THE INDETERMINATE-SENTENCE LAW UNCONSTITUTIONAL.[1]

It would seem that the large majority of mankind are more or less faddists as well as gregarious. Trivial fancies are adopted and pursued without thought, with irrational zeal, and are as contagious, seemingly, as fashions among women—but, unfortunately, are not within the quarantine regulations. Any fool notion can secure a following and obtain a "vogue," if it merely possesses "novelty," whether supported by reason and common sense or not—anything from Eddyism, spiritualism, psychicism, to Bolshevism. In the majority of cases, these are innocent diversions which may render one ridiculous in the eyes of sober-minded and thoughtful persons, but injuring no one other than the faddist himself. But when an important matter, not thoroughly understood, is thus taken up and urged with more zeal than sense, great harm may follow in the footsteps of the fad. Particularly is this true where well-meaning but insufficiently informed idealists or humanitarians who, like Giambattista Vico in philosophy, start out with an undemonstrated and undemonstrable assumption, and commence to tinker with the laws of the country.

Just this unfortunate thing has transpired with reference to our penal laws and polity in many—probably a majority—of the states in the Union. Political science—as contradistinguished from mere "politics," which knows no law but self-interest, and has no principle but party, right or wrong—and law-making are things of the deepest concern and demand profound thought and comprehensive understanding to attain the accomplishment of the desired results and lasting benefits. Men with fine-spun theories

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not squaring with well-known facts and conditions, and with half-baked ideas not founded upon observation, investigation, and recognized data, have no proper place in the legislature, or in influencing legislation that may promote and further interests of a fad.

It is one of the fundamental maxims of jurisprudence that all laws shall tend to promote the general welfare of the state or nation, and shall not be in the interest of a single individual or a class of individuals—criminals or otherwise—to the detriment of the rest of the people of the state or nation; that these laws shall be just, permanent, and certain; that the certainty of a law is next in importance to its justice. By "certainty" of a law is meant that it be well-defined, known, and unchangeable, and that its penalties shall fall with unerring certainty upon such as wilfully infract the law and deserve them. All penal statutes must have a sanction attached thereto—a penalty imposed for the violation thereof; otherwise they are not laws at all, but merely recommendations or suggestions carrying with them no obligation to accept the suggestion or follow the recommendation. To be effective and accomplish the end sought to be attained in the enactment of such laws, the penalty must be exacted for each infraction thereof; otherwise the law is not enforced, and if not enforced, it is better off of the statute book. This penalty must be fixed and certain, provided by the legislature itself with such definiteness that all may know just what that penalty is and all the penalty that may follow disobedience of the law; and the penalty provided must be visited with certain and swift infliction; otherwise the aim and end to be attained by the law is not reached any more than if no penalty was attached. The aim and end to be attained by all penal laws is to provide wholesome rules of conduct for the general welfare of the entire community, state, or nation. The object of the penalty attached is to secure obedience to the commands and requirements of the law. If the pen-

alty is not uniformly exacted, the law is not properly enforced, and the aim and end to be attained by the law are frustrated.

The object and end to be attained by the enforcement of the sanctions to penal laws, and inflicting the punishment provided, have been variously characterized by writers and philosophers; but all agree that the ultimate purpose is the general good and welfare secured through obedience to and respect for the laws. The only rational conception is the ancient view, *punitur quia peccatum est*—crime as crime must be punished, for the reason that mankind are at present not sufficiently civilized to dispense with the check which fear puts upon them.[2] It is not the purpose at this time, and it is not required in this place, to discuss the various theories advanced regarding the ground upon which the state inflicts the penalties attached to a violation of its criminal laws; whether it is to vindicate the broken law, redress a grievance, deter others from disobeying and breaking the laws, or to reform the offender; that has already been sufficiently done elsewhere.[3]

The clerical-philosophical theory—if it may with propriety be so denominated—which is at the present time sweeping the country, denies, seemingly, all the grounds upon which it has heretofore been supposed the state inflicted punishment for violation of its wholesome penal laws, in that it puts entirely aside the interest of the general public and the vindication of the law that has been violated, concentrating attention entirely upon the transgressor and his welfare, regardless of his injury to the community or to peaceful and law-abiding members thereof; the altruistic purpose announced being the "reformation" of the convict, not to redress the wrong committed by him, or to vindicate the law; to mitigate the punishment that would otherwise be inflicted in punishment for his

[2] Spencer's Principles of Ethics, vol. 2, sec. 420.
[3] See Kerr's Wharton on Criminal Law, 11th ed., secs. 1-13.

