

³³ *Id.* at 418, 398 N.Y.S.2d at 31.

³⁴ These officials were from Saginaw, Michigan; Phoenix, Arizona; San Francisco, California; and Covington, Kentucky.

³⁵ Albright, *supra* note 10, at 51.

³⁶ McGillis, *supra* note 15, at inside front cover.

³⁷ N.Y. CRIM. JUST. REFORM, ch. 481, § 61 (1978).

³⁸ *Id.*

enty to eighty jurisdictions nationwide.”³⁹

As valuable as the Major Offense Bureau has been to the criminal justice system, however, it is still only one dimension of a response to a problem which requires a three dimensional approach. The other two dimensions, improving the police department’s ability to apprehend the serious offender, and requiring the federal government to more rigorously patrol the shores of the United States to prevent entry of the alien serious offender in the first instance, must now be explored.

III. THE FELONY AUGMENTATION PROGRAM

The New York City Police Department’s response to the serious offender is conceptually similar to that of the Major Offense Bureau — namely, that a small but definable group of individuals commit a disproportionate share of serious crimes, and that the apprehension and conviction of these individuals should receive the highest priority. That proposition has received general recognition and support in the Rand Corporation research study of the inmates in five California prisons during July and August of 1976.⁴⁰

That study found that the most criminally active eight percent of incoming prisoners *each* committed over sixty crimes per year. Incarceration of that group, the study concluded, would have the effect of preventing three times as many crimes as would the incarceration of the entire least active half of all other California inmates. The twenty-five percent of inmates who most closely fit the career criminal profile committed well over one-half of all armed robberies, burglaries and auto thefts, almost one-half of the assaults, drug sales, and “confidence game” swindles, and over one-third of the homicides and rapes. Indeed, the report estimated that a typical group of 100 persons convicted of robbery would have committed 490 armed robberies, 310 assaults, 720 burglaries, 70 auto thefts, and 3400 drug sales in the previous year during which they were out on the street.⁴¹

Who fits the career criminal profile? The Rand study found that younger criminals were generally more active than older criminals, and that they generally did not specialize in one type of criminal behavior, but rather committed a wide variety of crimes. Older offenders, on the other hand, tended to specialize in one particular type of crime, but within that specialty they tended to commit that crime at the same rate as did the younger offenders. A prior criminal record, either as a juvenile or as an adult, was a constant factor. The study concluded that the

³⁹ Communication from Charles M. Hollis (Aug. 2, 1979) (on file in the author’s office).

⁴⁰ M. PETERSON, H. BRAIKER & S. POLICH, *WHO COMMITS CRIMES* (Rand Corp. 1981).

⁴¹ *Id.* at xxi, xxiv, 186-88.

separate importance of age and prior criminal record suggests that the criminal justice system should view as most dangerous those young offenders who have accumulated a lengthy record in only a few years.⁴² Furthermore, the study found that individuals who committed the most crimes began before they were thirteen years old because "everyone. . . was doing crime" and because it was just a normal way of life.⁴³

Drug abuse was another significant factor in identifying the career criminal: over forty percent of the Rand Sample reported use of or addiction to drugs, most frequently, heroin. Drug use was particularly significant in the identification of the typical property crime offender, and the study found that the relationship between the two persisted even after factoring out other personal characteristics.⁴⁴ The model also showed that individuals who moved from city to city committed more crimes than those who stayed in one place.⁴⁵ Race was not considered to be an important factor; the fact that more minorities were in prison reflected, in the opinion of the study, not that they committed more crimes but that they were more frequently arrested.⁴⁶ Most significant were the offenders' psychological pictures of themselves: those who thought of themselves as criminals committed more crimes than those who did not.⁴⁷

From all this emerges a statistical picture which suggests that if a larger percentage of our resources can be targeted at young offenders who already have a substantial record of antisocial behavior, we should be able to apprehend and incarcerate enough career criminals to dramatically reduce the incidence of crime in our communities.

Building on this hypothesis, in March of 1980 the New York City Police Department began a pilot Felony Augmentation Program to combat robberies in the borough of Manhattan. The targets of this program were individuals between the ages of sixteen and thirty-five who had an arrest history of at least two robberies, or one robbery and one other violent felony offense in Manhattan within a three year period.⁴⁸

The Felony Augmentation Program consists of two specialized detective units—The Career Criminal Investigation Unit and The Career Criminal Apprehension Unit—which are responsible for the public surveillance⁴⁹ and apprehension of targets, as well as any post-arrest in-

⁴² *Id.* at xxii, xxiv, 43-45, 48-49.

