The International Handbook of Psychopathic Disorders and the Law
Volume II
Laws and Policies

Edited by

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John Wiley & Sons, Ltd
To my parents
Robert A. Felthous
Agnetta W. Felthous

To my children
Christian Saß
Vera Saß
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Henning Saß, M.D., is currently Medical Director and Chairman of the Board of Directors at the University Hospital of the University of Technology (RWTH) in Aachen/Aix-la-Chapelle, Germany. He studied medicine at the universities of Kiel, Vienna and Mainz. After passing the state examination in Kiel and receiving his medical doctorate in Mainz, he was a resident in the Department of Psychiatry at the University of Heidelberg. Having completed his training in clinical psychiatry and in psychotherapy, he concentrated on forensic psychiatry, general psychopathology, diagnostic research and personality disorders. His habilitation on Psychopathie, Soziopathie, und Dissozialitat (Psychopathy, Sociopathy and Dissocial Behaviors) was published as a Springer monograph in 1987. He was then appointed Professor of Forensic Psychiatry at the Ludwig-Maximilians-University in Munich, after which he was the Chair of Psychiatry and Psychotherapy at the medical faculty in Aachen for 10 years, before he was appointed to his current position. His research interests remain focused on forensic psychiatry, especially in the field of personality disorders. During his academic career, he was President of the German Society for Psychiatry, Psychotherapy and Nervous Diseases (DGPPN) and of the Association of European Psychiatrists (AEP). He is editor or co-editor of several scientific journals and member of numerous boards of scientific organizations including the European Brain Council and the Research Council of the German Ministry for Science, Research and Technology.
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Preface to Volume II

The need for a comprehensive, international textbook on psychopathic disorders and the law was recognized when the co-editors prepared a special issue of Behavioral Sciences and the Law on 'International Perspectives on Psychopathic Disorders’ published in 2000. Contributors to this issue addressed phenomenological, molecular, psychosocial, therapeutic and legal aspects of psychopathic disorders. From our work on this special issue, we came to realize three facts. First, the scientific advancements in understanding psychopathic disorders have been substantial in recent decades. Secondly, every society is burdened with the necessity of dealing with psychopathically disordered individuals. And, thirdly, the considerable literature on psychopathic disorders is extraordinarily compartmentalized, limiting its usefulness to practitioners and policymakers alike.

The compartmentalization of knowledge on psychopathic disorders exists on several levels. Scientific disciplines tend to focus their methodologies on a single aspect or a few closely associated aspects of psychopathy. Consequently, attempts at broader, integrated views are relatively lacking. Literatures on phenomenology, pathogenesis and treatment are separate. Even more pronounced is the tremendous chasm that exists between printed knowledge of a clinical and scientific nature and that having to do with public policies and legal regulations. Yet psychopathic disorders impose a cost and stress on society, which responds with its frustrated attempts at correcting or at least ‘containing’ the problems secondary to psychopathic disorders. Finally, individual countries have a wealth of experience in studying, attempting to treat and manage and to limit harm and risks associated with psychopathy through legal regulations, but each country is left to its own with minimal international exchange, especially in public policy approaches. The time is ripe for a more comprehensive, encyclopedic treatment of psychopathic disorders, not limited by disciplinary or geopolitical boundaries.

We initially planned the outline for this International Handbook during a meeting of the German Psychiatric Society (the Deutsche Gesellschaft für Psychiatrie, Psychotherapy und Nervenheilkunde) in Berlin. From our intense discussions, we agreed that the main purpose was to collect important bodies of knowledge and conceptual traditions within the Anglo-American and European realms. The rather independent developments in these two realms needed to be brought together. Another goal was to assemble the different scientific approaches to the problem of psychopathy including the psychological, sociological, medical and psychiatric approaches. Even if we could not achieve an integration of these approaches into a single unified theory or empirical design, we have at least endeavored to collect the most important and influential perspectives. This work may serve as a basis for future attempts at developing an integrated view. A third objective was to give expression to the challenging debate involving legal and mental health experts on the significance of neurobiological findings in addressing questions of criminal responsibility. This debate is
still unsettled and should continue and include considerations of biologically determined dispositions, deficiencies in psychological functions such as empathy, current conceptions of ‘free will’, neuroplasticity and the possibility of repairing deficits with origins in early modes of learning and developing bonding behavior and moral attitudes.

We bring to this project our own overlapping, yet distinct experiences, interests and concepts. Over two decades, Henning Saß, M.D., has refined conceptualizations of psychopathic disorders, beginning with his monograph, *Psychopathy, Sociopathy and Dissocial Conditions: Towards the Differential Typology of Personality Disorders* (1987). Through original research and examination of the literature, he clarified important conceptual distinctions between these three concepts as well as the DSM concept of antisocial personality disorder, then following the DSM-III (1980). Dr. Saß’ continued study of psychopathic disorders emphasizes the importance of looking beyond mere behaviors and establishing presence of psychological dysfunctional symptoms such as the emotional deficiency of the psychopath (Herpertz & Saß, 2000). Alan R. Felthous, M.D., studied individual antisocial behavior, namely animal cruelty, which tends to be cavalierly de- or overvalued as a sign of antisocial personality disorder or psychopathy, but detailed inquiry should involve an assessment of the severity, motivation and mental state which in turn enhances or diminishes its pathological significance (Felthous & Kellert, 1987; Gleyzer, Felthous & Holzer, 2002). As a collaborative investigator, he participated with the late Dr. Ernest Barratt’s team in studying the nature and treatment of impulsive aggression.

