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COMMENTARIES ON THE WISCONSIN LAW OF PROBATION

EDWIN C. CONRAD*

PROLOGUE TO THE PROBATION ACT

Introduction

Throughout the official reports, many boasts are made to the effect that the Wisconsin system of probation is one of the earliest and most progressive in the country. At the outset it must be understood that my purpose is not the evaluation of the system. That remains for the future. Probation laws are of statutory origin. They were unknown to the common law. It was very clearly settled in our jurisprudence that under the common law the courts had no power to suspend sentence in order to give the defendant a chance to mend his ways.¹ Nevertheless, despite this lack of power, the courts of Wisconsin prior to the enactment of the present probation law, had repeatedly suspended sentences.² It had become an established practice for courts to suspend sentence. The evil in such a method, however, lay in the fact that no supervision of the convicted man was required. The granting of a suspended sentence is not probation. The evils of the suspended sentence were to some extent eliminated upon the enactment of our present probation law. Mr. Hiller, who made quite an extensive study of our system, traces our adult probation law back to the year 1901.³ This is erroneous. Our adult probation law was enacted in 1909, although juvenile probation was adopted in 1901.

The Statutes of Wisconsin dealing with probation, namely, Chapter 57, Wisconsin Statutes of 1937, make several classifications which should be clearly established before we can understand the probation act itself. The two principal classifications are as follows: (1) Adult Probation; (2) Juvenile Probation. Since our law carefully distinguishes between persons convicted of felonies and those

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¹ Warner and Cabot, "Changes in the Administration of Criminal Justice During the Past Fifty Years," *HARVARD LAW REVIEW*, 50:598, Feb., 1937.

² Hiller, Francis H., *Probation in Wisconsin*, New York, 1926, pp. 25-26.

³ *Ibid.*, p. 37.

convicted of misdemeanors, it is necessary to know what is meant by felony and misdemeanor.

Felonies and Misdemeanors

There is a fundamental distinction between the two words. Our own courts for a long period of time have been confused as to their meaning. However, in order to really analyze the act, we must define. The term felony when used in the Wisconsin Statutes means an offense for which the offender, on conviction, is liable by law to be punished by imprisonment in the state prison.⁴ This is the general statutory definition. In the English common law, felony signified "an offense which occasioned a forfeiture of either land or goods or both, and to which capital or other punishment could be added according to the degree of guilt."⁵ In Wisconsin as elsewhere in the United States, we have abandoned the English concept of a felony. As with other types of definitions, however, when we apply specific cases to the general term, we encounter difficulties. For example, the crime of murder in all degrees is clearly a felony, for the reason that imprisonment in the state prison is the only punishment provided. Where, however, a statute authorizes imprisonment in the state prison, or county jail, or a fine, leaving the punishment to the discretion of the judge, and the court actually sentences the offender to the county jail, or gives him a fine, do we get a conviction for a felony or a misdemeanor? The significance of the answer will be seen when we take apart the probation act. The rule as stated in *Corpus Juris* removes some of the doubt:

"In most jurisdictions a crime is a felony under such a statute if it may be punished by imprisonment in a penitentiary or state prison, although a court or jury may have the discretion to reduce punishment to imprisonment in jail or to a fine and although punishment is in fact imposed; but the rule is otherwise in a few states by statutes."⁶

This seems to be the general rule in the United States in those states which have a law similar to ours. In New York, where a similar statute was construed, it was held that it is not the actual sentence but the possible one which determines the grade of the offense.⁷ The New York rule seems to be the more logical one

⁴ *Wisconsin Statutes of 1937*, Section 353.31.

⁵ 4 *Blackstone's Commentaries*, 95.

⁶ 16 *Corpus Juris*, 57.

⁷ *People v. Hughes*, 137 N. Y. 29, 32 N. E. 1105 (1893).

and undoubtedly is the Wisconsin rule in view of the fact that so many of our statutes have been adopted by us in toto from the New York code. Just recently the Supreme Court of Wisconsin for the first time has had occasion to consider the problem in the case of *State v. Rogers*.⁸ The defendant, an attorney-at-law, was convicted of violating the Blue Sky law involving the sale of securities. A violation was punishable by imprisonment in the state prison, not exceeding five years or in a county jail not exceeding one year, or by a fine not exceeding five thousand dollars, or both. The defendant escaped imprisonment but paid a fine on each of three charges. The Wisconsin Supreme Court held that the defendant was convicted of a felony, although he had not been imprisoned. Whether the crime was a felony or not was not actually involved, so that this case may not be taken as an absolute authority on the proposition, but nevertheless the decision remains as an expression of the New York rule.

In general, felonies are regarded as the more serious crimes. Misdemeanors, on the other hand, are crimes which are not considered so serious. Misdemeanors are generally defined as anything less than a felony.⁹ However, from this class of misdemeanors are excluded all violations of city, county, village or municipal ordinances. The latter are not crimes at all and, therefore, shall not be considered.¹⁰

Juvenile and Adult Probation

The question as to the difference between adult and juvenile probation still remains. Under the Wisconsin law a minor is a person under the age of twenty-one years, and an adult is one over that age.¹¹ By statutory definition a "delinquent" child is any child under the age of eighteen years who has violated any law of the state or any county, city, town or village ordinance, or who by reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian or custodian; or who is habitually truant from school or home, or who habitually so deports himself as to injure or endanger the morals or health of himself or others.¹²

This background has been so carefully elucidated for the simple reason that the Wisconsin system cannot be clearly understood

⁸ 275 N. W. 910 (Wis. 1937).

⁹ Stimson, F. J., *A Concise Law Dictionary*, Boston, 1911, p. 249.

¹⁰ *City of Oshkosh v. Schwartz*, 55 Wis. 483, 13 N. W. 552 (1882).

¹¹ *Wisconsin Statutes of 1937*, Section 319.01.

¹² *Wisconsin Statutes of 1937*, Section 48.01 (c).

without an attempt to define the various elements in our law. There are 48 states in the Union. Each state has developed along its own lines. In view of this fact, it is not easy to generalize our concepts. Having disposed of these preliminaries, we may proceed to an examination of the Wisconsin Probation Act.

THE STATUTORY LAW OF WISCONSIN

Adult Probation—Convictions for Felonies

Under Section 57.01 of the Wisconsin Statutes, whenever any adult is convicted of a felony, and the court is satisfied that the convicted person's character and the circumstances of the case indicate that he will not commit crime again, and that the public good does not require that he shall suffer the penalty of imprisonment demanded by law, the trial court may suspend the judgment or stay the execution thereof and place the defendant on probation. When granting probation the judge shall state the reasons for his order. As a condition of granting probation, the court may order that restitution be made, or that the costs of the action be paid by the probationer, or both. Within the period of probation, the adult may be returned to such court at any time for sentence on the original charge, and upon the expiration of the period of probation he may be sentenced, discharged, or continued under probation for an additional period to be then fixed by the court, subject to like return, discharge, sentence or further probation.

Although Section 57.01 of the Statutes is very broad and comprehensive in its terms, it contains important exceptions. No probation may be granted by the court in any event under Section 57.01 when the defendant has been convicted of any of the following offenses:

- (1) Murder in the first degree.¹³
- (2) Murder in the second degree.¹⁴
- (3) Duelling resulting in death.¹⁵
- (4) Acting as a second in a duel resulting in death.¹⁶
- (5) Causing death by injury to a railroad.¹⁷
- (6) Setting fire to a building in the nighttime and causing death.¹⁸
- (7) Murder in the third degree.¹⁹

¹³ *Wisconsin Statutes of 1937*, Section 340.02.

¹⁴ *Wisconsin Statutes of 1937*, Section 340.03.

¹⁵ *Wisconsin Statutes of 1937*, Section 340.04.

¹⁶ *Wisconsin Statutes of 1937*, Section 340.05.

¹⁷ *Wisconsin Statutes of 1937*, Section 340.06.

¹⁸ *Wisconsin Statutes of 1937*, Section 340.07.

¹⁹ *Wisconsin Statutes of 1937*, Section 340.09.

- (8) Assault with intent to rob or murder with robbery.²⁰
- (9) Assault with intent to murder or rob.²¹
- (10) Kidnapping.²²
- (11) Breaking house in the nighttime while armed.²³
- (12) Burglary with explosives.²⁴
- (13) Entering bank or trust company.²⁵
- (14) Pandering.²⁶
- (15) Abandonment of wife or child.²⁷

It, of course, is obvious that the majority of the exceptions are in the classification of offenses against the person, with offenses against property next in line.

After a person convicted of a felony has been placed on probation, the work of supervision and control does not remain with the court as would be expected. Under Section 57.02 of the Statutes, every defendant placed on probation pursuant to Section 57.01 shall be subject to the control and management of the Board of Control of the State of Wisconsin under the regulations applying to persons paroled from state institutions. There is one exception to this rule. In counties having a population of 250,000 or over, the Municipal court of that county, instead of the Board of Control, shall have exclusive charge of all persons placed on probation in that county pursuant to Section 57.01 of the Statutes. In Wisconsin, only Milwaukee County falls within the last mentioned classification, and for this reason it may be stated that in the case of felon probationers, the Board of Control is the supervising agency in Wisconsin, except in Milwaukee County, where the Municipal court takes over these functions.

Section 57.03 of the Statutes is perhaps one of the features of the Act which makes the Wisconsin law unique in comparison with other plans. According to the terms of that provision, whenever it appears to the Board of Control that any probationer under its supervision under Section 57.01 has violated the regulations or conditions of his probation, the Board may upon *full investigation and personal hearing* order him to be brought before the court for sentence upon his former conviction, or if already sentenced to a penal institution, may order him to be imprisoned in said institution,

²⁰ *Wisconsin Statutes of 1937*, Section 340.39.

²¹ *Wisconsin Statutes of 1937*, Section 340.40.

²² *Wisconsin Statutes of 1937*, Section 340.56.

²³ *Wisconsin Statutes of 1937*, Section 343.09.

²⁴ *Wisconsin Statutes of 1937*, Section 343.121.

²⁵ *Wisconsin Statutes of 1937*, Section 343.122.

²⁶ *Wisconsin Statutes of 1937*, Section 351.16.

²⁷ *Wisconsin Statutes of 1937*, Section 351.30.

and the term of said sentence shall be deemed to have begun at the date of his first detention at such institution. Furthermore, whenever in the judgment of the Board the probationer has satisfactorily met the conditions of his probation, he shall be discharged from further supervision, and the Board shall issue to him a certificate of final discharge.

In no event shall the period of probation under 57.01 of the Statutes be less than the minimum nor more than the maximum term for which the probationer might have been imprisoned.

