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Commitment of Sexual Psychopaths in Ohio

HISTORICALLY SOCIETY has recognized that medical treatment, as opposed to imprisonment, of insane criminal offenders is the best method of protecting its interests; but only within recent years has society afforded similar treatment to sane criminal offenders found to have psychopathic personalities. A psychopathic personality has been described as:

An abnormal personality, with or without psychosis, associated with emotional instability, defective will power, a poorly developed ethical background and low character traits. Psychopathic individuals, as a rule, have no intellectual impairment but their judgment is poor; they are frequently antisocial; a number of them are chronic alcoholics, drug addicts, and sexual perverts.¹

Included in the class of persons with psychopathic personalities is the sexual psychopath.² The legislatures of fifteen jurisdictions have now passed statutes providing for the commitment and treatment of sexual psychopathic offenders.³ It is with these statutes, and particularly the Ohio statute, that this note is concerned.

The procedure for the commitment of sexual psychopathic offenders, as outlined by the statutes providing for such commitment, follows, in general, this pattern: When a person has been charged with or convicted of a

¹ East, *Sexual Offenders—A British View*, 55 YALE L.J. 527, 539 n.41 (1946). Insanity and mental deficiency must be distinguished from psychopathic personality. *Insanity*, in the eyes of the law, "is such want of reason, memory, and intelligence as prevents a man from comprehending the nature and consequences of his acts or from distinguishing between right and wrong." BLACK, LAW DICTIONARY 172 (3d ed. 1933); *accord*, State *ex rel.* Townsend v. Bushong, 146 Ohio St. 271, 65 N.E.2d 407 (1946). *Mental Deficiency* is an arrested or incomplete development of the mind, however caused, existing from youth. East, *supra*, at 539 n.40; People *ex rel.* Beldstein v. Thayer, 121 N.Y. Misc. 745, 202 N.Y. Supp. 633 (County Ct. 1923); *cf.* State *ex rel.* Solomon v. Bushong, 85 Ohio App. 333, 88 N.E.2d 703 (1949) (mentally deficient offender may be sane enough to understand the charge and make a defense).

² The leading treatise on the physiological aspects of sexual psychopathy is KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS* (Eng. transl. 5th ed. 1895).

³ CAL. WELFARE AND INSTITUTIONS CODE § 5500 *et seq.* (Deering, Supp. 1949); D.C. CODE § 22-3501 *et seq.* (Supp. VII 1949); ILL. STAT. ANN. c. 38, § 820 *et seq.* (Smith-Hurd, Supp. 1949); 4 IND. STAT. ANN. § 9-3401 *et seq.* (Burns, Supp. 1949); 4 MASS. LAWS ANN. c. 123A (Supp. 1948); 25 MICH. STAT. ANN. § 28.967 (1) *et seq.* (Supp. 1949); 31 MINN. STAT. ANN. § 526.09 *et seq.* (1947); 19 MO. REV. STAT. ANN. § 9359.1 *et seq.* (Supp. 1949); Neb. Laws 1949, c. 294; N.H. Laws 1949, c. 314; N.J. STAT. ANN. § 2:192-1.4 *et seq.* (Supp. 1949); OHIO GEN. CODE § 13451-19 *et seq.* (Page, Supp. 1949) (not limited to *sexual* psychopathic offenders); VT. REV. STAT. § 6699 *et seq.* (1947) (contains no definition of psychopathic offenders); Wash. Laws 1947, c. 273, amended in part, Wash. Laws 1949, c. 198; 1 WIS. STAT. § 5137 *et seq.* (1947). A similar act was passed by the New York legislature in 1947 but was vetoed by Governor Dewey because of

criminal offense, or one of certain designated offenses, of a sexual nature or otherwise, proceedings either may be or must be instituted to determine whether that person is a sexual psychopath. If the institution of such proceedings is not mandatory, they may be initiated by the prosecuting attorney, or, in some cases, by the court, the defense counsel or some other person acting on behalf of the defendant. The defendant for whom the proceedings are instituted is referred to a mental institution or board of psychiatrists for an examination. After this examination, the court conducts a hearing to determine whether the defendant is a sexual psychopath. This determination is made by the judge or a jury, who may take into consideration the examiners' report. If the defendant is found to be a sexual psychopath, he is committed to an institution for treatment until he is cured or improved to such an extent that he is no longer considered dangerous to the public. After release from the institution to which he was committed, the defendant is either transferred to prison to serve his criminal sentence, placed on parole or probation, or given an unconditional release.

The Ohio statute relates to the psychopathic offender generally, not merely to the *sexual* psychopathic offender.⁴ It provides for a mandatory psychiatric examination of all persons convicted of certain named sex felonies, and, in the discretion of the court, an examination of persons convicted of any other felony.⁵ The scope of this statute appears to be inadequate in several respects. Certainly it would seem advisable to require an examination of every person convicted of a sex felony other than those

procedural defects. Constitutional objections to the Illinois, Michigan and Minnesota acts have been overruled in *People v. Sims*, 382 Ill. 472, 47 N.E. 2d 703 (1943); *People v. Chapman*, 301 Mich. 584, 4 N.W. 2d 18 (1942); *State ex rel. Pearson v. Probate Court of Ramsey County*, 205 Minn. 545, 287 N.W. 297 (1939), *aff'd*, 309 U.S. 270, 60 Sup. Ct. 523 (1940). As to the constitutionality of such laws in general see Comment, 37 MICH. L. REV. 613 (1937). For a comprehensive survey of the laws relating to sexual psychopathy see TAPPAN, *THE SEXUAL PSYCHOPATH—A CIVIC—SOCIAL RESPONSIBILITY* (Am. Soc. Hygiene Ass'n, Pub. No. A-791) 18-23 (1949).