wrong-doing; to make the punishment fit the criminal, rather than the crime, in the vain hope thereby to put before the prisoner "great incentive to well-doing in order that his will to do well may be strengthened and confirmed by the habit of well-doing; instead of trying to break the will of the offender and make him submissive, to strengthen his will to do right and lessen his temptation to do wrong."[4] That is to say, the sole object of punishment, under the prevailing fad, is the reformation of the erring and returning the offender to the peaceful paths of a law-abiding citizen, on the theory that no healthy-minded person commits crime, ergo the criminal is "mentally sick" and is to be mentally cured, not physically punished. This attitude is assumed and contention made in utter ignorance of or in total disregard of the nature and history of man in the past and in the present. Such a theory might find justification in Heaven, but not in sin-cursed earth. It must always be borne in mind, in dealing with these matters, that we are not civilized and Christian in truth, but in name only. There are many fully civilized and law-abiding, and also many sterling Christian men and women in the land; but there is also a large, far too large, class among us who are neither "civilized" nor Christian—the predatory class and the "underworld," irreclaimable criminals, who must be dealt with as such to keep them within the bounds of the law; whose punishment for their infractions of the law must be full, swift, and certain.

The pseudo-philosophy upon which the above contention is made, and upon which the prevailing fad is founded, runs counter to the every-day experiences of all men, the precepts that have been inculcated from childhood up to the present time being false and not true. Through the churches and church teachings we all continually hear asserted the ingrained wickedness of men; every day's newspaper exposes various dishonesties and criminalities, bubble

[4] In re Lee, 177 Cal. 690, 171 Pac. 958.

schemes, swindling syndicates, and personal felonies; every court calendar is crowded with criminal causes waiting to be disposed of, and the jails are filled with those who have broken the criminal laws of the state.[5] The firmly established and unquestioned facts of recidivation and recidivists are utterly ignored, although all intelligent persons know that the evils of a relapse and fall again into crime, and the habitual criminal we are bound to have in our midst for all time, to a greater or less extent, and it is the part of wisdom and justice to the peaceful and law-abiding citizens to face the facts as they are, and treat the evil in a manner which will tend to reduce it to a minimum, and not in a manner to encourage and foster the malady. The recidivist is now universally known to exist in all civilized countries as one who has adopted wrong-doing and law-breaking as a profession. His persistency is ceaseless, his reformation hopeless, and the evil of his presence is inextinguishable by the ordinary methods of combating crime. Our entire country is overrun by these undesirable and predatory characters, and their number and boldness seem to be increasing daily. Penal justice, as now sought to be administered, is unavailing, and is little better than an automatic machine which draws in a vast number within its wheels and casts them out again practically unchanged in character—and always inadequately punished —to qualify again for the ineffective treatment. It is high time that there was a harking back by the courts to the fundamental law of the land, and an adherence to the constitution, in letter and in spirit.

Another objection to the basis of the theory or concept upon which the fad is founded is the fact that it makes all men mere automatons, governed in their every action by their environment and surroundings, forced into their every act and deed by that environment and those surroundings in a mechanical way, much as a steam engine

[5] See Spencer's Principles of Ethics, vol. 2, sec. 470.

is forced ahead when steam is up and the throttle opened —when all thoughtful people know that this is not the case. It is true that associations and environment have a potent influence upon the character and conduct of men; but these, in and of themselves, do not make him criminal and lead to criminal acts. Without entering upon a discussion of the much-controverted question of the "freedom of the will," it is sufficient to suggest that all men—except such as are irresponsible through lunacy—*have the will to act,* and that it is this will to act in a particular matter that leads to the act being done. As long as a man can will to act, he is responsible for the consequence of that act. Man is not an automaton, acting in a mechanical manner like a steam engine; there must be formulated in the brain a will to act, otherwise there will be no action; the brain must formulate the order to act, which, communicated to the muscle cells, causes them to respond, resulting in the action indicated.[6]

The indeterminate-sentence law has been held to be unconstitutional in some well-reasoned court decisions,[7] and to be constitutional in others.[8] The processes in the reasoning by which the conclusion of the constitutionality is

[6] See learned discussion of this proposition in Carpenter's Mental Psychology, and especially in the preface to the fourth edition.

[7] See, among other cases, People v. Cummings, 88 Mich. 256, 14 L. R. A. 285; In re Lorkowski, 94 Mo. App. 634, 68 S. W. 610; State ex rel. Attorney-General v. Peters, 43 Ohio St. 329, 4 N. E. 81; In re Ridley, 3 Okla. Cr. Rep. 356, 26 L. R. A. (N. S.) 110, 106 Pac. 549; In re Conditional Discharge of Convicts, 73 Vt. 414, 56 L. R. A. 658, 51 Atl. 10.

