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MORAL ISSUES IN THE LAW CONTROLLING DELINQUENCY

FREDERICK J. LUDWIG*

FOUR MORAL ISSUES persist prominently in the approach of the positive law to the control of crime and delinquency among young persons. They present the gravest moral and legal challenge of the mid-twentieth century. One is the question of responsibility of the young offender. Assuming that immature persons are to be held accountable for their voluntary behavior (some argue that they should not be held responsible at all), at what age, for what acts, and with what treatment consequences should responsibility be fixed? Closely related is the issue of parental responsibility. Should parents be subject to the sanction of law for any or all criminal behavior of their children? Third is the issue of control of a condition widely believed to be conducive to crime and delinquency among minors; *viz.*, dissemination of horror and obscene literature and films. What is a just and proper balance between liberty of opinion, on one hand, and the circulation of such pernicious materials, on the other? Finally, there is the crucial matter of moral and religious education in government sponsored schools. Does some "wall" of separation of church and state demand that one generation after another of young Americans be deprived of moral and religious training in public schools and colleges?

The first issue, that of the limits of responsibility of young persons, is the current subject of consideration for model state legislation by the American Law Institute and more particularly of debate in the legislative halls of New York on the new Youth Court Act. Parental responsibility is a recent recurrent subject of various legislative experiments. The issues of control of pernicious literature and religion in the public schools are subjects of frequent state legislation and sharply divided judicial opinion in the Supreme Court of the United States. All four issues relate to the

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control of crime and delinquency among minors. All of these present problems of law for legislatures and courts. All involve moral considerations of the first magnitude for their resolution.

Responsibility of Young Offenders

A 14-year-old high school freshman fires round after round of .22 calibre bullets into



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his mother and sister, and witnesses the collapse of his surviving father.¹ There is mild surprise when the prosecutor proclaims that what some supposed to be multiple murder does not amount even to the merest misdemeanor in

the rankings and gradations of our current criminal code. The author of this tragedy cannot be subjected to preliminary examination before a magistrate, indictment by a grand jury, arraignment and trial in a criminal court, conviction and sentence by a judge, or punishment even in the form of confinement in a state prison. Because of his immaturity, the boy involved must be regarded as a ward of the state, not a criminal defendant. An informal proceeding, without prosecution, jury, or rigid rules of evidence, can result only in adjudication of status as a delinquent and not in stigma of guilt. The treatment consequences of such proceeding may not be punitive, although compulsory institutionalization for the sake of education and rehabilitation may be prescribed.

Special lenient treatment in the case of

¹ N.Y. Times, May 23, 1957, p. 1; May 24, 1957, p. 1.

young offenders is by no means historic. The entire notion of juvenile delinquency is a relatively recent contrivance. From the time of the Romans through the Canon Law and then into the English Common Law the rules of responsibility for young offenders remained unchanged. There was absolute immunity from criminal prosecution for children under seven. Those seven and over who committed crimes were as fully liable as adults, except that under 14 (in some places 12) such children were presumed incapable of committing crimes. This presumption was rebuttable by proof of malice which somehow was supposed to make up for the deficiency in age. Convictions of children in this country for arson, assault, manslaughter and murder — with an occasional execution — provided the humanitarian impulse for reform fifty years ago leading to enactment of juvenile court acts in all but two states, and in most of the nations of the world.²

What constitutes "delinquency" under this half-century old juvenile court arrangement depends upon chronological age, sex and certain proscribed behavior, which vary with jurisdiction. In New York, the maximum age is sixteen, but eighteen or higher is the upper age limit in most states. In all states with such statutes, behavior which would be criminal if engaged in by an adult, constitutes delinquency — with varying exceptions for serious crimes. In New York, since 1949, these exceptions constitute crimes punishable by death or life imprisonment, if committed by children between fifteen and sixteen. In such cases, whether the offender is to be treated as a criminal or juvenile delinquent depends upon the discretion of the criminal court.³

² LUDWIG, YOUTH AND THE LAW 134-35 (1955).

³ *Id.* at 5.

