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HISTORICAL SKETCH OF THE INDETERMINATE SENTENCE AND PAROLE SYSTEM

EDWARD LINDSEY*

DEFINITION

The two systems of Indeterminate Sentence and Release on Parole not only may but necessarily must be considered together, for while there are jurisdictions where one exists without the other, or at least where the parole system is in operation but there is no indeterminate sentence, they are theoretically connected as parts of one general reformatory scheme in penal treatment and they at least tend to be so adopted and applied in practice. There is some confusion and uncertainty of terms in regard to these systems. Parole is often confused with probation and the term "indeterminate sentence" is used in more than one sense. While "parole" has been sometimes applied to the release of a convicted person on a suspended sentence without imprisonment and is so used even in some of the statutes, according to the general usage this is incorrect. Properly speaking, "parole" means the release of a person, sentenced and imprisoned for crime, for the balance of the term of his sentence, conditional on his observing certain requirements. In Europe this is known as "conditional liberation" and used to be called in England "ticket of leave." The release of a convicted person before sentence or under "suspended sentence," as it is usually called, conditioned on the performance of certain requirements during a certain period of time is, properly speaking, called "probation." In England this is termed "conditional release" and on the Continent "conditional sentence." Indeterminate sentence or indefinite sentence is sometimes used as meaning a sentence to imprisonment with no duration of time fixed. This has been advocated for some classes of criminals, but no purely indeterminate sentence in this sense has ever been put into effect. It is more generally used to mean a sentence in which a maximum limit for the duration of the imprisonment is specified, or if not expressed in the sentence, fixed by law and so implicit in the sentence even though not expressed. It is in this sense that the indeterminate sentence is in effect in the United States.

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BEGINNINGS

The hope of attaining something desired is an appeal to self-interest no less, perhaps more, efficacious than the fear of incurring something unpleasant. In other words, rewards may sometimes be of more effect than punishments. One of the first applications of this idea to prison management was the principal of commutation of sentence as a reward for good behavior. The idea was first embodied in statutory form by the legislature of New York in 1817 in an act giving the prison inspectors power to release, when he has served three-fourths of his sentence, any convict sentenced to imprisonment for not less than five years provided he could produce a certificate from the principal keeper showing that his behavior had been good and that from his net earnings there had been set aside and invested for his personal account not less than fifteen dollars per annum. This statute is said to have remained a dead letter. In 1836 an act was passed in Tennessee making it the duty of the Governor, in case the conduct of any prisoner in the state prison had been unexceptionable for a whole month, to commute the term of imprisonment of such prisoner, not to exceed two days for each and every month he should so conduct himself. In 1856 a statute in Ohio provided for a deduction of five days in each month during which any prisoner "shall not be guilty of a violation of any of the rules of the prison and shall labor with diligence and fidelity." These seem to have been entirely independent acts, but following the passage of the Ohio statute similar ones were passed as follows: In 1857, Iowa and Massachusetts; in 1860, New York and Connecticut; in 1863, Illinois; in 1864, Oregon and California; in 1865, Missouri and Nevada; in 1866, Maine; in 1867, New Hampshire, Minnesota, Kansas and Alabama; in 1868, New Jersey, Vermont and Rhode Island.¹

Another application of the idea was made by Colonel Montesinos in Spain. He applied a military organization to the prison at Valencia when appointed Governor of it in 1835. Companies were organized with prisoners for the inferior officers. They were taught trades and did all the work of the prison. A school was conducted, open to all but obligatory only to boys under twenty. By good behavior a convict could reduce the term of his sentence by one-third. In a pamphlet published in 1846 Montesinos says:

"What neither severity of punishments nor constancy in inflicting them can secure, the slightest personal interest will obtain. In different ways,

¹F. H. Wines, "Prison Reform," p. 13, Charities Publication Committee, N. Y., 1910.

therefore, during my command, I have applied this powerful stimulant; and the excellent results it has always yielded, and the powerful germs of reform which are constantly developed under its influence, have at length fully convinced me that the most inefficacious methods in the prison, the most pernicious and fatal to every chance of reform, are punishments carried the length of harshness. The maxim should be constant and of universal application in such places, not to degrade further those who come to them already degraded by their crimes. Self-respect is one of the most powerful sentiments of the human mind, since it is the most personal; and he who will not condescend, in some degree according to circumstances, to flattery of it, will never attain his object by any amount of chastisement; the effect of ill-treatment being to irritate rather than to correct and thus turn from reform instead of attracting to it. The moral object of penal establishments should be not so much to inflict punishment as to correct, to receive men idle and ill-intentioned and return them to society, if possible, honest and industrious citizens."²

Obermaier, at the Kaiserslautern prison in Bavaria, about 1830, and later at Munich, applied similar ideas with equally conspicuous success.

In the eighteenth century, in England, transportation to the colonies attained currency as a method of disposing of convicts. After the American revolution Australia took the place of the American colonies as the destination of transported convicts, and as early as 1790 Commodore Phillip, as Governor of New South Wales, was given the right of conditional pardon. In twenty years some 16,000 convicts were transported to Australia. Meantime the discovery of the adaptability of the country to sheep husbandry had attracted large numbers of settlers. The convicts were compelled to labor for the settlers, who paid the government for their labor on a lease system, and as time went on the relations of the free and convict populations became a burning question. It was investigated in 1837 by a committee of Parliament which included Lord John Russell and Sir Robert Peel, and as a result of this investigation the following system was adopted: The convict, on his arrival, was placed in what was called a probation gang, which was employed in various kinds of public work, worked in chains and were housed in barracks. By good conduct the convict rose through two or three grades in which he worked for private persons who paid the government for his labor to a conditional liberation on ticket-of-leave, as it was called, when he might hire himself out to a free settler. The ticket-of-leave was followed in time by a complete pardon. The ticket-of-leave and the system of grades were Australian inventions, but just who were responsible for them is not known.

²F. H. Wines, "Punishment and Reformation," Rev. ed. p. 201, N. Y., 1919.

Captain Alexander Maconochie in 1837 proposed to the Transportation Committee of the House of Commons "that the duration of sentences be measured by labor and good conduct, with a minimum of time but no maximum; that the labor thus required, being represented by marks, a certain number of these, proportioned to the original offense, be required to be earned in a penal condition before discharge, and that, according to the amount of work rendered, a proportion of them should be credited day by day to the convict and a moderate charge be made, enough for all provisions and other supplies issued to him; should he misconduct himself, a moderate fine be then imposed on him—only the clear surplus, after all similar deductions, to count toward his liberation."³ Maconochie said that he had been led to think of the expedient of marks as a form of wages by his observations of the convicts in Van Dieman's Land and the depravity in which they were sunk and which he attributed to the form of slavery to which they were subjected in the public gangs.

Archbishop Whately, of Dublin, had previously expressed a similar idea in an article in the *London Review* in 1829 and in a letter to Earl Grey in 1832. In his letter to Earl Grey he stated it to be "that of requiring, of such criminals as are sentenced to hard labor, a certain amount of work; compelling them indeed to a certain moderate quantity of daily labor, but permitting them to exceed this as much as they please; and thus to shorten the term of their imprisonment by accomplishing the total amount of their task in a less time than that to which they had been sentenced. I would also allow them, for a certain portion of the work done, payment in money; not to be expended during their continuance in prison, but to be paid over to them on their discharge; so that they should never be turned loose into the world entirely destitute. Instead of being sentenced to confinement for a fixed time, they should be sentenced to earn, at a certain specified employment, such a sum of money as may be judged sufficient to preserve them, on their release, from the pressure of immediate distress; and orderly, decent, submissive behavior during the time of their being thus employed should be enforced, under the penalty (besides others, if found necessary) of a proportionate deduction from their wages and consequent prolongation of their confinement."⁴

Whether Maconochie was acquainted with Archbishop Whateley's suggestion is not known; at all events when he was appointed, in 1840, superintendent of Norfolk Island, the worst of the penal settlements,

³Wines, "Punishment and Reformation," p. 193.

⁴Wines, *ibid.*, p. 192.

he put his mark system into operation there. A certain number of marks, depending on the character of the offense, was charged up to every convict, which he must redeem before receiving a ticket-of-leave. These marks were earned by labor and by good conduct, also by application to study by those so engaged, and the surplus above an amount by the assignment of an arbitrary pecuniary value charged for maintenance went toward the purchase of more speedy liberation. The object was, as Machonochie himself expressed it, "to place the prisoner's fate in his own hands, to give him a form of wages, to impose on him a form of pecuniary fine for his prison offenses, to make him feel the burden and obligation of his own maintenance and to train him, while yet in bondage, to those habits of prudent accumulation which after discharge would best preserve him from again falling." Extraordinary success followed the inauguration of the system, to such a degree that Machonochie could say: "I found Norfolk Island a hell, but left it an orderly and well-regulated community."

Sir Walter Crofton, the Director of Irish Convict Prisons, borrowed the mark system from Maconochie. As applied by him, the prisoner first served a period of solitary incarceration in a cell. Then followed a stage of "progressive classification," to use Crofton's own phrase. This consisted of five classes: the probation class, third, second and first classes and an advanced class. Most prisoners went from the cell into the third class and to progress to the second must earn nine marks a month for six months. The same number of marks must be earned in the second class and in the first twice that number. Finally the prisoner spent a period at what was called an intermediate prison, in a condition of comparative freedom, where the inmates slept in movable iron huts, and were occupied in farming and manufacturing before he was entitled to his ticket-of-leave. The object was to test the prisoner's self-control and reformation under an approximation to outside conditions for a period of at least six months before giving him his full freedom.

Thus the ticket-of-leave or conditional liberation, which was the forerunner of our modern parole systems, arose out of experience in the care and handling of convicts and was developed by men in charge of prisoners as a practical method of dealing with them. Its origin was in practical experience rather than in theoretical reasoning and it became established because it produced results in the matter of prison discipline more favorable than had ever been secured without it. The origin of the indeterminate or indefinite sentence, on the other hand, was from theoretical considerations. Archbishop Whatley had said in

the letter to Earl Grey previously quoted from, in 1832: "It seems to me entirely reasonable that those who so conduct themselves that it becomes necessary to confine them in houses of correction should not be turned loose upon society again until they give some indication that they are prepared to live without a repetition of their offenses." Frederick Hill, Inspector of Prisons of Scotland, in a report made by him in 1839, said:

"As regards the question, how are convicts to be disposed of after their release from prison, supposing transportation to be abolished, I would humbly suggest that it is desirable that those whom, from the nature and circumstances of their offenses, as shown upon their trial, there can be no reasonable hope of reforming, should be kept in confinement through the remainder of their lives; the severity of their discipline, however, being relaxed in various ways, which would not be safe were it intended that they should return again to society."⁵

Matthew Davenport Hill, Recorder of the City of Birmingham, a brother of Frederick Hill, in 1846 considered the objects of imprisonment to be either incapacitation or reformation. That is, he believed that the only result of imprisonment of itself to be the preventing the criminal for a time from repeating his offense. He considered therefore that imprisonment should only be used to furnish the opportunity for exercising reformatory action on the criminal or in extreme case "for withholding from society one who has resisted all endeavors to approve him." In a letter to Dr. E. C. Wines, in 1868, Recorder Hill said: "The subject you propose for a paper in your next report—the substitution of reformation sentences for time sentences—is one the importance of which cannot be overestimated. . . . It is quite clear that to fix a period for discharge in the sentence is calling on the judge to take upon himself the attributes of a prophet. In short, the reformatory system of treatment by necessary implication calls for the abrogation of time sentences."⁶

In 1846, also, M. Bonneville de Marsangy, procureur du roi at Versailles, at the opening of the Civil Tribunal at Rheims, delivered a discourse on preparatory liberation. Quoting the declaration of Charles Lucas that "the end of imprisonment being the reformation of the criminal, it would be desirable to be able to discharge every convict when his moral regeneration is sufficiently guaranteed, de Marsangy argued that the prison administration should have "the right upon the previous judgment of the judicial authority to admit to provisional liberty, after a sufficient period of expiation and on cer-

⁵Wines, *ibid.*, p. 223.

⁶Wines, F. H., in "Prison Reform," p. 30.

tain conditions, the convict who has been completely reformed, reserving the right to return him to prison on the least well-founded complaint." He pointed out that this was the method of dealing with juvenile offenders already accepted by French law. In 1847, de Marsangy, in a work entitled "Traite des Institutions Complementaires du Regime Penitentiaire," more fully set forth his views. His essay was distributed by the government to the members of both chambers, as in the case of a public document. A large work in two volumes entitled "De l' Amelioration de la loi Criminelle" was published in 1864, in which he discusses conditional liberation, which, he says, "is nothing more nor less than the extension to adult convicts of a principle applied with much success to juvenile offenders." He argues that when the convict is reformed his imprisonment should terminate, as further detention can do him no good and is a needless burden to the state. He would, however, have the prisoner sentenced to a definite term for the deterrent effect on others of such sentences, but the prisoner should be impressed with the fact that he has in his own hands the power to shorten his term by showing evidence of reformation which will be tested under a ticket-of-leave. This furnishes not merely an aid to prison discipline but a real moral encouragement and stimulus to the prisoner. De Marsangy is broader in his theory than the Hills. They see no deterrent effect in punishment and regard punishment as then inflicted and as inflicted in the past as a failure. The only hope they see is in seizing the opportunity of imprisonment to endeavor to reform the prisoner. De Marsangy recognizes the deterrent effect of punishment, but emphasizes the desirability for the reformation of the prisoner and would apply for the purpose the system already used for juveniles. The emphasis in both cases is on the idea of reformation.

A translation of de Marsangy's 1846 address was printed by Dr. E. C. Wines in the New York Prison Association report for 1866. In the Association report for 1864 Dr. Wines, under the title "Progress of Prison Reform in England," had already described the work of Captain Maconochie in Australia and of Sir Walter Crofton in Ireland. In 1866 Gaylord B. Hubbell, who was then the warden of Sing Sing Prison, visited Ireland for the purpose of investigating the operation of the Crofton system. He was greatly impressed with the system and in a report to the New York Prison Association recommended its introduction into New York. The New York Prison Association through its Executive Committee and especially its secretary, E. C. Wines, was at this time studying the prisons of New York State, and as a result of such study appointed a committee, of which Dr.

Theodore W. Dwight was chairman and Dr. Wines secretary, to prepare a plan for revision of New York's prison system. Dr. Dwight and Dr. Wines visited a large number of the prisons in the various states and their report, in 1867, was printed as a legislative document under the title "Prisons and Reformatories of the United States and Canada." The authors of this report say:

"Whatever differences of opinion may exist among penologists on other questions embraced in the general science of prison discipline, there is one point on which there may be said to be an almost if not quite perfect unanimity, namely, that the moral cure of criminals, adult as well as juvenile, their restoration to virtue and the spirit of a sound mind, is the best means of attaining the end in view—the repression and extirpation of crime; and hence that reformation is the primary object to be aimed at in the administration of penal justice. We have only, then, to ask ourselves the question, first, how far any given system aims at the reformation of its subjects, and second, with what degree of wisdom and efficiency it pursues that end, to have an infallible gauge wherewith to mark its standard of perfection. There is not a prison system in the United States which, tried by either of these tests, would not be found wanting. There is not one, we feel convinced, always excepting the department which has the care of juvenile delinquents, which seeks the reformation of its subjects as a primary object; and even if this were true of any of them, there is not one, with the exception noted above, which pursues the end named, by the agencies most likely to accomplish it. They are all, so far as adult prisoners are concerned, lacking in a supreme devotion to the right aim; all lacking in the breadth and comprehensiveness of their scope; all lacking in the aptitude and efficiency of their instruments; and all lacking in the employment of a wise and effective machinery to keep the whole in healthy and vigorous action. . . . The whole question of prison sentences is in our judgment one which requires careful revision. Not a few of the best minds in Europe and America have, by their investigations and reflections, reached the conclusion that time sentences are wrong in principle, that they should be abandoned, and that reformation sentences should be substituted in their place."⁷

In regard to the Crofton system the report says:

"We have no hesitation in expressing the opinion that what is known and has become famous as the Irish system of convict prisons is, upon the whole, the best model of which we have any knowledge;

⁷Wines, F. H., "Prison Reform," p. 17.

and it has stood the test of experience in yielding the most abundant as well as the best fruits. We believe that in its broad, general principles—not certainly in all its details—it may be applied, with entire effect, in our own country and in our own state. What, then, is the Irish system? In one word, it may be defined as an adult reformatory, where the object is to teach and train the prisoner in such a manner that, on his discharge, he may be able to resist temptation and inclined to lead an upright, worthy life. Reformation, in other words, is made the actual as well as the declared object. This is done by placing the prisoner's fate, as far as possible, in his own hands by enabling him, through industry and good conduct, to raise himself, step by step, to a position of less restraint; while idleness and bad conduct, on the other hand, keep him in a state of coercion and restraint."