[8] See In re Lee, 177 Cal. 690, 171 Pac. 958; People v. Lee, 36 Cal. App. 323, 334, 172 Pac. 158 (assumed, not decided); People v. Razo, — Cal. App.—, 184 Pac. 881; People v. Joyce, 246 Ill. 124, 92 N. E. 607; Miller v. State, 149 Ind. 607, 40 L. R. A. 169, 49 N. E. 894; State v. Duff, 144 Iowa 142, 122 N. W. 829; Wilson v. Com., 141 Ky. 341, 132 S. W. 557; In re Marlow, 75 N. J. L. 400, 68 Atl. 171; Com. ex rel. Bates v. McKenty, 52 Pa. Super. Ct. Rep. 332, followed in Com. v. Kalck, 239 Pa. St. 533, 537, 87 Atl. 61.

"If the constitutionality of the statutes is a question properly presented to the court for determination, the court's duty is plain. But, until the question is so raised, we think the statute should be obeyed. We need say no more about the constitutional aspect of the case."—State v. Perkins, 143 Iowa 55, 20 Ann. Cas. 1217, 21 L. R. A. (N. S.) 931, 120 N. W. 62.

arrived at is neither logical nor consistent within itself, the very language used—and all these decisions follow one formula as to language—of itself shows that an erroneous conclusion is reached. The fact that some courts have held the indeterminate-sentence law constitutional, does not make it constitutional. A court decision is not the law, it is merely evidence of an application of the law—good, bad, or indifferent. This doctrine was first announced by Mr. Justice Story, at the January term of the Supreme Court of the United States, 1842, in the case of Swift vs. Tyson,[9] and it has ever since been followed by the courts.[10] This fundamental principle is in no way affected by the fact that, as has been held, the court decisions of the highest appellate court in the state are as obligatory as the statutes of the state.[11] If the statute of the state is violative of the constitution it is without obligatory force; and the same is true of a decision of the court relative to that statute, or to any other matter.

There is more truth than poetry in our mid-western poetess' lines when she declares that

> No question is ever settled
> Until it is settled right;

and no decision of a court can stand which does not follow the canons of construction, apply the fundamental laws of the English language, give to plain English words their unquestioned force and meaning, and conform to the genius of the fundamental law establishing our institutions. These things cannot be overcome by a mere court decision. The genius of our institutions is fixed by the fundamental law, which is superior to all courts and by which the courts

[9] 41 U. S. (1 Cr.) 1, 19, 10 L. ed. 856, 871.

[10] See, among other cases, Coleman v. Newby, 7 Kan. 92; Lycoming Fire Ins. Co. v. Wright, 60 Vt. 523, 12 Atl. 108; Phelps v. Steamship City of Panama, 1 Wash. Tr. 523; Town of Weston v. Ralston, 48 W. Va. 189, 36 S. E. 454; Ex parte Waddell, 1 N. Y. Leg. Obs. 53, Fed. Cas. No. 17,027.

[11] In re Barry, 42 Fed. 113, 132, affirmed in Barry v. Morcein, 46 U. S. (5 How.) 103, 119, 120, 23 L. ed. 70, 77.

themselves exist and from which they derive their powers, and which court decisions cannot change. The right to change the fundamental law upon which our state government rests is reserved to the people themselves, and the people, only, can accomplish such a change. Neither the legislative department, by any law they may enact, nor the judicial department, by any decision they may make, can effect a change in the fundamental law of the state to conform it to a prevailing fad, sentimentalism, pseudo-philosophy, or false ethics.

The principal constitutional grounds of objection to the indeterminate-sentence law are:

1. That it is a delegation of the duty and power of the legislature to prescribe the punishment for the violation of the penal laws of the state.

2. That it is an invasion of the province of the judicial department to determine and fix, under the provisions of the legislature, the term of imprisonment to which a convicted person shall be subjected.

3. That the act of the prison board in determining what period, if any, the prisoner shall serve beyond the minimum term, constitutes in law and in fact a pardon, whatever the jugglery of words, and constitutes a power and prerogative which cannot be conferred upon that board.

4. That the section violates the inhibition of the constitution in that it seeks to take from the governor powers and prerogatives conferred by the constitution upon and distributed to him, and to confer that power and prerogative upon a prison board, a body unknown to the constitution.

5. That the section is against sound public policy. There are those who maintain, and not without plausibility, that the indeterminate-sentence law and the judicial-parole law, as administered, are largely responsible for the unprecedented crime-wave sweeping over the country.