Obviously, the State Board of Control when revoking a convict's probation, is acting as a quasi-judicial body. Therefore, when a convict has been sentenced, all further control over his conduct is vested in the Board with the exception heretofore noted. If the probationer who has violated the terms of his probation has not been sentenced, he must be brought before the trial court for sentence. Since in Milwaukee County the Municipal court itself is the supervising agency over felon probationers, it needs no express statutory authority for revoking probation, and does so pursuant to its broad general powers. For this reason no procedure is set up in the Act itself for the revocation of probation in Milwaukee County.

Convictions for Misdemeanors

The procedure for placing a person on probation where he has committed a misdemeanor or abandoned his wife or child is outlined in Section 57.04 of the Statutes. It is somewhat different from the procedure for felons outlined above. Under 57.04, whenever any adult is convicted in any court of record of a misdemeanor or of the crime of abandonment of child or wife, the court in its discretion may suspend the judgment or stay the execution thereof and place the defendant on probation for such period of time not exceeding the maximum penalty prescribed, and upon such terms and conditions, including the payment of any fine imposed, as it shall determine, so that the defendant may be given the opportunity to pay the fine if one is imposed, within a reasonable time. Upon the payment of the fine, the judgment shall be satisfied and probation cease.

In the case of a person convicted of a misdemeanor or abandonment and placed on probation, the court shall place the probationer in charge of the State Board of Control or designate some suitable person to act as probation officer. If the court has reason to believe

from the report of the probation officer or otherwise, that the probationer has violated or is violating the conditions of his probation or is engaging in criminal practices, or has formed improper associates, or is leading a vicious life, it may revoke such probation and pronounce sentence on the former conviction, or if sentence has been pronounced, issue a commitment on the sentence or judgment, without deducting the period of probation. The court may at any time after such revocation or probation again stay further execution on any terms and conditions which it could have imposed originally and may, whenever the ends of justice shall be served thereby and the good conduct and reform of the probationer shall warrant it, terminate the period of probation and discharge him from custody; but in all cases, if the court has not revoked the probation or discharged him from custody, he shall at the end of the term of probation be discharged from custody and the sentence or judgment shall be deemed fully satisfied.

Although under Section 57.04, the court may designate the State Board of Control or some suitable person to act as the supervising agency, there is one exception to this rule. In counties having a population of 250,000 or over, the District court of that county shall have charge of all probationers who have been convicted of a misdemeanor or abandonment. Milwaukee County is the only one falling within this classification, and, therefore, in that county the supervising agency is the District court exclusively. In the rest of the State, the supervising agency continues to be the State Board of Control or some suitable person appointed by the court. In explanation it should be stated that the District Court of Milwaukee County is a criminal court having trial jurisdiction in cases of minor crimes, and the Municipal court is also a criminal court having trial jurisdiction in cases involving the more serious crimes.

Juvenile Probation—For Minors Other Than Delinquents

The controlling section is Section 57.05. This section provides that if any minor other than a delinquent child as heretofore defined, shall be found guilty of any misdemeanor or be convicted of any felony, the court in its discretion may suspend sentence and place such minor under the supervision of the State Board of Control, as in the case of adults, or some other suitable person who consents to become responsible. The period of probation shall

not exceed the maximum penalty prescribed as the court may fix. The court may require as a condition of the making or continuing in effect of the order, the payment of costs and restitution, or both. Such minor may be returned to such court on the original charge for sentence, at any time within the period of probation, and upon the expiration of such period, he may be sentenced, discharged or continued under probation for an additional period to be fixed by the court, subject to like return, discharge, sentence, or further probation. Minors convicted of murder in the first degree, second degree, third degree, or assault with intent to rob (with or without the completed act of robbing), kidnapping, entering bank or trust company, or pandering, are not eligible for probation under this section.

In counties having a population of 250,000 or over, all minors placed on probation pursuant to Section 57.05 shall be under the charge of the District court of that county. Milwaukee County being the only one falling within this classification, the exception applies only to one out of seventy-one counties in the State.

For Minors Defined as Delinquent Children

An attempt has already been made to explain the nature of the delinquent child according to our Wisconsin law. Chapter 48, also known as the Children's Code, and its predecessors, were enacted for the express benefit of the children of Wisconsin and were outgrowths of the times. Any child who is suspected of being delinquent, dependent or neglected is brought before the Juvenile court of the county. The Juvenile court in counties having a population of 250,000 is required by statute to appoint a probation officer and his assistants. Again this mandate applies only to Milwaukee County. In all other counties in the State, the county boards may in their discretion appoint probation officers to take charge of delinquent, dependent and neglected children. It perhaps has already been noticed that a delinquent child is not necessarily one who commits a crime. He may be a habitually unruly fellow, or one who is habitually truant from school. This idea must be kept in mind.

Under Section 48.07, if the court finds that a child is delinquent within the meaning of the law, it may place him on probation under the supervision of a probation officer or of some other fit and suitable person, either in the child's home or elsewhere. The

Children's Code specifically provides that a judgment by the court finding the child delinquent is not an adjudication that the child has committed a crime. The child is not deemed to be a criminal.

However, although a delinquent child is defined to be one under the age of eighteen years, provided he satisfies all the other parts of the definition, yet notwithstanding this fact, Section 48.11 specifically provides that when any child under sixteen years of age is arrested and charged with a violation of any state law, county, city, town or village ordinance, he shall be taken directly before the Juvenile court. Conversely, where a minor over the age of sixteen is convicted of violating a state law or any municipal ordinance, he is not taken to the Juvenile court. He remains within the jurisdiction of the court which has issued the warrant, and if any probation is accorded to such minor, it is under the provisions of Section 57.05 of the Statutes and not under Chapter 48.

Difference Between Chapter 48 and Section 57.05.

What has just been stated might be somewhat perplexing. For this reason it is best to illustrate the point by concrete examples. Let us suppose that A is fifteen years of age. A petition filed with the Juvenile court alleges that A is habitually truant from school. A is taken directly before the Juvenile court of the county and adjudged to be a delinquent child under the provisions of Chapter 48 of the Statutes. The rendition of the judgment does not brand him as a criminal. The Juvenile court may place A on probation under Chapter 48 of the Statutes, under the supervision of the probation officer, if the court has one, or else under a suitable person appointed by the court. At all events, A is under the exclusive jurisdiction of the Juvenile court.

Supposing another case, let us assume that B, a minor, is fifteen years of age and has committed the crime of burglary. Let us suppose that the warrant was issued by a Justice of the Peace in Green County, Wisconsin. In the case of adults the normal procedure is to bring the offender before the Justice of the Peace, who holds a preliminary examination when burglary is concerned, and if he finds that there is probable cause to believe that the crime of burglary has been committed, the Justice will bind the defendant to the Circuit Court of Green County for trial. However, under Chapter 48 it is the duty of the officer making the arrest to take B before the Juvenile court of the county, which in the supposed

case would be the County Court of Green County. The Justice who issued the warrant loses jurisdiction, and the Juvenile court acquires it. The Juvenile court adjudges B to be a delinquent child and may place him on probation pursuant to Chapter 48.

C, on the other hand, is a minor, seventeen years of age, who has also committed the crime of burglary. A warrant for his arrest is issued by a Justice of the Peace of Green County, Wisconsin. By virtue of the warrant, he is taken before the Justice for a preliminary examination. If the Justice finds that there is probable cause that the crime is committed, C is bound over to Circuit Court for trial. If he is found guilty in the Circuit Court, he may be placed on probation pursuant to Section 57.05 of the Statutes. In C's case the Juvenile court would have no jurisdiction whatsoever.

If in the illustration above, A were seventeen years of age and not guilty of committing any crime, the procedure would still be under Chapter 48, the Juvenile court act.

The statutory law of Wisconsin regarding both juvenile and adult probation required over thirty years to reach its present state.

EVOLUTION OF OUR MODERN LAW OF PROBATION

The rational and irrational processes by which society reaches the various cultural levels, is best exemplified by the history of its legislation. At least this should be true as far as modern civilization is concerned. Why a certain law gradually shapes itself in the form it eventually takes is the everlasting question about which we are always inquiring. But legislation has its evolutionary cycle just as do living things. The progress and development of a people is revealed to a great extent by the history of their legislation. Just as the psychologist attempts to fathom the thoughts of the individual, so does the legal scholar study the present law by going back into the past to ascertain the thinking processes by which successive legislatures have molded present statutes. Perhaps this explanation of purpose will justify the following detailed history of the Wisconsin probation law.

Adult Probation—The Original Act

It has already been pointed out that the adult probation law in Wisconsin had its inception in the year 1909, although an assertion

has been made that the year 1901 is the correct starting point.²⁸ What Hiller had in mind when he made 1901 the origin was the Juvenile Probation Law, for in the year 1901 Wisconsin for the first time enacted a Juvenile Probation Law.²⁹ A careful analysis of this legislative act of 1901 reveals that it provided for no adult probation. A diligent search of our session laws does not reveal any enactment concerning adult probation until the year 1909. Although certain officials have boasted to the effect that our adult probation law was one of the earliest in the country, it was enacted practically thirty years after the Massachusetts act.

On June 17, 1909, the governor of the State of Wisconsin approved Chapter 541 of the Wisconsin Laws of 1909. This was the genesis of our adult probation system. The act added twelve new sections to the Statutes, namely Sections 4734 (a) to (l) inclusive,

Section 4734 (a) of the Statutes of 1898, therefore, provided that the court could place a defendant on probation if the court had power to sentence such defendant to the Wisconsin State Prison, the reformatory, any workhouse, house of correction or other correctional institution in cases where the minimum penalty was imprisonment for one year or more. Any one who hitherto had ever been convicted of a felony or a misdemeanor in this state or elsewhere was ineligible. Under Section 4734 (b) no person convicted of a crime the maximum penalty for which was more than ten years imprisonment could have the benefit of the act. Under Section 4734 (c) all persons convicted and placed on probation were put under the supervision of the State Board of Control. Section 4734 (g) is substantially like Section 57.04 of the Wisconsin Statutes of 1937.

Thus Sections 4734 (a) (l) inclusive were the forerunners of Sections 57.01 to 57.04 inclusive of the present statutes. These original sections attempted to take care of the same classification of crimes as the present act defines as felonies without actually distinguishing between felonies and misdemeanors. It will be seen that the original act only applied to first offenders. In this respect it differs from our present act which is not restricted to first offenders. The original act was very limited in the sense that a person was considered a first offender despite the fact that he had only committed a petty misdemeanor. Section 4734 (a) also placed all supervisory power all over the state in the hands of the State

²⁸ Hiller, *op. cit.*, p. 37.

²⁹ *Wisconsin Laws of 1901*, Chapter 90.