⁴³ *Id.* at xxiv, 142.

⁴⁴ *Id.* at xxiii, 162-64.

⁴⁵ *Id.* at xxv, 133-35.

⁴⁶ *Id.* at xxii-xxiii, 62-65, 169-71.

⁴⁷ *Id.* at xxv, 75-90, 122-23.

⁴⁸ See NEW YORK CITY POLICE DEP'T, FELONY AUGMENTATION PROGRAM, Publication No. BM194 (1981) [hereinafter cited as FELONY AUGMENTATION].

⁴⁹ Pre-arrest investigation of a suspect has withstood constitutional challenge. See, e.g.,

vestigations which may be needed by the prosecutor. Also included in the program is a Career Criminal Monitoring Unit which is responsible for identifying career criminals who are currently at large in the community and for collecting biographical data concerning their criminal records and any history of actual or threatened violence which would affect future bail decisions by a court.

These units co-ordinate their efforts in order to make weak cases strong and strong cases even stronger. For example, Gerald J.⁵⁰ was selected as a target. At the time, he was twenty-one years old and had an arrest history which included robbery, felonious assault, sodomy and fifteen misdemeanor offenses. Weapons were involved in four of these crimes, and in one he had used a handgun. The target had been convicted of one felony and one misdemeanor, and had received sentences of one year and ten days respectively.

In January, 1980, at about 2:30 p.m., Gerald J. and an accomplice robbed an individual of \$575 at knifepoint. The victim hailed a passing police car, and identified his assailants. At arrest, Gerald J. offered an alibi. This defense was refuted when Felony Augmentation Program detectives disproved the alibi and also obtained an incriminating statement from his accomplice. Gerald J. pleaded guilty to robbery and is currently serving a three to six year prison sentence.⁵¹

An extremely significant part of the program has been the care and consideration given to the needs of the innocent victim and witness. Illustrative of this aspect of the operation is the case of a Venezuelan citizen who was visiting New York City on business. On July 19, 1980, as he walked in the Times Square area at about 11:30 p.m., he was spotted by Mario R., an eighteen year old target who had been arrested twice for robbery, once for grand larceny and twice for misdemeanors. Mario R. approached the foreign visitor and attempted to rip a gold chain from his neck. Police officers who observed the struggle arrested the target. Unfortunately, from the prosecutor's point of view, the complainant in this case had pre-set travel arrangements to return to Venezuela on July 23rd. Working in tandem, the District Attorney's Office and the Felony Augmentation Program detectives found a practical solution. The District Attorney accelerated the presentation of the case and the detectives arranged transportation so that the testimony was completed within the applicable time constraints. Mario R. pleaded

Hoffa v. United States, 385 U.S. 293 (1966); *United States v. Kenney*, 645 F.2d 1323 (9th Cir. 1980), *cert. denied*, 452 U.S. 920 (1981); *United States v. Sikora*, 635 F.2d 1175 (6th Cir. 1980), *cert. denied*, 449 U.S. 993 (1980); *People v. Ferrera*, 54 N.Y.2d 498, 430 N.E.2d 1275, 446 N.Y.S.2d 222 (1981).

⁵⁰ The Police Department has kept confidential the full name of the individual.

⁵¹ FELONY AUGMENTATION, *supra* note 48, at 4.

guilty to the indictment charges and was sentenced to a term of one and one-half to three years in prison.⁵²

Although the Program has been in effect for only a short time, and sufficient data for a full statistical analysis is unavailable as yet, the preliminary results have been encouraging. Of approximately 1100 targets selected, 594 were arrested during the first nine months for a variety of offenses. Of these targets, 235 were selected for felony augmentation treatment of which 214 involved felony arrest charges.⁵³ Significantly, these 235 cases were considered to be routine police street arrests, and not of a type which normally commanded special attention. One hundred and twenty-seven cases resulted in indictments, and in 113 of these (89%) felony convictions were obtained. Moreover, ninety-four percent of those convicted (106) were incarcerated and in eighty-six percent of those cases the sentence imposed exceeded all previous combined prison sentences imposed upon the defendant.⁵⁴

It is my firm belief that programs such as this are an essential part of any comprehensive approach to the problem of violent crime. Funding under the Justice System Improvement Act,⁵⁵ therefore, should be carefully considered.