The tripartite genius of our institutions is firmly estab-

lished by the fundamental law of the land, the federal and the state constitutions. The designation and distribution of duties, functions, powers and prerogatives made in and by the constitution cannot be changed or modified except by act of the people themselves in the manner prescribed in the constitution. One department of the tripartite government cannot be infringed upon or invaded by either of the other departments of government or by the officers or persons or bodies exercising the powers and discharging the functions of such other departments of government. The duties, functions, powers and prerogatives designated and distributed to one department cannot be exercised and discharged, or abridged and infringed, by another or other departments of government. And any statute passed by the legislative department which seeks to transfer any of the duties, functions, powers or prerogatives appertaining to one department under the constitution to another department of government or to the officers, persons or bodies of another department of the government, or to a body of persons unknown to the constitution, is plainly unconstitutional. For these reasons the indeterminate-sentence law is absolutely and unqualifiedly unconstitutional on several grounds. The fundamental principle involved, from another angle, and dealing with "judicial paroles," has been fully discussed elsewhere.[12]

The language of the fundamental law, the particular constitution involved, in designating and distributing the various sovereign powers of government, and in specifying the respective duties, functions, powers and prerogatives of the various departments of the state government is plain, straightforward, and not susceptible of doubt or confusion in the mind of any person trained to legal analysis. The individual duties, functions, powers and prerogatives of each individual department of government are clearly

[12] The Constitutional Review, vol. 5, p. 132, July, 1921; The Lawyer and Banker, vol. XIV, p. 320, Sept.-Oct., 1921.

enumerated and plainly designated as distributed to the respective and appropriate departments. Any statute of the legislative department of government interfering in any manner with the constitutional distribution to the different departments of government of their respective duties, functions, powers and prerogatives, is unconstitutional. Any decision of the judicial department which, by forced construction and violation of the canons of interpretation, disregard of the fundamental laws of the English language, distortion of the plain meaning of well-known English words or disregarding their plain import, seeks to render valid and binding such unconstitutional statute, is not sound law on fundamental principle and cannot endure—or constitutional government must cease to endure. It is not for judges to set up their ideas and opinions, or the ideas and opinions of others not charged by the people with the function of making and administering the laws, as to what is the better theory of government and the better policy in practice for the benefit of the people of the state, or of any class of them, and to seek to enforce those ideas and opinions in contravention of the fundamental law by court decision. There is manifest at this time too great a disposition to forsake the old and the proven for the new and unproven; to break away from the wholesome ideals and splendid traditions of our country and institutions; ignore the fundamental law, substitute individual opinion and judgment for the organic law of the land, or in contravention of the organic law—e. g. as when the Supreme Court of the United States, by "construction," read into the Anti-Trust Act the word "reasonable," which not only was not there corporeally or in spirit, but which Congress had then recently on two occasions, by positive act, refused to incorporate into that statute.[13]

The courts holding the indeterminate-sentence law to be constitutional do so on the express ground that any judg-

[13] See United States v. American Tobacco Co., 221 U. S. 106, 177, 55 L. ed. 663, 693, 31 Sup. Ct. Rep. 632.

ment of sentence under such law is, in legal effect, a sentence to imprisonment for the maximum term provided by the law, and not for a minimum or any intermediate term; declaring that it is on this theory, only, that such sentences can be held to be certain and definite, and therefore not void, for otherwise the indeterminate-sentence law would be unconstitutional because of the uncertainty and indefiniteness of the sentence thereunder.[14] It being conceded that the term is certain and definite for the maximum term, whether that be the maximum term named by the judge in the judgment and sentence or that fixed by the statute as a punishment for the offense committed, and being fixed and determined, it follows as night follows day, that the prisoner must serve that term in full, with such credits as he is entitled to for good behavior only; and can be discharged or paroled by act of the governor only; any statute attempting to confer that power upon another person or body is plainly unconstitutional under a proper and intelligent construction of the provisions of the constitution, where those provisions are administered as written and the opinion of the individual is not set up against the fundamental law as to what the provision should be. The decisions do not square with legal requirements and sound principle, and many of them are self-contradictory in terms. The prison directors, or board of parole, or other body provided by statute, are not given the power of pardon, and cannot be given the power of pardon, by the in-