For some years the Prison Association, originally at the suggestion of A. B. Tappan, one of the Board of State Prison Inspectors, had advocated the establishment of a new prison. In 1868 it renewed the recommendation for this new prison to the legislature and stated that it "would afford an opportunity to test, on a small scale and under the most favorable circumstances, what is now generally known as the Irish system of prison discipline."⁸ In this year the legislature authorized the appointment of a commission to select a site for a new state institution to be known as a reformatory. A commission was accordingly appointed by the Governor, of which Dr. Dwight and Warden Hubbell were members, and reported in 1870 that it had procured a site in the city of Elmira, recommending the erection of buildings for five hundred inmates and the general plan of the institution. The Commission proposed that "when the sentence of a criminal is regularly less than five years, the sentence to the reformatory shall be, until reformation, not exceeding five years." This suggestion was not adopted, but the institution was established by an Act of the same year and a building commission appointed, of which General Amos Pillsbury was chairman.

The directors of the Ohio penitentiary, in their report for the year 1869, said: "It may seem to be in advance of the present day, but it is, we believe, but anticipating an event not far distant, to suggest that sentences for crime, instead of being for a definite period, especially in case of repeated convictions, will under proper restrictions be made to depend upon the reformation and established good character of the convict."

⁸"Prison Reform," p. 26.

Z. R. Brockway, superintendent of the Detroit House of Correction, a municipal prison, in 1869 secured the enactment by the Michigan legislature of what became known as "the three years' law," which is generally referred to as the first indeterminate sentence act.⁹ It did not, however, provide for an indeterminate sentence. It applied only to prostitutes and provided that a woman convicted of being a common prostitute might be sentenced to the Detroit House of Correction for a term of three years and that she might be released, absolutely or conditionally, by the inspectors upon reformation or marked good behavior. Mr. Brockway drafted a bill which was presented to the Michigan legislature of 1871, but failed of passage. This bill formulated some of the principles of indeterminate sentence and parole provisions in language substantially copied later in other statutes. It provided that any person convicted of an offense punishable in the Detroit House of Correction and who should be sentenced thereto should become thereby a ward of the state. The circuit judge of Wayne County and the inspectors of the house of correction were constituted a board of guardians and the person convicted was to be sentenced to their custody and "the court shall not fix upon, state or determine any definite period of time" for the continuance of such custody, but the board of guardians might release such persons, absolutely or conditionally, "upon their showing of improved character." If the release were merely from confinement in the house of correction and conditionally the board had power to return them to the prison on breach of the conditions. It was also provided by the bill that—

"When it appears to said board that there is a strong or reasonable probability that any ward possesses a sincere purpose to become a good citizen and the requisite moral power and self-control to live at liberty without violating the law and that such ward will become a fair member of society, then they shall issue to such ward an absolute release."¹⁰

THE CINCINNATI CONGRESS

Dr. Wines was the prime mover in the organization of the American Prison Association, the first meeting of which was held in Cincinnati the week beginning October 12, 1870. Gen. Rutherford B. Hayes was president of this meeting. Twenty-five states, together with Canada and Columbia, were there represented.¹¹

⁹Brockway, Z. R., "Fifty Years of Prison Service," p. 126. *Laws of Michigan, 1867, Chap. 145.*

¹⁰Spalding, Warren F., "The Indeterminate Sentence," *Senate Documents, Vol. 11, 55th Congress, 3rd Session Document No. 159, p. 9.*

¹¹F. B. Sanborn, "E. C. Wines and Prison Reform," in *Prison Reform*, p. 78.

Dr. Wines' own account of the initiation of the Cincinnati meeting is as follows: "Count Solohub, the originator, organizer and successful conductor of a remarkable experiment in prison discipline at Moscow, in replying in 1868 to a request for information on the state of the prison question in Russia, closed a very able report on that subject with the suggestion that an international congress be convoked for broader study of the question. The thought struck me as both timely and practicable. I was at that time, and had been for a number of years secretary of the Prison Association of New York, which was then largely national and to a certain extent international in the sense that it published and circulated information gathered at home and abroad in relation to penitentiary matters, so that its reports were sought from all parts of the world by governments as well as by individuals. Accordingly, at the stated meeting of the Association, which constituted in fact its board of managers, I submitted a proposition that the Association should undertake the convocation and organization of a congress of nations, as suggested by Count Sollohub, for the study and promotion of prison reform.

"This proposition was held under advisement for six months and finally negatived. But the project had received so much sympathy and encouragement from distinguished friends of the cause on both sides of the Atlantic that I was unwilling to let it drop without further effort. Consequently a call was drawn up and issued for a national prison reform convention to meet in October, 1870, at Cincinnati, Ohio, which call was signed by one hundred persons, including a large proportion of the governors of states and heads of nearly all the principal prisons and reformatories in the country. The result was a congress at the date and place named, composed of some hundreds of members drawn from nearly all the states of the Union. . . .

"The sessions of the Congress of Cincinnati continued for six days with unabated interest from the beginning to the end. It was a hard-working body. Nearly forty papers were read and discussed. Eleven of these were communicated from foreign countries, namely, six from England, two from France, one from Italy, one from Denmark and one from British East India. The project of organizing a national prison association was considered and adopted and the preliminary steps to that end taken. A note was passed to the effect that the time had come when an international congress might be summoned with good hopes of success and I was honored with an invitation to take charge of the work. Finally, a declaration of principles, thirty-

seven in number, was considered, debated and adopted with, I think, absolute unanimity."¹²

Among the papers presented to the Cincinnati Congress was one by Sir Walter Crofton on the system as introduced by him in Ireland; one by F. B. Sanborn on "How Far Is the Irish Prison System Applicable to American Prisons?" and one by Z. R. Brockway on "The Ideal of a True Prison Reform System." Mr. Brockway's paper embodied the fullest information up to that time of the reformatory system as afterwards applied at Elmira and other reformatories.¹³

The Declarations of Principles adopted by the Congress which more especially relate to the subject we are considering were as follows:

I. Crime is an intentional violation of duties imposed by law, which inflicts an injury upon others. Criminals are persons convicted of crime by competent courts. Punishment is suffering inflicted on the criminal for the wrongdoing done by him, with a special view to secure his reformation.

II. The treatment of criminals by society is for the protection of society. But since such treatment is directed to the criminal rather than to the crime, its great object should be his moral regeneration. Hence the supreme aim of prison discipline is the reformation of criminals, not the infliction of vindictive suffering.

III. The progressive classification of prisoners, based on character and worked on some well-adjusted mark system, should be established in all prisons above the common jail.

IV. Since hope is a more potent agent than fear, it should be made an ever-present force in the minds of prisoners, by a well-devised and skilfully applied system of rewards for good conduct, industry and attention to learning. Rewards, more than punishments, are essential to every good prison system.

V. The prisoner's destiny should be placed, measurably, in his own hands; he must be put into circumstances where he will be able, through his own exertions, to continually better his own condition. A regulated self-interest must be brought into play and made constantly operative.

VIII. Peremptory sentences ought to be replaced by those of indeterminate length. Sentences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time.

¹²E. C. Wines, "The State of Prisons and Child-Saving Institutions in the Civilized World," Cambridge, Mass., Wilson, 1880, pp. 45-56.

¹³Proceedings National Congress on Penitentiary and Reformatory Discipline, 1870, p. 54.

In other paragraphs it is declared that "in order to accomplish the reformation of criminals there must be not only a sincere desire and intention to that end but a serious conviction in the minds of the prison officers that they are capable of being reformed"; that "a system of prison discipline, to be truly reformatory, must gain the will of the convict"; that "the prisoner's self-respect should be cultivated to the utmost and every effort made to give back to him his manhood"; that "in prison administration moral forces should be relied upon, with as little admixture of physical force as possible"; that "the most valuable parts of the Irish prison system are believed to be as applicable to the United States as to Ireland"; that "reformation is a work of time and a benevolent regard to the good of the criminal himself, as well as to the protection of society, requires that his sentence be long enough for reformatory processes to take effect."¹⁴

Not only was the American Prison Association organized at Cincinnati, but as a result of the Cincinnati Congress and the efforts of Dr. Wines the International Prison Congress was organized and first met at London in 1872.

THE ELMIRA REFORMATORY

The ideas which have come to be known under the names of the Indeterminate Sentence and the Reformatory System first crystallized into definite, concrete form in the Elmira Reformatory. The Act establishing the reformatory did not contain any new provision in regard to sentences; it provided, however, that only persons not less than sixteen nor over thirty years of age should be sent there. The buildings were ready for the reception of inmates in 1876 and Z. R. Brockway was called from the Detroit House of Correction to take charge of the new institution. In 1877 Mr. Brockway drafted an act providing for the conduct of the reformatory. The original bill embodied an indeterminate sentence without limitation and this was approved by the board of managers and incorporated in their report to the legislature. But it appeared that neither public sentiment in general nor the views of the legislators would accept this project and it was therefore altered so as to limit the term of the sentence to "the maximum term provided by law for the crime for which the prisoner was convicted and sentenced," in which form it was enacted by the legislature of 1877.¹⁵

¹⁴Prison Reform, p. 39; Proceedings Nat. Congress on Penitentiary and Reformatory Discipline.

¹⁵Joseph F. Scott, "American Reformatories for Male Adults," in "Penal and Reformatory Institutions," N. Y. Charities Publication Committee, 1919, p. 94; Z. R. Brockway, "An Absolute Indeterminate Sentence," Charities and the Commons, Vol. XVII, p. 867 (1907).

The essential features of that Act are as follows:

Section 2. Every sentence to the reformatory of a person hereafter convicted of a felony or other crime shall be a general sentence to imprisonment in the New York State reformatory at Elmira and the courts of this state imposing such sentence shall not fix or limit the duration thereof. The term of such imprisonment of any person so convicted and sentenced shall be terminated by the managers of the reformatory, as authorized by this act; but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced.

Section 5. . . . The board of managers shall have power to establish rules and regulations under which prisoners within the reformatory may be allowed to go upon parole outside of the reformatory buildings and inclosure, but to remain, while on parole, in the legal custody and under the control of the board of managers, and full power to enforce such rules and regulations and retake and reimprison any convict so upon parole is hereby conferred upon said board, whose written order, certified by its secretary, shall be a sufficient warrant for all officers named in it to authorize such officers to return to actual custody any conditionally released or paroled prisoner; and it is hereby made the duty of all officers to execute said order the same as ordinary criminal process. The said board of managers shall also have power to make all rules and regulations necessary and proper for the employment, discipline, instruction, education, removal and temporary or conditional release and return as aforesaid of all the convicts in said reformatory.

Section 7. It shall be the duty of said board of managers to maintain such control over all prisoners committed to their custody as shall prevent them from committing crime, best secure their self-support and accomplish their reformation. . . .

Section 8. The board of managers shall, under a system of marks or otherwise, fix upon a uniform plan under which they shall determine what number of marks or what credit shall be earned by each prisoner sentenced under the provision of this act, as the condition of increased privileges, or of release from their control, which system shall be subject to revision from time to time. Each prisoner so sentenced shall be credited for good personal demeanor, diligence in labor and study and for results accomplished, and be charged for derelictions, negligences and offenses. . . . The managers shall establish rules and regulations by which the standing of each prisoner's account of marks or credits shall be made known to him as often as once a month, and oftener if he shall at any time request it, and may make provision by which any prisoner may see and converse with some one of said managers during every month. When it appears to the said managers that there is a strong or reasonable probability that any prisoner will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society, then they shall issue to such prisoner an absolute release from imprisonment and shall certify the fact of such release and the grounds thereof to the governor, and the governor may thereupon, in his discretion, restore such person to

citizenship. But no petition or other form of application for the release of any prisoner shall be entertained by the managers.

Section 10. Said managers may appoint suitable persons in any part of the state charged with the duty of supervising prisoners who are released on parole and who shall perform such other lawful duties as may be required of them by the managers. . . .¹⁶

As will be seen this act provides (1) for sentences to the reformatory the duration of which is not to be fixed by the court imposing the sentence, but under which the convict may be held for the maximum term provided by statute for the crime of which he was convicted; (2) authority in the managers of the reformatory to release a convict conditionally under a system of marks established by general rules, subject to liability to be returned for breach of the conditions, and (3) authority to grant an absolute release terminating all liability under the sentence.

The early advocates of the indeterminate sentence discarded the retributive and deterrent theories of punishment and justified it solely on the ground of the protection of society by confining the criminal until by reformation he shall be judged fit to be released. The theory as conceived by them embraces three essential elements: (1) a sentence indefinite as to time under which the prisoner may be held under restraint until reformed, (2) the facilities for and the application to the prisoner of appropriate training and education calculated to effect his reformation, and (3) parole or conditional release to test the fact of reformation before final discharge. The main point of the system is the use of reformatory methods and there is the underlying idea that practically all prisoners are capable of reformation, at least of the class to which the system was to be applied, for it was advocated first for young first offenders, although its proponents did not hesitate to follow the theory to its logical conclusion that if a prisoner cannot be reformed he should be kept in prison indefinitely. There is, however, in the early writings on the subject the tacit assumption that the combined effect of the reformatory measures and the psychologic motive of desire for release would prove so effective that practically no occasion would arise for having to carry the theory to this extremity in practice. As Machonochie expressed it, "when a man keeps the key of his own prison, he is soon persuaded to fit it to the lock." The indeterminate sentence and the parole system were conceived of as adjuncts to the reformatory treatment, essentials to its proper application but subsidiary to this main element. "This system of prison treatment has

¹⁶The act is quoted in full in "Penal and Reformatory Institutions," supra, p. 95.

three elements, namely, restraint, reformation, conditional and then absolute release. . . . The indeterminate sentence system, then, is a trinal unity, a structure supported by these three props before mentioned, neither of which can be spared or weakened without injury to the system."¹⁷ Eugene Smith expressed the idea as follows: "It is the aim of the indeterminate sentence to retain the convict in prison until he is fitted for freedom, making such fitness for freedom the condition precedent of his release. The sentence therefore presupposes a system of prison discipline that shall tend to fit the convict for freedom. . . . An essential principle of the system is the individual treatment of convicts; the utmost pains are taken to gain knowledge of the distinctive aptitudes and defects of each individual and to apply such special training as may serve to develop his capabilities and cure his defects."¹⁸ Again it is expressed by Dr. F. H. Wines in his book, "Punishment and Reformation," as follows: "The indeterminate sentence therefore puts into the hands of the competent and devoted prison superintendent the precise lever that he requires in order to subvert the criminality of the convict, assuming that it can be subverted. It is merely a tool. It is of no value if not used or in the hand of a man who does not know how to use it. It has in itself no reformatory power; it is a dead thing. The real power is in the reformatory agencies which have been named—labor, education and religion. These, if applied, will produce the same effect under a definite as under an indefinite sentence; the difference is that under the latter the prisoner ceases to resist their application and may even be induced to apply them to himself."¹⁹

The most complete statement of the theory of the so-called reformatory system and its underlying psychological basis is that made by Z. R. Brockway in his article on "The American Reformatory Prison System" in the volume on "Prison Reform" in the series entitled "Correction and Prevention" prepared by the Russell Sage Foundation for the Eighth International Prison Congress.²⁰ He says: "To accomplish such protective reformations it is necessary, preliminarily, to fix upon the standard of reformatory requirement, to adopt the criterion, to organize and perfect the plan of procedure. The standard fixed is, simply, such habitual behavior, during actual and

¹⁷Z. R. Brockway, "An Absolute Indeterminate Sentence," *Charities and the Commons*, Vol. XVII, p. 867 (1907).