⁴ OHIO GEN. CODE § 13451-19 (Page, Supp. 1949). Feeble-minded and mentally deficient offenders are also within the purview of the act, but the application of the statute to them will not be considered in this note.

⁵ ". . . A trial court must refer for examination all persons convicted under Sections 12413 [rape], 12414 [statutory rape], 12415 [attempted statutory rape], 12423-1 [indecent and improper liberties with a child under 16], 13023 [incest] or 13043 [sodomy] of the General Code The court . . . may refer for such examination, any person who has been convicted of any other felony except murder in the first degree where mercy has not been recommended. . . ." *Id.* § 13451-20. The methods of initiating psychopathy examination proceedings vary from state to state. CAL. WELFARE AND INSTITUTIONS CODE §§ 5501, 5601 (Deering, Supp. 1949); D.C. CODE § 22-3504 (Supp. VII 1949); ILL. STAT. ANN. c. 38, § 822 (Smith-Hurd, Supp. 1949); 4 IND. STAT. ANN. § 9-3403 (Burns, Supp. 1949); 4 MASS. LAWS ANN. c. 123A, § 2 (Supp. 1948); 25 MICH. STAT. ANN. § 28.967(3) (Supp.

specifically named in the statute.⁶ Also, Ohio is the only state whose statute authorizes an examination only of persons convicted of a felony.⁷ The activities of the exhibitionist,⁸ of the person who distributes obscene literature,⁹ and of others whose sex offenses are classified only as misdemeanors,¹⁰ may affect a greater number of persons than the activities of the rapist and more seriously injure the public morals. Furthermore, it seems that the better policy would be to seek out and attempt to cure those who have committed sex offenses of the less serious kind, before they commit other offenses having more tragic results on their victims.¹¹ Therefore, it appears that a mandatory examination of the sex misdemeanant as well as of the sex felon should be provided for.¹²

1949); 31 MINN. STAT. ANN. § 526.10 (1947); 19 MO. REV. STAT. ANN. § 9359.3 (Supp. 1949); Neb. Laws 1949, c. 294, § 4; N.H. Laws 1949, c. 314, § 3; N.J. STAT. ANN. § 2:192-1.4 (Supp. 1949); VT. REV. STAT. § 6701 (1947); Wash. Laws 1949, c. 198, § 26; 1 WIS. STAT. § 51.37(2) (1947).

⁶ *E.g.*, OHIO GEN. CODE §§12421 [assault with intent to commit rape], 13025 [carnal knowledge of insane woman].

⁷ One state provides for mandatory proceedings to determine the existence of psychopathy upon conviction of named offenses: N.J. STAT. ANN. § 2:192-1.4 (Supp. 1949). Five states provide for such proceedings against persons charged with crime: ILL. STAT. ANN. c. 38, § 822 (Smith-Hurd, Supp. 1949); 4 IND. STAT. ANN. § 9-3403 (Burns, Supp. 1949); 25 MICH. STAT. ANN. § 28.967(3) (Supp. 1949); 19 MO. REV. STAT. ANN. § 9359.3 (Supp. 1949); Wash. Laws 1949, c. 198, § 26. Another state provides for such proceedings for persons convicted of a felony or convicted for the third time of a misdemeanor: VT. REV. STAT. § 6701 (1947). Six states and the District of Columbia provide for such proceedings against persons regardless of whether they are charged with crime: CAL. WELFARE AND INSTITUTIONS CODE §§ 5501, 5607 (Deering, Supp. 1949); D.C. CODE § 22-3504 (Supp. VII 1949); 4 MASS. LAWS ANN. c. 123A, § 2 (Supp. 1948); 31 MINN. STAT. ANN. § 526.10 (1947); Neb. Laws 1949, c. 294, § 4; N.H. Laws 1949, c. 314, § 3; 1 WIS. STAT. § 51.37(2) (1947). For possible objections to commitment for psychopathy without conviction of a criminal charge as a condition precedent see *Sane Laws for Sexual Psychopaths*, 1 STAN. L. REV. 486 (1949). *Cf.* State ex rel. Pearson v. Probate Court of Ramsey County, 205 Minn. 545, 555, 287 N.W. 297, 302 (1939), *aff'd*, 309 U.S. 270, 273, 60 Sup. Ct. 523, 525 (1940). The objection has been raised that prosecuting officers or courts might rely on such commitment where evidence is insufficient to warrant conviction. Communications to Western Reserve Law Review from Dr. Groves B. Smith, Psychiatrist, Illinois Psychiatric Division, March 10, 1950, and Dr. John L. Smalldon, Superintendent, New Hampshire State Hospital, March 12, 1950.

⁸ OHIO GEN. CODE §§ 13032 (Page, Supp. 1949) [indecent exposure], 13032-1 (Page, Supp. 1949) [nudism], 13040 [giving immoral exhibitions].

⁹ *Id.* §§ 13036 [sending obscene literature by mail], 13038 [delivering or depositing immoral literature].

¹⁰ *Id.* §§ 13031-13, -17(b) [prostitution], 13039 [printing or posting immoral pictures], 13041 [exhibiting lewd pictures in a saloon], 13042 [enticing married women to join certain sects].

¹¹ See *Legis.*, 39 COL. L. REV. 534, 536 (1939).