We have as well made our respective contributions to thought concerning the application of clinical skills to public policy. Dr. Saß (1985, 1991a,b), for example, has refined and explicated the ‘pathological reference system’, a concept and method for assessing psychopathology as it relates to criminal responsibility. Dr. Felthous (e.g., 1989, 2006) has written extensively on the clinician’s legal duty to warn or protect of patients who present a foreseeable danger to others. Collaboratively we wrote about forensic evaluations (Felthous, Kröber & Saß, 2001) and treatment programs for offenders (Felthous & Saß, 2006).

We both share an extensive experience in evaluating and treating mentally disordered individuals and in consulting to attorneys and courts. Importantly, we share a desire for improvements in treatment and sound public policies that take into account the deficiencies and needs of psychopathically disordered individuals as well as the security of society. We would be pleased if this two-volume work contributes toward bringing about such improvements.

The present volume, II, comprehensively addresses laws and policies that pertain to psychopathic disorders. To our knowledge there has never before been an international attempt to discuss how a variety of civil and criminal laws apply to psychopathic disorders in particular. Sections include Civil Law Issues, Criminal Law Issues and Special Issues. Selected contributors for this volume are distinguished authors from 13 countries: Australia, Austria, Canada, France, Germany, India, the Netherlands, New Zealand, Russian, Spain, Switzerland, the United Kingdom and the United States.

Not every chapter is neatly, exclusively limited to its corresponding subheading topic and some chapters extend the discussion into treatment issues. For example, the chapter on treatment by Drs. Van Beek and Kröger could have been placed in Volume I on diagnosis and treatment. It is grouped with other approaches that include policy and legal structure for treating offenders, including psychopathically disordered offenders. This favors the integrative spirit of the two-volume book. In order to encourage a variety of perspectives
and rich discussion, authors were not restricted in the use of terms and concepts that refer to psychopathic disorders.

A detailed analytical comparison of laws in different countries is invariably complicated by the substantially different legal histories, assumptions and contexts that distinguish legal systems of individual countries. With this qualification and caveat, we believe some meaningful comparison between countries is instructive. Whether a psychopathic disorder qualifies as a mental disorder for civil commitment or for the insanity defense, for example, is handled differently in different countries. We hope that such cross-national comparisons can be useful in formulating public policy that takes into account the nature of psychopathic disorders.

Although this volume is available for purchase without its companion, we encourage those interested to obtain both volumes. The strength of this work, as a text and a reference, is its comprehensive approach to psychopathic disorders, an approach that relates laws and public policies to diagnosis and treatment.

REFERENCES


Acknowledgments

Alan J. Tomkins, J.D., Ph.D., who was editor of Behavioral Sciences and the Law when our special issue on psychopathic disorders was published, gave us the idea and encouragement to edit this greatly expanded work in the form of an international handbook. Many others offered useful thoughts and suggestions. We thank in particular Charles Patrick Ewing, J.D., Ph.D., current editor of Behavioral Sciences and the Law, Michael L. Perlin, J.D., John Petrila, J.D., LL.M., Mark Heyrman, J.D. and Roy Lacoursiere, M.D.

Sincerest thanks go to Felecia Rucker, Dr. Felthous’ extraordinarily proficient assistant, who was a key organizing force from the work’s inception to its publication. She essentially organized the project, corresponded with authors, tracked their progress, made corrections and sent the final products to John Wiley. Her support and energy for the project continued seamlessly even after Dr. Felthous relocated from Chester Mental Health Center and Southern Illinois University to Saint Louis University in Missouri. It is hard to imagine a more dedicated, capable assistant: it is hard to imagine successful completion of this work without Ms. Rucker’s invaluable participation. At the University of Technology (RWTH) in Aachen, it was Alex Morton, Stefan Galow and Annika Martens, who gave valuable technical support to Henning Saß.

We express our heartfelt appreciation to our spouses, Mary Felthous and Isabella Saß, Ph.D., for their unwavering support and for allowing us the time to pursue this project.

Finally, we thank our many outstanding authors for their excellent contributions. We thank them as well for their patience, their responsiveness, and their understanding whenever our communication with them was imperfect.
The impact that individuals with psychopathic disorders have on societies cannot be underestimated. Therefore, every country or state government necessarily deals with psychopathic disorders, often at great expense, but with little efficiency or effectiveness. Even though every society responds in some manner to the problems created by psychopathically disturbed individuals, governments, other institutions and policy makers give virtually no deliberations to the problem itself: psychopathic disorders. As a rule even those in behavioral sciences who investigate psychopathic disorders are not, by virtue of their research results alone, prepared to offer meaningful public policy solutions. Hence, the purpose of this volume indeed the raison d’être of the Handbook: to advance the discussion of what is to be done for and to individuals with psychopathic disorders.