There is no insistent demand for fundamental revision of such juvenile court jurisdiction and procedure. The wisdom of judicial leniency for the immature can be justified by numerous practical considerations. To attempt to inflict mandatory penalties upon young offenders in the same way as upon adults would nullify the possibility of any treatment at all. The sharp contrast between the severity of the penalty and the age of the offender makes the ordinary jury reluctant to return a verdict of guilt. Certainly, compulsory institutionalization, even for a half dozen years, is a safer course for social protection than the alternative of acquittal with no treatment at all.

Apart from the probability of such nullification, considerations of humanity suggest the wisdom of subjecting children who commit crimes to treatment for sake of their rehabilitation and not to punishment in order to deter them. Childhood and adolescence are periods of formative flexibility. The character of any person, child, adolescent or adult, is the sum total of his potentialities for good and evil. In the case of the young offender, it may well be that he has prematurely realized all of his potentialities for evil and has yet to develop the counteracting ones for good. If so, a program of treatment that provides maximum opportunity for fruition of undeveloped potentialities for good is likely in the long run to prevent recurrence of delinquent behavior. At the same time a program of punitive treatment might suppress and inhibit not only the evil but also the good potentialities and lead to abortive growth of a dangerous and embittered personality more likely than ever to commit a crime.

The heart of the problem of responsibility currently centers on the upward extension of socialized treatment to offenders in the

young adult period of life. In most states, juvenile court jurisdiction goes no further than age 18, with some states as low as 16, and only a few as high as 21.⁴ Since 1940, two separate proposals for older adolescent offenders have been made with extremely limited adoption among the states. Drastic revision of both is under current consideration. These will be discussed in some detail.

A. The New York Youth Court Act.

Prior to 1943, New York remained one of a minority of five states that limited the upper age of juvenile court jurisdiction to a level as low as 16. Indeed, at that time, crimes punishable by death or life imprisonment were excluded from such jurisdiction. In 1943, the Youthful Offender Act, applicable to offenders 16 through 18 at the time of commission of the crime, was adopted. With two exceptions a youth between those ages arrested for a crime might be investigated at the instance of the district attorney, the grand jury, or trial court judge, to determine whether he should stand trial as an adult or be accorded special non-criminal status and treatment as a "Youthful Offender." The exceptions were for charges of crimes punishable by death or life imprisonment, and for youths with prior felony convictions. If found eligible, the indictment or information on the original criminal charge was sealed, and the charge of "Youthful Offender" substituted. Upon plea of guilty, or upon being found guilty after a non-jury trial, the defendant was adjudged a youthful offender and thus avoided the stigma of a criminal record. As such, he might be committed for an indefinite term up to three years, or receive a suspended sentence involving a three to five-year period of probation. Commitment might be to

⁴ *Id.* at 69-74.

a public or private reformatory institution, but not to a prison.⁵

In 1956, the Youth Court Act was adopted providing several modifications of youthful offender proceedings. A single Youth Court presided over by a county court judge is established for each county. In addition, the socialized procedure and treatment of the Youthful Offender Act is extended along several lines: (1) offenders 19 and 20, as well as wayward minors and adolescent drug users, are included; (2) offenders 16 and 17 taken into custody and charged with such crimes are relieved of the stigma of arrest if they are accorded youthful offender treatment; (3) indictment by grand jury for felonies in such cases is no longer necessary unless the offender wishes to have his case presented to that body; and (4) the present maximum indefinite term of three years for institutional treatment is extended to five.⁶

The effective date of this measure, scheduled for February 1, 1957, was postponed fourteen months by subsequent statute, principally to enable counties to set up necessary machinery to implement its administration.⁷ But assuming *arguendo* that young adult offenders who commit serious crimes are more suitable subjects for rehabilitation than older ones, the New York system, considered as a program of socialized treatment, has substantial shortcomings sufficient to make unlikely its widespread adoption in other states:

(a) Consent of an offender, legislatively declared to be immature, is prerequisite to

setting in motion the machinery for his rehabilitation.

(b) Procedural safeguards for the protection of the accused in criminal proceedings may be by-passed. Indictment by grand jury, for example, is some assurance that a serious crime has in fact been committed. Heretofore, a defendant's willingness to plead guilty has been of no avail unless he pleads to a valid accusation of crime. The screening of a serious charge by a grand jury is a circumstantial guarantee designed for the protection of the accused.