¹² Prominent members of the Ohio bar have recently advocated that the Ohio act be extended to include examination of sex misdemeanants. Cleveland Press, April 24,

Many crimes, including murder and other types of felonious assault, burglary and larceny, may be motivated by the sex impulse and in many instances serve as sex substitutes.¹³ Sexual psychopaths who commit sex-substitute crimes are within the scope of the Ohio statute, since it provides for discretionary power in the court to require a psychiatric examination of persons convicted of felonies other than the sex offenses named in the statute.¹⁴ However, it is doubtful that the vesting of discretion in the court is well advised. Presumably, the statute is intended to provide a means whereby if a felon has a psychopathic personality that condition will most likely be detected, so that the felon may be given treatment more appropriate to his condition than imprisonment. If the symptoms of psychopathy could easily be recognized by persons lacking specialized medical training, the method now provided would of course adequately serve the purpose of the statute. However, such symptoms are in fact often extremely difficult to recognize, diagnosis of psychopathy requiring both time and expert knowledge.¹⁵ Therefore, the best method for detecting psychopathy in felons would be a mandatory psychiatric examination of every person convicted of a felony. Although upon its face such a plan seems impracticable, its administration can very practicably be worked out. Every felon upon entrance into the Ohio penitentiary is isolated for a period of approximately fifteen days, during which time he is given physical and psychometric examinations.¹⁶ Similarly, it could be

1950, p. 18, col. 4 (Final stocks ed.). To the effect that this would be constitutional see *Sane Laws for Sexual Psychopaths*, 1 STAN. L. REV. 486, 493 (1949).

¹³ Hulbert, *Post Sex Crime Amnesia*, 37 J. CRIM. L. & CRIMINOLOGY 191 (1945); Karpman, *Felonious Assault Revealed as a Symptom of Abnormal Sexuality*, 37 J. CRIM. L. & CRIMINOLOGY 193 (1945). See also Karpman, *Criminality, Insanity and the Law*, 39 J. CRIM. L. & CRIMINOLOGY 584, 597 (1948); Leppman, *Essential Differences Between Sex Offenders*, 32 J. CRIM. L. & CRIMINOLOGY 366, 375 (1942); Simmons, *Some Clinical Approaches in Penology*, 30 J. CRIM. L. & CRIMINOLOGY 865, 872 (1940).

The classes of sex impulse are: (1) *Heterosexuality*, which may lead to rape, carnal knowledge, incest, indecent assaults on unwilling women, statutory rape, and the attempt to commit any of the above; (2) *Homosexuality*; (3) *Exhibitionism*; (4) *Sadism and Masochism*, which have been known to lead to arson; (5) *Petishism*, which may lead to commission of such crimes as burglary to obtain desired objects; (6) *Transvestism or Eonism*, manifested by cross dressing; (7) those classes of less common occurrence such as: *Paedophilia*, i.e., attraction to immature girls; *Necrophilia*, manifested by intercourse with female cadavers; *Voyeurism*, manifested by peeping, and *Bestiality*, which is more common in rural than in urban areas. East, *supra* note 1, at 536.

¹⁴ See note 5 *supra*.

¹⁵ BROMBERG, CRIME AND THE MIND 82 (1948); *The Challenge of the Sex Offender*, 22 MENTAL HYGIENE 1, 7 (1938); *Sane Laws for Sexual Psychopaths*, 1 STAN. L. REV. 486, 494 (1949).

¹⁶ Communication to Western Reserve Law Review from R. W. Alvis, Warden, Ohio State Penitentiary, April 27, 1950. Persons sentenced to death are exempted from this procedure.

provided that upon entrance into the penal institution one convicted of a felony other than a sex offense would be isolated for an appropriate length of time during which a psychiatric board would examine the inmate to determine whether he is a psychopath.¹⁷ If the board should unanimously decide that the felon is not a psychopath, then he would forthwith continue to serve his penal sentence. But if one or more members of the board should determine that the offender is a psychopath, then a hearing to determine judicially the existence of psychopathy would be mandatory.

Although logically it would seem that a psychiatric examination should be required of the person who commits a misdemeanor other than one of a sexual nature, the difficulty and expense of administration would very likely be overwhelming if the procedure were extended to all misdemeanants.¹⁸ Balancing social desirability against practical difficulties, it seems that society would achieve the greatest feasible protection by providing for a mandatory psychiatric examination of all sexual offenders, whether felons or misdemeanants, and of all felons.

When a psychiatric examination is ordered by the court, the Ohio statute requires that the offender be referred to the department of public welfare, a psychiatric clinic provided by that department, or three psychiatrists, for examination.¹⁹ After an examination for a period not exceeding sixty days, the examiners must furnish to the referring court a written report of their findings of the defendant's mental condition.²⁰

A judicial hearing to determine whether the defendant is a psychopath is then conducted. Under the Ohio statute this hearing is mandatory in all cases.²¹ Although it seems inadvisable, and perhaps unconstitutional,

¹⁷ In Illinois and Michigan psychiatric examinations are given to persons confined in a penitentiary in order to determine whether sexual psychopathy has developed during their prison terms. Wall and Wylie, *Institutional and Post-Institutional Treatment of the Sex Offender*, 2 VAND. L. REV. 47, 57 (1948).

¹⁸ The procedure recommended for felons would be inapplicable to misdemeanants since the latter, if deprived of their liberty, are confined in local jails. OHIO GEN. CODE §§ 12372, 12370. The cost of providing a psychiatric examining board in each local jail would be prohibitive. Also many misdemeanants are not confined for a sufficient length of time to conduct an adequate psychiatric examination.

¹⁹ OHIO GEN. CODE § 13451-20 (Page, Supp. 1949). In order to qualify as a psychiatric examiner under this statute, psychiatrists must be licensed to practice medicine in Ohio and have had at least five years' experience in treating mental diseases. Psychologists, to qualify, must have received either a doctor of science or a doctor of philosophy degree from an accredited graduate school and have had at least two years' experience in clinical psychology.

²⁰ *Ibid.* In addition to their findings, the report must also contain the opinions and recommendations of the examiners.