[14] In re Lee, 177 Cal. 690, 172 Pac. 958; People ex rel. Bradley v. Illinois State Reformatory, 148 Ill. 413, 32 L. R. A. 139, 36 N. E. 76; Miller v. State, 149 Ind. 607, 40 L. R. A. 109, 49 N. E. 894; State v. Perkins, 143 Iowa 55, 20 Ann. Cas. 1217, 21 L. R. A. (N. S.) 931, 120 N. W. 62; State v. Page, 60 Kan. 667, 57 Pac. 514; State v. Tyree, 70 Kan. 203, 3 Ann. Cas. 1020, 78 Pac. 525; Com. v. Brown, 167 Mass. 144, 45 N. E. 1; Oliver v. Oliver, 169 Mass. 592, 48 N. E. 843; Murphy v. Co., 172 Mass. 264, 70 Am. St. Rep. 266, 43 L. R. A. 154, 52 N. E. 505; State ex rel. Attorney-General v. Peters, 43 Ohio St. 629, 4 N. E. 81; Com. v. Klack, 239 Pa. St. 533, 542, 87 Atl. 61; Woods v. State, 130 Tenn. 100, L R. A. 1915F, 531, 169 S. W. 558; In re Conditional Discharge of Convicts, 73 Vt. 414, 56 L. R. A. 658, 51 Atl. 10.

determinate-sentence law;[15] the utmost that they can do, or can be constitutionally authorized to do, is to recommend the prisoner to the governor for pardon.[16]

The contention is made on behalf of the indeterminate-sentence law that it does not make a delegation of legislative or judicial power to the board of prison directors, or to another body designated as the particular board or body constituted under the statute to carry its provisions into effect. It is inferentially admitted that if there were such a delegation the law would be unconstitutional. It is the theory of those who seek to uphold the constitutionality of the law that, in the language of the California supreme court—which follows the other cases seeking to maintain the law very closely, even in phraseology—"the actual carrying out of the sentence and the application of the same are *administrative in character,* and properly exercised by an administrative body."[17] The supreme court of Tennessee says that "the powers conferred on the board of prison commissioners is not judicial in its nature, but only '*administrative.*'"[18]

The phraseology and reasoning of the courts are not adequate to the conclusion arrived at upholding the constitutionality of the statute under consideration. The admissions made in the opinions so holding, in and of themselves, shatter the judicial argument and overturn the conclusion announced. Among these admissions and concessions are (1) that an indeterminate sentence is "certain and definite for the maximum term" of imprisonment pro-

[15] "No power to pardon is given by the indeterminate-sentence law to the board of parole."—State v. Perkins, 143 Iowa 55, Ann. Cas. 1217, 21 L. R. A. (N. S.) 931, 120 N. W. 62.

[16] Woods v. State, 130 Tenn. 100, 113 L. R. A. 1915F, 531, 169 S. W. 558. See Murphy v. Com., 172 Mass. 264, 267, 70 Am. St. Rep. 266, 269, 43 L. R. A. 154, 156, 52 N. E. 505.

[17] In re Lee, 177 Cal. 690, 171 Pac. 598.

[18] Woods v. State, 130 Tenn. 100, L. R. A. 1915F, 531, 538, 169 S. W. 558.

vided by law or by the judgment of sentence by the court, the sole ground upon which such sentences can be upheld at all, and (2) that the action of the prison board in paroling or discharging convicts is "*administrative.*" By any permissible legal terminology the words "administerial" and "*administrative*" relate to the executive department of the government alone, and include the doing of an act in the management of the affairs of the government and the enforcement of the laws of the state; and for that reason the legislature cannot divorce the performance of the "administrative act" from the executive department of government and delegate it to one of the other departments of government, or to a mere ministerial body, under one or another of the departments of government. The constitution specifically inhibits this power to the legislative department, and the constitution is to be revered and strictly adhered to—if our institutions and freedom are to endure—regardless of what impractical idealists or mere theorists may regard as a more desirable thing or provision for the general welfare of the public, and especially for the criminal and predatory class which mankind and civilization have always had, and from the very nature and constitution of man—of some men——always will have as a thorn and pestilence in the midst of society.