(c) Absence of such indictment making a specific charge, the recording of competent proof substantiating it, a verdict by a jury on a specific issue of fact, and judgment entered on that verdict by a judge, leave no precise picture of the criminal conduct for which an alleged offender may be restrained for as many as five years. In estimating the potential for reformation of any youth, it is important to know whether his behavior was serious or trivial.

(d) One judge may deny the benefits of youthful offender treatment to virtually all youths charged with crimes like robbery or rape; another may invariably grant such treatment to qualified youths in such cases. There is no appellate review of the exercise of such discretion. Identical offenses involving materially similar offenders are not assured equal treatment under the Act, except in the limited situation of offenses of the grade of misdemeanor or less committed by youths under eighteen.

(e) The stigma of criminal conviction is withheld for criminal conduct in the case of all youthful offenders without regard to whether or not they are subsequently convicted of serious crimes. One of the principal purposes of the act is to prevent youths, capable of rehabilitation, from be-

⁵ See Ludwig, *Considerations Basic to Reform of Juvenile Offender Laws*, 29 ST. JOHN'S L. REV. 226 n. 1 (1955).

⁶ *Ibid.*

⁷ Laws of N.Y. 1957, c. 3.

coming avowed enemies of society by branding them criminals forever on the basis of a single offense. It is not the aim of the Act, however, to enable multiple felony offenders to subtract their first major felony in any compilation of their criminal record.

Numerous advances, with value peculiar to New York, are offered by the Youth Court Act: probation facilities for young adults who commit misdemeanors and offenses are equated to the superior ones formerly available only for felony offenders; provisions are made for teachers and scholarships in probation work; new institutional facilities of the "minimum security" type are set up, such as reforestation camps and hostels or foster homes.

B. American Law Institute Model Statutes.

The Model Youth Correction Authority Act, adopted by the American Law Institute in 1940, offers an approach to the reformation of young adult offenders fundamentally different from that of the New York plan. There is no repudiation of the criminal nature of the proceedings involving an accused youth, or the consequence of conviction in which they may culminate. Accordingly, the elaborate constitutional and procedural safeguards developed in the course of centuries for the protection of the accused in Anglo-American criminal justice, are preserved intact. Courts determine disputed issues of guilt or innocence in accordance with rules of evidence and criminal procedure. After judgment of conviction, the socialized process begins with the program of rehabilitation of the Youth Authority to which the offender is committed. In fifteen years since its promulgation, the Model Act has been adopted and made applicable to young adult offenders in

only two states — California and Minnesota, with a handful of other jurisdictions⁸ making selected sections of the Act applicable to juvenile offenders.

The basic principle of providing specialized rehabilitative treatment for young adults after court disposition of their cases is continued in the most recent modifications of the Act tentatively adopted by the American Law Institute.⁹ Several significant changes are proposed.

Eligible Age. The New York system applies to offenders who at the time of the commission of the crime, are between sixteen and twenty-one. The Model Youth Correction Authority Act provided for an identical age group, measured however by the time of apprehension and not that of commission. The recent tentative modification of this Act suggests ages sixteen to twenty-two, determined by the time of sentence. These are the limits adopted by Congress in the Federal Youth Correction Act of 1950, applicable to the somewhat inappreciable proportion of young offenders who come under Federal criminal jurisdiction.

Exclusion of Serious Crimes. Both the New York statute and the Model Youth Correction Authority Act exclude youths who commit crimes punishable by death or life imprisonment. The tentative modification of the Model Act would not exclude youths sentenced to life imprisonment.

Stigma of Conviction. No explicit provision for avoiding the brand of conviction was made in the original Model Act of the American Law Institute. The New York Act, by making this the central consideration, denies the criminal nature of

⁸ Illinois, Kentucky, Massachusetts, Texas and Wisconsin.

⁹ ALI MODEL PENAL CODE 22-23 (Tent. Draft No. 7, 1957).

proceedings involving youthful offenders. The tentative modifications of the American Law Institute provide for an order at the time of sentence that judgment shall not constitute a disqualifying conviction so long as the offender is not subsequently convicted of another felony.

Other modifications include duration of treatment that is fixed with no minimum and a maximum of four years, regardless of the degree of the felony, and a discretionary commitment up to ninety days in advance of sentence to aid the court in determining whether to impose the traditional penalty or the maximum four year commitment. The separate Youth Correction Authority is abandoned as the treatment agency in favor of a special division within the framework of correction departments as they now exist in most states.