²¹ *Ibid.*: "A certified copy of such report shall be served upon such person and his attorney of record within three days after the filing thereof with the court. The court shall conduct a hearing thereon not earlier than ten days nor later than thirty days after the service of such copies of the report. . . ."

to abolish completely the device of a judicial hearing for determining the mental disorder prerequisite to commitment, it is doubtful that a hearing should be required in all cases.²² A provision that no hearing is required if the examiners are unanimous in their findings that the offender is *not* a psychopath would not be open to constitutional objection, for no commitment would result.²³ Such a provision²⁴ would tend to relieve the administrative burden upon courts whose dockets are already overcrowded without depriving the offender of any substantial rights.

In the hearing to determine the existence of psychopathy, the Ohio statute provides that the state and the alleged psychopath shall have the following rights:

Both the state and such person or his guardian or next friend shall have the right to appear in person or by counsel at such hearing, to subpoena, examine and cross-examine the examiners making the report regardless of the part of the state in which the examiners may live, and to produce witnesses, both lay and expert, as to the mental condition of such person. In the event and to the extent that no subpoenas are issued for the examiners to appear at the hearing, the report or such part of it as was prepared by the examiners for whom no subpoena was issued, shall constitute prima facie evidence.²⁵

The statute further provides that the *court* shall determine whether the offender is a psychopath.²⁶ The failure of the legislature to provide that this determination be made by a jury raises the question of the constitutionality of the statute. The Ohio Constitution provides that "The right of trial by jury shall be inviolate . . ." ²⁷ Unless the right to a jury is waived, this provision requires a jury trial in criminal proceedings whenever there is a possibility of imprisonment.²⁸ Imprisonment has been defined as "any

²² See Weihofen, *Commitment of Mental Patients—Proposals to Eliminate Some Unhappy Features of Our Legal Procedure*, 13 ROCKY MT. L. REV. 99, 103-08 (1940); Comment, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L.J. 1178, 1181-84, 1199-1200 (1947).

²³ Since the legislature created the "right" on the part of the state to commit the offender as a psychopath and on the part of the offender to be committed as a psychopath, neither the state nor the offender could validly object to the legislature's conditioning of the "right" in the manner suggested.

²⁴ For a statutory provision to this effect see D.C. CODE § 22-3507 (Supp. VII 1949).

²⁵ OHIO GEN. CODE § 13451-20 (Page, Supp. 1949). There could be no objection to the introduction of the examiners' reports in evidence as long as the examiners themselves are subject to being called for cross examination. 5 WIGMORE, EVIDENCE § 1385a (3d ed. 1940).

²⁶ OHIO GEN. CODE § 13451-20 (Page, Supp. 1949).

²⁷ OHIO CONST. ART. I, § 5. Trial by jury is not necessary to provide due process of law. *Ex parte Januszewski*, 196 Fed. 123 (C.C.S.D. Ohio 1911); see *Palko v. Connecticut*, 302 U.S. 319, 324, 58 Sup. Ct. 149, 151 (1937).

²⁸ *City of Fremont v. Keating*, 96 Ohio St. 468, 118 N.E. 114 (1917); cf. *Cochran v. State*, 105 Ohio St. 541, 138 N.E. 54 (1922); *Hoffrichter v. State*, 102 Ohio St. 65, 130 N.E. 157 (1921); *Cincinnati v. Wright*, 77 Ohio App. 261, 67 N.E.2d 358 (1945).

restraint placed upon one contrary to his wishes and amounting to a physical detention of his person. It is not necessary that he should be restrained behind prison bars."²⁹ It would seem that commitment of a psychopath to an institution would constitute imprisonment. Therefore, if the commitment proceedings are criminal in nature, the offender has a right to a jury trial. If, however, they are civil in nature, a jury trial is necessary only if it would have been required by the common law of Ohio prior to the adoption of the Ohio Constitution.³⁰ Since there were no proceedings for the commitment of persons with psychopathic personalities at the Ohio common law,³¹ it must be determined by analogy whether, if the proceedings are civil, a jury trial is required. The Ohio courts have held that no jury trial is necessary in proceedings for the following: commitment of juvenile delinquents,³² commitment of the criminally insane,³³ commitment for medical treatment of a person acquitted of a charge of prostitution,³⁴ and appointment of guardians for habitual inebriates.³⁵ These proceedings appear to be closely analogous to those for the commitment of psychopaths. Therefore, if the proceedings for the commitment of psychopaths are civil in nature, it would seem that no jury trial is required.³⁶

Thus, the necessity of a trial by jury in proceedings for the commitment of a psychopath would seem to depend upon whether the proceedings are criminal or civil in nature. In determining which they are, the statute, its purposes and its effects should be considered as a whole—no single factor being determinative. The fact that the provisions relating to the commitment of psychopaths appear in the penal code may be considered an indication that these proceedings are criminal.³⁷ But this is not necessarily so, for the commitment provisions are found in the chapter on "Sentence

²⁹ *United States ex rel. Carapa v. Curran*, 297 Fed. 946, 950 (2d Cir. 1924) (habeas corpus proceeding).

³⁰ *Inwood v. State*, 42 Ohio St. 186 (1884); *Dunn v. Kanmacher*, 26 Ohio St. 497 (1875); *State ex rel. Seney v. Toledo Gardeners' Exchange Co.*, 13 Ohio App. 250 (1919).

³¹ The first statute authorizing the commitment of persons with psychopathic personalities was enacted in Michigan in 1935. Mich. Pub. Acts 1935, No. 88, as amended, Mich. Pub. Acts 1937, No. 196.

³² *Prescott v. State*, 19 Ohio St. 184 (1869).

³³ *State v. Beard*, 63 Ohio App. 486, 27 N.E.2d 184 (1939).