It is obvious, at this point, that the crime problem faced by prosecutors and police departments in our cities and states is greater than the local resources available to deal with it as evidenced by the congressional findings and declarations previously discussed. Clearly then, local governments should not now have to suffer an additional burden resulting from the failure of the federal government to perform a function which is uniquely federal in nature. Yet this is precisely the situation which currently exists with respect to the influx of violent criminals from foreign countries.

IV. THE IMMIGRATION PROBLEM

The right of a government to exclude aliens from its shores is clearly established:

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and on such conditions as it may see fit to prescribe. Jurisdiction over its own territory to that extent is an incident of every

⁵² *Id.* at 15.

⁵³ The misdemeanor cases occurred very early in the Program. In a short time, augmentation of these cases was discontinued as an ineffective application of resources.

⁵⁴ FELONY AUGMENTATION, *supra* note 48, at 4, 7-9, 11.

⁵⁵ Pub. L. No. 90-351, tit. I, § 100, 42 U.S.C. § 3701, as added, Pub. L. No. 96-157, § 2, 93 Stat. 1169 (1979).

independent nation, and the right to its exercise cannot be granted away or restrained on behalf of anyone. If an independent nation could not exclude aliens it would to that extent be subject to the control of another power.⁵⁶

It is equally clear that in this country such power to exclude belongs solely to the federal government.

In the United States the power of exclusion of aliens is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress.⁵⁷

The failure of the federal government to conscientiously discharge its responsibilities in this area has taken a toll on the resources available to the criminal justice systems in our cities and states. The "Mariel Boat Lift" of 1980 is illustrative of the problem.

On April 20, 1980, the Castro government announced over Radio Havana that all Cubans wishing to emigrate to the United States were free to board boats at the Port of Mariel. Within hours a number of Americans headed to Cuba. Those of Cuban extraction planned to reunite with lost friends and relatives; others sought merely to bring freedom to human beings whom, they thought, had lived long enough without it. However, when the boats departed Cuba for Miami and Key West, Florida, this so-called "Freedom Flotilla" also contained many highly undesirable passengers whom the Castro government forced the boat owners to accept. By the end of April, approximately 7500 Cubans arrived in this country.

The Federal Emergency Management Agency set up operations in Miami to interview and process the new arrivals. Since these individuals arrived without any documentation, however, and since the United States and Cuba had long ceased diplomatic relations, no meaningful screening process could be accomplished. Therefore, it remained unanswered whether or not an individual had a prior criminal record, and if so, the nature and extent of such record. Nevertheless, many of these individuals were cleared almost instantly to enter the community at large with their relatives or other sponsors,⁵⁸ although they were not given any official status.

In May, 1980 the influx of Cubans at the points of arrival was so

⁵⁶ 3 AM. JUR. 2d *Aliens and Citizens* § 56 (1962)(citations omitted).

⁵⁷ *Id.*

⁵⁸ Significantly, sponsorship was not considered a legal relationship and imposed no binding legal obligation whatever upon the sponsor. Moreover, no proof was required that individuals were in fact related. Clearly, the motivation of some "relatives" and sponsors was questionable at best.

great that it exceeded the space available to hold and process them. By the end of May the number of Cuban arrivals totaled more than 115,000. On June 20, 1980, the United States Coordinator for Refugee Affairs announced the Administration's decision to "parole" the Cuban "boat people" into the United States as "Cuban entrants (status pending)."⁵⁹ On September 26, 1980, the Castro government closed the Mariel Harbor, and ordered all boats awaiting passengers to depart. By the time the emigration officially ended on October 10, 1980, the Office of Refugee Resettlement determined that 124,789 "boat people" had arrived on our shores.⁶⁰

With the glory of the "boatlift" a fading memory, local governments were forced to confront the aftermath. Mayor Stephen Reed of Harrisburg, Pennsylvania, put the matter in perspective:

"Give me your tired, your poor, your huddled masses yearning to breathe free. The wretched refuse of your teeming shores." These words, inscribed in the Statue of Liberty, stand as a proud proclamation of America's desire to share its freedom with those denied this most precious gift.