Despite insistent demand, during the past fifteen years, only four jurisdictions have subscribed to programs of socialized treatment along these lines for offenders above juvenile court jurisdiction age. This is not surprising. About two-thirds of the most serious aggressive felonies are committed by youths under twenty-one. Drastic revisions of criminal codes affecting upper adolescent age groups would be tantamount to repeal of present penal provisions in the case of all but a third of the most serious crimes. The demands for social protection against dangerous persons have undoubtedly made many states unwilling to drain their criminal codes of their deterrent efficacy, especially in the age group that has produced a disproportionate number of the most dangerous offenders.

We are urged to substitute rehabilitation for punishment as the exclusive goal of treatment among a group of offenders who have manifested the maximum likelihood

to repeat their crimes. Yet practically all of these young adult offenders have come into conflict with the law at earlier ages. During their more formative and flexible years, the mandatory program of juvenile court rehabilitation has somehow not succeeded in their cases. One may ask why a similar program undertaken at a later period of less formative and flexible development has appreciable probability of success. Meanwhile, why stop at age 21 or 22? "Surely, there must be some violators over 21 years of age who might safely be given similar treatment so that they, likewise, would not be branded with the stigma of a criminal arrest and conviction with the serious consequences which sometimes follow in later life."¹⁰

What is urgently needed is some demonstration that lawbreaking youths can be transformed into law observing ones in a large scale program under public auspices. Perhaps it would be wiser to thrust these young offenders precipitately into our correctional machinery, rather than await development of workable techniques of rehabilitation. Necessity is after all the mother of invention, and to pose the problem of reforming young offenders in its gross, immediate and physical aspect, might galvanize government agencies to come up with its solution. Yet even supposing a solution in the shape of a sound system of rehabilitation of offenders in early adulthood, such program could promise little, if anything, in the way of halting or reducing the ever increasing incidence of crime among our young population. It cannot do so, because the program of reform begins to operate only after the tragic consequences of murder, rape,

¹⁰ LUDWIG, *YOUTH AND THE LAW* vii-viii (1955).

and maiming have been suffered by the community. Relaxing the ground rules for handling young offenders after the event is not likely to prevent crime before it occurs.

Controlling Conditions Conducive to Crime and Delinquency

Whether tomorrow's young adult offender is to become a convicted felon deposited in a state prison, or an adjudicated youthful offender reposing in some reformatory institution, is a question of moment. But that issue is wide of the mark of preventing serious crime among young persons before it occurs. If we are to come to grips realistically with the current serious situation, we must face up to the conditions that give rise to delinquency. Three of these conditions pose questions of law with moral implications.

A. Parental Responsibility

It has long been known that the moral judgments of children are more closely correlated with those of their parents than with the judgments of anyone else, including playmates, school teachers, and even Sunday school teachers.¹¹ Two groups of boys between eleven and seventeen — one group delinquent and the other not — were matched as to age, intelligence, ethnic background, and area of residence. The delinquent group was readily identifiable on the basis of several deficiencies in parental supervision and parent-child relations.¹² We are repeatedly reminded of the broken home as a factor in delinquency. No doubt such homes account for a disproportionate share of young offenders; they do not explain all such cases. The

¹¹ HARTSHONE & MAY, *STUDIES IN DECEIT* (1928).

¹² GLUECK & GLUECK, *UNRAVELING JUVENILE DELINQUENCY* 261 (1950).

divorce rate in the United States is still alarmingly high. During the past decade, however, the precipitate rise in delinquency was matched by a downward trend in marriages disrupted by divorce (approximately 610,000, or 4.3 per 1,000 population for 1946, declining 46.5 percent to about 373,000, or 2.3 per 1,000 in 1956).¹³ Clearly, measures must be taken to strengthen all homes, and not merely those broken by judicial decree.

Responses to a recent survey of police chiefs covering more than 56 million people, including almost 95 percent of the population living in cities of 100,000 and more, indicate that an overwhelming majority (86.1 percent) recommended that more consistent enforcement of adequate statutes on parent responsibility would reduce delinquency. Only a little more than a third (38.2 percent) found existing statutes adequate, and indeed only a bare majority (57.4 percent) were aware of the existence of legislation in this field.¹⁴ This was so although all but two states in fact have statutes making parents criminally responsible for the delinquent acts of their offspring.