Board of Control. It is also clear that if a person could be sentenced by the court for a maximum term exceeding ten years, he was not eligible to probation.

Section 4734 (j) of the Statutes of 1898 as created by Chapter 541 of the Laws of 1909, applied to that class of crimes defined as misdemeanors at the present time and now within the provisions of Section 57.04 of the Wisconsin Statutes of 1937. By virtue of the original section, in all cases arising either under the statutes or any municipal ordinance where the penalty provided for the offense was imprisonment in a jail or workhouse for a period less than one year or that the defendant be fined and in default of payment of fine that he be imprisoned for a term less than one year, the defendant could be placed on probation. The supervising agency was a suitable person appointed by the court. The maximum period of probation could not exceed the maximum penalty provided by the law for that particular crime. Under Section 4734 (a) the period of probation could not be less than the minimum nor more than the maximum term for which he might have been imprisoned.

The original act relating to misdemeanors differed in two respects from the present Section 57.04: in the first place, persons could be placed on probation if they had violated a city ordinance; this is not the law at the present time; in the second place, the State Board of Control was not named as an alternative supervising agency as does the present act.

Subsequent Developments

Chapter 269 of the Laws of 1911 segregated Milwaukee County from the rest of the state in the administration of the Probation law. By that act all probationers in Milwaukee County were placed under the charge of the Municipal court of that county. Milwaukee County was not named specifically in the act, but since the law as enacted only applied to counties of 250,000 or over in population, Milwaukee County was the only one affected.

Chapter 136, Laws of 1913, introduced the present division between misdemeanors and felonies in the Wisconsin Probation Law. Section 4734 (a) was amended so as to read that whenever there is any conviction in any court of this state of a felony punishable by imprisonment for a term not exceeding ten years, the court may place the defendant on probation. Section 4734 (j) was amended to apply only to misdemeanors or abandonment, and thus

were eliminated from this section all violations of municipal ordinances.

Thereafter nothing of a very substantial nature was done in the way of amending the adult probation law until 1919. In that year the law was revised and redrafted. This was effected through the passage of Chapter 30, Laws of 1919, and Chapter 615, Laws of 1919. The old chapter dealing with probation was Chapter 199 of the Revised Statutes of 1898 as amended. With the revision of 1919, the probation law became Chapter 57 of the Statutes. At the same time the decimal system of numbering the statutes was applied to the probation law. Therefore, Section 4734 (a) became Section 57.01 of the Statutes of 1919, Section 4734 (d), (e) and (m) were consolidated and took the form of Section 57.02 of the Statutes of 1919. Section 4734 (g) and (h) were consolidated and became Section 57.03 of the Statutes of 1919. Sections 4734 (j) and (k) became the present Section 57.04 pertaining to misdemeanors.

These two enactments effected several important changes. Prior to this time, the wording of both the felony and misdemeanor section was substantially to the effect that probation could be granted in cases for conviction of a felony or a misdemeanor. There was no attempt to specify that Section 4734 (a) and Section 4734 (j) applied only to adults. There was quite some confusion as a result. The 1919 revision henceforth made Sections 57.01 and 57.04 apply only to adults. The 1919 law for the first time provided that the court could order costs to be paid and restitution made as a condition for granting probation. In addition thereto, in the case of misdemeanants, the court could now designate some suitable person to act as probation officer, or in the alternative name the State Board of Control. As revised, Section 57.01 continued to apply only to persons convicted of offenses punishable by imprisonment for a period not exceeding ten years, provided that person had never before been convicted of a felony elsewhere.

Two more significant changes appeared before the adult probation act was finally molded into its present form, that is, Chapter 57 of the Statutes. The limitation in the adult probation law that no probation could be granted in a situation where a person was convicted of a felony the punishment for which could exceed ten years imprisonment was stricken by Chapter 150, Laws of 1931. This law also struck out the provision that a prior conviction for a felony would bar a person from having the privilege of probation.

From 1931 on, Section 57.01 extended to all convictions for felonies with the present exceptions in the statutes noted above. The net result of this change was to broaden and expand the adult probation law to include all crimes with a few heinous ones excepted.

Chapter 357, Laws of 1931, further provided that in Milwaukee County the supervision of persons convicted of misdemeanors and placed on probation was placed in the District court of that county.

Juvenile Probation

An attempt was made by Chapter 90, Laws of 1901, to create a system of juvenile probation in counties having a population of 150,000 or more. Again this particular act applied to Milwaukee county alone. It parallels the enactment of the original Massachusetts act applying to the City of Boston and perhaps was patterned after that act. The law provided that the court was to appoint probation officers to serve without compensation. A delinquent child was defined to be one under sixteen years of age who had violated any law of this state, the maximum for which was not imprisonment in the State prison. The court could grant the custody of the child to the probation officer under the court's supervision. Chapter 97, Laws of 1903, enlarged this act somewhat by providing that when the child was found to be delinquent, the court could continue the hearing until the child was sixteen years of age and could, among other things, commit the child to the custody of the probation officer.

1907 marked another milestone in the development. Chapter 426, Laws of 1907, was passed in that year. It provided that if any minor of the age of sixteen years or over be found guilty of any misdemeanor, or be convicted of a felony for the first time, for which offense the maximum penalty could not exceed seven years imprisonment, the court could place the offender on probation for a period not exceeding six months. This became Section 4725 (a) of the Revised Statutes of 1898. Section 4725 (a) was amended by Chapter 131, Laws of 1911, to apply to all cases of minors, regardless of age. But in 1915 Section 4725 (a) was enlarged by Chapter 13, Laws of 1915, to apply to convictions for which the maximum punishment could not exceed ten years imprisonment. By Chapter 30, Laws of 1919, Section 4725 (a) was renumbered to read Section 4734 (b). By the same act the probation agency was to be either some suitable adult person or the State Board of Control as in our present system.

The next significant change was Chapter 194, Laws of 1921. Section 4734 (b) now became Section 57.05. At this point children who were defined as delinquents were brought and treated under the provisions of the Juvenile Court Act, Chapter 48, and not under Section 57.05. The latter section from then on only applied to minors who were not classified as delinquents under the Juvenile Court Act. Furthermore, Section 57.05 as amended in 1921 fixed the period of probation not exceeding the maximum penalty prescribed for the offense. In 1929 under Chapter 439, Laws of 1929, the court could require costs to be paid and restitution made. Chapter 214, Laws of 1931, changed Section 57.05 so that it took its present form.

If the past is any indication, our present probation law, both juvenile and adult, certainly has not reached any state of stability.

The picture just given is biased, in that it gives only the legislative development. What has been the attitude of our Supreme Court in relation to the probation act, should be the next logical phase to pursue.

JUDICIAL INTERPRETATION

The Supreme Court

Our Supreme Court has had three occasions to consider our probation law. In 1923 it decided the famous case of *State ex rel. Zabel v. Municipal Court of Milwaukee County*.³⁰ In that case one M. had been convicted of manslaughter in the first degree, which constitutes a felony under our statutory definition. The court sentenced him to the reformatory at Green Bay for a period of five years. M. appealed to the Supreme Court. Presumably, while defendant's appeal was being considered in the Supreme Court, the Municipal court executed an order placing the defendant on probation. The District Attorney of Milwaukee County issued a writ to have the probation order reviewed by the Supreme Court. In its original opinion the court laid down three fundamental principles which should aid materially in the construction of the act.

(1) The court held that the district attorney of the county where the conviction was obtained could by means of a writ of certiorari have the probation order of the trial court reviewed to see whether the court could have the power to make such an order. From the standpoint of administration of the law this is important

³⁰ 179 Wis. 195, 190 N. W. 121 (1923).

because it gives the state, through its proper officers, a chance to review a void probation order of the trial court.

(2) The court also held that where a defendant is sentenced and not put on probation at the time of the sentence, and he appeals from the judgment of conviction, the lower court has no power to grant probation to the offender while the case is pending in the Supreme Court.

(3) As a third principle, the court enunciated the doctrine that if a defendant is sentenced and at such time he is not placed on probation, the court may at any time during the current term of court revise its sentence and place the person on probation. But if a person was sentenced with no probation, the court could not revise the sentence and grant probation after the expiration of the term of court during which the defendant was sentenced.

The first two principles advanced in this case are based on sound logical reasoning. The state is vitally interested in how and why the court grants probation to offenders. If the probation order is void, the state should have a right to have that order reviewed. However, the third principle established by the court smacks too much of the common law, without any attempt to reconcile the common law system with modern conditions. In reaching the decision the court was of the opinion that the common law rule that a sentence could not be revised after the term had expired prevailed and that Section 57.01 of the statutes could not be construed to the effect that such common law rule was abrogated. A perusal of Section 57.01 indicates that it is much broader than the court suspects it to be. The result reached by the court is too artificial and based too much on the archaic. The court was considering the Probation Act enacted in this state in 1909. Why the court went back to the common law in construing a modern statute is hard to determine. The law was intended to give the trial judge power to place a defendant on probation at any time if it saw fit to do so. The discretion was placed in the hands of the judge. The law says nothing about the time when such discretion shall be exercised.

Because of a mistaken procedure the court was not called upon to answer an interesting question in the case of *Application of Knox*.³¹ On August 16, 1920, one Knox, an infant nineteen years of age, was convicted of driving an automobile without the consent

³¹ 180 Wis. 622, 192 N. W. 395 (1923).

of the owner, which act constituted a felony. Knox was placed on probation for a term of one year. Within the year the petitioner was brought before the court on the charge of having violated his probation, and was thereupon sentenced to Waupun for a term of three years. The petitioner contended that probation for one year was sentence and punishment and, therefore, the court did not have a right to pass another sentence on him for the same offense. However, since the defendant proceeded by way of a writ of *habeas corpus* instead of a writ of error, the court would not pass upon this question.

That the courts have very broad powers under the probation law was clearly established in *Brozosky v. State*.³² The trial court had found the defendant guilty of a second offense under the liquor laws. A violation of such law was a misdemeanor. The trial court withheld sentence on defendant's plea of *nolo contendere* and placed him on probation for the term of one year. The defendant was placed under the charge of the trial court itself. Some months after the judgment was entered, the defendant was brought before the trial court and given a term in the house of correction. The trial court found that the defendant had violated the terms of his probation.

The decision formulates two new and distinct principles in this realm of jurisprudence.