³⁴ *Ex parte Company*, 106 Ohio St. 50, 139 N.E. 204 (1922). In this case, after having been acquitted of a charge of prostitution, the petitioner, pursuant to statute, was detained against her will by the Board of Health for treatment for gonorrhoea. See also *Ex parte O'Connor*, 29 Cal. App. 225, 231, 155 Pac. 115, 118 (1915).

³⁵ *Hagany v. Cohnen*, 29 Ohio St. 82 (1876).

³⁶ See *State ex rel. Pearson v. Probate Court of Ramsey County*, 205 Minn. 545, 287 N.W. 297 (1939), *aff'd*, 309 U.S. 270, 60 Sup. Ct. 523 (1940).

³⁷ See *People v. Frontczak*, 286 Mich. 51, 281 N.W. 534 (1938).

and Proceedings Thereunder," and since the act provides that commitment shall operate to suspend the execution of sentence,³⁸ the placement is logical even if the proceedings are not criminal in nature.

The fact that physical detention results does not of itself render the proceedings criminal.³⁹ In *Prescott v. Ohio*,⁴⁰ the grand jury found that there was sufficient evidence to justify indicting Prescott, a fourteen year old boy, for arson. As permitted by statute,⁴¹ the grand jury, instead of returning an indictment, bound Prescott over to the court as a juvenile delinquent. The court then committed him to a state reformatory until he became of age or was reformed. On appeal, Prescott claimed that the statute under which he was committed violated the Ohio Constitution in that it deprived him of his right to trial by jury.⁴² In holding that this commitment could be made without a jury trial, the Supreme Court of Ohio said:⁴³

The provisions referred to in our State constitution relate to the preservation of the right of trial by jury, and to the rights of the accused in criminal prosecutions. We do not regard this case as coming within the operation of either of these provisions. It is neither a criminal prosecution, nor a proceeding according to the course of the common law, in which the right to a trial by jury is guaranteed.

The proceeding is purely statutory; and the commitment, in cases like the present, is not designed as a punishment for crime, but to place minors of the description, and for the causes specified in the statute, under the guardianship of the public authorities named, for proper care and discipline, until they are reformed, or arrive at the age of majority. The institution to which they are committed is a school, not a prison; nor is the character of their detention affected by the fact that it is also a place where juvenile convicts may be sent, who would otherwise be condemned to confinement in the common jail or the penitentiary.

The reasoning of the *Prescott* case is especially applicable to the proceedings for the commitment of psychopaths. These proceedings, as in the *Prescott* case, are purely statutory. Also, the proceedings are to determine whether the offender is a psychopath; they are not to determine his guilt since he has already been convicted of a crime. The purpose of commitment is not punishment for a crime,⁴⁴ but to place psychopaths under the care of the department of public health for treatment for their psychopathic condition.⁴⁵ For these reasons it appears that the Ohio pro-

³⁸ OHIO GEN. CODE § 13451-20 (Page, Supp. 1949).

³⁹ *United States ex rel. Carapa v. Curran*, 297 Fed. 946 (2d Cir. 1924).

⁴⁰ 19 Ohio St. 184 (1869).

⁴¹ 54 Ohio Laws 163, 166 (§8) (1857), codified, 66 Ohio Laws 145, 190 (Mun. Code c. 19, § 242) (1869), repealed by implication, 99 Ohio Laws 192 (1908).

⁴² OHIO CONST. Art. I, §§ 5, 10.

⁴³ 19 Ohio St. 184, 187-88 (1869).

⁴⁴ *Cf. Vona v. State*, 54 N.Y.S.2d 453 (Ct. Cl. 1945).

⁴⁵ In view of the holding of the *Prescott* case, it would seem that the nature of the

ceedings for the commitment of psychopaths are civil in nature⁴⁶ and, therefore, no jury trial is required.⁴⁷

The court's determination of the question whether the offender is a psychopath is made upon consideration of the examining psychiatrists' report and other evidence which may have been introduced.⁴⁸ The court has broad discretion in making this determination.⁴⁹ When the examining psychiatrists disagree as to the psychopathic condition of the offender, it is not an abuse of discretion for the court to decide contrary to the majority of the psychiatrists.⁵⁰

Section 13451-19 of the Ohio General Code provides:

The purpose of this act is to establish, for the greater protection of the public, proceedings to be administered by the criminal courts dealing with . . . psychopathic offenders, as defined in this act, in cases in which the court having jurisdiction finds that the imposition, or continued enforce-

detention would not be affected by the fact that Ohio General Code § 13451-22a provides that if facilities for the treatment of psychopathic offenders are lacking the department of public welfare may send the offender to the penitentiary.

⁴⁶ Although it appears that for reasons of convenience the Ohio act should be placed in the criminal code where it is presently found, it would be advisable, in order to avoid controversy, that the act be amended to provide expressly that the proceedings are civil.

⁴⁷ See *People v. Chapman*, 301 Mich. 584, 4 N.W.2d 18 (1942); *State ex rel. Pearson v. Probate Court of Ramsey County*, 205 Minn. 545, 287 N.W. 297 (1939), *aff'd*, 309 U.S. 270, 60 Sup. Ct. 523 (1940). See also Weihofen and Overholser, *Commitment of the Mentally Ill*, 24 TEXAS L. REV. 307, 344 (1946). Nine of the fifteen jurisdictions having laws relating to the commitment of psychopaths expressly provide for trial by jury in determining the question of psychopathy. Two states require a jury trial in all such cases: ILL. STAT. ANN. c. 38, § 824 (Smith-Hurd, Supp. 1949); Neb. Laws 1949, c. 294, § 6. Four states and the District of Columbia provide that the alleged psychopath in order to have a trial by jury must demand it: CAL. WELFARE AND INSTITUTIONS CODE §§5511, 5128 (Deering, Supp. 1949); D.C. CODE § 22-3508 (Supp. VII 1949); 25 MICH. STAT. ANN. § 28.967(7) (Supp. 1949); Wash. Laws 1949, c. 198, §§ 8, 38; 1 WIS. STAT. § 51.37(4) (1947). One state provides that a jury trial may be held at the discretion of the judge if it is requested by the person charged: 19 MO. REV. STAT. ANN. § 9359.4 (Supp. 1949). One state provides for a jury trial at the judge's discretion: 4 MASS. LAWS ANN. c. 123A, § 2 (Supp. 1948). On the question of the advisability of a jury trial in commitment proceedings see Weihofen, *Commitment of Mental Patients—Proposals to Eliminate Some Unhappy Features of Our Legal Procedure*, 13 ROCKY MT. L. REV. 99, 109 (1941); Comment, 56 YALE L.J. 1178, 1192-93 (1947).