Existing statutes on parent responsibility vary in many particulars from state to state:¹⁵ whether the adult responsible must be a parent or guardian, or may be any person; whether or not the child must be adjudicated delinquent before conviction of its parent is lawful; whether juvenile, or criminal courts, or both concurrently, have jurisdiction to try offending parents;

¹³ 1957 *World Almanac*, pp. 365, 375.

¹⁴ THE INTERNATIONAL ASS'N OF CHIEFS OF POLICE, *THE ROLE OF THE POLICE IN JUVENILE DELINQUENCY* 14, 68-69 (1956).

¹⁵ For collected statutes see, LUDWIG, *YOUTH AND THE LAW* 153-67 (1955).

and the severity or leniency of punishment upon conviction. All of these statutes make criminal the intentional contributions to the delinquency of minors, *i.e.*, by counsel, command, inducement, or procurement of a child to commit a crime. No one can seriously dispute the application of these statutes to such flagrantly deliberate parental conduct. The statutes, however, have remained largely a dead letter. The relatively few reported cases in which they have been invoked have involved negligent and not intentional behavior. In this area of careless conduct of parents, the statutes are uniformly vague in prescribing a standard of parental conduct, being no more specific than to make criminal omission "to exercise reasonable diligence in the control of a child," or "to permit such child" to engage in various proscribed patterns of behavior. The imposition of criminal responsibility without fair advance warning in such instances cannot be justified. It does not mean, however, that parents cannot and should not be made responsible by positive sanction for obligations imposed by higher law.

In a few states, there have been recent efforts to establish civil sanctions to encourage parent responsibility. Anti-vandalism acts¹⁶ have imposed civil liability up to three hundred dollars in damages on parents for willful misconduct of their children resulting in injury to another's property. Such legislation extends the sharply limited exceptions of vicarious liability beyond any judicial development of the law of torts. It applies only to the single offense of malicious mischief, among the many and more serious ones committed by juveniles. Finally, the economic burden of damages falls unequally on poor

¹⁶ *E.g.*, California and Michigan.

parents compared with their more financially privileged neighbors.

A somewhat more ingenious use of non-criminal sanction is the recent experiment in New York¹⁷ making parents liable in civil contempt for willful refusal to obey a written order of the children's court specifying measures to be taken to prevent the continued delinquency of their children. The issuance of such an order to a parent upon the adjudication of delinquency of its child is discretionary with the judge. In the first six months since the effective date of this statute, the children's court in the City of New York entertained no proceedings against parents under this statute. Indeed in more than ten thousand new cases of delinquents before the court during the entire year, only ten adults were involved in proceedings under any statute.¹⁸ Obviously, success depends on a less lethargic and more sympathetic approach to the administration of such a statute. Lacking this, a mandatory measure by the legislature would be indicated.

It is argued that better men cannot be made by acts of parliaments. We ask, where else can such a program under public auspices begin? It is urged that even mild compulsion will hamper the socialized approach and cloud the permissive atmosphere of our children's courts. But if sanction and authority have no role in the resolution of such social problems, then it is time for the police and courts to abandon the field entirely in favor of some non-enforcement, non-judicial and, perhaps,

¹⁷ Laws of N.Y. 1956, c. 949, amending, N.Y. CHILDREN'S CT. ACT §22, and N.Y.C. DOM. REL. CT. ACT §83.

¹⁸ REPORT OF THE DOMESTIC RELATIONS COURT OF THE CITY OF NEW YORK pt. 2, table 2, p. 2 (1957).

non-governmental agency. This, in our view, is an unlikely solution even in a social casework situation, because the participants — child and parent — are far from voluntary seekers of aid. Finally, we are asked to surrender hope for existing delinquent parents as beyond salvage, and concentrate on the rehabilitation of their more impressionable offspring. But there is a fresh supply of millions of new parents each year for the more than four million annual births in the United States. If the suggested sanction could influence only the conduct of new parents in relation to their children, the attempt to assure parental responsibility by statute would have ample justification.