(1) The defendant contended that the term in which the original judgment had been imposed had expired, and according to the rule of *State ex rel. Zabel v. Municipal Court*,³³ the judgment could not be revised after the term had expired. The court dismissed this argument. It conceded that after the term had expired the court did not have the power to revise its sentence and judgment. "But the judgment here in question did provide for probation and for the subsequent sentence of the defendant if he violated the terms of his probation. So that the sentence here in question was imposed in strict accord with the express terms of that judgment and pursuant to power expressly conferred by statute. The sentence imposed did not change or modify the judgment of the court as it did . . . in *State ex rel. Zabel v. Municipal Court, supra*." This result was the only conclusion which the court could reach. The defendant was relying on a pure technicality.

³² 197 Wis. 446, 222 N. W. 311 (1928).

³³ 179 Wis. 195, 190 N. W. 121 (1923).

(2) The following language taken from the decision sustains what has always been considered the basis for disposition of probation cases by summary procedure:

“The court had the power to inquire into the conduct of the defendant in a summary way and to impose sentence without a formal trial of the issue whether the defendant had violated the conditions of his probation. The defendant has no right to demand he be placed upon probation. The statute above quoted gives the court the discretion to determine whether the good of society and the defendant will be promoted by placing the defendant on probation and also the power to determine when that probation should be terminated. Beneficent results could not be secured under the probation law if every probationer was entitled to a trial—perhaps a jury trial—to determine whether his probation should be terminated. The vesting of such power in the court does not deprive the defendant of any of his constitutional rights. When one has been found guilty of an offense against society, no constitutional provision guarantees him the right to produce proof or to try out the issue of what his punishment should be. That is a question that must be determined by society, which has vested the power in the courts.”

It will be noticed that the above case involved a misdemeanor. The same ruling should apply to felony convictions. In the event of a felony conviction the State Board of Control acts as a quasi-judicial body and will be subject to the same ruling. However, by virtue of Section 57.04 the board shall give a full and personal hearing before it revokes a term of probation.

(3) The defendant also urged that the court had no power to place him on probation subject to the direct control of the trial judge. Assuming that the defendant was right in his contention, it was decided nevertheless that the defendant was not prejudiced by such action because he still enjoyed his freedom and could have escaped punishment had he obeyed the rules of the game. Therefore, if the decision is to be followed even where the State through its officers makes complaint, it enlarges the probation act to include supervision by the court. This would not then be probation; it would be a suspension of sentence, and from a sociological standpoint cannot be tolerated. However, it seems highly possible that if the rights of the State were brought into question, the court might hold that a trial judge could not make himself the probation officer in view of the Supreme Court's statement in the principal case that the trial court should appoint someone else to act as probation officer.

USE OF THE PROBATION PROCEDURE

Although our probation law is over thirty years of age, it was not used very extensively in the early period of its existence. It is rather difficult to give a perfect picture pertaining to the use of probation in Wisconsin. Table I³⁴ attempts to give an approximate idea. However, in all fairness, it must be pointed out that Table I is perhaps based on statistics which are inadequate. The Board of Control did not begin to compile criminal statistics until the year 1922. Consequently, we have no earlier data as to the use of probation in this state. Despite the fact that the data on which Table I is based are not as complete as they should be, the facts therein set forth present substantially a universe of facts and will give us a pretty good idea of the use made of the probation law by our courts. If we take the mean average for the years 1922 to 1936, inclusive, we discover that approximately 19.4% of all persons convicted in our courts of record of general jurisdiction were placed on probation during this period. Furthermore, Table I reveals that for the years 1931 to 1936 inclusive the percentage of those placed on probation in Wisconsin as compared with the total number of convictions doubled. Taking the mean for the years 1931 to 1936 inclusive as a fairer representation of the present day picture, we find that during these years approximately 33.1% of all such persons convicted were placed on probation. Table I will also show that the year 1933 saw a more prevalent use of the probation procedure than at any other time in the history of the act. Figures for 1937 are not available.

In the year 1936, courts of general criminal jurisdiction of 69 out of a total of 71 counties in the state reported. During the year 1936, these courts reported a total of 12,835 persons who were found guilty and convicted by the courts, 2,330 cases being for felonies and the balance for misdemeanors, generally speaking. Out of the total of 12,835 convictions, both for misdemeanors and felonies, a total of 3,658 persons were placed on probation, or 28.5 per cent. A total of 856 or 6.6% were sent to the Wisconsin State Prison or Reformatory; 1770 or 13.7% were sentenced to local jails. A total of 6430 or 50% of all those convicted paid fines and costs, or costs alone; and 121 or about 1 were sent to juvenile institutions or were disposed of in other ways.³⁵

³⁴ See next page.

³⁵ *Statistics of Courts of General Criminal Jurisdiction; 1936: Wisconsin*, Department of Commerce, Bureau of Census, Washington, D. C., Dec., 1937, p. 2.

TABLE I

DEFENDANTS IN CRIMINAL CASES FOUND GUILTY BY TRIAL COURTS OF GENERAL CRIMINAL JURISDICTION IN WISCONSIN, SHOWING THE TOTAL NUMBER OF CONVICTIONS, THE TOTAL NUMBER PLACED ON PROBATION, OTHER DISPOSITIONS, AND THE PERCENTAGE OF THE TOTAL NUMBER OF THOSE CONVICTED PLACED ON PROBATION*

Year	Total Convictions	Placed on Probation	Other Disposition	Percentage of Convicted Placed on Probation
1922	9626	1151	8475	11.9
1923	10993	905	10088	8.2
1924	9404	1293	8111	13.7
1925	12288	898	11390	7.3
1926	11857	1104	10753	9.3
1927	13332	1275	12057	9.5
1928	11593	1257	10336	10.8
1929	12995	1528	11487	11.7
1930	15113	1559	13554	10.3
1931	15754	5542	10212	35.1
1932	15108	5732	9376	37.9
1933	16969	7371	9598	43.4
1934	17117	4325	12792	25.2
1935	14634	4199	10435	28.6
1936	12855	3658	9177	28.5

* Table compiled from the following sources: *Seventeenth Biennial Report of the State Board of Control of Wisconsin*, Madison, Wis., 1924, pp. 50-53; *Eighteenth Biennial Report of the State Board of Control of Wisconsin*, Madison, Wis., 1926, pp. 91-96; *Nineteenth Biennial Report of the State Board of Control of Wisconsin*, Madison, Wis., 1928, pp. 52, 55; *Twentieth Biennial Report of the State Board of Control of Wisconsin*, Madison, Wis., 1930, p. 60; *Twenty-first Biennial Report of the Wisconsin State Board of Control*, Madison, Wis., 1932; *Twenty-second Biennial Report of the State Board of Control of Wisconsin*, Madison, Wis., 1934, pp. 14-15; *Twenty-third Biennial Report of the State Board of Control of Wisconsin*, Madison, Wis., 1936, pp. 243, 246; *Statistics of Courts of General Criminal Jurisdiction*, 1936: Wisconsin, Department of Commerce, Bureau of Census, Washington, D. C., December, 1937, pp. 1, 2. Substantially all the courts of record in the State are included in this table. There are, however, certain omissions. For example, in 1932 only 105 out of 109 courts reported; in 1933, 107 out of 108 courts reported; in 1934, all but two courts reported; in 1935, four counties and one municipal court missing; in 1936, 69 out of the 71 counties reported.

Arranging the frequency of the different types of dispositions of criminal cases of those actually convicted in the year 1936 for all crimes, both felonies and misdemeanors, we get the following order:

	<i>Per Cent</i>
Fines and costs	50 plus
Probation	28.5 plus
Local jails	13.7 plus
Prison, or Reformatory.....	6.6 plus
Other dispositions	1. minus
Total	99.8 plus

Among our trial courts of general criminal jurisdiction, therefore, probation ranks second in line as a method of dealing with the person who has been convicted of a crime.

A comparison of the use which Wisconsin courts make of probation with the use made by other courts reveals that the percentages are somewhat the same. The United States Census Bureau found that in 24 states reporting, 23.3% of all persons convicted in courts of general criminal jurisdiction in 1934 were placed on probation. In Massachusetts this percentage was 23.4%. In New York the courts of record placed 22.7% of all persons convicted on probation.³⁶

ADMINISTRATION OF THE PROBATION LAW

Historical Background

The law at the present time recognizes four administrative agencies. In cases of convictions for felonies, the work of supervision after judgment has been entered by the court is delegated exclusively to the State Board of Control, excepting in the case of Milwaukee County, where all felons placed on probation are supervised by the Municipal court of that county. In the case of misdemeanants, the supervising agency is either the State Board of Control or some suitable person appointed by the court, except in Milwaukee County, where that function is in the hands of the District court. We have already seen that our Supreme Court has recognized a fifth administrative agency, and that is the court itself.

The supervising agencies which are typical of Wisconsin at the present time are the State Board of Control in the state outside of Milwaukee County, and the Municipal and District courts in Milwaukee County.

A history of probation in Wisconsin reveals the fact that from 1909, the year of the inception of our probation act, to 1924, the

³⁶ *Social Work Year Book, 1937*, Russell Sage Foundation, N. Y., 1937, pp. 350, 351.

year of the reorganization of the State Board of Control, the board was inadequately financed and poorly staffed. As a result, judges became dissatisfied with the law and the public was unconvinced of its merits. For many years in the earlier period only one field officer and one assistant supervised all of the probation cases in the hands of the State Board of Control.³⁷ The period from 1909 to 1924 in Wisconsin probation history may be characterized as one of two much economy, without any attempt to do any real case work. However, this policy was to change upon the appointment of Dr. William F. Lorenz to the State Board of Control. His advent marked a radical change in the policies pertaining to the administration of the probation law. The aim of the board became, in their own words:

"In the administration of the probation laws and the laws relating to children . . . the aim was to apply higher standards, make a more thorough study of each case, and through better supervision secure more thorough rehabilitation of first offenders."³⁸

With this ideal in mind, the Board in 1924 invited the National Probation Association to send its field director to Wisconsin to study our system, and make his recommendations.³⁹ Pursuant to this request, Francis Hiller, field secretary for the association and a member of the New York bar, undertook a field study in Wisconsin, being assisted in his work by the Department of Sociology of the University of Wisconsin. Approximately four months were spent in this manner. As a result of this scrutiny, the association made the following findings:

- (1) There is a general acceptance in Wisconsin of the principle of probation for adults in proper cases.
- (2) In most counties probation is being very little used and its possibilities for usefulness are not being realized.
- (3) Probation service by volunteers is the prevailing system outside Milwaukee county, but is inadequate and inefficient.
- (4) The state Probation Department is not meeting the need and probably cannot be developed so to do.
- (5) Local volunteer probation officers are being used to a much greater extent than the state Probation Department, even though often illegally so.

³⁷ *Twenty-second Biennial Report of the State Board of Control of Wisconsin*, Madison, Wis., 1934, p. 87.

³⁸ *Eighteenth Biennial Report of the State Board of Control of Wisconsin*, Madison, Wis., 1926, pp. 7, 8.