¹⁸Eugene Smith, "The Indeterminate Sentence for Crime—Its Use and Abuse," *Charities and the Commons*, Vol. XVII, p. 731 (1907).

¹⁹F. H. Wines, "Punishment and Reformation," Rev. ed., p. 216, N. Y., 1919.

²⁰*Prison Reform*, p. 88, at p. 95 and ff, N. Y. Charities Publication Committee, 1910.

constructive custody, as fairly comports with the legitimate conduct of the orderly free social class to which the prisoner properly belongs in the community where he should and probably will dwell. The criterion of fitness for release is precisely the same performance subjected to tests while under prison tutelage by the merit and demerit marking system . . . and tested, also, by proper supervision during a period of practical freedom while on parole. Both the standard and criterion must be somewhat pliant to meet the variant capacity of communities to absorb incongruous elements and because each prisoner must be fitted for his appropriate industrial and social niche.

“Viewed en masse, prisoners are characterless; they lack positiveness, are without an inward dominant purpose. They are unduly influenced by instinct, trivial circumstances, or by hidden transient impulses. . . . Morbidity of body, mind, or the moral sense diminishes individual efficiency and in turn narrows opportunity, leading on to indolence, privations, dissipation and crimes. The source is held to be in physiological defects; the declaration of Ribot and other eminent psychologists is credited as true, that ‘the character is but the psychological expression of a certain organized body drawing from it its peculiar coloring, its special tone, its relative permanence.’ The nature and habit of living matter must exert such powerful influence upon volition that the conception of the individual will, dominating and unaffected by constituents and conditions of the total personality, is deemed no longer tenable. On the contrary, it is confidently believed that quite independent of the immediate conscious choice and will of the prisoner, agencies foreign to himself may be made effective to change his character; that the material living substance of being is malleable under the simultaneous reciprocal play of scientifically directed bodily and mental exercises; and that the agencies are irresistible. The doctrine of the interaction of body and mind is so well established and altogether reasonable that there is no need here to guard against a fancied materialistic tendency. . . . To this extent the principle of determinism is espoused; and unhesitatingly alleged freewill is invaded. By rational procedure the social in place of anti-social tendencies are trained and made dominant. Thus the man is redeemed.

“A majority of prisoners instinctively respond to the inherent persuasion of the combined agencies; and of those who do not a majority readily respond to the moral coerciveness of the agencies. Some, only a small ratio, do not respond at first, except to some form of corporal coercion—some bodily inconvenience and discomfort. These, the irresponsible, who for the good of the prison community and for the

public safety most need reformation, should not be neglected nor relegated to incorrigibility until every possible effort has unavailingly been made for their recovery. The advantages proffered are, naturally, not appreciated until availed of and enjoyed. Some cannot adopt and carry into execution measures calculated for their own good without the intervention of coercion. Adjustment to environment, even if it is compulsory, leads from the avoidance of bodily risks to the avoidance of social risks and thus to non-criminal habits, which, when duly formed, no longer need the prop of compulsion. . . .

"Efficiency of the reformatory procedure depends on completeness of its mechanism composed of means and motives; on the force, balance and skill with which the means and motives are brought to bear upon the mass, the group and the individual prisoners; and not a little on the pervading tone of the reformation establishment. A mere enumeration of means and motives of the mechanism is, briefly, as follows:

"1. The material structural establishment itself. This should be salubriously situated and, preferably, in a suburban locality. The general plan and arrangements should be those of the Auburn Prison System plan, but modified and modernized as at the Elmira Reformatory; and ten per cent of the cells might well be constructed like those in the Pennsylvania System structures. The whole should be supplied with suitable modern sanitary appliances and with abundance of natural and artificial light.

"2. Clothing for the prisoners, not degradingly distinctive, but uniform, yet fitly representing the respective grades or standing of the prisoners, similarly as to the supply of bedding which, with rare exceptions, should include sheets and pillow slips. For the sake of health, self-respect and cultural influence of the general appearance, scrupulous cleanliness should be maintained and the prisoners kept appropriately groomed.

"3. A liberal prison dietary designed to promote vigor. Deprivation of food, by a general regulation, for a penal purpose, is deprecated; it is a practice only tolerable in very exceptional instances. More variety, better quality and service of foods for the higher grades of prisoners is serviceably allowable, even to the extent of the a la carte method, whenever the prisoners, under the wage system, have the requisite balance for such expenditure.

"4. All the modern appliances for scientific, physical culture: A gymnasium completely equipped with baths and apparatus; and facilities for field athletics. On their first admission to the reformatory all are assigned to the gymnasium to be examined, renovated and quickened; the more defective of them are longer detained and the decadents are held under this physical treatment until the intended effect is accomplished.

"5. Facilities for special manual training sufficient for about one-half of the resident population. The aim is to aid educational advancement in the trades and school of letters.

"6. Trades instruction based on the needs and capacities of individual prisoners, conducted to a standard of perfect work and speed performance that insures the usual wage value to their services.

"7. A regimental military organization of the prisoners with a band of music, swords for officers and dummy guns for the rank and file of prisoners. The regular army tactics, drill and daily dress parade should be observed.

"8. School of letters with a curriculum that reaches from an adaption of the kindergarten and an elementary class in the English language for foreigners unacquainted with it, through various school grades up to the usual high school course; and, in addition, special classes in college subjects and, limitedly, a popular lecture course touching biography, history, literature, ethics, with somewhat of science and philosophy.

"9. A well-selected library for circulation, consultation and under proper supervision, for occasional semi-social use. The reading room may be made available for worthy and appreciative prisoners.

"10. The weekly institutional newspaper, in lieu of all outside newspapers, edited and printed by the prisoners under due censorship.

"11. Recreating and diverting entertainments for the mass of the population, provided in the great auditorium; not any vaudeville or minstrel shows, but entertainments of such a class as the middle cultured people of a community would enjoy, stereopticon instructive exhibitions and explanations, vocal and instrumental music and elocution, recitation and oratory for inspiration and uplift.

"12. Religious opportunities, optional, adapted to the hereditary, habitual and preferable denominational predilection of the individual prisoners.

"13. Definitely planned, carefully directed, emotional occasions; not summoned, primarily, for either instruction, diversion nor specifically, for a common religious impression, but figuratively, for a kind of irrigation. . . . Esthetic delight verges on and enkindles the ethical sense and ethical admiration tends to worthy adoration. . . . I have sufficiently experimented with music, pictures and the drama, in aid of our rational reformatory endeavors, to affirm confidently that art may become an effective means in the scheme for reformation."

"In addition to the foregoing items the prisoners are constantly under pressure of intense motives that bear directly upon the mind. The indeterminateness of the sentence breeds discontent, breeds purposefulness and prompts to new exertion. Captivity, always irksome, is now unceasingly so because of the uncertainty of its duration; because the duty and responsibility of shortening it and of modifying any undesirable present condition of it devolve upon the prisoner himself, and, again, because of the active exactions of the standard and criterion to which he must attain. Naturally, these circumstances serve to arouse and rivet the attention upon the many matters of the daily conduct which so affect the rate of progress toward the coveted release. . . . Habitual careful attention with accompanying expectancy and

appropriate exertion and resultant clarified vision constitute a habitus not consistent with criminal tendencies. . . .

"It is uniformly conceded that the nervous system, centering in the brain, is the organ or instrument of the mind; that the mind is a real being which can be acted upon by the brain and which can act in the body through the brain. For the sake of the authority and simplicity of statement of this elementary biological truth I quote from Professor Ladd as follows: '. . . The physical process consists in the action of the appropriate modes of physical energy upon the nervous and end-apparatus of sense, . . . brought to bear through mechanical contrivances carrying impulses to the mind. And psychical energies are transmitted into physiological processes—a nerve commotion within the nervous system thence propagated along the tracks and diffusing over the various areas of the nervous system.' This brief statement of the dual human constitution, the condition of whose changeable and changing elements at any time so determines conduct, points to the possibility and so to the duty of effecting salutary alterations in the personality of prisoners by means of skilfully directed exercises of mind and body in harmonious mutual conjunction. . . .

"With the utmost confidence in the category of principles arrayed and supplied with the completest reformatory mechanism, yet, when confronted with the duty to effect reformations, so lofty and complex is the problem, so delicate are the processes and so much is the skill required, that it is not surprising if incredulity should arise. But when the problem is resolved into two essential elements it seems more simple. These elements are the formation of desirable habitudes and development of individual economic efficiency. The only useful knowledge we can have of the springs of character is to be derived from intelligent observation and true interpretation of the customary behavior. That every individual has characteristics fixed in his innate constitution or nature—a certain temperament and natural tendencies cannot be denied. But external circumstances have already somewhat modified the original characteristics; and none can name the limit of further possible modifications to be effected by different customary conduct. While the force of the original nature should not be utterly disregarded and some regard must be had to the influence of exceptional flowering reason, new dominating tendencies like an acquired or second nature may be created.

"Nature—custom—reason; the greatest of these is custom. Criminal behavior may but express a want of regulated channels for the flow of vital force or lack of force. As the stagnant pools of a barren

rivulet exhale malaria and as the freshet serves to spread pollution, so a low rate of vitality may account for vagrant impulses and, when under even normal pressure, insufficiency or irregularity of ducts of habit may produce pernicious conduct. Habit is formed by practice. By practice new nervous paths are made and connected. Movements of body and mind become more and more under conscious direction of the subject—from mere automatism through various stages until permanent change is wrought. Repeated efforts and movements which tend to produce right habits and, at the same time, disuse of every unsuitable activity may become so fixed in the constitution that when any spring of action is touched, desirable action will follow and with reasonable certainty of result as a consequence of collaborated forces of mind and body. The degree of perfection of habit may be fairly estimated by the promptness and uniformity of the action responsive to the stimulus. . . .

“The formation of such a new social habitude is an educational, therefore a gradual process, which requires time as well as practice. . . . Neither punishment nor precept nor both combined constitute the main reliance; but, instead, education by practice—education of the whole man, his capacity, his habits and tastes, by a rational procedure whose central motive and law of development are found in the industrial economies. This is a reversal of the usual contemplated order of effort for reformations—the building of character from the top down; the modern method builds from the bottom upward and the substratum of the structure rests on work.”

The building up of desirable habits, physical and mental, by routine training, the belief that appropriate methods can be found to accomplish the result, the possibility of transformation of character by habit formation—these are the foundation ideas of Mr. Brockway's system of reform and to the reformatory methods and processes the indefinite sentence and the parole system are necessary adjuncts. While few of the advocates of the reformatory system so clearly formulated the theoretical bases of the proposed measures and some perhaps would not agree in all details Brockway's exposition fairly exemplifies the general underlying ideas back of the measures proposed. Nowhere has the theory been logically and completely put into practice. It was inaugurated enthusiastically at Elmira and other reformatories were all more or less patterned after it. Certain phases of the plan have perhaps been more fully developed elsewhere; one at one institution, another at another, but Elmira serves as the type of all the reformatory

institutions in this country. It has been the subject of many articles, descriptive and theoretical, both in this and other countries.²¹

GROWTH OF INDETERMINATE SENTENCE AND PAROLE: 1876 TO 1900

For a number of years agitation had been going on in Massachusetts for a separate prison for women convicts and in 1877 one was established and opened. The influence of the newer ideas in penology is shown in the designating of the new prison as the "Reformatory Prison for Women." The sentences were definite, but the parole system was provided for. Parole was not usually granted until about two-thirds of the sentence had been served in the prison.²²

The Massachusetts Reformatory for males was established and opened in 1884. Reformatory methods for juvenile offenders had been adopted very early in Massachusetts and the same principles on which the Elmira Reformatory was founded had been advocated for young first offenders at least as early as 1865.²³ With the successful operation of the reformatory at Elmira—a fact the sentiment for an institution similar in plan and scope moved the legislature to act. The original Act of 1884 did not provide for the indeterminate sentence. It did, however, provide for release on parole as follows:

"When it shall appear to the commissioners of prisons that any person imprisoned in said reformatory has reformed, they may issue to him a permit to be at liberty during the remainder of his term of sentence, upon such conditions as they may deem best; and they may revoke said permit at any time previous to its expiration."²⁴

In 1886 the indeterminate sentence was provided for:

"Whenever a convict is sentenced to the Massachusetts reformatory, the court or trial justice imposing the sentence shall not fix or limit the duration thereof, unless the term of said sentence shall be more than five

²¹For the best description of the methods used at Elmira in detail and of the institution itself see: Frank B. Sanborn, "The Elmira Reformatory" in *The Reformatory System in the United States*, a report prepared for the International Prison Commission, House Documents, 56th Congress, 1st Session, Document No. 459, p. 28, Washington, Government Printing Office, 1900; Joseph F. Scott, "American Reformatories for Male Adults," in *Penal and Reformatory Institutions*, one of the series entitled *Correction and Prevention*, prepared by the Rusell Sage Foundation for the Eighth International Prison Congress, N. Y. Charities Publication Committee, 1910; Alexander Winter, "The New York State Reformatory in Elmira," London, 1891; and, in greater detail, of course, the series of "Year Books" of the Institution itself.

²²F. B. Sanborn, "E. C. Wines and Prison Reform," in *Prison Reform*, p. 64.

²³Isabel C. Barrows, "The Massachusetts Reformatory Prison for Women," in *The Reformatory System in the United States*, House Document No. 459, 56th Congress, 1st Session, p. 101, Washington, 1900.

²⁴Acts of 1884, Chap. 255, Sec. 33.

years, but said convict shall merely be sentenced to the Massachusetts reformatory."²⁵

The same act provided that a person sentenced for drunkenness, or for being a common drunkard, vagabond, vagrant, tramp, stubborn child or an idle and disorderly person might be held in the reformatory not longer than two years and one sentenced for any other offense might be held for not longer than five years unless sentenced for a term longer than five years. By amendment in 1892 the distinction between the two-year and the five-year limit was based on whether the offense for which the prisoner was sentenced was punishable by imprisonment in the state prison or not.²⁶ Under these acts the commissioners of prisons adopted rules for the marking and grading of prisoners and governing their release on parole. No prisoner was considered eligible for parole until he had served in the first grade with a perfect record, under the system of marks, in the case of a misdemeanant for three consecutive months, in the case of a felon for six consecutive months and in the case of a felon with definite sentence for one-half the sentence with one month added thereto for every imperfect month, but the last five months served must be with a perfect record. The reformatory methods adopted were similar to those used at Elmira.²⁷

Pennsylvania was the third state to establish an adult male reformatory institution. By Act of April 28, 1887, the Pennsylvania Industrial Reformatory at Huntington was established, and it was provided that any court exercising criminal jurisdiction in the state might sentence to that institution male criminals between the ages of fifteen and twenty-five years, not known to have been previously sentenced to a state prison, upon conviction of such person of a crime punishable under existing laws in a state prison. In respect to the class of offenders to be sent to the institution the provisions of the Pennsylvania Acts conform more nearly to those of the statutes governing the Elmira reformatory than did the Massachusetts statute, as the class of minor offenders provided for in the Massachusetts reformatory were not to be provided for at Huntington. The court in sentencing the convict shall not fix or limit the duration of the sentence, which shall be to imprisonment in the reformatory until discharged according to law, and the time of such imprisonment shall be terminated by the board of managers of the reformatory, but it shall not exceed the maximum time provided by law for the crime of which such person

²⁵Acts of 1886, Chap. 323, Sec. 1.

²⁶Acts of 1892, Chap. 302.