⁴⁸ OHIO GEN. CODE § 13451-20 (Page, Supp. 1949). If the court is still uncertain as to the psychopathic condition of the offender it should have the power to commit him for further observation and examination. For a statutory provision giving the court this power see CAL. WELFARE AND INSTITUTIONS CODE § 5512 (Deering, Supp. 1949).

⁴⁹ *People v. Parrish*, 75 Cal. App.2d 907, 172 P.2d 89 (1946); *Dittrich v. Brown County*, 215 Minn. 234, 9 N.W.2d 510 (1943).

⁵⁰ *People v. Parrish*, *supra* note 49.

ment, of the applicable penal sentence will not afford to the public proper protection against possible future criminal conduct of such . . . psychopathic offenders.

Evidently relying upon this provision, in *State v. Hall*,⁵¹ the Supreme Court of Ohio refused to disturb the ruling of the trial judge that even though the defendant was found to be a psychopathic offender, greater protection would be afforded the public by imposing the applicable penal sentence — life plus 68 years — than by committing Hall to an institution for the treatment of his psychopathic condition.⁵² Therefore, it would seem that the trial judge has discretion in deciding whether to commit the psychopathic offender for treatment or to impose the applicable penal sentence.

There is another provision in the Ohio statute permitting the psychopathic offender to be sent to the penitentiary instead of to a mental institution; the statute provides that when the psychopath has been committed to the custody of the department of Public Welfare and there is a lack of facilities for the treatment of psychopaths in an appropriate institution, he "shall be sent to the institution to which he would have been sentenced had he not been adjudged . . . a psychopathic offender."⁵³ At the present time, there are no adequate facilities in Ohio for the treatment of psychopaths.⁵⁴ Consequently, most of the persons found to be psychopathic offenders are being sent to penal institutions.⁵⁵

The advisability of statutory provisions which allow acknowledged psychopathic offenders to be sent to the penitentiary instead of to institutions for treatment is doubtful. In cases of sexual psychopathy, experience has shown that incarceration in a penal institution for a term often does not act as a deterrent to and even may increase the danger of sex offenses in the future.⁵⁶ It has also shown that the prison term may lead a person of stronger than average sexual propensities toward sexual perversion,⁵⁷

⁵¹ 150 Ohio St. 382, 82 N.E. 2d 543 (1948). The facts of this case may be found in an editor's note in 38 Ohio Op. 235 (1948).

⁵² This decision is questionable since Ohio General Code § 13451-20, dealing specifically with commitment, states: "If . . . the court shall find that such person is . . . a psychopathic offender . . . the court *shall* enter an order of indefinite commitment of such person to the department of public welfare. . . ." (italics supplied).

⁵³ OHIO GEN. CODE § 13451-20 (Page, Supp. 1949).

⁵⁴ Hoy, *What is Wrong with the Ohio Penal System*, 18 U. OF CIN. L. REV. 166, 171 (1949). This situation will be remedied by the completion of a 300-bed hospital to be used exclusively for treatment of psychopaths. Appropriations for this hospital have already been made. 123 Ohio Laws Supp. 246, 261 (1949).

⁵⁵ Communication to Western Reserve Law Review from Dr. R. E. Bushong, Superintendent, Lima State Hospital, Lima, Ohio, March 14, 1950.

⁵⁶ Wall and Wylie, *Institutional and Post-Institutional Treatment of the Sex Offender*, 2 VAND. L. REV. 47, 48 (1948).

⁵⁷ Karpman, *Toward the Psychogenesis of So-Called Psychopathic Behavior*, 36 J. CRIM. L. & CRIMINOLOGY 305, 313 (1945).

as well as create an unhealthy atmosphere for the normal prisoners.⁵⁸ The legislature should require the commitment for treatment of all persons found to be psychopathic offenders and should provide institutions with adequate facilities so that all such persons could be segregated during the period of their confinement for treatment.⁵⁹

Under the Ohio statute, psychopathic offenders are committed for an indefinite term.⁶⁰ Since the purpose of the statute is to provide for the treatment and cure of the psychopath, it is important that no time limits be placed upon the commitment.⁶¹ There can be constitutional objection to the indefinite term, since it is a necessary means of achieving a legitimate end.⁶²

All the statutes dealing with psychopathic offenders provide methods by which these offenders may be released.⁶³ The Ohio statute provides that the director of public welfare shall order the release of a person from the institution to which he has been committed as a psychopathic offender whenever the director finds that such person has recovered or is sufficiently improved to justify his release.⁶⁴ If the person released has been confined for a period less than the maximum sentence for the crime of which he

⁵⁸ Note, 32 J. CRIM. L. & CRIMINOLOGY 196 (1941).

⁵⁹ To the effect that such segregation and treatment are necessary see Wall and Wylie, *supra* note 56, at 48-50; *The Psychological Treatment of Crime*, 103 JUST. P. 280, 296 (1939). For a statute providing for separate facilities for and treatment of sexual psychopaths see N.H. Laws 1949, c. 314, § 8.

