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WISCONSIN'S PROPOSED YOUTH SERVICE ACT

Each year a large number of youthful offenders are committed to existing penal institutions. Each year a large number of youthful offenders are released from correctional schools and reformatories. Each year a large number of those previously discharged are recommitted to these same institutions. It seems like a futile and costly procedure. Unfortunately, recidivism is the price that is being paid for a chaotic and ineffective penology. Viewing its grim statistics, the question logically arises as to whether or not the present method of dealing with delinquents and criminals is adequate or efficacious. The answer is obvious. Judges who have had long experience in dealing with this group of offenders, are recognizing increasingly, that a system is basically unsound which perpetuates a vicious cycle of arrest, imprisonment, rearrest and re-imprisonment. Modern methods of treatment and rehabilitation are being advocated in place of those derived from present concepts of retributive punishment. Judge Joseph Ulman is one of many who has voiced his protest against present penal practice, asserting that the old formula of punishment is fruitless and ineffectual. In the words of Judge Camille Kelly, the time has come when we must study the offender instead of the offense. Uniformity of law for uniformity of crime is about as practicable as uniformity of shoes for uniformity of feet.

With a view to remedying these evils of mass treatment, the present session of the Wisconsin Legislature is being asked to consider the adoption of a Youth Service Act, Which has for its purpose service to youth and the prevention and reduction of delinquency, by co-ordinating and developing all activities within the state which promote the welfare of youth and the successful rehabilitation of the youthful offender. The proposed Wisconsin act is based on a Model Act for a Youth Correction Authority which was brought forth by the Criminal Justice-Youth Committee of the American Law Institute, after two years of painstaking work and research. The Model Act was adopted by the Council of the American Law Institute in 1940, which means that it had to run the gamut of scrutiny of a membership of seven hundred lawyers, judges, and other persons of national repute. Today California is the only state

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2 Ulman, "Dead-End Justice," 33 Journal Criminal Law and Criminology, 6 at 8 (1942) "We who sit on the bench and apply the old formula of punishment because no better means are available, are shocked by a realization of our own futility."
3 34 Journal Criminal Law and Criminology 195 (1943).
4 Bill 169S 58.61 (1947).
which has by law put the tenets of the Model Act into practice. Encouraged by the successful results in California, legislatures in Minnesota and Illinois are also considering a similar act.

The pattern outlined in the Model Act has been followed closely in the Wisconsin act but some deviations have been made to better adapt the provisions of the act to local conditions. Whereas the Model Act provides for the creation of a new administrative body called the Youth Authority, to which commitments would be made by the court, the drafting committee in Wisconsin believed that the act could best be administered by the Department of Public Welfare. The California experience has shown that it is wise to utilize existing facilities as much as possible. Hence, the Wisconsin bill creates the Youth Service Division in the Department of Public Welfare under a director appointed by the director of the department on the nomination of the Youth Service Commission for an indefinite term. This division has the responsibility of administering the correctional services to youth provided for in the bill. In addition to the Youth Service Division, the bill also creates a Youth Service Commission to consist of eleven members recognized for their interest in the welfare of youth. They are appointed by the governor by and with the advice and consent of the senate. This commission nominates the director of the Youth Service Division, but the appointment is made by the director of the Department of Public Welfare. Non-administrative in character, this commission has duties connected only with prevention of delinquency. A continuous program of delinquency prevention is most essential if the results achieved by treatment are to be lasting.

It is part of the basic philosophy of the Wisconsin act to do as little violence to existing law as possible. The process of arrest, prosecution and conviction is not interfered with. Only post conviction procedure is affected. No right of sentence now possessed by the committing judge is interfered with or abridged, with one exception. The bill specifies that all persons under twenty-one years of age at the time of apprehension, who have been convicted of a violation of the law for which the maximum penalty is imprisonment for life or less than life, but more than six months, shall be committed by the court to the Department of Public Welfare. Commitment may also be made to the department by the Juvenile Court.

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6 Supra, footnote 4, 58.64 (2).
7 Ibid., 58.66 (13).
8 Ibid., 58.64 (1).
9 Ibid., 58.71 (2a-e).
10 Ibid., 58.69, "When any juvenile is found to be delinquent under the provisions of chapter 48 and the Juvenile Court does not release such person unconditionally, place him on probation or in a family home or private institution, the court shall commit such juvenile to the department."
The present practice has been to commit the offender to a definite institution provided that he is not discharged unconditionally or placed on probation. There he must remain for a specified time regardless of whether or not that institution is equipped to change him into a safe member of society. This specified period has no relation to the time required for the rehabilitation of the criminal. Therein lies one of the glaring deficiencies of the current practice. It is difficult, if not impossible, for any judge to estimate in advance the amount of time required to alter human behavior. Hence, the person who is not treated intelligently and constructively during incarceration will return to society bitter, hostile and antagonistic.