Public officers, and official acts and duties, are of four kinds or classes, to-wit: (1) Executive; (2) legislative; (3) judicial, and (4) ministerial. The constitutions of the states make provision for the first three classes of officers and official acts; the last class of officers, official acts and duties may appertain to one or another of the tripartite departments formed by the constitution, the duties and functions, powers and prerogatives of each defined and distributed to the particular and appropriate department. It is not necessary or desirable to enter upon a discussion of these matters in this place, further than to point out that the limitations placed upon the legislature prohibit it from

in any way infringing upon or invading either of the other departments of government, and that any statute which, giving to its words and the ordinary and manifest meaning—construed according to the well-established canons of interpretation—does in any manner and to any extent invade either of the other departments of government, and in any way and to any extent impairs the duties and functions, powers and prerogatives of that department, is manifestly unconstitutional, and no decision of a court can make it otherwise. The derivation, established use, and common meaning, in legal terminology, of "administrative act" show unmistakably that it is an act appertaining to the duties and functions, powers and prerogatives of the executive department of government, upon which the legislative body is inhibited to lay violent hands and transfer it to another department of government, or to a body of persons unknown to the constitution; this fundamental principle is recognized in all the decisions, aside from some of the decisions interpreting the indeterminate-sentence law; others of these decisions recognize and enforce this fundamental principle.[19]

It is not questioned that a ministerial duty may be created by the legislature and delegated to a person or body, where the act creating such duty is full and complete in every detail, leaving nothing to the judgment or discretion of the person, body or board to whom or which delegated; but the same is not true of those duties and acts in which there is a judicial discretion, or personal judgment, to be exercised by the person, body or board to whom the delegation is made. The sovereign power of the legislature to define crimes and affix penalties for their commission is not denied and will be further alluded to presently. Where the legislature affixes conditions to the penalties

[19] As in People v. Cummings, 88 Mich. 249, 14 L. R. A. 285, 50 N. W. 310; Ex parte Hart, 29 N. D., 38 L. R. A. 1915C, 149 N. W. 568; In re Conditional Discharge of Convicts, 73 Vt. 414, 56 L. R. A. 658, 51 Atl. 10.

provided, under certain circumstances and with the proper restrictions, the duty and power relating to the matter of carrying out those conditions may be delegated to a prison board or other body, in order to carry the law into effect in those cases, and in those cases only, in which the law is so complete, explicit and perfect as to constitute the act of carrying it into effect ministerial merely and not administrative in effect or in fact; there must be plain and unmistakable duty to be performed under the plain direction of the law itself, in obedience to the provisions of which the act is done, without regard to, or the exercise of, discretion or judgment upon the propriety of the act to be done; if there is discretion or judgment to be exercised, the act is (1) administrative in its character and appertains to the executive department, or (2) judicial in its nature and appertains to the judicial department; in either of which cases the legislature is inhibited by the constitution from delegating to another the act to be done; such delegation can be legally and properly made in those cases, only, in which the act is a governmental act relating to the enforcement of the law.

A ministerial act, which is a governmental act relating to the enforcement of the law, not judicial or discretionary and not involving personal judgment,[20] and not quasi-judicial in character,[21] may properly be created and delegated by the legislature to a person, or to a body of persons unknown to the constitution, attached to or affiliated with either of the departments of government, where the law is complete and full and explicit in its provisions, leaving nothing to personal discretion or requiring the exercise of personal judgment, because a ministerial act is merely one which is performed by a person acting under the direction and authority of a superior or the express direction of the law, in a given state of facts, in a manner pre-

[20] Ham v. Los Angeles County, Cal. App., 189 Pac. 462, 468.
[21] State ex rel. Isaacson v. Parker, 40 S. D. 102, 166 N. W. 309.

scribed, in obedience to a mandate of legal authority, without regard to or the exercise of individual discretion or judgment upon or with regard to the propriety of the act to be or being done.[22] Anything requiring the exercise of personal discretion or judgment is not a ministerial act, but is either administrative or judicial in its character, appertains either to the executive or judicial department and for that reason cannot be thus delegated by the legislative department. The confusion of "administrative" and "ministerial" by some courts is unwarranted by the nature and functions of the two classes of positions of offices, and does violence to accepted usage of the words and a proper legal terminology. This confusion of ideas and improper employment of terminology is found among those cases which seek to uphold the constitutionality of the indeterminate-sentence law.[23]

It is undeniably true, as has been said, that "the performance of a purely ministerial duty may involve something more than doing a prescribed thing in a prescribed way. Knowledge of the correlation of facts, the exercise of reason, the application of established principles and rules, may be required before the necessity for the performance of a ministerial duty is indicated, before the fact