³⁹ *Ibid.*, p. 31.

- (6) There is a widespread dissatisfaction with the present probation laws and their administration.
- (7) There is a great need of information and aid to local communities and courts in the development of good probation work.
- (8) In spite of defects in the law and weaknesses in its administration, the probation work being done is of great value to the state and the individuals concerned."⁴⁰

With these recommendations and findings in mind, the board undertook to effect a complete departmental reorganization in the division of probation. More workers were added to the staff, and a more sociological approach, such as the case work method, was organized. The board, however, rejected the recommendation of the National Probation Association based on this study that the plan of state administration be abandoned in favor of county probation systems. The board in rejecting the change to a county system, believed that for Wisconsin the state system was best; that there were no inherent defects in our own system; that the reasons for the low state which the administration had fallen into were due largely to lack of funds and appropriations and inadequate staffs.⁴¹ A study of Table I will show that following this reorganization there was a more extended use of the provisions of our probation law, beginning with the year 1931, by which time the new department was fully organized.

In 1932 Francis H. Hiller again visited Wisconsin and spent a week here observing the organization and work of the state Probation Department. At the conclusion of his visit, he wrote as follows:

"The growth of the Wisconsin State Probation Department during the past seven years affords a notable demonstration of what energy and intelligence can do in replacing a worthless probation department in a comparatively brief time by an efficient organization with high standards of work."⁴²

Having acquired an ever increasing staff, the probation division effected another change in February, 1932. From that time on the department took over the parole work at the various state penal and reformatory institutions.⁴³ Such a plan proved very successful

⁴⁰ Hiller, *op. cit.*, pp. 39, 40.

⁴¹ *Eighteenth Biennial Report of the State Board of Control of Wisconsin*, Madison, Wis., 1926, p. 31.

⁴² Hiller, Francis H., *The Wisconsin State Probation Department*, Report of Field Visit, March 28-April 2, 1932, New York, 1932, p. 15.

⁴³ *Probation and Parole in Wisconsin*, Statistical Department, State Board of Control, Madison, Wis., p. 14.

for the reason that a great deal of needless duplication in similar types of work was eliminated.

The department of the State Board of Control handling probation and parole was finally designated the Division of Probation and Parole.

In the spring of 1936, the governor appointed a group of thirty-five citizens from all sections of the state and from all walks of life to make a study of all welfare work in the state of Wisconsin. It was known as the Citizens Committee on Public Welfare. After a year's study, it reported the following recommendations, *inter alia*: (1) That a State Department of Corrections be created to handle correctional work and, among other things, to handle adult and minor probation work and parole work; (2) that a Division of Probation and Parole be created within the Department of Corrections. The duties of this division would include those already carried on by the State Probation Department and the present advisory pardon board.⁴⁴

Administration by the State Board of Control

At the present time the Division of Probation and Parole of the State Board of Control handles the work of probation. On June 30, 1936, the staff of this division consisted of 34 members—a supervisor of probation and parole, three assistant supervisors, and twenty-seven probation and parole officers.⁴⁵ The civil service law requires all persons who wish to become probation officers to pass a special examination in their field. At the present time the Bureau of Personnel has classified probation officers into two groups: (1) *Probation Officer*. A prerequisite is graduation from a recognized institution with major work in social science, or its equivalent. In addition to this, a candidate for this position must have served the state at least two years as a junior probation officer, or five years' experience in supervised social and case work, or equivalent training. (2) *Junior Probation Officer*. This position requires graduation from a recognized institution, with major in the social sciences, or its equivalent; also knowledge of court procedure, principles of

⁴⁴ *Public Welfare in Wisconsin*, Report of the Citizens Committee on Public Welfare, Madison, Wis., February, 1937, pp. 38-46.

⁴⁵ *Twenty-third Biennial Report of the State Board of Control of Wisconsin*, Madison, Wis., 1937, p. 54.

criminology and accepted case work methods and practices. The position of Junior Probation Officer was but recently created.⁴⁶

Upon conviction the trial court may enter an order suspending sentence and placing the defendant on probation either without or with pre-sentence investigation. A notice stating all the proceedings in the case and the facts is forwarded to the central office in Madison. Thereupon, the field probation officer is notified and investigates the case, if he has not done so already, arranges for employment, develops a plan to meet the requirements of the probationer, and then proceeds with his work or supervision just as any other social case worker.⁴⁷

The probationer enters into the following agreement with the State Board of Control:⁴⁸

- (1) I shall proceed at once to the place of employment provided for me and there remain until I receive notice of my final discharge, or through my supervising officer obtain the consent of the State Board of Control to change my place of employment.
- (2) I shall at all times keep my supervising officer informed of my whereabouts and activities and shall on the first day of each month until my release report to him or her . . .
- (3) I shall in all respects conduct myself honestly, avoid evil companions, obey the laws and abstain from the use of intoxicating liquors.
- (4) With my report each month I shall enclose all money paid to me and not used in the necessary maintenance of myself or those dependent on me.
- (5) I shall remain while on probation under the legal custody of the State Board of Control.
- (6) I shall hold myself ready to be returned to the court in which I was convicted or to the institution to which I was sentenced for any reason that shall be satisfactory to the State Board . . .
- (7) I shall not contract marriage while on probation without obtaining the consent of the Board.
- (8) I shall not leave the state of Wisconsin during my probation period without the consent of the State Board of Control.
- (9) In all matters not covered by the foregoing I shall be governed by the instructions of my supervising officer.

It is evident that most of those placed on probation to the State Board of Control are persons convicted of felonies. The

⁴⁶ *Probation and Parole in Wisconsin*, The Statistical Department of the State Board of Control, Madison, Wis., 1937, pp. 22-24.

⁴⁷ *Ibid.*, p. 14.

⁴⁸ Taken from the office records and forms of the State Board of Control of Wisconsin.

board does not have any great number of misdemeanants under its supervision for the reason that the probation period for this type of crime cannot exceed the maximum term, which in most cases is six months. Up to June 30, 1936, the State Board of Control had handled 9780 cases of probationers from the date of the enactment of the adult probation law in 1909. In the official reports no figures are available as to the number of those who were convicted of felonies and as to the number handled by the board in comparison with the other supervising agencies of the state. Table II reveals the number of probationers placed with the board by biennial periods. We can work out the approximate percentage of all cases of probation in the state handled by the board by using data contained in Tables I and II. One assumption must be made before we can do this. Criminal statistics in Wisconsin are gathered and reported on the basis of the calendar year, whereas Table II is based upon the fiscal year, that is from June 30 to June 30. I shall, therefore, take the liberty to compare a fiscal biennial period with a calendar biennial period in determining from Tables I and II what percentage of all persons placed on probation by courts of general criminal jurisdiction in Wisconsin, including both felons and misdemeanants, were placed with the State Board of Control. If we take from such Tables I and II the calendar years 1922 and 1923 and compare them with the fiscal years June 30, 1922, to June 30, 1924, we find that during these years 11.4% of all felons and misdemeanants placed on probation by the courts in the State of Wisconsin were placed under the charge of the board.

If we compare the calendar years 1924 and 1925 and the fiscal years June 30, 1924, to June 30, 1926, the percentage is 19.7%; for the calendar years 1926 and 1927 and the fiscal years June 30, 1926, to June 30, 1928, 35%; for the calendar years 1928 and 1929 and the fiscal years June 30, 1928, to June 30, 1930, 39%; for the calendar years 1930 and 1931 and the fiscal years June 30, 1930, to June 30, 1932, 27%; for the calendar years 1932 and 1933 and the fiscal years June 30, 1932, to June 30, 1934, 15% for the calendar years 1934 and 1935 and the fiscal years June 30, 1934, to June 30, 1936, 21%. It follows that only a small number of all persons placed on probation in this state are placed in charge of the State Board of Control.

TABLE II

NUMBER OF PERSONS PLACED ON PROBATION TO THE STATE BOARD OF CONTROL OF WISCONSIN FROM THE ENACTMENT OF THE PROBATION LAW IN 1909 TO JUNE 30, 1936*

Years	Number Placed Under Board
1909-1910	12
1910-1912	72
1912-1914	156
1914-1916	290
1916-1918	219
1918-1920	275
1920-1922	383
1922-1924	236
1924-1926	434
1926-1928	837
1928-1930	1090
1930-1932	1963
1932-1934	1977
1934-1936	1836
Total	9780

* Compiled from the data contained in the 11th to the 23rd Biennial Reports of the State Board of Control of Wisconsin. The years above represent fiscal years from June 30 to June 30.

Administration in Milwaukee County

As indicated heretofore felon probationers in Milwaukee County are under the control of the Municipal court; misdemeanants, under the control of the District court. In the year 1936 the Municipal court of Milwaukee County boasted of a staff of 12 probation officers and one chief probation officer. In Milwaukee County practically every third person convicted in the Municipal court is placed on probation. During the year 1936, 336 new cases were placed in charge of the probation department of Milwaukee's Municipal court. During the same year the District court of Milwaukee County placed 188 new cases under the direct supervision of the probation department of the Municipal court.⁴⁹

Reorganization Law of 1937

A careful scrutiny of the duties of the State Board of Control as it existed prior to October, 1937, will reveal that it exercised a

⁴⁹ Annual Report for 1936 of the Probation Department of the Municipal Court of Milwaukee County, Milwaukee, Wis., 1936, pp. 2, 12, 20.

diversity of functions. The State Board of Control had a multitude of different institutions under its wings. It supervised and managed such institutions as the state prison, the state reformatory, the industrial school for boys, the industrial school for girls, the women's prison, the school for the blind, the hospital for criminal insane, hospitals for the insane, state public schools, workshop for the blind, tuberculosis camps and sanitariums. As a result of this great diversity in duties and functions the Citizens Welfare Committee, whose findings and recommendations have been touched upon, advocated the creation of a State Department of Corrections to take over all the correctional work now under the State Board of Control.⁵⁰ As a result, Chapter 9 of the Special Session Laws of Wisconsin for the year 1937 was enacted by the Wisconsin legislature. This act created a State Department of Corrections, which consists of the State Board of Corrections, a Director of Corrections, and such officers as may be authorized by the board. The newly created Board of Corrections consists of five members appointed by the governor for a term of six years, although some of the early terms will be shortened to two years so as to provide that at least one member with experience will always be on the board. In the words of the act, the powers and duties of the State Board of Corrections shall be regulatory, advisory and policy forming, and not administrative or executive. The actual administrative and executive work of the Department of Corrections shall be vested in the State Director of Corrections, who shall be appointed for an indefinite term at a salary not to exceed seven thousand dollars per year. The State Department of Corrections in turn shall be composed of the following divisions:

- (1) The Division of Administration.
- (2) The Division of Parole and Probation.
- (3) The Division of Criminal Apprehension.