²⁷Joseph F. Scott, "The Massachusetts Reformatory," in *The Reformatory System in the United States*, House Document No. 359, 56th Congress, 1st Session, p. 80.

was convicted. The Act provided that the construction of the institution should be such as to admit of classification of the inmates and their employment in useful labor and that the discipline should be such as might best promote and encourage the reformation of the prisoners and thus prevent them from becoming habitual criminals. The managers are authorized and required to establish such rules and regulations as shall assure to the inmates instruction in the rudiments of an English education and in such manual handicraft or skilled vocation as may be useful to them in obtaining support after discharge. They are also required to adopt a uniform plan by a system of marks, or otherwise, under which each prisoner shall be credited for good demeanor, diligence in labor and study and general results and shall be correspondingly charged for negligence, dereliction and offenses, and may adopt rules for the conditional release of such prisoners. "When it appears to the said managers that there is a strong or reasonable probability that any prisoner will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society then they shall issue to such prisoner an absolute release from imprisonment."²⁸

The reformatory was opened for the reception of prisoners February 15, 1889. The agencies established were a system of graded schools, with definite moral and religious training and a system of trade school classes and manual handicraft with the performance of certain labor each day. In operating the parole system the rule was adopted that no release on parole would be made until at least one year had been spent in the institution.²⁹

Almost contemporaneously with Pennsylvania, Minnesota was establishing her State Reformatory. This institution was provided for as a second state prison by the legislature of 1887, but in 1889 it was organized as a reformatory for males from sixteen to thirty years of age never before convicted of crime, where they might receive such discipline and education as should be calculated to form such habits and character as would prevent their continuing in crime, fit them for self-support and accomplish their reformation. The sentences are indeterminate, but the convict cannot be held under the jurisdiction of the managers longer than the maximum term provided by law for the crime of which he was convicted. The board of managers may parole at any time, but the convict may not receive an absolute discharge until

²⁸Act of Apr. 28, 1887, P. L. 67.

²⁹Sixteenth Biennial Report, Pa. Industrial Reformatory, 1920; Isaac J. Wistar, "The Pennsylvania Industrial Reformatory," in *The Reformatory System in the United States*, p. 134.

after the expiration of the minimum term prescribed by law for his offense.³⁰

By Act of June 18, 1891, the Illinois legislature reorganized the State Reform School, which had been established in 1867, as the Illinois State Reformatory, and it began to function as such January 8, 1893. As it took the place of the reform school, it was provided that boys between the ages of ten and sixteen years convicted of a crime punishable by imprisonment in the county jail or penitentiary should be committed to the reformatory. To it also might be sentenced any male criminal between the ages of sixteen and twenty-one, not shown to have been previously sentenced to a penitentiary, upon conviction of a crime punishable by imprisonment in a penitentiary. The sentence, it was provided, should be a general sentence to the reformatory without fixing or limiting the duration thereof, but should be terminated by the board of managers, but no prisoner to be held beyond the maximum term provided by law for the crime of which the prisoner was convicted. The board of managers was authorized to parole prisoners, under general rules to be made by them, and was required to provide for the training of each inmate in the common branches of an English education and in such trade or handicraft work as should enable him, upon his release, to earn his own support.³¹

Kansas³² and New Jersey³³ in 1895 and Ohio³⁴ in 1896 opened reformatories for young male first offenders, similar in plan and scope to the Elmira reformatory and modeled after it. They all provide for reformatory treatment, indeterminate sentence and parole. The Act establishing the Ohio reformatory was passed in 1884, the same year that Massachusetts was establishing the next reformatory after the New York institution, and the cornerstone of the main building was laid in 1886, but it was not until September of 1896 that the construction was sufficiently advanced to receive prisoners. In other of the states institutions for young offenders called reformatories had been established from time to time, but without the provisions comprising the "reformatory system." If some special treatment was provided for the inmates their term was a definite one and they were not entitled to parole.

³⁰Henry Wolfer, "The Reformatory System in Minnesota," in *The Reformatory System in the United States*, p. 214; Joseph F. Scott, "American Reformatories for Male Adults," in *Penal and Reformatory Institutions*, p. 118.

³¹Samuel Fallows, "The Illinois State Reformatory," in *The Reformatory System in the United States*, p. 141.

³²*The Reformatory System in the United States*, p. 159.

³³Report of the Prison Inquiry Commission, p. 15, Trenton, N. J., 1917.

³⁴*The Reformatory System in the United States*, p. 179.

With the approval of the operation of the indeterminate sentence and parole system in the reformatories where it had been established came advocacy of its application to penitentiary or state prison prisoners. In 1884 the Ohio legislature passed an Act providing that "every sentence to the penitentiary of a person hereafter committed for felony, except for murder in the second degree, who has not previously been convicted of a felony and served a term in a penal institution, may be, if the court having said case thinks it right and proper, a general sentence to the penitentiary. The term of such imprisonment of any person so convicted and sentenced may be terminated by the board of managers, as authorized by this Act; but such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted and sentenced; and no such prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime for which he was convicted." By other sections of the Act provision was made for the classification and the parole of prisoners under the indeterminate sentence modeled in the main upon the Act governing the Elmira reformatory. In 1885 the legislature extended these provisions to all prisoners, whether committed under the indeterminate sentence or otherwise, except those sentenced for murder in the first or second degree. This was, so far as ascertained, the first application of the indeterminate sentence or parole system to any penitentiary or state prison.³⁵ It will be noted that while the form of the sentence is indeterminate, not only is an actual maximum of the term of imprisonment specified but a minimum as well. It will be noted also that it was left discretionary with the court to employ the indeterminate sentence or not.

In 1889 the Michigan legislature passed an Act which was said to be patterned after the Ohio Act. This Act is as follows:

"Section 1. The People of the State of Michigan enact that every sentence to state prison at Jackson, the state house of correction and reformatory at Ionia, and the state house of correction and branch of the state prison in the Upper Peninsula, of any person hereafter convicted of a crime, except of a person sentenced for life, or a child under fifteen years of age, may be, in the discretion of the court a general sentence of imprisonment in that one of the prisons provided by law for the offense of which he is convicted. The term of such imprisonment of any person so convicted and sentenced may be terminated by the board as authorized by this Act; but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and

³⁵R. Brinkerhoff, "The Reformation of Criminals," in *The Reformatory System in the United States*, House Document No. 459, 56th Congress, 1st Session, p. 176, Washington, 1900.

sentenced; and no prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime for which he is convicted.

"Section 2. Every clerk of any court by which a criminal shall be sentenced to any prison whenever the term of sentence may not be fixed by the court, shall furnish the warden or other officer having such criminal in charge, a record containing a copy of the information or complaint of any such plea, the name and residence of the judge presiding at the trial, also of the jurors and witnesses sworn on the trial, with a statement of any fact or facts which the presiding judge may deem important or necessary for the full comprehension of the case and of his reasons for the sentence inflicted; and such copy, statement, and abstract, signed by the clerk of the court, shall be prima facie evidence against the convicted person in all proceedings for the relief of such person by a writ of habeas corpus or otherwise. The clerk of the court shall be entitled to such compensation in every case in which he shall perform the duties required by this Act as shall be certified to be just by the presiding judge at the trial, and shall be paid by the county in which the trial is had, as a part of the court expenses. The clerk shall also, upon any conviction and sentence forthwith transmit to the warden of the prison to which sentenced notice thereof.

"Section 3. The board of control of prisons shall have power to establish rules and regulations under which prisoners sentenced under this act may be allowed to go upon parole outside of the buildings and inclosures, but to remain, while on parole, in the legal custody and under the control of the board and subject at any time to be taken back within the inclosure of said prison; and full power to enforce such rules and regulations, and to retake and reimprison any convict so upon parole, is hereby conferred upon said board, whose written order, by its clerk, shall be sufficient warrant for all officers named therein, to authorize such officer to return to actual custody any conditionally released or paroled prisoner; and it is hereby made the duty of all officers to execute such order the same as any ordinary criminal process.

"Section 4. The board shall make such rules and regulations for the separation and classification of prisoners sentenced under this act into different grades, with promotion and degradation according to the merits of the prisoners, their employment and instruction in industry, and generally, as may from time to time appear to be necessary or promotive of the purpose of this Act.

"Section 5. And it is hereby provided that when any prisoner violating the conditions of his parole or conditional release (by whatever name) is, by a formal order, entered in board's proceedings, declared a delinquent, he shall thereafter be treated as an escaped prisoner owing service to the state, and shall be liable when arrested to serve out the unexpired period of the maximum possible punishment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any part or portion of the time served; and any prisoner at large upon parole or conditional release, committing a fresh crime, and upon conviction thereof being sentenced anew to the prison, shall be sub-

ject to serve the second sentence after the first sentence is served or annulled, to commence from the date of the termination of the first sentence.

"Section 6. Nothing in this act contained shall be construed to impair the power to grant a pardon or commutation in any case."³⁶

This Act was declared unconstitutional in 1891.

New York, in 1889, passed an Act providing for an indeterminate sentence for convicts sent to the state prison and for the parole system as well. Here, however, the court in passing sentence fixes the maximum and minimum terms for which the convict is to be held, within, of course, the maximum prescribed by law for the crime of which the prisoner was convicted; a provision similar to that of the Massachusetts Act, which will be presently quoted. It was discretionary with the court whether or not to employ the indeterminate sentence and as a matter of fact little use was made of it under this Act.³⁷

In 1893 the Minnesota legislature enacted that the courts might in their discretion sentence prisoners to the state prison under the same conditions as prisoners were sentenced to the state reformatory. This was known as "sentenced to the prison on the reformatory plan." Here the maximum and minimum term the prisoner could be held was the maximum and minimum provided by statute for the crime of which he was convicted, but the form of the sentence itself was indefinite. The parole system was also provided for convicts in the state prison under a definite sentence who were serving their first sentence for felony. One-half the sentence must be served before the convict would be eligible to parole.³⁸

In 1895 Massachusetts and Illinois substituted indeterminate for definite sentences to their state prisons. These were the first acts applying to state prisons or penitentiaries under which the courts had no discretion, but must use the indeterminate sentence. The Illinois statute provided for a sentence indefinite in form, but with the term of imprisonment, although not expressed in the sentence, limited by the statute to within the maximum and minimum terms prescribed by statute for the crime of which the prisoner was convicted. The Massachusetts Act provided that the sentencing court should fix a maximum and minimum term in the sentence itself. That Act was as follows:

³⁶Public Acts of Michigan, 1889, Act No. 228.

³⁷Warren F. Spalding, "The Indeterminate Sentence," in *The Indeterminate Sentence and the Parole Law*, Senate Document No. 159, 55th Congress, 3rd Session, p. 15, Washington, 1899.

³⁸*The Indeterminate Sentence and Parole Law*, Senate Document No. 159, 55th Congress, 3rd Session, p. 45.

"Section 1. When a convict is sentenced to the state prison, otherwise than for life or as an habitual criminal, the court imposing the sentence shall not fix the term of imprisonment, but shall establish a maximum and minimum term for which said convict may be held in said prison. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offense of which he is convicted, and the minimum term shall not be less than two and one-half years.

"Section 2. At any time after the expiration of the minimum term for which a convict may be held in the said prison under a sentence imposed as aforesaid, the commissioners of prisons may issue to him a permit to be at liberty therefrom, upon such terms and conditions as they shall deem best, and they may revoke said permit at any time previous to the expiration of the maximum term for which he may be held under said sentence. No such permit shall be issued without the approval of the governor and council nor unless said commissioners shall be of the opinion that the person to whom it is issued will lead an orderly life if set as liberty. The violation by the holder of a permit issued as aforesaid of any of the terms or conditions thereof, or the violation of any law of this commonwealth, shall of itself make void such permit.

"Section 3. When any permit issued as aforesaid has been revoked, or has become void, said commissioners may issue an order authorizing the arrest of the holder of said permit and his return to said state prison. The holder of said permit when returned to said prison, shall be detained therein according to the terms of his original sentence, and in computing the period of his confinement the time between his release upon said permit and his return to the prison shall not be taken to be any part of the term of the sentence."

It has been said that the provision that the court should fix the upper and lower limits of detention in the sentence arose from the fact that in Massachusetts the legislature had never itself regulated the maximum and minimum limits of sentences for various offenses with as much particularity as had most of the state legislatures, but had as a matter of policy left very large latitude with the courts in such matters. "Breaking a bake-shop window at night to steal a loaf of bread is an offense in the same category with bank burglary. The laws leave it with the court to make the proper discrimination."³⁹ With the opinion that wide latitude should be left to the court in each particular case rather than for the legislature to attempt a more rigid apportionment of proper limits of confinement as punishment for hard and fast classes of cases obtaining as a settled legislative policy, it was natural to carry this measure of judicial discretion into the indeterminate sentence law. The minimum of two and one-half years was fixed to conform to existing laws as to the length of state prison sen-

³⁹Warren F. Spalding, "The Indeterminate Sentence," p. 16, Senate Document 159, 55th Congress, 3rd Session.

tences and "out of deference to the prevailing sentiment that crime should be properly punished and to guard the bill from the attacks of those who might fear to give too much power to the commissioners."⁴⁰ The last mentioned consideration also dictated the provision that releases should only be made with the consent of the governor and council, which provision was later removed. A similar provision has, however, been inserted in the acts in some states for the purpose of warding off the objection being made of unconstitutionality on the ground of infringement on the pardoning power of the executive.

In Illinois, as well as in some other states, the legislature had given trial juries the power to fix sentences in their verdicts. Much dissatisfaction has found expression with regard to these provisions and has facilitated the passage of indeterminate sentence acts in states where they exist. This was the case in Illinois.

Indiana adopted the indeterminate sentence and parole system applicable to the state prison in 1897, the same year that she established the state reformatory with that system, and in 1899 the system was extended to the penal institutions for women. The Act applying to the state prison provides that in the case of any male person thirty years of age or over, convicted of any felony punishable by imprisonment in the state's prison, except treason and murder in the first and second degree, "instead of pronouncing upon such person a definite time of imprisonment in the state prison for a fixed term, after such finding or verdict, the court trying said cause shall pronounce upon such person an indeterminate sentence of imprisonment in a state's prison for a term, stating in such sentence the minimum and maximum limits thereof, fixing as the minimum time of such imprisonment the term now or hereafter prescribed as the minimum imprisonment for the punishment of such offense, and as the maximum time, the maximum time now or hereafter prescribed as a penalty for the commission of such offense." The Act proceeds to provide for the system of parole, the same to be administered by a Board of Commissioners of Parole Prisoners for each prison, to consist of the warden, the board of directors, the chaplain and the physician of such prison.⁴¹

Up to the year 1900 reformatories for young male first offenders in which more or less of a special reformatory discipline was provided, including the indeterminate sentence and parole system, had been established in the states of New York, Massachusetts, Pennsylvania, Minnesota, Illinois, New Jersey, Kansas, Ohio, Indiana, Colorado and Wisconsin.

⁴⁰Ibid.

⁴¹Acts of 1897, ch. 143.

The indeterminate sentence as applying to persons sentenced to the state prison or penitentiary had been adopted by the states of Ohio, New York, Michigan, Minnesota, Massachusetts, Illinois and Indiana. All of these states had first had experience with the indeterminate sentence in the adult reformatories before applying it to the state prisons except Ohio and Indiana, where it was adopted for both classes of institutions at the same time.

In acts passed during this period we find five different forms of the indeterminate sentence provided for as follows:

1. The sentence indefinite in form but the maximum period of detention limited by the Act to the maximum prescribed by law for the offense of which the prisoner was convicted. This is the form adopted in the case of the reformatories generally, wherever located, and is patterned after the Elmira Act.

2. The sentence indefinite in form but with both maximum and minimum period of detention limited by the Act to the maximum and minimum prescribed by law for the offense of which convicted. This form was adopted in Ohio, Michigan, Minnesota and Illinois.

3. A maximum and minimum period to be fixed by the court in the sentence but with the provision in the Act that the maximum shall not exceed the maximum prescribed by law for the offense. New York.

4. The court to fix the maximum and minimum period of detention in the sentence but with the provision in the Act that the maximum shall not exceed the maximum prescribed by law for the offense and the minimum shall not be less than two and one-half years. Massachusetts.

5. The court to name the maximum and minimum period of detention in the sentence, which shall be the maximum and minimum prescribed by law for the offense. The Indiana Act.