In May of 1980 we received Cuba's tired, poor, and huddled masses. Among those masses were forty thousand people with criminal records. The federal government estimates that approximately two thousand of those refugees were hard-core criminals. Other reports indicate the number of hard-core criminals exceeded twenty thousand.⁶¹

In 1981, Bronx County alone had at least 164 Cuban "boat people" *arrested and charged* with the commission of a felony. This constituted nearly half of the 340 recorded arrests of "boat people" in 1981 for the

⁵⁹ CUBAN/HAITIAN TASK FORCE, DEP'T OF HEALTH AND HUMAN SERVICES, CUBAN/HAITIAN ENTRANT PROGRAM OPERATING MANUAL 1 (Mar. 20, 1981), [hereinafter cited as OPERATING MANUAL]. The parole originally encompassed only those Cubans who arrived in the United States between April 21 - June 19, 1980, and who were in Immigration and Naturalization Service (INS) proceedings as of that latter date. Subsequently, that eligibility date was extended to October 10, 1980. The Cuban/Haitian Task Force has been dissolved as a separate entity, and absorbed by the Office of Refugee Resettlement. The parole action was taken by the Attorney General pursuant to the Immigration and Nationality Act, 8 U.S.C. § 212(d)(5) (1970), and "was designed to enable Congress to consider legislation offered by the Administration that would create a permanent legal status in the United States for Cuban entrants." *Id.* The permanent status contemplated and, at the time of this writing, still unresolved is "Refugee Status" which is granted usually to people seeking political asylum. While the parole status was subject to renewal on a six-month basis, the Immigration and Naturalization Service apparently no longer has the resources to cope with that task. Therefore, the six-month period has, *de facto*, been extended indefinitely.

⁶⁰ OFFICE OF REFUGEE RESETTLEMENT, DEP'T OF HEALTH AND HUMAN SERVICES, OFFICE OF REFUGEE RESETTLEMENT MONTHLY DATA REPORT 8 (Dec. 1981).

⁶¹ CRIM. INVESTIGATIVE DIVISION, HARRISBURG POLICE DEP'T, WORKSHOP: IMPACT OF THE CUBAN REFUGEE CRIMINAL (first unnumbered page)(1981). The Harrisburg Police Department distributed this handbook at a workshop on January 21, 1982. Participants from prosecutor's offices and police departments in the Bronx, New Jersey and Pennsylvania were in attendance. Significantly, the only representatives of the federal government were a few agents from the Bureau of Alcohol, Tobacco and Firearms and the Harrisburg F.B.I.

entire City of New York.⁶² The case of Ramon Batista Carrelero, one of the aforementioned 164 Bronx defendants, is illustrative of the problems which our local communities must now confront.

On January 8, 1981, Carrelero and a friend Ramon Pena, spent some time at a Bronx bar and restaurant called the 950 Lounge. It was managed by Jose Carrero, whom Carrelero had known in Cuba. Before Carrelero and Pena left the lounge, they had an argument with the manager and an individual named Morales. At about 1:10 a.m. on January 9, Carrelero and Pena returned. Carrelero took out a .32 caliber pistol, placed it to Morales' head and killed him without saying a word. After Pena shot the manager in the chest with a shotgun, Carrelero knelt beside him, said "Jose, can you hear me?", then spit on Carrero, kicked him and then shot him in the head. During the incident a man unknown to Carrelero had taken refuge under a table. The defendant spotted him, reached beneath the table, put the gun to the man's head and squeezed the trigger. The victim died eight days later. The defendant was arrested as he left the lounge.

Ramon Carrelero came to this country as part of the "Freedom Flotilla" in 1980. He was sponsored by a man who had known him in Cuba as a young man when they had cut cane together. The man knew that Carrelero had been in prison in Cuba, but did not know why. To this day, that question remains unanswered. At the time of the shooting at the 950 Lounge, Carrelero had been in the United States for about six months.

On February 10, Carrelero was indicted for three counts of murder and related offenses. His trial, which commenced on October 15, lasted two weeks, and resulted in conviction. On November 24, 1981, the court, calling his crime "the most vicious I've seen in forty-five years of practicing law," sentenced him to three consecutive prison terms of from twenty-five years to life. The defendant, who since arrest had been remanded to a local detention facility, was then transferred to the custody of the state. The *entire* cost of his prosecution, detention and incarceration must be borne by the taxpayers of the City and State of New York. Carrelero is eligible for release in the year 2056.