B. Control of Obscene and Horror Materials in Mass Media

One of the most invincible eccentricities of current American credibility is refusal to accept that which is not susceptible to precise mathematical measurement, and conversely to entertain with enthusiasm abstract notions carried to the third decimal place, such as baseball batting averages. For centuries in many civilized countries, obscene publications have been supposed to have deleterious effect, and accordingly been subject to the control of the criminal law. But principally because the impact of such materials has not been classified on rating scales, or in won-lost columns, their suppression is currently being considered an unwarranted infringement of liberty of opinion.

There is divergent opinion among laymen as to whether there is significant relationship between exposure to obscene and horror materials and overt criminal and delinquent behavior. An overwhelming majority of police chiefs (82.6 percent)

recently surveyed in the United States, its Territories, and Canada, recommended more consistent enforcement of adequate statutes in this area to reduce crime and delinquency among young persons.¹⁹ A number of writers have expressed similar opinions from time to time on the impact of such materials;²⁰ others have questioned the existence of any considerable connection between criminal behavior and indecent publications.²¹ Of course, there is no scientific demonstration that any young offender would not have committed a given crime but for his exposure to certain horror or obscene materials. Nor is it possible to see how science, with all its advances, could isolate the impact of such materials from the myriad stimuli in a child's world, and measure its effect with unerring calibration. Yet the federal government,²² and all but one of our states,²³ and many of the civilized nations of the world²⁴ have made legislative appraisal of the social danger inherent in the dissemi-

¹⁹ THE INTERNATIONAL ASS'N OF CHIEFS OF POLICE, *op. cit. supra* note 14, at 13-14, 66-67.

²⁰ See ELLIS, *THE CRIMINAL* 419 (1907); HEALY, *THE INDIVIDUAL DELINQUENT* 224, 233 (1915); SIGHELE, *LITTERATURE ET CRIMINALITE* 222 (1908); Baker, *The Press and Crime*, 33 *J. CRIM. L., C. & P.S.* 463 (1943); Preston, *Children's Reactions to Movie Horrors and Radio Crime*, 19 *J. PEDIATRY* 147 (1941).

²¹ See *United States v. Roth*, 237 F. 2d 796, 821 (2d Cir. 1956) (concurring opinion), *cert. granted*, 352 U.S. 964 (1957).

²² 69 STAT. 183, 18 U.S.C.A. §1461 (Supp. 1956).

²³ New Mexico, the only American state lacking a general criminal statute on obscenity, authorizes its municipalities to prohibit dissemination of such materials.

²⁴ *E.g.*, Argentina, Belgium, England, France, Germany, Italy, Japan, Mexico, Spain, Switzerland, and Russia.

nation of deleterious prints. In balancing the constitutional interest in freedom of expression against the evil sought to be suppressed by such statutes, some weight must be given to this contemporary cross-section and authoritative opinion of mankind, to say nothing of two centuries of experience in the enforcement of such prohibitions in Anglo-American jurisprudence.

Curiously enough, constitutional obstacles to the enforcement of statutes prohibiting dissemination of indecent materials have been interposed only as recently as 1948, and actually coincide with the unprecedented rise in the rate of delinquency from that date. In the preceding 157 years since the adoption of the First Amendment, the Supreme Court of the United States never interfered on constitutional grounds with federal or state convictions in this area.²⁵ Then in 1948, a divided court, after three arguments of the case, held unconstitutional a statute effective in twenty states that made criminal dissemination of materials "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime," so massed as to become vehicles for inciting violent and depraved crimes against the person. The Court made no reference to any interest served by the instant publication involved, a pulp magazine devoted to horror stories. The legislation was held invalid on its face, regardless of its application, on the ground that its warning was too vague, and this despite a

²⁵ During that period in only two prosecutions, both federal, convictions were reversed on non-constitutional grounds. *Swearington v. United States*, 162 U.S. 446 (1896); *United States v. Chase*, 135 U.S. 225 (1890).

careful and narrowing construction by the state court.²⁶

In 1954, the Supreme Court unanimously held invalid state motion picture censorship.²⁷ Forty years earlier the same Court had held, with equal unanimity, that such legislation was constitutional.²⁸ Early in 1957, the Court held unconstitutional a state statute prohibiting dissemination of obscene material, apparently because it embodied this test of obscenity: "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." A unanimous Court found such language obnoxious: "Surely, this is to burn the house to roast the pig."²⁹ No mention was made of the fact that this test of obscenity was one of the first judicially formulated,³⁰ had been employed in the courts for more than four score years, especially in states with considerable litigation involving obscenity,³¹ and indeed had been found unobjectionable by the Supreme Court itself.³² As this is written,

²⁶ *Winters v. New York*, 333 U.S. 507 (1948).