In the same period, however, the parole system spread more widely than the indeterminate sentence. A number of states, while not adopting the indeterminate sentence, provided for the system of parole for prisoners in their state prisons or penitentiaries. The system was in general the same as provided in the indeterminate sentence states, but applied under a general sentence. A certain proportion of the sentence, usually one-half, must be served before the prisoner was eligible to parole. These early acts also usually made the system applicable to first termers only and those sentenced for some of the more serious crimes—murder and manslaughter usually, sometimes sodomy, rape and arson, and even robbery and burglary—were excepted from their

provisions. Later acts, however, in most of the states extended the parole system to most of the inmates of the state prisons. Thus New Jersey, in 1889, provided that "all first termers, except those convicted of one of the seven major crimes—murder, manslaughter, sodomy, rape, arson, burglary and robbery—should become eligible to parole, on the recommendation of the prison authorities, after serving half the terms for which they had been sentenced."⁴²

North Dakota adopted the parole system for its penitentiary in 1891; California and Nebraska provided for it in 1893; Michigan, whose Indeterminate Sentence Act, passed in 1889, was declared unconstitutional in 1891, enacted a statute in 1895 providing for the parole system; Alabama, Connecticut and Idaho passed acts providing for parole in 1897, and Utah and Virginia adopted parole in 1898. None of these states had the adult male reformatory plan in operation at the time they adopted the parole system. Wisconsin, which had established such a reformatory, provided that first term prisoners might be transferred from the state prison to the reformatory and paroled from it under the system as established for the reformatory.⁴³

By 1900, therefore, the parole system had been adopted either for state reformatory, state prison or penitentiary by twenty states, as follows: New York, Massachusetts, Pennsylvania, Ohio, Michigan, Minnesota, New Jersey, California, Nebraska, North Dakota, Illinois, Kansas, Indiana, Connecticut, Alabama, Idaho, Utah, Virginia, Colorado and Wisconsin. Eleven of these states had the indeterminate sentence. Missouri adopted what it called parole by the court, but this was in reality not a parole system at all but a system of probation under suspended sentence. In some of the states also the Governor, under the pardoning power, had inaugurated a system of granting conditional pardons, notably in Iowa, Vermont and West Virginia. This provided benefits similar to parole for a limited number of prisoners.

THE CONSTITUTIONAL QUESTION

Constitutional objections have been raised against many of the indeterminate sentence and parole acts in various states. These have prevailed in a few cases, but have generally been held to be not well founded. The main objections made have been that the passing of an indeterminate sentence and giving a board or commission the right to

⁴²Report of the Prison Inquiry Commission, Vol. 1, p. 15, Trenton, 1917.

⁴³Report of Committee of American Bar Association and app., in *The Indeterminate Sentence and the Parole Law*, Senate Document No. 159, 55th Congress, 3rd Session, Wash., 1899.

release on parole is an impairment of the judicial power vested by the Constitution in certain courts in that the right to fix the length of punishment by sentence is taken away from the court and given to a board or other authority; or that it is a delegation of legislative power in giving a board power to fix the time of detention; or that it is an infringement on the pardoning power of the Governor in giving to other authority the right to release on parole. From the standpoint of the individual the chief objections are that the indeterminate sentence renders the punishment uncertain, which brings it under constitutional inhibitions of cruel and unusual punishments. It has also been claimed that the right of trial by jury is interfered with, that the sentence was not due process of law, that such an act is *ex post facto* and that under such an act the punishment is not proportioned to the nature of the offense. The decisions of the courts on these points have not been uniform, though there is no doubt about the weight of authority. It must be remembered, however, that there is considerable variation in the provisions of the various statutes. In fact, the decisions and the reasons given for them by the different courts are much more uniform than the provisions of the different statutes, the variations in the latter being largely in matters of detail which are not necessarily involved in the principles discussed by the courts.

The first case in an appellate court involving constitutional questions is that of *State v. Peters*, 43 Ohio 629, 4 N. E. 81, in the Supreme Court of Ohio, involving the Ohio Act of 1884. This case was a *quo warranto*, filed December 15, 1885, by the attorney-general against the board of directors of the Ohio penitentiary. The Act was claimed to be unconstitutional because (1) it provided for the exercise by a non-judicial body of judicial power lodged by the Constitution in the courts and (2) because it infringed on the pardoning power vested by the Constitution in the Governor. The opinion by Johnson, P. J., is in many respects the best discussion of these questions to be found in the cases. He says: "The new feature of this Act is that providing for a parole of convicts. It marks a new experiment in the management and discipline of prisoners whether serving under fixed or indeterminate sentences. It is evidently prompted by a desire to reform as well as to punish; to make better those under sentence, as well as to protect society. . . . This legislation makes it the duty of the board of managers, while executing the penalties for crime, to seek the improvement of the criminal. The paramount object is the welfare of society; hence the sentence to imprisonment of those convicted, and hence also the effort to educate and reform the convict, so that he may,

if possible, become a good member of society when he is released or his term expires. Whether this legislation is wisely adapted to that end, or whether it is practicable it is not the province of this court to determine. It is conceded that the rules and regulations are such as the Act authorizes; so the sole question is, is the Act itself, as amended, valid? Are the powers conferred an infringement upon the executive or judicial department?

“What are legislative powers, or what are executive or judicial powers, is not defined or expressed in the Constitution, except in general terms. The boundary line between them is undefined and often difficult to determine. . . . It must suffice for our present purpose to say that it is among the admitted legislative powers to define crimes, to prescribe the mode of procedure for their punishment, to fix by law the kind and manner of punishment and to provide such discipline and regulations for prisoners, not in conflict with the fundamental law, as the legislature deems best. In many instances the legislature fixes the penalty, as, for instance, in murder in the first and second degree, and this has never been regarded as an infringement of the judicial power. The law might fix a definite sentence for each crime without such infringement. The statute vests in the court in some instances a discretion between a maximum and minimum penalty or between alternative penalties; but this discretion might be taken away without infringing upon the exclusive power of the judiciary. . . . The trial, verdict and sentence provided by law are judicial functions, yet no one doubts the power of the legislature, as the representative of the state, to mitigate the penalty by abolishing hard labor or solitary confinement and substituting therefor a less severe form of executing the sentence. The manner in which the discipline of the prison shall be enforced must necessarily be left to the board of managers under appropriate legislation.”

A different conclusion was reached in the case of *People v. Cummings*, 88 Mich. 256, 14 L. R. A. 285, decided in 1891. There a statute authorizing an indeterminate sentence and parole by the board of control of prisons was held to infringe both the judicial and pardoning powers. As to the former the court says: “The term of imprisonment is fixed by the board and not by the court. The sentence is to confinement in the prison generally—no term is fixed by the judge. How long that term shall be rests entirely in the will of the board. It may be one day or fifteen years, as they see fit, in some cases. It is in the power of the legislature to fix all punishment for crime and to provide for a minimum and maximum punishment and to give the courts in

which the prisoners are convicted a discretion to fix a term between these lines, but it cannot be contended for a moment that this discretion can be given to any other person or persons. To do so would imperil the liberties of the citizen by putting his punishment for wrongs committed into the arbitrary power of unauthorized persons, without any right or remedy in the courts. Nor can the legislature authorize a circuit judge to delegate his power and discretion in such a case to any other person or persons than himself. . . . The term of imprisonment is entirely, not only at the discretion of the board of control, but at their will and pleasure. No court can review their action. They may discharge him the next day after he arrives at the prison, but, worse than this, they may keep him confined for fifteen years. If the board are honest men, the term of imprisonment depends on his behavior after he enters the prison. If they are not honest, it depends solely on their will. When the convict, in whose interest so-called humanitarians have devised this manner of indeterminate sentence for his reform, enters the prison, he becomes the servant and slave of the prison board and no court in the country has any power to protect his rights and redress his wrongs."

This characterization of the nature of the power vested in the board of control by the Act is exaggerated, for the Act makes it the duty of the board to establish rules and regulations to govern the granting of paroles. Nevertheless, the powers of the boards of parole in all similar acts are very extensive and the responsibility involved great. If they are to be wisely exercised the personnel of the board must be very high. There has been considerable dissatisfaction with the functioning of many of the parole boards. In some cases their rules and practices have nullified the apparent intentions of the statutes themselves.⁴⁴ The question of whether the giving of such unlimited discretion to parole boards to determine by their rules what shall entitle the prisoner to a discharge is not a delegation of legislative power cannot be regarded as settled by the cases which have so far been decided. It is strange that there has not been more discussion of it

⁴⁴"In actual practice parole is granted as a matter of course at the expiration of the minimum term, except in those cases in which the applicant has had his minimum term extended as a penalty for misconduct in prison. . . . Thus, in all the state institutions, is the aim of the indeterminate sentence defeated by the policy of the paroling authority." Report of the Prison Inquiry Commission, Vol. I, p. 62, Trenton, N. J., 1917. "We would reiterate that more than 91 per cent of the 1,028 persons on parole at the time of this survey, November 22, 1916, had been released either immediately upon the expiration of their minimum sentences, or within one month of the expiration of the same. In short, it may fairly be said that at the present time, the minimum sentence to state prison represents practically the length of imprisonment to be undergone by the inmate." Ann. Rep. Prison Association of N. Y. for 1916, Albany, N. Y., 1917.

in the opinions, but the question has apparently been nowhere squarely raised and presented to the court for decision. Aside from the legal aspect, however, it is a grave question whether, as a matter of legislative policy, the statutes should not prescribe the prerequisites for parole more definitely than they do.

Grant, J., filed a dissenting opinion in the *Cummings* case. He said: "The power of the legislature to interfere with and modify the sentence of prisoners by the courts has long been recognized in this and other states and in so doing it has never been thought that the legislative authority was encroaching upon the judicial authority. . . . It is clearly the prerogative of the legislature, under the Constitution, to fix all punishment for crime and to provide for a minimum and maximum punishment. It is only limited by the Constitution to the rule that they must not be cruel or unusual. The legislature by this Act has given the courts the power and discretion to sentence a dangerous criminal to prison for the maximum term and conferred the power and discretion upon the board of control to so modify that sentence as to give him temporary and conditional liberty. I am unable to see in this any cruel or unusual punishment or any usurpation of, or encroachment upon, judicial powers as fixed by our Constitution. If the constitutional power exists in the legislature to provide for the absolute discharge of a prisoner before the expiration of his term of imprisonment, fixed by the court, it must follow that the right exists to provide for his conditional release. No constitutional right of the prisoner is infringed, for his term of imprisonment may be thereby shortened, while society may be benefited by his reformation."

In the case of *George v. People*, 167 Ill. 447, 47 N. E. 74, the Illinois Act of 1895 was considered by the Supreme Court of Illinois. On the question of infringement of the judicial power as far as the parole of the convict goes the court said: "The legislature has the undoubted right to empower the commissioners in charge of the penitentiary to make rules and regulations for the government and discipline of the inmates and, under proper regulations, no reason is perceived why the commissioners might not allow prisoners, under certain specified circumstances, to go outside of the prison. This is all this section of the Act allows." Under this Act, before the paroled prisoner could be finally discharged, the commissioners made up a record of the case and of their action and with their recommendation sent the same to the court before whom the prisoner was tried. The judge, if satisfied, might enter an order for the prisoner's final discharge, which, however, in order to become effective, must be approved by the Gov-

error. The court points out that the discharge of the prisoner is the act of the court itself or of the Governor.

The Supreme Court of Indiana, in 1898, in the case of *Miller v. State*, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109, held that under the Indiana Act the grant of authority to release on parole is not an infringement on the judicial power. However, Jordan, J., in dissenting, said: "Not only are the trial, conviction and sentencing of a person convicted of the commission of a crime a judicial duty, but also, in my opinion, is the right to assess the punishment and thereby fix the term of imprisonment provided within the limits of the statute a judicial function of which the court cannot be deprived by the legislation. . . . The provisions of the statute under consideration wholly rob the court of all judicial discretion in regard to the term of imprisonment and in imperative language require it to sentence the prisoner to an indefinite term." Howard, C. J., also dissenting, said: "The clear meaning of the Act . . . is that the sentence should be for some time more than two years and less than fourteen years, such time to be finally determined by the board of managers of the reformatory. That, however would be to substitute for the judgment of the court trying the case the judgment of the administrative officers appointed to carry out the sentence. Such an interpretation of the Act makes it a plain invasion of the constitutional functions of the judiciary."⁴⁵

In *State v. Duff*, 144 Iowa 142, 24 L. R. A. (N. S.) 625, the Iowa statute was attacked "because it takes away the power vested in the courts and vests it in officers appointed by the Governor." But the Supreme Court said: "If the legislature may fix a definite punishment for any crime, it must logically follow that the indeterminate sentence statute no more deprives the court of the power vested in it by the Constitution than does any other statute fixing a definite punishment; for if, as in the case of murder, the trial court is bound by the statute to impose the death penalty under certain conditions, it may just as certainly and constitutionally be compelled to obey the mandate of the statute in any other given case."

In *Woods v. Tennessee*, 130 Tenn. 100, L. R. A. (N. S.) 1915 F. 531, decided in 1914, it was held that judicial powers are not conferred by authorizing a board of commissioners to parole prisoners. "The powers conferred on the board of prison commissioners are not judicial in their nature, but only administrative. They require the exercise of

⁴⁵Historically both contentions are correct. Originally the assessment of the punishment was entirely a judicial function, but with the rise of popular legislatures this power was appropriated by them and the discretion of the judge confined within comparatively narrow limits.

judgment and discretion, it is true; but it is essential that such powers be vested in administrative officers or they cannot discharge any of their duties."⁴⁶

That the judicial power of the courts, as sanctioned by the Constitution, is not infringed by statutes providing for indeterminate sentence and parole may be regarded as settled. As to the question of delegation of legislative power, however, in the only case where this question was discussed (*People v. Cummings*), the statute was declared unconstitutional. The question appears to have been raised in *Woods v. State*, supra, but only as to the mere authority to parole and not as to establishing rules governing eligibility to parole and discharge. The tendency has been to regard all such matters as merely administrative regulations of prisons and prisoners on the same plane as what the dietary should be or the kind of work the prisoners should perform. Hence there has been practically no discussion and the question must be considered an open one.⁴⁷

Statutes authorizing the governing board of an institution or a parole board created for the purpose to parole convicts have been claimed to be unconstitutional as infringing on the pardoning power vested by the Constitution in the Governor. In *State v. Peters*, supra, it was said on this point: "While on parole the convict remains in the legal custody and under the control of the board and subject at any time to be taken back within the inclosure of the said institution and with full power to enforce such rules and regulations and to retake and to re-imprison any convict so upon parole. This is not a pardon; . . . a pardon discharges the individual designated from all or some specified penal consequences of his crime: Bouv. Law Dict., 1 Bishop Criminal Law, 6th ed., sec. 914; *U. S. v. Wilson*, 7 Peters 150. Section 8 does not purport to discharge the prisoner or shorten his term of service. . . . Neither is it a commutation of the sentence. Commutation is the change of a punishment to which a person has

⁴⁶For an argument contra see James M. Kerr, "The Indeterminate Sentence Law Unconstitutional," LV American Law Review, 722.

⁴⁷The principle cases holding that parole statutes do not vest judicial power in the parole board so as to make them unconstitutional as infringements upon the power of the judiciary are, in addition to those cited in the text: *People v. Strassheim*, 242 Ill. 124, 92, N. E. 607; *People v. Dennis*, 246 Ill. 559, 92 N. E. 964; *State v. Page*, 60 Kan. 664, 57 Pac. 514; *State v. Stephenson*, 69 Kan. 405, 76 Pac. 905; *George v. Lillard*, 106 Ky. 820, 51 S. W. 793; *Wilson v. Com.* 141 Ky. 341, 132 S. W. 557; *Berry v. Com.*, 141 Ky. 422, 132 S. W. 1030; *Prison Comrs. v. DeMoss*, 157 Ky. 289, 163 S. W. 183; *Re Marlow*, 75 N. J. Eq. 400, 68 Atl. 171; *People v. Warden*, 39 Misc. 113, 78 N. Y. Supp. 907; *People v. Madden*, 120 App. Div. 338, 105 N. Y. Supp. 554; *People v. Flynn*, 55 Misc. 22, 105 N. Y. Supp. 551; *Com. v. McKenty*, 52 Pa. Sup. Ct. 332; *State v. Rimmer*, 131 Tenn. 316, 174 S. W. 1134.

been condemned into a less severe one: Bouv. Law Dict. It is not a conditional pardon but the substitution of a lower for a higher grade of punishment and is presumed to be for the culprit's benefit." In *People v. Cummings*, supra, however, it was held that the pardoning power was infringed. The court said: "This law introduces the 'ticket-of-leave' system, and places despotic power in the hands of the prison board over the persons sentenced under this statute. . . . I have not sufficient words at my command to use in condemnation of this statute. It would fill our state with convicts—they could not be called freemen—running at large outside of our prison walls, all liable at any moment to be taken back inside at the will of four individuals, no better probably in their impulses and caprices than the average man. These people thus at large would not only be subject to the will and pleasure of their masters, without hope of redress if wronged by them, but they would be out of prison under various conditions, such as the board might impose upon them, without regulation or restriction from any other power or authority—one under the condition that he shall drink no intoxicating liquor and another that he shall not chew tobacco and still another that he shall not use opium or drink strong coffee. There is no limit or qualification to the conditions that may be imposed. In looking upon this law, it is difficult to see in what respect this system of parole differs from a pardon by the Governor upon conditions. . . . This system of parole is either a pardon upon conditions, and therefore unconstitutional, or it is no release at all and only a permission to go outside of the walls and stay as long as the board may will. If it is the latter—a simple leave to stay outside until the board sees fit to call them in—the law evidently does not meet the intention of the legislature and is not only undesirable but indefensible. . . . The law, in my opinion, is not only unconstitutional, as heretofore pointed out, but also wrong in theory and dangerous in practice."