Under this special session act it is contemplated that the duties of the State Board of Control will not be transferred immediately to the State Department of Corrections. Some time will have to elapse before such transfer of duties can actually be made. Such transfer may be made at any time in such manner as the State Board of Corrections shall determine with the approval of the governor in writing, but in any event the transfer shall take place prior to January 1, 1939.

⁵⁰ *Public Welfare in Wisconsin*, Report of the Citizens' Committee on Public Welfare, Madison, Wis., February, 1937, pp. 38-47.

The net result of this act was the placing of all the correctional work in the state under the State Board of Control in the hands of the State Department of Corrections. At the date of this writing, no transfer of duties from the State Board of Control in the hands Department of Corrections has been made. Insofar as the probation law itself is concerned, this special session act does not change the substantive law, but does modify the statutes as to the administrative agency behind the probation law. It is believed that a coordination of all the correctional work in one state department will result in a better administration of our criminal laws. Wisconsin's system of probation will be benefitted by this change. This reorganization does not change the system in Wisconsin to any extent except perhaps to coordinate it more fully with other correctional work, because from now on one board will be engaged exclusively in correctional work. It is to be remembered that after a complete transfer of duties has taken place, the probation law and all of its provisions must read as if the words "State Department of Corrections" were used in the statutes instead of the words, "State Board of Control."

Cost of Administering the Law

Although it has been suggested that the ideal case load for probation officers should be approximately fifty per officer, because of the lack of funds the case load for each officer under the State Board of Control has average about seventy-five.⁵¹ For the biennial period ending 1936, the State Board of Control reported that the per capita cost per week of operating the probation system was \$1.04.⁵² Curiously enough for the year 1936 the Municipal Court of Milwaukee County reported the same per capita cost of \$1.04.⁵³ The per capita cost per week of taking care of an inmate of the Wisconsin State Prison for the same year was \$5.53; for the State Reformatory it was \$10.22; and for the Milwaukee House of Correction it was \$7.08.⁵⁴ There is, however, too much emphasis placed upon the saving which probation effects. This should not be a con-

⁵¹ *Twenty-second Biennial Report of the State Board of Control of Wisconsin*, Madison, Wis., 1934, pp. 86, 87.

⁵² Murphy, L. F., "Probation and Its Relation to Crime Prevention," *Proceedings of the First Wisconsin Conference on State and Local Organization for Crime Control*, University of Wisconsin Extension Division, Madison, Wis., 1937, p. 164.

⁵³ *Annual Report for 1936 of the Probation Department of the Municipal Court of Milwaukee County*, Milwaukee, Wis., 1936, p. 23.

⁵⁴ *Ibid.*, p. 23.

trolling item to any extent. Sociologically, a convict should not be placed on probation if he is not fitted for such treatment, regardless of the comparative saving to the state by placing him on probation. Neither should the quotation of the aforementioned figures be any justification for the existence of the probation system.

A COMPARATIVE ANALYSIS

It has been indicated that the Wisconsin system of probation is unique in several respects. A general comparison of this system with those of other states is difficult in view of the great diversity between the various laws. However, it is believed that such a comparative analysis will be helpful in determining just how the Wisconsin act differs from others. It may be entirely possible that Wisconsin can utilize some of the principles established by the laws of other states.

Courts Authorized to Use Probation for Adults

Wisconsin is one of the few states in the Union which restricts the use of probation procedure in the case of adults to courts of record. Minnesota and Nebraska, and Wisconsin are the only three states in the Union making such a limitation. Twenty-four states authorize all courts having jurisdiction of the offenses to use the probation procedure, regardless of whether they are courts of record or not. Other states have designated specific courts to handle probation.⁵⁵ The State of Kentucky authorizes only circuit courts to use this release procedure.⁵⁶ Tennessee authorizes all trial judges in the state having criminal jurisdiction to use this method.⁵⁷ Pennsylvania is typical of the majority of the states in that it allows any court in the commonwealth before whom a person is convicted to utilize the probation release procedure.⁵⁸ Rhode Island specifically gives any court in the state power to release a convict on probation.⁵⁹

⁵⁵ Hiller, Francis H., *Adult Probation Laws of the United States*, New York, 1933, pp. 17, 18.

⁵⁶ *Acts of the General Assembly of the Commonwealth of Kentucky for 1936*, Chapter 30.

⁵⁷ *Tennessee Public Acts, 1937*, Chapter 276.

⁵⁸ *Report of Supervisor of Paroles to Board of Pardons for the Period June 1, 1931 to May 1, 1934*, Harrisburg, Pa., 1934, pp. 10-20.

⁵⁹ *General and Public Laws Relating to Probation, Parole and Juvenile Offenders and Criminal Statistics*, Rhode Island Juvenile Court Commission, Providence, R. I., 1937, p. 17.

Revocation of Probation

So far a diligent search has revealed that Wisconsin is the only state which authorizes a supervising agency, the State Board of Control, to revoke a convicted person's probation where the trial court has already sentenced the offender, but has suspended the execution of the sentence. However, even in Wisconsin in the event that the judge has not sentenced the offender, he must be returned to the court in order to have his probation revoked. Even in the case of a sentenced convict, the Board of Control must have a personal hearing before the probation can be revoked. In this respect as to revocation of probation by the State Board of Control without a court hearing, the Wisconsin system is most unique. In all the rest of the states some hearing by the court is required before the probation may be revoked.⁶⁰

Classes of Offenders Eligible for Probation

It was seen that the Wisconsin act makes all convicts, with a few exceptions, eligible for probation, regardless of whether they are second offenders or not. It was also seen that up until 1931 persons who had previously been convicted of a felony in any court were ineligible. After that date the law was amended to take its present form.

Rhode Island makes all offenders eligible to receive terms of probation regardless of whether they are recidivists.⁶¹ New York makes ineligible any person convicted of a felony for the fourth time; Connecticut makes ineligible persons convicted of a felony for a third time; California, Colorado, Idaho and Iowa restrict the use of the law to those persons never previously convicted of a felony. Montana and Pennsylvania make ineligible those previously imprisoned for a crime.⁶² Illinois has recently amended its statutes to provide that any defendant not previously convicted of a crime greater than a misdemeanor, petit larceny and embezzlement excepted, may be placed on probation.⁶³ Vermont has an act

⁶⁰ Hiller, Francis H., *Adult Probation Laws of the United States*, New York, 1933, p. 21.

⁶¹ *General and Public Laws Relating to Probation, Parole and Juvenile Offenders and Criminal Statistics*, R. I. Juvenile Court Commission, Providence, R. I., 1937, p. 17.

⁶² Hiller, Francis H., *Adult Probation Laws of the United States*, New York, 1933, p. 21.

⁶³ *Illinois Revised Statutes of 1937*, State Bar Association Edition, 1937, Chicago, Ill., Section 785, p. 785.

in this respect substantially the same as ours.⁶⁴ Tennessee makes its law applicable to recidivists.⁶⁵ Kentucky adopted the Model Probation Act, but excepted therefrom persons convicted by a jury where the jury fixes punishment at life imprisonment or death.⁶⁶ The United States has applied the same rule to its district courts.⁶⁷ Ohio also allows second offenders the benefits of the act.⁶⁸ This comparison will reveal that Wisconsin has recognized the fact that even second offenders in some cases are fit subjects to receive probation.

In this subdivision only the classes of offenders eligible to probation have been presented. The only question here presented is whether or not the person convicted is a recidivist. If he is, under certain of the state laws, he falls within a class which is ineligible to receive the benefits of the probation act. In addition to falling within such a class, however, a person might be before the court for the commission of a particular type of crime, and the court has actually the power to punish him for that crime. Thus A may be indicted for murder. He is a second offender. Under our Wisconsin law the fact that he is a second offender does not put him in a class which is ineligible to procure terms of probation. However, A in this particular case is ineligible under our probation law because convictions for murder are excepted from the provisions of the act. This subdivision, therefore, deals with the type of convict before the court and to his classification. He may be ineligible because he falls within the class of recidivists. The subdivision following will show that the convicted person may be ineligible for another reason—that being the particular type of crime which he committed and for which he is actually before the court.

Offenses to Which Probation Is Applicable

The Wisconsin act applies to all offenses committed with the exceptions heretofore enumerated. It will be seen that these exceptions fall in the classification of serious crimes. For example, public policy in this state has demanded that a person actually

⁶⁴ *Public Laws of the State of Vermont Relating to Public Welfare, 1937*, p. 55.

⁶⁵ *Tennessee Public Acts of 1937*, Chapter 76.

⁶⁶ *Acts of the General Assembly of the Commonwealth of Kentucky for 1936*, Chapter 30.

⁶⁷ *United States Code*, Title 18, Sections 725, 726, Washington, D. C., 1935, p. 781.

⁶⁸ *Laws of Ohio Relative to Probation, Pardon and Parole, Department of Public Welfare, 1932*, p. 24.

before the court for a designated crime of murder cannot be put on probation. For many years up until 1931, if a person were convicted of a felony, the maximum punishment for which could exceed ten years in the state prison, he was ineligible. It was seen that in 1931 the act was amended to apply to all offenses, with the exceptions now existing in our present act.

Nine states make all offenders eligible regardless of the crime they have committed. Five states grant power to the courts to use probation procedure in all cases involving any offense, except one involving life imprisonment or capital punishment. Sixteen states make no limitation because of the crime committed, except that those committing certain specified serious offenses are excluded. Wisconsin falls in this category. Two states, Minnesota and Alabama, limit such procedure to all crime convictions where the maximum punishment possible is not more than ten years imprisonment. It was seen that up to 1931 the state of Wisconsin was in this classification. Three states restrict the use of probation to cases of misdemeanors only. North Carolina recognizes the procedure in cases of a few minor offenses only.⁶⁹ Tennessee recently passed an act which provides for probation only in cases where the possible maximum punishment is five years imprisonment in the State Penitentiary.⁷⁰ The Iowa act applies to all crimes except treason, murder, rape, robbery and arson.⁷¹ In Kentucky, the Model Probation Act was followed and the law applies to all convictions except convictions by the jury where the jury fixes punishment at life or death.⁷² Vermont falls within the same category.⁷³ Pennsylvania excepts convictions for murder, poisoning, kidnapping, incest, sodomy, rape, assault with intent to rape, arson, and burglary from the operation of the act.⁷⁴ Rhode Island contains the exceptions for the more serious crimes.⁷⁵ The United States act applies to all persons convicted of a crime not punishable by death or life

⁶⁹ Hiller, Francis H., *Adult Probation Laws of the United States*, New York, 1933, pp. 19, 20.