[22] See, among other cases, Ham v. City of Los Angeles, — Cal. App. —, 189 Pac. 462; Ex parte Batesville & N. Co., 39 Ark. 82, 85; American Casualty & Security Co. v. Tyler, 60 Conn. 448, 25 Am. St. Rep. 337, 22 Atl. 494; State v. Staub, 61 Conn. 553, 23 Atl. 924; Flournoy v. City of Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; Pennington v. Streight, 54 Ind. 376; First National Bank v. Hayes, 186 Iowa 892, 171 N. W. 715; Lemoine v. Ducote, 45 La. Ann. 857, 12 So. 939; State v. Clair, 86 Me. 522, 30 Atl. 7; State ex rel. North & S. R. Co. v. Meier, 143 Mo. App. 439, 45 S. W. 306; State ex rel. Perea v. Board of Commissioners, 25 N. M. 338, 182 Pac. 865; In re Harris, 12 Misc. 223, 33 N. Y. Supp. 1106, affirmed 90 Hun 525, reversed on another point in Harris v. Land Commissioners, 148 N. Y. 582, 43 N. E. 987; State v. Nash, 66 Ohio St. 612, 64 N. E. 558; In re Courthouse, 58 Okla. 683, 161 Pac. 200; State ex rel. Isaacson v. Parker, 40 S. D. 102, 166 N. W. 309; Marcum v. Lincoln, Mingo & Wayne counties, 42 W. Va. 263, 36 L. R. A. 296, 26 S. E. 281.

[23] See, among other cases, In re Lee, 177 Cal. 690, 171 Pac. 958; Jackson v. State ex rel. Majors, 57 Neb. 187, 42 L. R. A. 792, 77 N. W. 662; State v. Laechner, 65 Neb. 814, 59 L. R. A. 915, 91 N. W. 874, and Woods v. State, 130 Tenn., 100 L. R. A. 1915F, 531, 169 S. W. 558.

upon the existence of which the duty arises can be said to be established";[24] but in such cases the law itself must contain all the provisions and directions out of which that "something more" arises; the foundation for the "knowledge of the correlation of facts," the basis for the "exercise of reason" and the "application of established principles and rules." That is to say, a duty is ministerial in those cases only in which the law exacting the discharge of the duty prescribes and defines the time, mode and occasion of its performance, with such certainty that nothing remains for judgment or discretion; where such discretion and judgment enter into the act, it is judicial.[25] Where a duty imposed or a power delegated is one lying in the discretion or judgment of an officer other than a judge, it is a quasi-judicial and not a ministerial duty; and when such officer is charged with the duty of looking into and acting upon facts not in a way in which the law specifically directs, but after a discretion in its nature judicial, as is the case under the indeterminate-sentence statutes, the function is a quasi-judicial function. An act is judicial when it requires the exercise of judgment or discretion by one or more persons, body or board, when acting as public officers in an official capacity, in a manner which seems to them just and equitable, or for the general public welfare—as is the case under the indeterminate-sentence statutes.[26] This being the case the act can in no sense be termed ministerial, and a law conferring the right, power or function is not within the protection as to constitutionality of laws conferring purely ministerial duties and func-

[24] Ostrander, C. J., in Scott v. Vaughan, Secretary of State, 202 Mich. 629, 168 N. W. 709, in relation to ministerial duty of secretary of state to file petition for amendment of state constitution.

[25] Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Gulnav v. Bergen County, 74 N. J. L. 543, 122 Am. St. Rep. 405, 64 Atl. 998.

As to line of distinction between judicial and ministerial functions, see Merlette v. State, 100 Ala. 42, 14 So. 562.

[26] See Appeal of Malmo, 72 Conn. 1, 43 Atl. 485; State ex rel. Board of Liquidation v. Briede, 117 La. 183, 41 So. 487; People v. Board of Supervisors, 35 Barb. (N. Y.) 408; In re Courthouse, 58 Okla. 683, 161 Pac. 200.

tions; hence the indeterminate-sentence statutes cannot be upheld on this ground.

Under the California indeterminate-sentence law,[27] the board of prison directors is empowered to make laws and regulations touching and controlling the issuance of paroles and the granting of dismissals, supplementary to the legislative act, and in aid of and to enable them to carry out the provisions of the act itself. It is submitted that this is the delegation of the sovereign powers and prerogatives of the legislature. To be valid the law should be complete and definite, containing all the needful directions and regulations for its applications by the state prison board, and failing in this it should, for that reason alone, be held to be unconstitutional and void.[28]

Conditions attached by the legislature to the penalties prescribed for the infraction of penal laws, being admittedly within the power and prerogative of the legislative department, do not in any way militate against the force of the argument against the constitutionality of the indeterminate-sentence law, made upon other grounds. The courts have said that "it is undoubtedly true that the sole power to provide for the punishment of offenders belongs to the legislature. It alone has power to define offenses and affix punishments. Its authority in these respects is supreme. Courts are empowered only to ascertain whether an offense has been committed, and, if so, to assess punishment, within the terms of the law, for its commission;[29] that "it cannot be doubted that the legislature, in virtue of its exclusive and sovereign authority over such matters, may affix conditions to the punishment it ordains, and, among other things, may set a limit to its duration, terminable upon conditions. To these conditions the courts, in assigning punishment, must conform. Into every sen-