It has been usual in the statutes, while providing that parole may be granted by the board of managers of the prison or a special parole board, to provide that final discharge shall only be granted by the Governor or the sentencing court upon recommendation by the board. Such acts have generally been held to be merely regulative of punishment of prisoners and not an infringement on the pardoning power.⁴⁸

⁴⁸*George v. People*, 167 Ill. 447, 47 N. E. 741; *People v. Joyce*, 246 Ill. 124, 92 N. E. 607; *People v. Nowasky*, 254 Ill. 146, 98 N. E. 242; *Miller v. State*, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109; *State v. Duff*, 144 Iowa 142, 24 L. R. A. (n. s.) 625; *State v. Page*, 60 Kan. 664, 57 Pac. 514; *State v. Stephenson*, 69 Kan. 405, 76 Pac. 905; *George v. Lillard*, 106 Ky. 820, 51 S. W. 793; *Prison Comr's v. DeMoss*, 157 Ky. 289, 163 S. W. 183; *Murphy v. Com.*, 172 Mass. 264, 45 L. R. A. 154; *Re Marlow*, 75 N. J. Eq. 400, 68 Atl. 171; *People v.*

In *Prison Commissioners v. DeMoss*, 157 Ky. 289, it was held that a statute providing for the final discharge of a prisoner without providing for the assent or approval of the Governor would be unconstitutional. Some statutes, nevertheless, invest the parole board with authority to discharge finally and some, probably on account of fear that otherwise the act might be held to be in conflict with the Constitution, have only given the parole board power to recommend a parole the actual granting of which, as well as the final discharge, is, under these statutes, to be the act of the Governor. In some states parole has been held to be a conditional pardon, at least in effect, which therefore can only be constitutionally granted by the Governor.⁴⁹

In Vermont and Oklahoma, prior to the passage of the statutes in question, a practice had grown up of the Governor granting paroles to prisoners in the penitentiary. The assumption was of course that the Governor had power to do this under the pardoning power, and they were usually called conditional pardons and not paroles. This established practice may have influenced the rulings of the courts in these two states. However, it would seem to be evident that the idea of parole as embodied in these statutes is an entirely different thing from any aspect of the pardoning power.

In *State v. Woods*, *supra*, the indeterminate sentence and parole act of Tennessee was held not to confer judicial power in authorizing a board of commissioners to parole prisoners, nor is there any delegation of legislative power in such authorization, nor does it constitute an interference with the pardoning power. The powers conferred on the board of prison commissioners are said to be administrative. And in a California case it is said: "The actual carrying out of the sentence and the application of the same are administrative in character."⁵⁰ In an article in the *American Law Review*⁵¹ James M. Kerr argues that administrative duties relate to the executive department of the government alone and that the legislature cannot delegate such power to one of the other departments of government or to a mere ministerial body. The same reasoning, however, would bring within the constitutional inhibition the numerous boards and commissions, such as the

Adams, 176 N. Y. 351, 68 N. E. 636, 637 L. R. A. 406; *People v. Warden*, 39 Misc. 113, 78 N. Y. Supp. 907; *People v. Madden*, 120 App. Div. 338, 105 N. Y. Supp. 554; *People v. Flynn*, 55 Misc. 22, 105 N. Y. Supp. 551; *Woods v. State*, 130 Tenn. 100, L. R. A. (n. s.) 1915 F., 531; *Greene v. Rimmer*, 131 Tenn. 316, 174 S. W. 1134.

⁴⁹*Re Convicts*, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658; *Re Ridley*, 3 Okla. Crim. Rep. 356, 266 L. R. A. (n. s.) 110; *Fuller v. State*, 122 Ala. 32, 45 L. R. A. 502; *State v. State Board of Corrections*, 16 Utah 478, 52 Pac. 1090.

⁵⁰In *re Lee*, 177 Cal. 690, 171 Pac. 598.

⁵¹Vol. LV, p. 722.

public service commissions and indeed the boards of managers of the prisons and other state institutions.

In general, it may be said that in some states it has been held that the power of parole is included in the pardoning power and therefore constitutionally vested in the Governor. In most of the states, however, it is held that the paroling of prisoners is merely a method of carrying out the sentence or punishment imposed by the law and that the authority to parole may be exercised by a board created by statute, but that the power to finally discharge the prisoner and thus to absolve him from so much of punishment or sentence prior to the expiration of the maximum is vested in the Governor under the pardoning power. Such power as is held to be vested in the Governor cannot of course be taken away or infringed upon without a constitutional amendment, but the legislature may create a board or other authority to make investigations and make recommendations to the Governor as to his action. On principle it would seem that parole is entirely distinct from pardon and that the power to parole, including the granting of a final discharge, might be vested in a board without any infringement of the pardoning power. This question must, however, be regarded as an open one under the decisions. Most statutes, in order to avoid its arising, provide for the concurrence of the Governor in the granting of parole or at least of a final discharge.

From the standpoint of the individual the principal constitutional objection urged against the indeterminate sentence acts is that they provide a punishment which is uncertain and therefore cruel and unusual. The usual answer to this objection is that the punishment is not uncertain because in legal contemplation the sentence is for the longest period specified therein, or the maximum term prescribed by statute for the crime of which the prisoner was convicted, and this is not altered by the fact that under certain circumstances the prisoner's term may be shortened. It is impliedly conceded that a completely indefinite or uncertain term would render the sentence void, but it is pointed out that the term is not in fact indefinite. In *People v. Reformatory*, supra, it was said: "It is insisted, however, that as, by the judgment and warrant of commitment, the imprisonment was not for a specified time but 'to be terminated by the board of managers of the Illinois State Reformatory' the judgment and mittimus were void for uncertainty and that the statute which makes provision for such a judgment is unconstitutional and invalid; and in that behalf reliance is placed upon the case of *People v. Pirpenbrick*, 96 Ill. 68, where it was held that all judgments must be specific and certain and must

determine the rights recovered or the penalties imposed. We think that the judgment and mittimus in this case must be read and interpreted in the light of and under the restrictions imposed by the statute upon which they are based. That statute provides that although the sentence is a general sentence to imprisonment, yet that 'such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced.' This provision and others of like import being read into the judgment and mittimus, we think it should be regarded that the judgment and commitment in this case was for twenty years, that being the maximum term provided by law for the crime of burglary. The fact that the prisoners might, in accordance with the provisions of the Act, be sooner discharged by an order of court, predicated upon the recommendation of the board of managers of the reformatory or by the pardon or commutation of the Governor, would not have the effect of rendering the sentence and commitment uncertain and indefinite."

In *Miller v. State*, supra, the court said: "And we are gravely told by appellant's learned counsel that this Act violates the Constitution in placing it within the convict's power, by good conduct, fidelity and trustworthiness while on parole, to mitigate the severity of his punishment by being restored to liberty conditionally, and, it may be, finally discharged, long before the very shortest term he would be compelled to serve under the old law, because such provision is cruel punishment." However, in dissenting in that case, Chief Justice Howard said: "The best defense that can be made of the legality is that it is, in effect, a sentence of imprisonment for fourteen years. Yet it must be plain that the legislature did not intend this result, else it would have said so and omitted all reference to the minimum time." Nevertheless, the construction that the sentence is in effect a sentence for the maximum period has been generally adopted by the courts. In *Commonwealth v. Brown*, 167 Mass. 144, 45 N. E. 1, the Supreme Judicial Court of Massachusetts, in 1896, said: "Such a sentence is, in effect, a sentence for the maximum fixed by the court unless a permit to be at liberty is issued as provided by sec. 2." And the same court, in 1897, in *Oliver v. Oliver*, 169 Mass. 592, 48 N. E. 843, said: "The sentences must be deemed to be, for the purpose contemplated by this statute, either for the maximum or for the minimum term. They are indeterminate and they cannot be treated as sentences for any intermediate term. In the interval between the two dates fixed is the convict under sentence to imprisonment or not? He is all the time in the custody of the law under his sentence. He is in confinement at

hard labor unless for good reason a permit to be at liberty on certain terms and conditions is given to him by the commissioners of prisons. If he obtains such a permit it may be revoked at any time; and if any of its terms or conditions are broken it becomes *ipso facto* void. He is certainly under sentence during the whole of the maximum term." In *Murphy v. Comw.*, 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, the same court said: "It is as correct, it seems to us, to say that the duration of his sentence is uncertain because the Governor may pardon him absolutely or conditionally at any time as it is to say that it is uncertain because after the expiration of the minimum term the commissioners may release him before the expiration of the maximum term on a permit approved by the Governor and Council."

In *People v. Joyce*, 246 Ill. 124, 92 N. E. 607, it was held that the contention that the Illinois Act of 1899 is uncertain and indefinite is without force; the sentence is for the maximum term and is therefore definite and certain. Other cases holding to the same effect are: *Re Marlow*, 75 N. J. Eq. 400, 68 Atl. 171; *Skelton v. State*, 149 Ind. 646, 49 N. E. 901; *State v. Perkins*, 143 Iowa 55, 21 L. R. A. (N. S.) 931; *People v. Warden*, 39 Misc. 113, 78 N. Y. Supp. 907.

Some states have provisions in their constitutions to the effect that punishments shall be proportioned to the nature of the offense and it has been urged that an indeterminate sentence violates such a provision. In *People v. Reformatory*, *supra*, it was held that imprisonment in itself was not a cruel or unusual punishment, and the term thereof, "if it does not extend to perpetual imprisonment, is to a great extent, if not altogether, a matter of legislative discretion." Where the legislature fixes a certain punishment for a designated crime it must be presumed that its action represents the general moral ideas of the people and the courts will not hold it disproportioned to the nature of the offense unless it is so wholly so as to shock the moral sense of the community. The same ruling was made in the case of *Miller v. State*, *supra*.

In the states where, under statutory provisions, the jury, in case of conviction, also fix or assess the punishment, within statutory limits of course, which the convict shall undergo, it was claimed that the taking from the jury of this function was an infringement of the accused person's constitutional right of trial by jury. The right to jury trial, which is protected by the Constitution, however, is the right as it existed at common law and the assessing of punishment by the jury was no part of the common law trial by jury; it rests entirely upon modern statutes and hence may be taken away without impair-

ment of the constitutional right of the accused. Cases so holding are: *People v. Reformatory*, supra; *George v. People*, supra; *Miller v. State*, supra; *Skelton v. State*, 149 Ind. 641, 49 N. E. 901; *Woods v. State*, 130 Tenn. 100, L. R. A. (N. S.) 1915 F. p. 531; *Durham v. State*, 89 Tenn. 723, 18 S. W. 74.

In *Murphy v. Comw.*, supra, the Massachusetts Act of 1899 was attacked as being an *ex post facto* law, but without success. See also *Comw. v. Brown*, supra, and *Re Conlon*, 148 Mass. 168, 19 N. E. 164.

Finally it was contended that an indeterminate sentence deprived the convict of his liberty without due process of law. It was ruled to the contrary of this contention in *Woods v. State*, supra, and *People v. Reformatory*, supra, as far as the state constitutions were concerned. The federal question was raised in two cases: *Dreyer v. Illinois*, 187 U. S. 71, 47 L. ed. 79, 23 Sup. Ct. Rep. 28, and *Ughbanks v. Armstrong*, 208 U. S. 481, 52 L. ed. 582, 28 Sup. Ct. Rep. 372. In the *Dreyer* case it was held that the United States Supreme Court will follow the decisions of the court of last resort in the state in which the case was tried on the question of constitutionality of state parole statutes so far as only the state constitution is involved. This case involved the Illinois Act of 1899, and it was held that the question of whether the Act confers judicial powers on executive officers did not present a judicial question. It was said that whether the legislative, judicial and executive powers of a state shall be kept altogether distinct and separate or not is for the determination of the state and in any event has no bearing under the due process clause of the Constitution of the United States. In the *Ughbanks* case it was held that the sixth and eighth amendments to the Constitution of the United States do not limit the powers of the states, citing *Spies v. Illinois*, 123 U. S. 131, and *Maxwell v. Dow*, 176 U. S. 581; and that the fourteenth amendment was not intended to and does not limit the powers of a state in dealing with crime committed within its own borders or with the punishment thereof, although no state can deprive particular persons or classes of persons of equal and impartial justice under the law, citing *In Re Kemmler*, 136 U. S. 436, and *Caldwell v. Texas*, 137 U. S. 692.⁵²

1900 to 1910

In the decade from 1900 to 1910 the following states passed acts providing for the indeterminate sentence and parole systems in their state prisons and penitentiaries: Colorado, Iowa, Kansas, Kentucky,

⁵²See also the discussion of constitutionality of indeterminate sentence and parole statutes in note to *Woods v. State* in L. R. A. (N. S.), 1915, F. p. 531.

New Hampshire, New Mexico, Pennsylvania, Washington, West Virginia and Wyoming. Of these states, Colorado, Kansas and Pennsylvania had previously had the systems in effect as applying to their state reformatories. Connecticut and Idaho, which already had the parole system, added the indeterminate sentence during this period. Arkansas, Georgia, Montana, Oklahoma, Nevada and South Dakota, while not adopting the indeterminate sentence, put into effect the parole system, and Congress passed an Act providing parole for federal prisoners. California, Virginia and Wisconsin passed new parole acts changing in some respects the system as first adopted. New York and Michigan also passed new acts providing for both parole and indeterminate sentence.

Under the new CALIFORNIA Act, passed in 1901, parole may be granted by a board appointed by the Governor, but which must include the wardens of the two state prisons. Final discharge, however, must be by act of the Governor. Presumably the latter provision was dictated by the fear that final discharge might be held to be an act coming under the pardoning power vested in the Governor by the Constitution. Life termers are within the provisions of the Act, but must serve at least seven years. In the case of all others a clear record in the prison for six months is necessary.⁵³

The same year CONNECTICUT, which already had the parole system in effect, provided for the indeterminate sentence by an Act which directed that a sentence to the state prison otherwise than for life should express the maximum term for which the convict might be held in the prison; such maximum fixed by the court in the sentence must not be longer than the maximum term prescribed by statute for the offense of which the prisoner was convicted and the minimum term must not be less than one year. Any person so sentenced might be paroled by a board of parole, consisting of the board of directors of the prison and the warden thereof, after having been in confinement for a period not less than the said minimum term.

In 1901 also, KANSAS extended the indeterminate sentence and parole system which already was in force as applied to the state reformatory to all convicts except those sentenced for murder or treason. The court was to fix the maximum and minimum term in the sentence, which term must be within the maximum and minimum prescribed by law for the crime of which the prisoner was convicted. After having served the minimum term with a clear record for six months any prisoner is eligible to parole. A parole board of three members recom-

⁵³Report of Committee F of American Institute of Criminal Law and Criminology, JOURNAL OF CRIM. LAW AND CRIM., Vol. III, p. 552.

mends to the Governor the issuance of a parole. After being on parole for six months without any default the prisoner may be finally discharged, but such discharge is by act of the Governor.