After commitment by the court to the Department of Public Welfare, a decision is made as to which of the agencies or institutions under its control would be best fitted to treat the individual. Both public and private agencies may be utilized. Thus recognition is given to the fact that each offender has needs or problems peculiar to that individual alone. The offender need not be committed to any institution. Although a special committee of the Bar Association of New York City, criticized the Model Act on the basis of cost and the fact that the goal could be accomplished by improving existing agencies, it recognized that many individuals have been committed to institutions who should not be there. It is not the fault of the judges, the Bar Association claims, but the fault of an impersonal legally circumscribed system. The only effect of incarceration of some individuals has been to enlarge their repertoire of crime.

Mandatory examination after commitment of the physical, psychological, educational and social background of the offender is provided for in the Wisconsin act. This furnishes the basis on which intelligent treatment can be predicated. Likewise periodic re-examinations are required to determine whether or not the existing order should be modified or continued. If no re-examination is made within a year, the offender is entitled to petition the court for an order of discharge. This eliminates the danger of indefinite control over an individual merely because he has been forgotten by the department. Any person committed to the department is to remain under its control, subject to certain limitations, so long as in its judgment such control is necessary for the protection of the public. Under the present statutory law an offender must be released at the

11 Ibid., 58.84 (1).
12 Ibid., 58.89 (1).
13 34 Journal of Criminal Law and Criminology 250 (1943).
14 Supra, footnote 4, 58.87 (4).
15 Ibid., 58.87 (4).
16 Ibid., 58.91 (1) (2).
17 Ibid., 58.88 (1).
end of his sentence regardless of the danger to society. John Barker Waite, in one of his articles on the Youth Correction Authority,\(^\text{18}\) cites the example of the Michigan prisoner who was released at the expiration of his four year sentence, although the prison psychologist advised against his release because of definite homicidal tendencies. Within two weeks of his release he had murdered three people. The public would be protected from such a catastrophe under the act and still the inalienable rights of the individual are protected. However, Professor Jeroma Hall inveighs against the arbitrary power granted under the Model Act.\(^\text{19}\) He contends that a petty wrongdoer might be incarcerated until the end of his days if the Authority believed that it was necessary for the protection of society, subject only to a vague ill-conceived appeal to a court. He also objects to the substitution of treatment and rehabilitation for punishment on the basis that punishment is a therapeutic agency of first importance. William Draper Lewis, in answering some of the criticisms of Mr. Hall, points out that the object of the Model Act is to discharge the person just as soon as in the opinion of the Authority there is reason to believe that he can be given full liberty without danger to the public.\(^\text{20}\) The Wisconsin act as well as the Model Act looks toward the earliest possible restoration of the offender to society. It is interesting to note that the provision for indefinite retention objected to by Mr. Hall has been eliminated from the California act. Under that act no person can be detained longer than the maximum statutory period prescribed for the crime of which he was convicted. In Wisconsin the judge making the committment, may, but is not required, to fix a maximum term not to exceed the limit otherwise prescribed by law for the offense.\(^\text{21}\) If the Department of Public Welfare believes that the release of an offender would be dangerous because of mental deficiency or other abnormalities, the Wisconsin bill provides that it may apply to the court for extended control.\(^\text{22}\) A hearing is then held and the individual has the right to representation by counsel. If the court is of the opinion that further control is not justified the offender is released, otherwise control is extended.

Although the Model act and the Wisconsin act have been criticized for various reasons, all who have offered objections concede the ineffectiveness of the present system. Judge John Perkins admits the dire

\(^{18}\) Waite, "The Youth Correction Authority Act," 9 Law and Contemporary Problems, 600 at 613 (1942).


\(^{21}\) Supra, footnote 4, 58.72.

\(^{22}\) Ibid., 58.92.
need for a changed penology, but he has condemned the Model Act on the ground that power may be exercised arbitrarily by the Authority, thus jeopardizing individual rights.\[23\] One youth convicted of larceny, he claims, might be committed to an institution, while another convicted of the same offense, because in the opinion of the Authority he did not need institutional care, might be discharged. This he feels would create great bitterness and resentment. Professor John Waite, in reply to Judge Perkins, points out that even under the current system, the power of discrimination exists from the very beginning to the end, and because it exists it may be abused. Juries if they wish may convict one person and acquit another on the same evidence; a governor can pardon one criminal and not another; judges may place one offender on probation and yet incarcerate another for the same offense.\[24\]