⁶⁰ OHIO GEN. CODE § 13451-20 (Page, Supp. 1949). New Jersey is the only state having a statute relating to the commitment of psychopaths which does not provide for an indefinite commitment—the commitment there being limited to the maximum term for which the offender could have been sentenced. N.J. STAT. ANN. § 2:192-1.9 (Supp. 1949).

⁶¹ *Sane Laws for Sexual Psychopaths*, 1 STAN. L. REV. 486, 495 (1949).

⁶² Comment, 37 MICH. L. REV. 613, 615-17 (1939). The constitutional guaranty against cruel and unusual punishment does not apply to these civil commitment proceedings. *People v. Chapman*, 301 Mich. 584, 4 N.W.2d 18 (1942).

⁶³ Statutory methods of release vary greatly from state to state. CAL. WELFARE AND INSTITUTIONS CODE §§ 5517, 5518, 5605 (Deering, Supp. 1949); D.C. CODE § 22-3509 (Supp. VII 1949); ILL. STAT. ANN. c. 38, § 822 (Smith-Hurd, Supp. 1949); 4 IND. STAT. ANN. §§ 9-3407, 9-3408 (Burns, Supp. 1949); 4 MASS. LAWS ANN. c. 123A, § 2 (Supp. 1948); 25 MICH. STAT. ANN. §§ 28.967.(6), 28.967.(7) (Supp. 1949); 31 MINN. STAT. ANN. §§ 526.10, 525.761 (1947); 19 MO. REV. STAT. ANN. § 9359.6 (Supp. 1949); Neb. Laws 1949, c. 294, § 8; NEB. REV. STAT. §§ 83.339-83.343 (1943); N.H. Laws 1949, c. 314, § 12; N.J. STAT. ANN. § 2:192-1.11 (Supp. 1949); VT. REV. STAT. § 6703 (1947); Wash. Laws 1947, c. 273, § 6, as amended, Wash. Laws 1949, c. 198, § 28; 1 WIS. STAT. §§ 51.37 (6), 51.11 to 51.13 (1947).

⁶⁴ OHIO GEN. CODE § 13451-22 (Page, Supp. 1949). Before the director of public welfare may make such a finding, both the commissioner of mental hygiene and the superintendent of the institution to which the person was committed must have made similar findings.

was convicted, he is transferred to an appropriate penal institution.⁶⁵ For the purpose of determining eligibility for parole or discharge from the penal institution the period of confinement in the "treating" institution is considered as time served under the penal sentence.⁶⁶ The wisdom of requiring the former psychopath to serve the remaining portion of his criminal sentence is questionable.⁶⁷ Even though the offender's mental condition has improved sufficiently to justify his release from the institution to which he was committed for treatment of his psychopathic condition, in a large proportion of cases it will not have improved to such an extent that it equals in stability the mental condition of a person who has never been afflicted with a psychopathic personality. To subject the former psychopath to the demoralizing atmosphere of a penitentiary upon his release from the "treating" institution would jeopardize the result which has been accomplished.⁶⁸ Thus it would seem that requiring the remaining portion of the criminal sentence to be served is contrary to the purpose of the statute — the greater protection of the public by means of effective treatment of psychopathic offenders.⁶⁹

If the person released under an order of the director of public welfare has been confined to an institution for the treatment of his psychopathic condition for a period equaling or exceeding the maximum sentence for the crime of which he was convicted, the Ohio statute provides that he shall be placed on trial visit under supervision.⁷⁰ After an appropriate period of trial visit, if the director of public welfare finds that supervision is no longer necessary, the former psychopath is completely discharged.⁷¹

Another method of releasing a person who has been committed as a

⁶⁵ *Id.* § 13451-22(1).

⁶⁶ *Ibid.*

⁶⁷ Some statutes go even further and require that the full criminal sentence be served after the offender has been released from the institution to which he was committed for treatment of his psychopathic condition. CAL. WELFARE AND INSTITUTIONS CODE § 5517 (Deering, Supp. 1949); D.C. CODE §§ 22-3510, 22-3511 (Supp. VII 1949); ILL. STAT. ANN. c. 38, §§ 823 to 825 (Smith-Hurd, Supp. 1949); 4 MASS LAWS ANN. c. 123A, § 6 (Supp. 1948); 31 MINN. STAT. ANN. § 526.11 (1947); 19 MO. REV. STAT. ANN. § 9359.7 (Supp. 1949); VT. REV. STAT. § 6703 (1947); 2 WIS. STAT. § 351.66 (1947).

⁶⁸ Wall and Wylie, *Institutional and Post-Institutional Treatment of the Sex Offender*, 2 VAND. L. REV. 47, 50, 59, 60 (1948); Legis., 39 COL. L. REV. 534, 542 (1939).

⁶⁹ To the effect that the psychopathic offender should be punished after he has been treated see BROMBERG, CRIME AND THE MIND 197 (1948); Wertham, *Psychiatry and the Prevention of Sex Crimes*, 28 J. CRIM. L. & CRIMINOLOGY 847, 848-49 (1938).

⁷⁰ OHIO GEN. CODE § 13451-22(2) (Page, Supp. 1949).

⁷¹ *Ibid.* The director of public welfare may make such a finding only upon the written recommendation of the commissioner of mental hygiene.

psychopathic offender is provided in Ohio General Code Section 13451-22a:

At any time after the expiration of the period equivalent to the maximum sentence for the offense of which he was convicted . . . any person committed under the provisions of this act may make application, personally, by counsel or by guardian or next friend, for his release to the court by which he was committed. . . . No subsequent application may be heard on behalf of any person whose application is denied, except by leave of court, within one year after the date of the last preceding hearing. If, upon any hearing provided by this section, the court finds that such person is not then . . . a psychopathic offender . . . the court shall order the department of public welfare to discharge such person. . . .