WEST VIRGINIA in 1903 provided for indeterminate sentence and parole. Parole is granted by the Governor. The sentence is in form a general sentence to the penitentiary, but detention is limited by the maximum term provided by law for the offense, and the minimum so provided must be served before the convict can be paroled. It is discretionary with the court to impose an indeterminate or a definite sentence.

VIRGINIA in 1904 passed a new parole act, but it has been declared unconstitutional and there is now no indeterminate sentence or parole law in force in this state.

MICHIGAN, having amended her constitution, in 1905 passed a new indeterminate sentence and parole act to take the place of the indeterminate sentence act, which was declared unconstitutional, and of the parole act of 1895. The Act applies to all convicts except those under a life sentence; it provides that the court shall fix a maximum and minimum term in the sentence, the maximum not to exceed the maximum prescribed by law for the offense and the minimum to be not less than six months. The authority to grant parole is vested in the Governor with an advisory board of four, and the warden of the prison makes recommendations.

SOUTH DAKOTA in 1905 provided for the parole of convicts. Parole under the Act might be granted by the Governor on recommendation of the warden and Board of Charities.

IDAHO, having had parole in effect since 1897, in 1907 adopted the indeterminate sentence. The Act applied to all convicts except those convicted of treason or first degree murder. The court fixes the maximum and minimum term of imprisonment in the sentence. The maximum shall be the maximum provided by law for the offense; the minimum shall not be less than the minimum prescribed by law nor less than six months in any case and shall not exceed one-half of the maximum term fixed by statute. Parole may be granted by the prison board, consisting of the Governor, Secretary of State, Attorney-General and warden of the penitentiary, at any time after service of the minimum term. The same year IOWA adopted the indeterminate sentence and parole system for the first time. The sentence shall not fix or limit the duration of the imprisonment, but the same shall not in fact exceed the maximum term provided by law for the offense. Paroles may be granted by a board of parole consisting of three members.

Final discharge may be made by the Governor upon recommendation of the board of parole after the prisoner has passed not less than twelve months of his parole acceptably. MONTANA in 1907 adopted the parole system for first offenders for felony after they have served one-half their term. Parole is granted by the Board of Prison Commissioners, but final discharge must be by the Governor upon recommendation of the board. In OKLAHOMA the Governor had established a custom of granting paroles and in 1907 a Board of Pardons was created to consider and make recommendations to the Governor as to paroles and pardons. ARKANSAS also adopted the parole system in 1907. By the Act it is made the duty of the State Board of Penitentiary Commissioners to meet every three months to consider the advisability of releasing on parole those convicts who have served the minimum time of a general sentence. The board may discharge finally any prisoner who has served not less than six months on parole acceptably, but such discharge must be approved by the Governor before becoming effective. WISCONSIN, in this year also, enacted that the State Board of Control might parole prisoners in the state prison who have served one-half of their sentence, excepting life term prisoners who cannot be paroled until they have served thirty years less commutation.

COLORADO in 1908 extended the indeterminate sentence and parole to convicts sentenced to the state penitentiary other than for life. Under the Act the court is to fix the minimum and maximum term in the sentence, but the maximum may not be longer than the longest term fixed by law for the offense. The Governor may parole any such convict who has served the minimum term of his sentence, but the convict may not be finally discharged until the expiration of the maximum term. The GEORGIA legislature in 1908 provided for the parole system. The prison commission was given authority to parole any prisoner in the penitentiary, except those serving life sentences for treason, arson, rape or attempt to commit rape, after he shall have served at least the minimum term fixed by law for the crime of which he was convicted, but a life term must have served ten full years (later changed to three) before being eligible to parole. Such parole, however, must be approved by the Governor before being effective and the Governor must report to the next session of the General Assembly every parole granted and the reasons therefor. When the prisoner has served at least twelve months of his parole in a satisfactory manner the Governor, upon recommendation of the commission, may par-

don him; otherwise he must serve out the full term of his sentence as a paroled prisoner.

NEW HAMPSHIRE established the indeterminate sentence and parole system in 1909. The Act provides that when a convict is sentenced to the state prison otherwise than for life or as an habitual criminal the court shall fix a maximum and minimum term in the sentence which must be within the maximum and minimum fixed by law for the offense of which he was convicted. Any such convict who has a record for good conduct shall be entitled to release upon the expiration of the minimum term of his sentence and shall then be given a permit to be at liberty during the unexpired portion of the maximum term of his sentence by the Governor and Council upon such conditions as they shall establish, one of which shall be that the released prisoner shall remain in the legal custody of the board of trustees of the state prison and their parole officer to whom the prisoner shall report at least once each month. NEVADA, by Act of March 11, 1909, adopted the parole system for prisoners in the state prison and created a board of parole commissioners. In this year also NEW MEXICO passed an Act adopting both indeterminate sentence and parole. The maximum and minimum term is to be fixed by the court in the sentence. The prison board may parole any prisoner who has served the minimum term of his sentence. After having served not less than six months of his parole acceptably the prisoner may be finally discharged upon recommendation of the prison board by the judge of the court who sentenced him, which discharge must be approved by the Governor. PENNSYLVANIA, the same year, extended the indeterminate sentence and parole system to all convicts sentenced to the penitentiary. The sentence fixes a maximum and minimum term, but the maximum cannot exceed that prescribed by law for the offense. After having served his minimum term a prisoner in good standing may apply for a parole to the board of prison inspectors, who report, with recommendation for or against, to the board of pardons, three of whom must concur in recommendation to the Governor for action by him. Final discharge takes place upon expiration of maximum term or upon pardon by the Governor, prior thereto upon recommendation of the board of pardons upon recommendation to it by the board of prison inspectors. WASHINGTON adopted the indeterminate sentence and parole for the state reformatory in 1907, and for the state penitentiary in 1909. Under the Act of 1907 paroles were to be granted by the Governor, but the Act of 1909 provided that paroles should be granted from the penitentiary by the state board of control acting in conjunc-

tion with the warden and from the reformatory by the board of managers acting in conjunction with the superintendent. WYOMING also established indeterminate sentence and parole in 1909. The Act applies to all convicts sentenced to the penitentiary otherwise than for life. The court fixes a maximum and minimum term in the sentence which must be within the maximum and minimum prescribed by law for the offense. The Governor may issue paroles on recommendation of the board of pardons. A prisoner may apply for parole after having served his minimum term and having a perfect prison record for the preceding six months. Final discharge is only by expiration of sentence. NEW YORK passed a new Act on indeterminate sentence and parole in 1909. It applied to all first offenders convicted of felonies other than murder of first or second degree. Maximum and minimum limits are to be stated in the sentence and the minimum "shall not be less than one year, or in case a minimum is fixed by law, not less than such minimum; otherwise, the minimum of such sentence shall not be more than one-half the longest period and the maximum shall not be more than the longest period fixed by law for which the crime is punishable of which the offender is convicted." After having served the minimum any prisoner may be paroled by the board of parole, which is composed of the superintendent of prisons and two members appointed by the Governor. The board may also grant final discharge in their discretion. By this Act all first offenders convicted of felony must receive an indeterminate sentence. First offenders in state prisons under definite sentences may also be paroled under the Act.⁵⁴

In 1910 KENTUCKY provided for the indeterminate sentence and parole. The Act applied to all convicts over thirty years of age sentenced to state prison or habitual criminals or incorrigibles at the reformatory. Any prisoner having served his minimum term and having a good behavior record for nine months might be paroled by the board of penitentiary commissioners, consisting of four members, which board might also grant him a final discharge. Congress in 1910 passed an Act providing for the parole system for UNITED STATES prisoners serving terms of more than one year. By the Act the superintendent of prisons of the Department of Justice and the warden and physician of each United States prison are constituted a board of parole for such prison and may parole any prisoner with a good conduct record after he has served one-third of his sentence. The parole, however, must first be approved by the Attorney-General of the United States before becoming effective. It is also provided that United States prisoners

⁵⁴Laws of 1909, Ch. 282.

confined in state reformatories where a parole system is in effect may be paroled under such system the same as other inmates of such institution.⁵⁵

In the acts providing for the indeterminate sentence passed in this decade two new forms of the sentence appear:

6. A maximum and minimum term to be fixed by the court in the sentence which must be within the maximum and minimum terms prescribed by law for the offense of which the prisoner was convicted. This form first appeared in the Kansas Act and was adopted also by New Hampshire, New Mexico, Kentucky, Wyoming, Washington and by the New York Act of 1909.

7. A maximum and minimum term to be fixed by the court in the sentence; the maximum shall be the maximum prescribed by law for the offense and the minimum shall not be less than the minimum prescribed by law for the offense and not more than one-half the maximum. Idaho.

Iowa adopted form No. 1; Colorado and Pennsylvania form No. 3; Connecticut form No. 4 with one year as the flat minimum, and Michigan form No. 4 with a flat minimum of six months. West Virginia adopted form No. 2.

Thus in 1910 thirty-two states and the United States had the parole system in operation in some form and twenty-one of these states had some form of the indeterminate sentence.

THE INTERNATIONAL PRISON CONGRESS OF 1910

The International Prison Congress met in the United States at Washington in October, 1910. It was natural that the question of indeterminate sentence should have a prominent place in the discussions of the Congress. It had been considered at previous congresses, but, except for the American delegates, had found little favor. In Europe the indeterminate sentence had not become linked up with release on parole and measures of prison discipline and management designed to effect the reformation or improvement of the offender as it had in this country. It was advocated for its own sake and not as part of a reformatory plan. It had not won any opportunity for practical experiment, but remained in the realm of pure theory. Lombroso advocated it, but largely in connection with his theory of the born criminal and habitual criminal whom, he argued, it was necessary, for the protection of society, to keep shut up to prevent their committing the crimes

⁵⁵36 U. S. Statutes at Large, 819-821.

which otherwise they were certain to commit.⁵⁶ Saleilles in his book, "The Individualization of Punishment,"⁵⁷ approves of the principle of the indeterminate sentence, though cautiously. He does not regard it as applicable to deterrent or corrective punishments and says that if adopted at all in Europe it should be with a general maximum limitation of term for each class of crime.⁵⁸ This was of course the form in which it was first introduced at Elmira. Garofalo applied the idea of an indeterminate period to his proposal of internment in penal colonies to effect what he called "relative elimination" of the criminal.⁵⁹ He had advanced the idea of punishment without fixed duration in 1880,⁶⁰ not, however, for the purpose of reformation—Garofalo does not believe that, with the exception of children and adolescents, criminals are susceptible of reformation—but for the purpose of eliminating them from society.⁶¹ Ferri advocated that every convict (if he is to receive punishment at all beyond making reparation for damage caused) should be sentenced to segregation for an indefinite period in a different kind of institution according to the classification of the criminal. The execution of the sentence should be under the supervision of a commission composed of experts, the judge and administrative officials, and the sentence be subject to periodical revision; that is, the convict might be sent to a different institution or released upon condition if he were judged to have reformed. This system he thinks would keep the "born criminals" and "incurables" in confinement and release the "occasional delinquents, actually capable of reform."⁶² Ferri, as well as the others of the Italian school, considers the greater proportion of all criminals abnormal and only a small proportion of them capable of reformation. It is as a method of keeping these abnormal individuals segregated from society that he advocates indefinite sentences. This is true of most of the European advocates of the indeterminate sentence.⁶³ What these advocates proposed to accomplish

⁵⁶Cesare Lombroso, "Crime; Its Causes and Remedies," p. 386, Modern Criminal Science Series, Little, Brown & Co., Boston, 1911.

⁵⁷Translation in the Modern Criminal Science Series, Little, Brown & Co., Boston, 1911.

⁵⁸Op. cit., pp. 304-307.

⁵⁹R. Garofalo, "Criminology," Tr. by R. W. Millar, p. 411, Modern Criminal Science Series, Little, Brown & Co., Boston, 1914.

⁶⁰Op. cit., p. 269.

⁶¹Op. cit., pp. 255-269.

⁶²Enrico Ferri, "Criminal Sociology," Tr. by Kelly and Lisle, Boston, 1917. The first edition of this work was published in 1881.

⁶³The European discussions are well summarized in DeQuiros, "Modern Theories of Criminality," Tr. by De Salvio, pp. 173-180. Modern Criminal Science Series, Little, Brown & Co., Boston, 1911. DeQuiros cites the Norwegian Penal Code of 1902, the Swiss Draft Code of 1893 and the Russian Draft Penal Code of 1903 as applications of the indeterminate sentence, but all

by an indefinite sentence was the aim of what we know in the United States as habitual criminal acts.

There were some Europeans, such as Willert, who had in mind the reformation of the criminal in wishing to do away with fixed sentences. However, as was noted before, the idea of indefinite sentence did not, in Europe, become associated with the idea of parole, or conditional liberation, as it was there known, and probably for the reason that it was thought of generally in connection with incorrigibles. Conditional liberation originated, as hereinbefore pointed out, in connection with the English system of transportation of convicts. It was extended in 1853 to convicts confined in England. It was applied of course under a definite sentence. It spread rapidly in Europe. It was adopted by the Kingdom of Saxony and the Grand Duchy of Oldenburg in 1862; in 1868 by the Canton of Sargovie in Switzerland and by Aargau; in 1869 by Servia; in 1870 by Zurich and the German Empire; in 1871 by Lucerne, Zug and Mexico; in 1873 by Tessin, Denmark and Neuchatel; in 1875 by the Canton of Vaud and the Kingdom of Croatia; in 1878 by Hungary and the Canton of Unterwalden; in 1880 by Japan; in 1881 by Holland and Schwyz; in 1885 by France; in 1887 by Bosnia; in 1888 by Belgium; in 1889 by Italy, Finland and Uruguay; in 1890 by Brazil; in 1893 by Portugal; in 1896 by Bulgaria; in 1897 by Egypt; in 1900 by Norway, and in 1906 by Sweden.⁶⁴ The object of the system of conditional liberation was stated to be to help the convict to reform as well as to improve prison discipline, but its measure of success as to the latter aim was probably the main reason for its rapid spread and also for the spread of the parole system in the United States.

Both conditional liberation and the indeterminate sentence had been under consideration at all of the International Prison Congresses. At the Sixth Congress held in 1900 at Brussels the indeterminate sentence was made a topic for consideration in the section on Penal Legislation. The conclusion of the Congress, after presentation of the prepared reports and debate was that the system of indeterminate sentences is inadmissible and that the system of conditional liberation under definite sentence is "more logical, more simple and more practical."⁶⁵

these were in fact more in the nature of habitual criminal acts such as are familiar in the United States.

⁶⁴F. H. Wines, "Punishment and Reformation," p. 229; Mittermaier, "Conditional Liberation," Acts du Congress Penitentiaire International de Washington, 1901, Vol. I.

⁶⁵Samuel J. Barrows, "The Sixth International Congress," p. 38, House Document No. 374, 57th Congress, 2nd Session, Washington, Gov't Printing Office, 1903.

At the Washington Congress there developed more difference of opinion. The arguments usual in this country in favor of the indeterminate sentence were of course presented by American delegates. Of the foreign delegates taking part in the consideration Ernest Friedman of Hungary argued that there was as yet no general agreement on the theory of the indeterminate sentence, as in Europe it is used for youthful criminals and advocated for recidivists and in America it is not applied to those guilty of the gravest crimes, but is employed for those who give promise of betterment. He would therefore preserve the principle of the fixed sentence. Ugo Conti of Italy considered that for misdemeanants we need special sentences or substitutes for the ordinary sentence, something tempering the execution of the penalty, like conditional liberation. For ordinary delinquents and for those almost incorrigible there are needed the ordinary sentence, the severe sentence, the supplementary penalty, and that an indeterminate sentence meets neither one case nor the other. A. Berlet, of France, criticized the indeterminate sentence as an unwarranted violation of liberty. Respecting above all else individual liberty, he said, we cannot admit the system of the indeterminate sentence. We see in it a backward step, not progress. Such a change would be going back several centuries, putting absolute power into the hands of those charged with the execution of the sentence, an annihilation of the fundamental principle of the separation of executive and judicial powers. Conditional liberation, he believed, was an adequate means of proportioning the length of penalty to the reformation of the convict.