The constitutionality of the Model act has been carefully considered by Mr. Carney Mimms Jr.\[25\] In view of the fact that the Wisconsin act substantially follows the Model Act these considerations regarding constitutionality would be applicable to the Wisconsin bill. Mr. Mimms emphasizes the fact that a truly indeterminate sentence law such as that advocated by the Model Act stands as an original proposition today. There seems never to have been such a statute in our legislative history. Because the Act affects individual freedom it will be closely scrutinized. Constitutional objections have been raised on the basis that an indeterminate sentence is incompatible with the constitutional distribution of governmental powers; that is, it impairs the judicial power vested by the state constitution in the courts, it is a delegation of legislative power, and it is not due process. Considering the objection that it impairs the judicial power, Mr. Mimms points out that admittedly the legislature has the power to define crimes and to fix the manner and period of punishment without infringing the judicial power. It may also give the courts discretion to fix sentences between certain limits, but as this right was given to the courts by the legislature it may also be taken away.\[26\] Where the legislature exerts its power to fix the penalty for crime, the judicial function is only that of pronouncing sentence. Where the legislature gives the jury the power to fix the sentence, the judiciary again has no discretion. Directing commitment to a Board or Authority constitutes no greater limitation on the power

\[24\] Waite, "Judge Perkins' Criticism of the Youth Correction Authority Act," 33 Journal of Criminal Law and Criminology, 293 at 295 (1942).
\[25\] Mimms, "Indeterminate Control of Offenders Under the Youth Correction Authority Act; Constitutional Issues," 9 Law and Contemporary Problems 635 (1942).
\[26\] Miller v. State, 149 Ind. 607, 49 N.E. 894 (1898); 24 L.R.A. (N.S.) 625 (1908).
of the judiciary Mr. Mimms concludes. If the sentence is limited to the period prescribed by statute there seems to be no question regarding the delegation of legislative authority. However, when the control is extended beyond the maximum provided for by statute this question is raised. The validity of any grant of discretionary power to an administrative agency is tested by an inquiry as to the adequacy of the standard provided to guide the agency's action. Both the Model Act and the Wisconsin act specify the standard "dangerous to the public" in addition to the standards of guidance for the reviewing court. This seems to be as definite as that given to many other administrative bodies.

Mr. Mimms considers that there is greater risk that the act would be unconstitutional because the indeterminate sentence renders the punishment so uncertain as to fall within the constitutional prohibition of cruel and unusual.27 The objection might be met, however, with the defense that commitment to the Authority is no more subject to condemnation than the so-called habitual offender laws which have existed as part of our criminal law since 1817. The fact that the habitual offender has committed several crimes of a serious nature does furnish some basis for curtailing his freedom. Against this ground of distinction would have to be weighed the protection accorded the individual under the Act by a periodic reconsideration of his case coupled with a judicial review. A further constitutional question is whether the power conferred on the Authority would lead to a deprivation of due process. The risk of such an abuse will not invalidate the act unless it fails to provide adequate procedural safeguards. In making provision for judicial review of extension orders, for a hearing, and for representation by counsel, the act seems to comply with the principal criteria for procedural due process. In the Minnesota case,28 the hazard of administrative abuse were called to the attention of the United States Supreme Court on appeal. The Supreme Court held that while recognizing the danger of a denial of due process in the proceeding in question, (analogous to a proceeding under the Youth Correction Authority) they had no occasion to consider the abuse for none had occurred. They assumed that the Minnesota Court would protect appellant in every constitutional right that he possessed. Only the actuality of administrative abuse and not the potentiality would be likely to move a court to find a denial of procedural due process.

27 Wis. Const. Art. I Sec. 6, "Excessive bail shall not be required, nor shall excessive fines be imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. Art. 1 Sec. 8, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

28 Minn. ex rel Pearson v. Probate Ct., 309 U.S. 277 (1940); State ex rel Pearson v. Probate Ct., 205 Minn. 545; 287 N.W. 297 (1939).
The provisions of the Wisconsin act are diametrically opposed to age old concepts of justice which call for equal treatment of all who commit a given offense. Nevertheless, there is a growing realization that the tradition of punishment and threat of punishment as a method of building up resistance to criminal inclinations has failed. The civil law treats a person under twenty-one with a marked paternalistic attitude. Is there any reason why the criminal law should treat the individual in this manner only until he has reached the age of sixteen? In most states a youth who has violated any one of the numerous penal laws is held fully responsible for his crime and treated according to the same legal procedure as an adult. In Wisconsin, the Juvenile Court now has concurrent jurisdiction with the criminal courts over youths between the ages of sixteen and eighteen, but when the criminal court does take jurisdiction the trial becomes a criminal one and the sentence is the same as for an adult.\(^2\)

Charles Evans Hughes has described the Model Act as "the most important constructive suggestion for dealing with the crime problem that has been made since the original probation and Juvenile Court legislation".\(^3\) Members of the Wisconsin judiciary, among them Chief Justice M. B. Rosenberry and Justice John D. Wickhem, have displayed a keen interest in the drafting of the Wisconsin bill. It would be idealistic to assume that the proposed act will be a panacea for all crime and delinquency, but it is a step forward into an era of enlightened justice where the treatment will fit the offender rather than the punishment fit the crime. In the long run a well planned and integrated program of Youth Service will pay not only in human values but in dollars and cents.

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\(^{3}\) 33 Journal of Criminal Law and Criminology 15 (1942).