It would seem that this method of release is defective in that the statute fails to provide for a period of trial visit. If a probationary period is advisable when the decision to release is made by those who are experts in determining a person's mental condition,⁷² then it should certainly be equally as advisable when this decision is made by a court.⁷³

In addition to the statutory methods, a person who has been committed to an institution for treatment as a psychopathic offender may be able to obtain his release by means of a writ of habeas corpus. If a person who has been committed to an institution for treatment of a mental disorder is confined in that institution after his mental condition has been restored to normal, he is being unlawfully restrained.⁷⁴ It is generally held that a person who is being unlawfully restrained may seek relief under a writ of habeas corpus unless there is an adequate statutory remedy available which was intended to be exclusive.⁷⁵ The Ohio statute provides no method by which a person who has been committed as a psychopathic offender may

⁷² "The most glaring defect of the (Illinois) law lies in its failure to provide opportunity for parole, and making it mandatory for the psychiatrist to assume complete and permanent recovery, for who . . . is able to tell how an individual will react when released back to the community, when in our present Psychiatric Division status there are no females whom these individuals might rape, no female members of their family with whom they might have incestuous relationships, and no small children on whom they can commit indecent liberties. In other words, I know of only one test, and that is an opportunity in a free community to revert . . . to such behavior." Communication to Western Reserve Law Review from Dr. Groves B. Smith, Psychiatrist, Psychiatric Division of Illinois, March 10, 1950. The District of Columbia law pertaining to psychopaths has also been criticized for its failure to provide for parole. Communication to Western Reserve Law Review from Winfred Overholser, M. D., Superintendent, Saint Elizabeths Hospital, Washington, D.C., April 12, 1950.

⁷³ To the effect that a probationary period should be provided see Wall and Wylie, *supra* note 69, at 54-55, 60.

⁷⁴ *Northfoss v. Welch*, 116 Minn. 62, 133 N.W. 82 (1911); SMOOT, LAW OF INSANITY § 165 (1929).

⁷⁵ *Hodison v. Rogers*, 137 Kan. 950, 22 P.2d 491 (1933); *In re Clendenning*, 145 Ohio St. 82, 60 N.E.2d 676 (1945); *Ex parte Justes*, 121 Ohio St. 628, 172 N.E. 307 (1930) (memorandum decision); *Ex parte Remus*, 119 Ohio St. 166, 162 N.E. 740 (1928); *In re Ackerman*, 95 Ohio St. 404, 116 N.E. 1085 (1916) (memorandum decision); *State ex rel. Colvin v. Superior Court*, 159 Wash. 335, 293 Pac. 986

have a judicial determination of his present mental condition until after a period of time equivalent to the maximum sentence for the crime of which he was convicted.⁷⁶ Generally statutory methods, such as the one provided in Ohio, in which the decision to release a person from confinement is left entirely to administrative officers, are held to be inadequate and thus not to preclude relief under a writ of habeas corpus.⁷⁷ Whether a writ of habeas corpus could be brought after the expiration of a period of time equivalent to the maximum sentence for the crime of which the psychopathic offender was convicted would depend upon whether the statutory provision permitting, without leave of court, no more than one court adjudication per year of such offender's present mental condition affords an adequate remedy, and, if this statutory remedy is found to be adequate, upon whether it was intended to be exclusive.⁷⁸

In the foregoing appraisal of the Ohio act dealing with psychopathic offenders certain defects have been noted. It is suggested that the Ohio act be amended in the following respects:

1. A psychiatric examination should be required for every person convicted of a felony or a sex misdemeanor;
2. No hearing to determine whether the offender is a psychopath should be provided if the examiners unanimously find that he is not psychopathic;
3. Commitment to a non-penal institution for treatment should be mandatory for every person found to be a psychopathic offender;
4. No person should be required to serve any portion of his penal sentence after his release from the institution to which he has been committed for treatment as a psychopathic offender;
5. A probationary period should be provided for each person released from such an institution.

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(1930); *Wright v. Wright*, 78 W. Va. 57, 88 S.E. 606 (1916); SMOOT, LAW OF INSANITY §§ 170, 171 (1929); Note, 73 A.L.R. 567 (1931). For cases which have intimated that a statute may not make another remedy exclusive and thus preclude the use of a writ of habeas corpus where the constitution has given the court the power to hear such writs see *Ex parte Remus*, 119 Ohio St. 166, 170-71, 162 N.E. 740, 741-42 (1928); *Prescott v. Ohio*, 19 Ohio St. 184, 188-89 (1869); *In re Maggie Kruse*, 13 Ohio Dec. Repr. 775, 777 (1871).

⁷⁶ OHIO GEN. CODE § 13451-22 (Page, Supp. 1949).

⁷⁷ *Kennedy v. Meara*, 127 Ga. 68, 56 S.E. 243 (1906); *Ex parte Remus*, 119 Ohio St. 166, 162 N.E. 740 (1928). See *State ex rel. Rogers v. Bushong*, 82 Ohio App. 209, 216-17, 81 N.E.2d 314, 317-18 (1947); *State ex rel. Colvin v. Superior Court*, 159 Wash. 335, 343-44, 293 Pac. 986, 989 (1930). See also SMOOT, LAW OF INSANITY § 166 (1929). Some courts hold that the statutory remedy must be exhausted before a writ of habeas corpus can be brought. *Mann v. Parke*, 57 Va. 443 (1864); *State ex rel. Thomson v. Clifford*, 106 Wash. 16, 179 Pac. 90 (1919). *Contra: Kennedy v. Meara*, *supra*.

⁷⁸ See note 75 *supra*.