⁷⁰ *Tennessee Public Acts of 1937*, Chapter 76.

⁷¹ *State of Iowa Parole Law*, Iowa Board of Parole, Des Moines, Iowa, 1916, p. 11.

⁷² *Acts of the General Assembly of the Commonwealth of Kentucky for 1936*, Chapter 30.

⁷³ *Public Laws of the State of Vermont Relating to Public Welfare*, 1937, p. 54.

⁷⁴ *Report of Supervisor of Pardons to the Board of Pardons for the Period June 1, 1931, to May 31, 1934*, Harrisburg, Pa., 1934, p. 16.

⁷⁵ *General and Public Laws Relating to Probation, Parole, Juvenile Offenders and Criminal Statistics*, Rhode Island Juvenile Court Commission, Providence, R. I., 1937, p. 17.

imprisonment.⁷⁶ Illinois in her revision of the statutes, lists the following exceptions: convictions for murder, rape, kidnapping, willful contempt, perjury, subornation of perjury, arson and larceny and embezzlement where the amount involved exceeds two hundred dollars.⁷⁷

Limits on the Duration of Probation

In Wisconsin, of course, for felony cases the period of probation may not exceed the maximum and may not be less than the minimum period for which the defendant might have been convicted. In misdemeanor cases, the period of probation shall not exceed the maximum period for which the defendant might have been imprisoned.

The laws of other states are so diversified that it is difficult to attempt a general classification. In Ohio the probation provided by the act shall continue for such period as the judge shall determine, not exceeding five years.⁷⁸ In Minnesota the total period of suspension of the sentence shall not exceed one year except in the case of a conviction for crime the maximum penalty for which is imprisonment for a term exceeding one year, and in such a case the period of suspension shall not exceed the maximum penalty.⁷⁹ In Pennsylvania the term shall not exceed the maximum period for which the defendant might have been imprisoned.⁸⁰ The probation period in Illinois shall not exceed six months if the offense involved was the violation of a municipal ordinance, and not to exceed one year in cases involving other offenses.⁸¹ The United States act limits the term of probation to a period not exceeding five years.⁸² Apparently in Vermont there is no limitation, and the court may prescribe any length of time.⁸³ In Tennessee in misdemeanor cases the period of probation is one year, and in felony cases the period is equivalent to the maximum punishment which could be imposed

⁷⁶ *United States Code*, Title 18, Sections 725, 726, Washington, D. C., 1935, p. 781.

⁷⁷ *Illinois Revised Statutes of 1937*, State Bar Association Edition, 1937, Chicago, Ill., Section 785, p. 785.

⁷⁸ *Laws of Ohio Relative to Probation, Pardon and Parole*, Department of Public Welfare, 1932, p. 25.

⁷⁹ *Thirteenth Biennial Report, State Board of Parole of the State of Minnesota*, St. Paul, Minn., 1936, p. 32.

⁸⁰ *Report of the Supervisor of Paroles to the Board of Pardons*, Department of Justice, Harrisburg, Pa., 1934, p. 19.

⁸¹ *Illinois Revised Statutes of 1937*, State Bar Association Edition, 1937, Chicago, Ill., Section 787, p. 1208.

⁸² *United States Code*, Title 18, Sections 725, 726, Washington, D. C., 1935, p. 781.

⁸³ *Public Laws of the State of Vermont Relating to Public Welfare*, 1937, p. 54.

on the defendant.⁸⁴ Kentucky empowers the trial judge to fix the period of probation.⁸⁵

Pre-Sentence Investigation

For some reason, which from a sociological standpoint is unexplainable, the Wisconsin act has never contained any provision for the pre-sentence investigation of the convicted person. The probation law cannot be effectively administered unless it is discovered what persons are placed on probation. However, this discussion will be relegated to the next chapter with the brief comment at this point that in this aspect Wisconsin has not really progressed or pioneered.

Administrative Agencies

The Wisconsin system is a combination of county and state administration. It is neither a complete state nor a complete county system. The Milwaukee system is purely a county system of probation. The plan under the State Board of Control is essentially a state system. Another way of characterizing the Wisconsin system is to call it a combination of urban and rural probation, because of the fact that outside of Milwaukee County the population is not dense. It was this fact which has resulted in the present differentiation between Milwaukee County and the rest of the state.

Minnesota comes closest to the form of our administrative system, because it too has a combination of rural and urban probation.⁸⁶ Being a sister state with practically the same conditions as Wisconsin, it was natural that these two systems should grow side by side. Twenty-one states provide for some form of state participation, chiefly supervisory, in probation work, either adult or juvenile or both. It was seen, of course, that in Wisconsin the state has control of adult probationers convicted of felonies exclusively, and that it has no jurisdiction in juvenile probation work, except as the trial court in its discretion may give it jurisdiction. In contrast, Rhode Island seems to have a complete state probation system, since the State Probation officer, appointed and directed by the State Public Welfare Commission, appoints and directs the

⁸⁴ *Tennessee Public Acts of 1937*, Chapter 76.

⁸⁵ *Acts of the General Assembly of the Commonwealth of Kentucky for 1936*, Chapter, 30.

⁸⁶ *Thirteenth Biennial Report of the State Board of Parole of the State of Minnesota*, St. Paul, Minnesota, 1936, p. 32.

work of all probation officers.⁸⁷ Vermont follows the plan of Rhode Island.⁸⁸ In Indiana, Oregon and Massachusetts there are separate state departments which supervise and aid probation work and aid in its development. In New York the Division of Probation of the Department of Correction with a director of probation as executive has general supervision of probation officers throughout the state. The director has power to formulate rules which when approved by the commissioner of correction have the full force and effect of laws.⁸⁹ It will be noted, therefore, that direct work by the state and not only supervision, and the county system in Milwaukee County, are some of the outstanding features of the Wisconsin act.

Conditions

The Wisconsin act provides that the conditions of probation shall be those imposed by the State Board of Control in cases of persons paroled from the State Prison or reformatory. There is nothing in the parole law which makes any particular conditions necessary.⁹⁰ Therefore, conditions on which probation is granted in the case of felonies are determined by the State Board of Control, outside of Milwaukee County. In those cases not under the supervision of the State Board of Control, the trial courts impose such conditions as they desire. Neither does the Ohio act determine what the terms of probation shall be, leaving that function to the court.⁹¹ The new Kentucky act specifically provides the conditions of probation which may be imposed in addition to those added by the court.⁹²

Violations of Municipal Ordinances

When the original act of 1909 was enacted by the legislature, probation could be granted in cases of persons convicted of violating village, city, county or municipal ordinances. However, in

⁸⁷ *General and Public Laws Relating to Probation, Parole, Juvenile Offenders and Criminal Statistics*, Rhode Island Juvenile Court Commission, Providence, R. I., 1937, p. 17.

⁸⁸ *Public Laws of the State of Vermont Relating to Public Welfare*, 1937, p. 53.

⁸⁹ Hiller, Francis H., *Adult Probation Laws of the United States*, New York, 1933, pp. 39-43.

⁹⁰ *Wisconsin Statutes of 1937*, Section 57.06.

⁹¹ *Laws of Ohio Relative to Probation, Pardon and Parole*, Department of Public Welfare, 1932, p. 24.

⁹² *Acts of the General Assembly of the Commonwealth of Kentucky, for 1936*, Chapter 30.

1913 the law was changed, and from that time on probation could only be granted in cases of crimes against the state, which is also true of the present statutory law.⁹³ Some of the other states in the Union have authorized judges to grant probation in cases of violations of municipal ordinances. Thus, Illinois specifically grants that right.⁹⁴ So does Minnesota.⁹⁵

The Wisconsin Act and the Model Act

The National Probation Association has proposed for adoption a model law for adult probation.⁹⁶ Kentucky has just enacted this act substantially in toto.⁹⁷ The Model Act applies to any person charged with a crime. The Wisconsin act, of course, comes into operation after a person has pleaded guilty or has been found guilty of the charge, and in addition thereto there are certain exceptions in the Wisconsin act heretofore noted which have been eliminated in the Model Act. The Model Act also provides for a pre-sentence investigation, which the Wisconsin act does not attempt to do. The Model Act has suggested terms of probation which in Wisconsin are left to the State Board of Control to determine. The Model Act does not differentiate between felonies and misdemeanors as does the Wisconsin act. The Model Act authorizes the court to fix the period of probation, there being no limit to such period. Wisconsin, of course, has limited the periods of probation as was seen in the prior discussion. The Model Act authorizes all courts to use this procedure; the Wisconsin act, only courts of record. Under the Model Act only the court shall have the power to revoke the probation where the convicted person has violated his conditions, whereas in Wisconsin in felony cases where the court has pronounced sentence at the time of conviction, the State Board of Control has the duty to revoke probation, thus assuming a function which in most laws is left to the courts. In all these respects the Wisconsin act differs greatly from the Model Act.

⁹³ See section of this article entitled, *Evolution of Our Modern Law of Probation*.

⁹⁴ *Illinois Revised Statutes of 1937*, State Bar Association Edition, Chicago, Ill., 1937, Section 785, p. 1208.

⁹⁵ Mason, William H., *Minnesota Annotated Statutes*, St. Paul, Minn., 1927, Section 9936, p. 1969.

⁹⁶ For a copy of the Model Act see Hiller, Francis H., *Adult Probation Laws of the United States*, New York, 1933, pp. 49-56.

⁹⁷ *Acts of the General Assembly of the Commonwealth of Kentucky for 1936*, Chapter 30.

The Wisconsin Act and the English Act

Like the Model Act the English statutes on probation apparently apply to all persons convicted of crimes without any exceptions such as in the Wisconsin act. The English act provides that when any person has been convicted of any offense punishable with imprisonment, the court may place the convicted person on probation. The period of probation shall not exceed three years. The court may also require the probationer to enter into a recognizance with sufficient sureties to guarantee that the terms of probation shall be carried out. If anything, the English act corresponds more closely to the Model Act than to the Wisconsin act.⁹⁸

In Retrospection

This somewhat cursory comparison between the various probation acts in this country and England is not intended to be a complete picture of probation systems. It is merely intended to show how the Wisconsin act has taken its own course and has acquired certain ideas which are peculiar to this state.

SOME MORE CHANGE

Will Rogers once said that when two Americans get together one will invariably assume a sort of a chairmanship and call a meeting to order. In this same humorous vein it may not be amiss to mention another peculiar characteristic of the American people—the doctrine of “There ought to be a law.” Men trained in legal lore fully know the chaotic condition which has resulted as a result of the volumes and volumes of new laws being added every year. However, despite this fact, it may not be presumptuous to suggest a few changes in our probation act in the light of the experience of those administering it. Legislation is never static, but dynamic. Perfection is change. Our goal is the perfection of law, among other things. Stability cannot satiate men’s appetites when there is vast room for improvement. It is with this spirit that the following changes in the probation act of this state are recommended.