[27] Kerr's Cyc. Cal. Pen. Code, 2d ed., vol. 2, sec. 1168, subdivision 5e.
[28] See discussion, treating of delegation of legislative power from another angle, 12 Am. L. Reg., N. S. 129-143.
[29] State v. Page, 60 Kan. 667, 57 Pac. 514.

tence or conviction the terms and conditions, which beforehand the legislature had prescribed, enter as much as though they were written into and made a formal part of the record of sentence.''[30]

These general propositions of fundamental law regarding the sovereign power of the legislature to affix penalties to crimes defined and denounced, will be questioned by none; neither will it be questioned that the legislature may also affix conditions to the punishments prescribed which will lessen the term or ameliorate the punishment. But these ''conditions'' must be positive quantities ascertained and fixed by the legislature itself, and not delegated to another person or body to fix and determine. The legislature cannot confer upon another person or body of persons the exercise of the discretion which the constitution has vested in the legislature itself. The great trouble with all the indeterminate-sentence statutes is that they are shadowy and not definite; they delegate to others the discretion which the legislature should exercise in definite manner in positive law and not by way of suggestion and recommendation. The gracious power to acquit and release from the pains and penalties of a sentence pronounced, conferred by indeterminate-sentence statutes, is not ''assimilated to the pardoning power,'' as some of the cases confess,[31] it is the genuine pardoning power, which the constitution says shall be exercised by the executive alone. No amount of sophistry will relieve the situation. The indeterminate sentence is admitted on all hands to be ''certain and definite for the maximum term,'' and being such, nothing but a pardon, complete or partial, can relieve the convicted person from the whole, or any fraction thereof. Another objection to these statutes is that they put into the hands of men and boards unknown to the constitution sovereign executive

[30] State v. Page, 60 Kan. 667, 57 Pac. 514. See Miller v. State, 149 Ind. 607, 40 L. R. A. 109, 49 N. E. 894.
[31] State v. Page, 60 Kan. 667, 57 Pac. 514.

powers, and lay them open to abuse by ignorant and irresponsible persons—probably appointed to pay a "political debt," not responsible to the people; and also to abuse by corrupt and corrupting influences.

In the consideration and interpretation of the indeterminate-sentence law, the courts should bear in mind and adhere to the first two fundamental rules of interpretation, and also in determining their constitutionality. Francis Lieber, formerly a professor in the Columbia Law School, has well pointed out that "in no case of human life in which we are called upon to act, to apply rules, or to understand what others say, can we dispense with (1) common sense, and (2) good faith."[32] These fundamental first rules are especially applicable in the interpretation of statutes, because, as has been well said, "its object is to discover something that is doubtful, obscure, veiled; which, therefore, must admit of different explanations. If without common sense we may make even of strict syllogism an instrument, apparently, to prove absurdities, how much more are those two ingredients of honesty necessary in interpretation. Common sense and good faith are the leading and principal characteristics of all interpretation. The object must not be to bend, twist or shape the text until it can be forced into the mould of preconceived ideas; but simply and solely to fix upon the true sense, whatever that may be. Good faith, in interpretation, means that we conscientiously desire to arrive at the truth; that we honestly use all means to do so; and that we strictly adhere to it; when known to use, it means the shunning of subterfuges, quibbles and political shuffling; it means that we take words fairly as they were meant. If good faith be not the guiding star to direct in the construction of solemn instruments, like constitutions and statutes, no human wisdom can devise an instrument of this character that may not be interpreted so as to ef-

[32] Lieber's Political Ethics, vol. I, bk. 1, ch. 6.

fect anything but that for which it was intended.'"[33] A third fundamental principle to be constantly borne in mind by those who construe constitutions and statutes is that, in the language of Mr. Chief Justice Marshall, "The government has been emphatically termed a government of laws, and not of men."[34]

These three great and enduring principles should be applied to the interpretation of the indeterminate-sentence law, and to the determination of the constitutionality thereof. It is of no consequence what any particular judge, or any number of judges, may think regarding the character or desirability of a particular law; it is their plain duty to declare any law which does not square with the provisions of the fundamental law, giving to the words of the constitution their manifest import and force, unconstitutional, and refuse to enforce it.

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[33] Potter's Dwarris, p. 48.
[34] Marbury v. Madison, 5 U. S. (1 Cr.) 137, 163, 2 L. ed. 60, 69.