Since the federal government has the power as well as the obliga-

⁶² The statistics for the rest of the City are as follows: New York County (Manhattan): 117; Queens County: 39; Kings County (Brooklyn): 20; Richmond County (Staten Island): 0. It is stressed that these statistics are unofficial. Basically they were obtained in the following manner: when a police officer made an arrest of a person he suspected might have been on the "boatlift" he asked the individual for his I-94 card, which is the interim identification card issued by the Immigration and Naturalization Service. Failure of an officer to ask for the card, or for the defendant to surrender it would, of course, skew the statistics in a *downward* fashion. However, we may be confident that the numbers accurately reflect the *minimum* amount of criminal activity by the "boat people" in the reporting areas.

tion under law to exclude undesirable aliens in the first instance,⁶³ it certainly seems that the federal government, rather than our cities and states, should bear the responsibility for crimes committed by aliens in this country. The federal government should further assume the cost of prosecuting such individuals and of incarcerating them both before trial and after conviction and sentence. Current law, however, does not impose these burdens upon the federal government, nor does it appear, as a matter of policy, that the federal government will assume them:

If the matter warrants revocation of parole [the interim status granted to the Cuban Entrants by the U.S. Coordinator for Refugee Affairs], CHTF [Cuban/Haitian Task Force] will refer the matter to the Immigration and Naturalization Service (INS). Only CHTF has the authority to request a detainer be placed on an entrant by INS. Once INS is notified, it will determine what further action is required.

In extreme cases, INS will encourage state authorities to prosecute and a detainer will be placed on the alien if appropriate. After the subject *has been convicted, served his sentence, or the sentence has been suspended*, INS will revoke the parole and the alien can be sent to a Federal Correctional Institution for an exclusion hearing if a 212(a)(9) excludable charge can be established [emphasis added].⁶⁴

It seems grossly inappropriate that Ramon Carrelero, for example, should be allowed into the United States as a matter of federal policy, and then, because of a refusal to extend that same policy, become a burden to an individual state. In fact, it is at least arguable that federal responsibility in this area should be imposed upon the federal government by the government's own law. Therefore, I propose that the United States Code be amended so that a Federal crime is committed by any individual who commits any conduct which would be a felony under the laws of the state within whose boundaries such conduct is committed, if such individual is not a citizen of the United States at the time of such conduct.⁶⁵

V. CONCLUSION

Nothing so affects the quality of our life today as the burgeoning incidence of violent crime. Yet, rather than searching for and supporting effective methods of confronting the problem in accordance with its congressional declarations, our federal government seems to be more interested in avoiding it.

With the presidential election of 1980 came the dawn of "The New

⁶³ 8 U.S.C. § 1182. See, 3 AM. JUR. 2d § 56, *supra* note 56.

⁶⁴ OPERATING MANUAL, *supra* note 59.

⁶⁵ As a natural corollary, even if the State itself should prosecute the case for some compelling reason, the cost of prosecution and any ancillary expense should be borne by the federal government.

Federalism”: a concept of “benign” neglect by the federal government in which the cities and states have sole responsibility for community affairs supplemented, where necessary, by the private sector. No government, however, by semantic device or otherwise, can abdicate its responsibility to the People of, by and for whom it governs. That crime is a matter of national import affecting the general welfare, and requiring federal technical and financial aid and assistance is no less a fact today than it was in 1968. If anything, the problem is now one of even greater magnitude. That the duty to patrol our shores and otherwise regulate immigration and naturalization is a matter of federal responsibility cannot be denied except in the event of an amendment to the Constitution of the United States.

Clearly, the federal government has a substantial role to play in combatting violent crime. However, to be effective it must fulfill its responsibility in partnership with state and local governments and agencies of law enforcement. Undoubtedly, the public expects crime to be the number one item on the government’s agenda. By identifying and supporting workable crimefighting programs on a local level, by stemming the flow of illegal aliens into the country, and by accepting responsibility for the crimes committed by aliens who are in this country as a matter of grace, the federal government will be making a meaningful response to the public’s demand.