²⁷ *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587 (1954).

²⁸ *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915).

²⁹ *Butler v. Michigan*, 352 U.S. 380, 383 (1957). See also 3 CATHOLIC LAWYER 180 (April 1957).

³⁰ *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868).

³¹ See *People v. Muller*, 96 N.Y. 408, 411 (1884); *People v. Berg*, 241 App. Div. 543, 544-45, 272 N.Y. Supp. 586, 587-88 (2d Dep't), *aff'd*, 269 N.Y. 514, 199 N.E. 513 (1934); *People v. Pesky*, 230 App. Div. 200, 203-04, 243 N.Y. Supp. 193, 196-98 (1st Dep't), *aff'd per curiam*, 254 N.Y. 373, 173 N.E. 227 (1930). See also *Commonwealth v. Eisenstadt*, 318 Mass. 543, 62 N.E. 2d 840 (1945); *Commonwealth v. Delacy*, 271 Mass. 327, 171 N.E. 455 (1930); *Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930); *Commonwealth v. Buckley*, 200 Mass. 346, 86 N.E. 910 (1909).

³² *Rosen v. United States*, 161 U.S. 29, 43 (1896).

the Supreme Court is considering the constitutionality of the federal obscenity statute, even though that act embodies no special tests involving the morals of the immature.³³

The balance between free speech and the prevention of crime and delinquency among young persons is a delicate one. It is simple to arrive at an acceptable arrangement if one interest is carefully considered, and the other obviously ignored. Certainly, liberty of opinion is currently receiving careful consideration. But what about the interest in halting the ever increasing rate of crime and delinquency?

It is commonly supposed that government control of literary output, even in the name of decency, smacks of book burning and benighted despotism. But history demonstrates that just the opposite is the case. Political concern with obscenity is a relatively recent phenomenon that has coincided with the rise of limited government, freedom of expression, and modern democracy. In Anglo-American history, government control of obscenity dates from the eighteenth century.³⁴ One may search in vain among the ashes of books burned in ancient despotisms to find a single instance of censorship invoked in the name of decency and morality. The Chinese burned books many centuries before Christ; but they did so for the same reasons that Western broadcasts are jammed today behind the Iron Curtain.³⁵

³³ *United States v. Roth*, 237 F.2d 796 (2d Cir. 1956), cert. granted, 352 U.S. 964 (1957).

³⁴ *Rex v. Curl*, 2 Str. 788, 93 Eng. Rep. 849 (K.B. 1727).

³⁵ See GOODRICH, *THE LITERARY INQUISITION OF CHIEN-LUNG* (American Council of Learned Societies, Studies in Chinese and Related Civilizations Pub. No. 1, 1935); Ku Chich Kang, *A Study of Literary Persecution During the Ming*, 3 HARV. J. ASIATIC STUDIES 254, 257, 305 (1938).

The same was the case of suppression of writings under the most absolutist regimes in ancient Greece³⁶ and Rome.³⁷ One critic of control of obscenity concedes that, "A successful absolutism in the very nature of things is not concerned with the sex censorship."³⁸

To those who insist that the law should keep its hands off all questions of decency and leave them to the judgment of the readers and playgoers themselves, an ardent advocate of freedom answers:

Most of us agree that the law must draw some line between decency and indecency, a line between permitted art and art that can be punished or suppressed. . . . They [legislators] and the great majority of their constituents will continue to insist for a long time to come that there must be some limit on the literary discussion of the relation between the sexes, and that when this limit is passed the police or other government officials must take vigorous measures.³⁹

C. Moral and Religious Training in Schools

Chaplains in 230 "training schools" throughout the United States report that 90 percent of the Catholic youth within these walls have had no instruction in parochial schools.⁴⁰ A decade ago, 1,160 men at Dannemora reported themselves as Catholics. Only 59 of these were found to

³⁶ PUTNAM, *AUTHORS AND THEIR PUBLIC IN ANCIENT TIMES* 264 (1894).