R. Garraud, of France, considered that conditional release and the indeterminate sentence are designed to bring about the amendment of the prisoner if wisely administered. The former of these measures has been enthusiastically received in almost all civilized countries, but the latter has only been tried here and there. The indeterminate sentence has advantages and few disadvantages. It would, in the first place, do away with short sentences and, secondly, conciliate the two parties who are concerned in the best solution of the problem. We all find it repugnant to our ideas of justice that a man should be sentenced without knowing what may be the limit of that sentence. A limit fixed in advance by the code and by the judge who applies it reassures the public and safeguards the individual.

Dr. Ruzstem Vambéry, of Budapest, Hungary, said that the real aim of the penalty should be the protection of society and to attain that there is needed, beyond punishment, methods of education and protection as well as of repression. The justice of the indeterminate

sentence and its compatibility with the fundamental principles of modern penal law depend on these two things, the protection of society and the minimum limitation of individual liberty. It must not be forgotten that the indeterminate sentence is only a form of procedure, which makes possible the educative idea. The value of it is closely bound up with the reformatory system, of which it is the corollary and with which it lives or dies. It is indisputable that when the individual is concerned the indeterminate is the educative sentence par excellence. He stated that he had been opposed to the indeterminate sentence, but that the writings of Barrows and others and the instructive facts gathered from the practice in America had modified his views. At the same time he had not lost all his skepticism. "I still doubt," he said, "the possibility of securing individual liberty by a purely institutional guaranty. If the maximum limit be adopted, that scruple would at once vanish. I see no objection to a maximum of ten years. Another objection, that the duration of confinement would be left to the arbitrary authority of the administrative authorities, is met by establishing the method of authorizing the court to decide upon the time of release, or a body constituted to make such decisions, as suggested by Liszt and Dr. Freudenthal. But the true guaranty of individual liberty always resides in the moral and intellectual qualities of the officers charged with carrying out the indeterminate sentence. There is no reason why a prison officer should not exercise the function of judging whether a man is to be trusted to meet the requirements of the indeterminate sentence."

Giustino de Sanctis, Inspector-General of Prisons of Italy, believed that for certain classes of criminals the indeterminate sentence is a means of correction of great importance. The old classic school desired that punishment should be both reformatory and protective of society, but the means to that end cannot be the same today that they were yesterday. The only real social defense is to bring these criminals back to the normal way of living by training them in institutions suitable for that purpose under government control, where the principles of wise pedagogy can be applied. But penalties as usually pronounced rarely accomplish this end. Reformation of prisoners subjected to the ordinary penal sentence is exceptional. The indeterminate sentence may be applied to advantage in certain cases. Apart from persons found guilty of premeditated, serious crimes, who have been sentenced to long terms; and those who have become delinquent by lack of intelligence, imbecility, insanity, etc., there are still criminals of occasion and some habitual criminals who should be submitted to

the educative but severe discipline of the indeterminate sentence. It ought not, however, to lose its character of penalty; therefore there should be a minimum limit, according to the circumstances preceding and accompanying the crime. After the expiration of that minimum the convict should be held till he shows himself fitted to be restored to society, but in institutions suitable for the purpose and under officers trained to carry on the work of education and reformation in a rational manner. Release should be decided by a commission and there should be proper oversight of those who are liberated.

M. W. Mittermair, of Germany, said that though in theory the indeterminate sentence might be applied to all offenses, yet in practice there must be restrictions. So long as we consider short term sentences necessary we shall not give them the character of an indeterminate sentence. There are thousands of cases in which by inflicting a penalty we wish to show not only the offender, but all the people, that the state will not tolerate such acts. In such cases we do not pay so much regard to the individuality of the offender as to the nature of the crime. The indeterminate sentence takes account of the personality of the criminal. When it is a question of studying the crime with the greatest care; of trying to reform the criminal, of securing public safety and to have a sentence that shall show the gravity of the case, then the indeterminate sentence is indicated. He saw no reason why the indeterminate sentence should not be used for some categories of offenses and not for others.

This brief review of typical opinions expressed by foreign delegates foreshadowed the final action of the Congress in approving the principle of the indeterminate sentence. This action was not taken without vigorous opposition from many European delegates. The opposition was, however, mainly to the theoretical, completely indeterminate sentence and mainly on the ground of its irreconcilability with democratic principles and modern views of political liberty. There is a sound historical basis for this position. The practically unlimited power of the judges, who represented the sovereign, in imposing penalties for crime had, at least in popular estimation, often been exercised to oppress the subjects. The limitation of this power had been one of the aims and achievements of the struggle for political liberty. The establishment of fixed penalties for crime by legislatures representative of the people and the reduction of judicial discretion within comparatively narrow limits was one of the means of attainment of individual liberty and one of the prized gains of advancing democracy. Advocated, as it generally was in Europe, in its absolute,

unlimited form and for the avowed purpose of making possible in the discretion of the jailer the continual incarceration of certain classes of offenders so as to permanently remove them from society, it was open to objection from the standpoint of political liberty.⁶⁶ This was not, however, the form nor the purpose in and for which it had come into operation in the United States. Indeed, as we have seen in the review of the constitutional question, it is possible that in its absolute form it would be declared unconstitutional in this country, as it was only by holding the indeterminate sentence, so called, to be in legal effect a sentence for the maximum term that the courts preserve it from the objection of uncertainty and indefiniteness. But while many of the early advocates of the indeterminate sentence repeated the arguments made for its absolute form such as that the prisoner should be held in prison until he has reformed and permanently in the absence of reformation, they nevertheless did not attempt to pass statutes providing for that form, but, on the contrary, always provided for a maximum period beyond which the prisoner could not be held, which was expressed in the statutes and therefore understood if not expressed in the sentence itself. Associated, as it generally was, also with at least some effort to improve the prisoner in the prison and with the system of conditional liberation or, as we know it, of parole, the indeterminate sentence, so called, which is actually in operation in the United States is a quite different thing from the indeterminate sentence of pure theory.⁶⁷

1911 to 1922

In 1911 Arizona, Oregon and Texas passed acts providing for indeterminate sentence and parole, none of these states having previously had either system. The Arizona Act applied to all convicts over eighteen years of age for any crime except treason and first degree murder. The limits of the sentence were to be the maximum and minimum prescribed by law for the crime. Both parole and final discharge were to be controlled absolutely by a board of parole, of which, however, the Governor was made a member *ex officio*. In Oregon a parole board was created to investigate and recommend to the Governor who may parole. Texas by Act of 1911 provided for parole, the same to be granted by the Governor on recommendation of the board of prison commissioners and by Act of 1913 provided for the indeterminate sentence for all felonies.

⁶⁶See Maurice Parmlee, "Criminology," p. 398, N. Y., The Macmillan Co., 1920.

⁶⁷Acts du Congress Penitenciaire International de Washington, 1910.

In 1911 also Nebraska, New Jersey, North Dakota and South Dakota, which had all had parole statutes in effect—Nebraska since 1893, New Jersey since 1889, North Dakota since 1891 and South Dakota since 1905—adopted the indeterminate sentence also. In Nebraska and South Dakota the limits of the sentence were to be those provided by law for the offense; in New Jersey the maximum as provided by law with the minimum not less than one year nor more than one-half of the maximum, and in North Dakota the sentence could not exceed the maximum prescribed by law for the offense. Minnesota in 1911 passed a complete indeterminate sentence and parole act applying to all convicts except those convicted of treason and murder. The maximum sentence must not exceed the maximum provided by statute for the crime of which the prisoner was convicted, but no minimum limit was named. A state board of parole of three members was created and final discharge provided to be by act of the Governor on recommendation of the board. Pennsylvania in 1911 passed a new indeterminate sentence and parole act, the chief change from the Act of 1909 being that the court fixes the maximum and minimum terms in the sentence, but the maximum cannot be more than that prescribed by law.

In 1912 South Carolina by statute authorized the Governor to “suspend sentence or parole any prisoner upon such terms and conditions as he may deem just in the exercise of executive clemency.” In practice applications for parole are referred to the board of pardons, which investigates and recommends action to the Governor.

In 1913 Maine, Tennessee, Nevada and Utah provided for indeterminate sentence and parole for the first time. In Maine the maximum term is to be fixed by the court in the sentence not to exceed the maximum prescribed by statute for the offense and the minimum shall be the statutory minimum. Parole is granted by the Governor with the advice of an advisory board in the matter of paroles consisting of three members of the executive council. In Tennessee the limits of the sentence are fixed as the maximum and minimum prescribed by law for the offense. The board of prison commissioners acts as a board of parole and grants paroles. There can be no final discharge prior to expiration of maximum except by pardon by the Governor. In Utah the Act applies to all prisoners except those convicted of treason or murder. The limits of the sentence must be the maximum and minimum provided by statute for the offense. The board of pardons grants paroles. Nevada passed an Act providing for an indeterminate sentence “whenever any person shall be con-

victed of any felony for which no fixed period of confinement is imposed by law." The sentence is to fix the term with the maximum and minimum prescribed by statute for the offense. The same year California, already having parole, adopted the indeterminate sentence and Montana provided for a parole commissioner. In Ohio the indeterminate sentence was extended to include all sentences to the penitentiary for felonies except treason and first degree murder, the minimum term to be fixed in the sentence and no prisoner to be detained beyond the maximum term prescribed by statute for the offense. In Missouri Governor Hadley had begun paroling prisoners, assuming the power to do so under the constitution provision giving the Governor power to grant "reprieves, commutations and pardons." In 1913 the legislature passed an Act creating a board of pardons and paroles consisting of three members to investigate and make recommendations to the Governor in the matter of both paroles and pardons. »

In 1914 Maryland provided for an advisory board of parole to recommend to the Governor as to granting a conditional pardon or parole to any prisoner in any of the penal institutions of the state. Kentucky also passed a new indeterminate sentence act. The limits of the term of sentence are to be named by the jury in its verdict, but must be within the maximum and minimum prescribed by statute for the offense named in the verdict.

In 1915 Rhode Island adopted the parole system and created a board of parole to consist of the Governor, the Agent of State Charities and Correction and three other citizens of the state to be appointed by the Governor with the advice and consent of the Senate. It is provided that whenever a person convicted of any offense shall be sentenced to the state prison or to a county jail for more than six months such sentence shall be subject to the control of the board of parole. The board in any such case, unless the prisoner be confined as an habitual criminal or for life, may by an affirmative vote of the Governor and at least two other members of the board issue to such prisoner a permit to be at liberty upon parole during the remainder of the term of his sentence under terms and conditions to be prescribed by the board, whenever such prisoner has served not less than one-half of the term for which he was sentenced. In the case of an habitual criminal he must have served five years and a life prisoner must have served twenty years to be eligible to parole. In 1915 also Montana, which adopted the parole system in 1907, added the indeterminate sentence for any offense punishable by imprisonment in the state prison except treason, first degree murder, rape or administering poison with

intent to kill. The court in passing sentence must fix the maximum and minimum limits thereof, which must be within the maximum and minimum terms prescribed by statute for the offense, and in no case shall the minimum be less than six months. Where the punishment is fixed by the jury the verdict must set forth the maximum and minimum. In the same year New York passed an Act creating a parole commission in each of the first class cities of New York, Buffalo and Rochester. The commission is to have jurisdiction over the release of prisoners from the workhouses, penitentiaries and reformatories administered by these cities. The Act provides that the duration of the term in the penitentiary shall not be fixed by the sentence, but shall not exceed three years. Workhouse sentences are generally for definite periods not exceeding six months, but in certain instances may be for an indeterminate period not to exceed two years. The institutions called penitentiaries are, however, for misdemeanants, felons going to the state prisons. The penitentiary sentence is anomalous as the severest penalty for a misdemeanor imposed by the New York Penal Code and is imprisonment for one year and a fine of five hundred dollars.

In 1916 Louisiana for the first time adopted the indeterminate sentence and parole systems. The indeterminate sentence applies to persons sentenced to the penitentiary otherwise than for life or less than one year, except persons convicted of treason, arson, rape, attempt to rape, crimes against nature, bank and homestead officials misusing funds of depositors, notaries public who are defaulters, train wreckers, kidnapers and dynamiters. The term is fixed by the sentence within the maximum and minimum prescribed by statute for the offense. A board of parole of three members is created.

North Carolina passed its first indeterminate and parole statute in 1917. The indeterminate sentence applies to all prisoners sentenced to the state prison, these being prisoners sentenced for five years or more, but it is discretionary with the court whether or not to make the sentence an indeterminate one. The judges are authorized, "in their discretion, in sentencing prisoners to the state prison to pass upon such prisoners a minimum and maximum sentence, thus making the sentence of said prisoner an indeterminate sentence." While not expressed in the Act, the minimum and maximum would of course necessarily be within the minimum and maximum prescribed by statute for the offense. An advisory board of parole is created to consider and recommend prisoners "to be paroled on a conditional pardon." In 1917 the territory of Hawaii provided the parole system for all prisoners convicted of felony except those sentenced for first degree murder,

such paroles to be granted only by the Governor within recommendation of the board of prison inspectors. In this year also California passed a new indeterminate sentence act providing that every person thereafter convicted of "a public offense for which public offense punishment by imprisonment in any reformatory or the state prison is now prescribed by law" should be sentenced to the state prison, "but the court in imposing such sentence shall not fix the term or duration of the period of imprisonment." The actual period of confinement shall not be more than the maximum or less than the minimum term prescribed by statute for the offense. After expiration of the minimum term fixed by statute the governing authority of the prison shall determine what additional length of time, if any, the prisoner shall be confined. Michigan provided that authority to parole should rest in the Governor exclusively in all cases of murder, rape, bribery, offenses by public officers and conspiracy to defraud public municipalities, and in all other cases such authority is conferred upon the advisory board in the matter of pardons. Minnesota amended her Act by providing that the court in passing sentence should fix the maximum term thereof and that the indeterminate sentence should not apply to those convicted of treason or murder. Montana provided that the minimum in the sentence should not be longer than one-half the maximum. In Oregon it was provided that the sentence by the court should state both the minimum, which should not exceed one-half of the maximum term prescribed by statute for the offense, and the maximum, which should not exceed the maximum prescribed by statute for the offense.

In 1919 Alabama, where the parole system had been in effect since 1897, adopted the indeterminate sentence. It is made to apply to all cases in which the punishment fixed by statute is imprisonment in the penitentiary. The limits of the term are to be fixed by the court in the sentence within the maximum and minimum prescribed by statute for the offense. Georgia in the same year adopted the indeterminate sentence for the first time, having had the parole system since 1908. It applies in all cases of felony not punishable by life imprisonment. The jury in their verdict are to fix the maximum and minimum terms within the maximum and minimum prescribed by statute for the crime. New acts were passed in 1919 by Illinois, Oregon, California, Maine and New York. New acts relating only to parole were also passed by New Jersey and Wisconsin.

In 1920 Massachusetts passed a new indeterminate sentence and parole act and in 1921 Minnesota and Nebraska did likewise. In 1922 New Jersey passed a new indeterminate sentence act.

Six new forms of the indeterminate sentence appear in the acts passed in this period. They are as follows:

8. A maximum term to be fixed by the court in the sentence which shall not exceed the maximum prescribed by statute for the offense. This form was adopted in Minnesota and Oregon.

9. The court to fix in the sentence a minimum term which shall be the minimum prescribed by statute for the offense and a maximum term which shall be the time fixed by the jury in its verdict. Adopted in Texas.

10. The court to fix in the sentence a maximum term which shall be the maximum prescribed by statute for the offense and a minimum which shall not be less than one year nor more than one-half the maximum. New Jersey.

11. The court to fix in the sentence a maximum term which shall not exceed the maximum prescribed by statute for the offense and a minimum term which shall be the minimum prescribed by statute for the offense. Maine.

12. The court to fix in the sentence a minimum term within the limits prescribed by statute for the offense, but no prisoner to be detained beyond the maximum prescribed by statute for the offense. Ohio.

13. The jury to fix a maximum and minimum in its verdict within the maximum and minimum prescribed by statute for the offense. Georgia.

California adopted form No. 2; North Dakota form No. 3; Arizona, Nebraska, Nevada, South Dakota, Tennessee and Utah form No. 5, and Alabama, Louisiana, Montana and North Carolina form No. 6.

In 1922 forty-four states, the territory of Hawaii and the federal government had the parole system in operation to some extent, thirty-seven of these states had some form of the indeterminate sentence and only four states still were without either.