(1) *Chapter 57 should be amended to make mandatory a pre-sentence investigation.*

Dr. John L. Gillin, America’s eminent criminologist, has always emphasized this aspect of probation work. He says:

⁹⁸ Hailsham, Lord, *Halsbury’s Laws of England*, Second Edition, London, 1937, Vol. 9, p. 232.

"Good probation work must be based on thorough investigation. Unless this be done persons will be placed on probation who should be sent to an institution, and offenders will be sent to institutions who should be placed on probation. Careful investigation is necessary for any adequate treatment of the criminal."⁹⁹

The National Probation Association has very clearly recognized this need and has recommended the following provision, being Section 2 of the Model Probation Act:

"When directed by the court the probation officer shall fully investigate and report to the court in writing the circumstances of the offense, criminal record, social history, and present condition of any defendant. No defendant charged with a felony and unless the court shall direct otherwise in individual cases, no other defendant shall be placed on probation or released under suspension of sentence until the report of such investigation shall have been presented to and considered by the court. Whenever practicable, such investigation shall include physical and mental investigation of the defendant. If such defendant is committed to any institution a copy of the report of such investigation shall be sent to the institution at the time of commitment."¹⁰⁰

Such requirement is bound to eliminate a lot of criticism on the part of the public because it has a sociological basis. Probation is successful only insofar as the right persons are chosen to receive its benefits. Who are the right persons, of course, depends upon a thorough investigation of each case. It is a sad commentary on the Wisconsin law of probation to note that this progressive state has so far failed to recognize this axiomatic principle, although actually many of the judges throughout the state are insisting on pre-sentence investigation.

(2) *Chapter 57 should be amended to give the courts power to place the defendant on probation for an indefinite period.*

Dr. Gillin is of the opinion that the term of probation should not be fixed in advance, because probation should be continued until the court and the probation officer are convinced that the probationer shall conduct himself well or else the probation is hopeless.¹⁰¹ The present Wisconsin act tends to be too inelastic. A felon may not be put on probation for a period of time exceeding the maximum term for which he might have been imprisoned and for a term not less than the minimum term for which he might have been incarcerated. In case of misdemeanants his probation

⁹⁹ Gillin, J. L., *Criminology and Penology*, New York, 1926, p. 831.

¹⁰⁰ See A Model Probation Act in Hiller, Francis H., *Adult Probation Laws in the United States*, N. Y., 1933, p. 49.

¹⁰¹ Gillin, John L., *Criminology and Penology*, New York, 1927, p. 832.

term may not exceed the maximum sentence, which is usually six months. It was seen that under the Model Act the period of probation is determined by the court and may be continued or extended by the court without any definite time limitation. Probation work should be individualized and each case determined on its own merits. This calls for a law providing for elastic terms to be fixed by the court. From a sociological standpoint, no definite term of probation should be fixed in advance. When the court is actually satisfied that a probationer is conducting himself as a normal individual and will be able to conduct himself in the future, it will discharge him from probation. In some cases of felonies it would be exceedingly desirable to have the defendant on probation for a longer period than three years, and the case may demand it. In others, the court might well discharge the felon probationer before the end of the first year, which at the present time it is not empowered to do.

(3) *Section 57.04 of the Statutes should be amended to extend the permissible period of probation for any period of time up to two years.*

This suggested amendment is offered only in the event that suggestion (2) is rejected. As heretofore stated, the usual penalty for a violation of law denominated a misdemeanor is a maximum of a \$100 fine or six months in jail or both. Therefore, for misdemeanants the term of probation usually does not exceed six months. Obviously, no effective plan of probation can operate successfully in such a short span of time. An amendment of the law as suggested would permit the State Board of Control to supervise more cases involving misdemeanors than it does at the present time. It is because of the short period of time designated in probation cases concerning misdemeanants that the State Board of Control has been so reluctant in traversing this field of probation.¹⁰² The result has been the localizing of all misdemeanor probation work in the local courts and not the State Board of Control. The two year period would be merely the maximum period, and a court in individual cases could fix a short time if it saw fit so to do.

(4) *Section 57.04 of the Statutes should be clarified to the extent of determining just where the administrative power lies.*

The Director of Probation and Parole thinks there is some

¹⁰² *Twenty-second Biennial Report of the State Board of Control of Wisconsin, Madison, Wis., 1934, pp. 91, 92.*

doubt on this point at the present time.¹⁰³ By way of illustration, A, a person convicted of a misdemeanor, is placed on probation to the State Board of Control. If he were a felon probationer, there is no doubt but that from that time on he is under the exclusive jurisdiction of the board and subject to its rules and regulations. But being a misdemeanant, the section may be interpreted in two ways: it may mean that the court continues to act as the administrative agency; or it may mean that the court having elected to have the person put under the charge of the board, loses jurisdiction as to administration from that time on. Since this ambiguity exists, it should be removed. However, as a member of the Wisconsin bar, it is my opinion that the court in such a situation always remains the administrative agency.

(5) *Section 57.03 of the Statutes should be amended to provide that in the event a person under the Board has violated the terms of his probation, the State Board of Control may appoint an Examiner to determine whether such person's probation should be revoked, giving the Examiner the right to hold hearings anywhere in the state, with a right of appeal to the State Board of Control from the findings of such Examiner.*

The present section, of course, makes it mandatory that before the board can revoke probation, it must conduct a *full investigation* and give the defendant a *personal hearing*. As early as 1934 L. F. Murphy, Chief Probation Officer of Wisconsin, made the following comment regarding this matter:

"Obviously this is impracticable from an administrative standpoint because the State Board of Control cannot be expected to spend the necessary large amount of time required to make these hearings, and the expense of transporting every person accused of violation and the necessary witnesses to Madison would be too great to receive any consideration. The right of a defendant to a hearing cannot be denied because even with the care taken by probation officers an error in fact or in judgment may creep in. No solution of the problem is presented at this time, but it is hoped that some legislation may be developed which will clear up this matter."¹⁰⁴

The plan suggested is derived from the procedure followed in compensation cases. But it would seem to be very practical and

¹⁰³ *Twenty-second Biennial Report of the State Board of Control of Wisconsin, Madison, Wis., 1934, p. 92.*

¹⁰⁴ *Twenty-second Biennial Report of the State Board of Control of Wisconsin, Madison, Wis., 1934, p. 92.*

not costly and at the same time assure the defendant of a fair hearing, with a right to appeal to the board itself.

(6) *A new section should be added to Chapter 57 to provide that all case records and confidential reports given to probation officers shall be deemed privileged material and not subject to be examined as a public record.*

It has been suggested by the State Probation Department that much of the material in their files is very personal and of a confidential nature.¹⁰⁵ An effective case method depends upon thorough investigation. People from whom information is derived should be free to speak and will do so if they know that the information they give is in the nature of a privileged communication. A draft of such privileged communication statute is contained in Section 9 of the Model Adult Probation Act:

"All information and data obtained in the discharge of official duty by any probation officer shall be privileged information, shall not be receivable as evidence in any court, and shall not be disclosed directly or indirectly to anyone other than to the judge or to others entitled under this act to receive report, unless and until otherwise ordered by such judge."¹⁰⁶

(7) *Chapter 57 should be revised so that all courts in the state having criminal jurisdiction shall have the powers granted by the act; furthermore, violations of municipal ordinances should be included within the scope of the act.*

The present distinction between courts of record and courts not of record is arbitrary and without foundation. Many of the criminals in the state gain their first experience in a justice court, which is not a court of record. The justice may imprison the person in the county jail, in the usual cases for a period not exceeding six months. The county jail has been termed the breeding place of crime. Yet the justice is powerless to place the convicted person on probation for the reason that the present act does not empower him so to do. If a court of record is authorized to use the procedure for the same type of crime, there is no inherent reason why this same privilege should not be extended to those courts not of record.

Then, too, many of the municipal ordinances at the present time provide for certain penalties for violations. In many instances

¹⁰⁵ *Twenty-third Biennial Report of the State Board of Control of Wisconsin, Madison, Wis., 1936, pp. 56, 57.*

¹⁰⁶ See Hiller, Francis H., *Adult Probation Laws of the United States, N. Y., 1933, pp. 52, 53.*

ordinances have reached the dignity of state laws in defining crimes. The city of Madison has an ordinance which empowers a court to punish a person keeping a house of ill fame, by imprisoning him in the county jail for one year.¹⁰⁷ The state law also provides punishment for such a crime.¹⁰⁸ At present probation is possible for the person convicted of the statutory crime, but not for the person convicted of the municipal ordinance. A crime from the sociological standpoint, is "an act which is believed to be socially harmful by a group of people which has the power to enforce its belief."¹⁰⁹ Within the meaning of this definition a violation of a city ordinance is just as much of a crime as a violation of a state law, and probation should be available in both cases.

(8) *A careful study of the juvenile probation law should be made with a view of revising the entire sections pertaining to juvenile probation.*

The conflict between the various courts administering the juvenile law has been discussed in the statutory section. No adequate attempt has been made in Wisconsin to date to really examine the workings of the juvenile probation law. As it now stands there is practically no correlation between adult probation and juvenile probation. The probation law pertaining to juveniles was enacted thirty-seven years ago, and yet today after all these years 58 out of the 71 counties in the state are without paid probation officers for juveniles, and in many cases without even responsible volunteers.¹¹⁰ A standard juvenile court law has been recommended by the National Probation Association, and perhaps many of its features can well be considered.¹¹¹ At any rate it seems that some revision must be made in our juvenile probation laws. What remains to be done will depend on what research reveals.

The foregoing changes seem to be the major ones to be considered in the attempt to reach an ideal probation system in Wisconsin. Perhaps in the long process of legislative evolution a time will come when some of these fundamental principles will be enacted into law in this state.

¹⁰⁷ *The General Ordinances of the City of Madison*, Madison, Wis., 1931, Section 26.08, p. 486.

¹⁰⁸ *Wisconsin Statutes of 1937*, Section 351.35.

¹⁰⁹ Gillin, J. L., *Criminology and Penology*, N. Y., 1926, p. 13.

¹¹⁰ *Twenty-third Biennial Report of the State Board of Control of Wisconsin*, Madison, Wis., 1934, p. 55.

¹¹¹ *A Standard Juvenile Court Law*, Prepared by the Committee on Standard Juvenile Court Laws of the National Probation Association, National Probation Association, N. Y., 1933.