³⁷ Cramer, *Bookburning and Censorship in Ancient Rome*, 6 J. HIST. OF IDEAS 165, 169-70, 186-87, 193, 196 (1945).

³⁸ ERNST, *TO THE PURE* 147 (1928).

³⁹ CHAFEE, *FREE SPEECH IN THE UNITED STATES* 529-30 (1941).

⁴⁰ Hogan, *The Role of Religion in the Prevention of Crime and Delinquency*, 1 POLICE 27, 29 (1957).

have ever attended a parochial school.⁴¹ The average eighteen year old inmate of a reformatory is typically a nominal member of a church he never attends. Conspicuous silence in the mass of printed material on the subject about the role of religion in prevention of delinquency⁴² may be in part attributable to the confusion of nominal church membership or Sunday school attendance of reformatory inmates with real religion based on systematic training. The preventive efficacy of religion in delinquency and crime is so obvious and so important that, like so many other truisms, it is ignored. "Invariably," says F.B.I. Director Hoover, "when you analyze the reasons for such [criminal] actions, certain facts stand out stark and revealing — the faith of our fathers, the love of God, and the observance of His Commandments have either been thrust aside or they never existed in the heart of the individual transgressor. . . . The secular way of thinking must give way to the spiritual if our Nation is to stand."⁴³

A curious contradiction exists in current church-state relations from the viewpoint of preventing and reducing crime and delinquency among young persons. On one hand, no indignant taxpayer can be found to challenge in court the appropriation of state funds to a reformatory institution conducted under religious auspices, or to question the paid employment of chaplains in public institutions of the same kind. Indeed the New York State Constitution specifically permits government funds for correctional and reformatory institutions

under private control.⁴⁴ On the other hand, use of public monies for schools under religious control, or for religious instruction in public schools arouses the familiar cry in the courts of separation of church and state. The same State Constitution that permits monies for private reformatory institutions prohibits funds to schools under religious control.⁴⁵

Government recognition of the reformatory power of personalized religion is dimmed by public repudiation of the preventive power of the same religion made available with official encouragement under compulsory educational programs. Why public support of religion as a cure in training schools, but not as a prophylactic in elementary and high schools? For reduction of crime and delinquency among young persons, the more strategic use of public funds — and the more economic in the long run — suggests major investment in a program designed to prevent the tragedy before it occurs, such as support of increased moral and religious instruction in all schools, rather than merely providing such instruction in training schools after the event. By the time a youth reaches the reformatory, he has usually travelled a long way on the criminal path. The rehabilitation of even a young offender is many times more difficult under optimum conditions than the prevention of his criminal career in the first place.

The First Amendment to the Constitution of the United States states merely that "Congress shall make no law respecting an establishment of religion," It makes

⁴¹ *Ibid.*

⁴² See Coogan, *Religion a Preventive of Delinquency*, 18 FED. PROB. 29 (1954).

⁴³ The Tablet, May 15, 1954, p. 3.

⁴⁴ N. Y. CONST. art. VII, §8; art. VIII, §1. See Guilfoyle, *Church-State Relations in Welfare*, 3 CATHOLIC LAWYER 112 (April 1957).

⁴⁵ N. Y. CONST. art. XI, §4.

no reference whatsoever to any "wall of separation" between church and state. A decade ago, the Supreme Court of the United States held that this provision of the Constitution, as made applicable to the states by the due process clause of the Fourteenth Amendment, did not invalidate a state statute authorizing transportation of parochial school pupils. But in dictum, the majority of the Court observed that states lacked power to "pass laws which aid one religion, aid all religions, or prefer one religion over another."⁴⁶ In 1952, in the course of sustaining a program of released time for religious instruction of public school pupils, a majority of the Court apparently repudiated this earlier view so far as it denied validity to state laws which "aid all religions." "We cannot read into the Bill of Rights such a philosophy of

⁴⁶ *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

hostility to religion."⁴⁷ In this most recent pronouncement on the question of church-state relations, the view prevailed that:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. . . . When the state encourages religious instruction . . . , it follows the best of our traditions. . . . But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.⁴⁸

Carried to its logical limits, this view suggests no federal constitutional barrier to the extension of existing state-church cooperation in the correction and reform of young offenders to a program of prevention of such criminal careers by increased religious and moral instruction in the schools.

⁴⁷ *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

⁴⁸ *Id.* at 313-14.