A leitmotif question that runs throughout this volume is: Whose problem is the psychopathic individual? In some cases the answer seems straightforward. The psychopathic serial killer after due process and conviction can be sentenced to life imprisonment without possibility of parole. This answers the critically important need for public protection. At the other end of the spectrum is the psychopathically disturbed individual who also suffers from comorbid mental illness, but has not committed a serious crime. For the treatment of his or her mental illness, mental health services are appropriate; if he requires hospitalization and meets requirements for involuntary hospitalization due to serious mental illness, such mental health services should not be denied because of co-occurring psychopathic disorder.

The world is not so simple, however, and conditions between these two extremes are especially controversial in the arena of public policy. Consider, for example, sexual offenders. The public is justified in its concern over offenders who would kill, torture and mutilate anyone, but especially children, and the legal system has a solemn responsibility to take every reasonable measure to protect the public from such predatory offenders, many of whom seem to have both paraphilias and antisocial or psychopathic features.
Unfortunately, public commentators on the topic often paint all sexual offenders as equally dangerous and hopelessly untreatable. The critical controversy is whether sexual offenders should be the responsibility of the mental health system (Janus, 2000). Arguments against civil commitment of sexual offenders include: they are not bereft of the capacity to make treatment decisions (LaFonda, 2000); they do not suffer from a recognized major mental illness (LaFonda, 2000); without more effective treatment, their commitment amounts to preventive detection (LaFonda, 2000); and the cost of such care can result in less public financial support for the treatment of the seriously mentally ill (Janus, 2000). In favor of civil commitment of sexual offenders is the following dilemma: if sexual offenders are handled only through the crime punishment model, where the punishment fits the crime, many less serious offenders will be released from prison after a relatively short imprisonment and some of these offenders will go on to commit more serious sexual offenses. If sentences of sexual offenders are extended to provide greater public protection through incapacitation, this will be at great expense to the criminal justice system and grossly unfair to the offender whose sexual violations were relatively minor. This same social policy dilemma, so visible and contentious about sex offenders, exists, even if unexpressed, for psychopathically disordered offenders in general. The reader will want to bear in mind such pros and cons of competing public policy positions.

One might well believe that there is no useful purpose in comparing legal systems in different countries. The inquisitorial system of justice, for example, and the adversarial system are so fundamentally different, comparison is useless. Science in contrast is universally comparable and exchangeable. The laws of physics are the same in China, Uruguay and Canada. There are cultural differences in how mental illnesses may manifest themselves cross-culturally, but the core pathophysiology should be the same. If, for example, antisocial personality disorders is more malleable by cultural context than core psychopathy, clinicians are interested in discussing differences and similarities in order to better understand the conditions. Actually, there is probably much more in common among diverse legal systems than is generally assumed. Individual rights and public protection are universal issues, regardless how much or how little weight is given. Most advanced societies attempt some kind of balance.

In order to chart the most constructive direction for the future and to formulate the most prudent laws and policies, it is necessary to take stock of current laws and policies; their historical development, structure, function and effectiveness. Immediately apparent is the diversity of public policy approaches taken by different countries, and in some cases different states within a country, to the universal problems associated with psychopathic disorders. We believe international comparisons of relevant laws and policies in several selected countries should be illustrative if not instructive and should be relevant to policy makers in any country.

A salient point to be drawn from examining an expansive variety of professional fields and legal domains that would have the most involvement with psychopathically disordered individuals is the pervasive failure to address the problem itself. As an example of a topic that did not make it into this Handbook for this reason, consider the important function of professional regulation. No doubt psychopathically disturbed professionals, such as judges, lawyers, physicians and mental health clinicians can harm those they are entrusted to serve and can create enormous problems for their own profession. Professional regulatory bodies, however, rely on the medical model of disease with the aim of helping the impaired
professional while protecting the public. Alcoholism resulting in dangerous or irresponsible professional conduct is an appropriate condition to be addressed; psychopathic disorders are not. The logic of this position is understandable. Most psychopathic individuals should be held accountable and dealt with through supervision, discipline or legal sanctions. However, as more agencies ‘wash their hands’ of psychopathic professionals who practice more or less independently, the risks that such professionals pose have fewer procedures for containment.

Each author or groups of co-authors addresses a specific legal or policy issue that deals with psychopathically disordered individuals. The law itself is described, followed by an attempt to relate the law to psychopathic disorders in particular. Some chapters lean more descriptive, others more prescriptive. Some argue that a given legal procedure or service should not apply to the psychopathically disturbed; whereas others advocate for greater flexibility and interagency cooperation. Any progress in addressing psychopathic disorders must begin with a dialectical process that engages scholarly discussion from different nationalities, disciplines and perspectives.

This volume is divided into two major parts, concerning civil and criminal law issues respectively, with a few miscellaneous but important topics included separately at the end. Each chapter is self-contained. For example, the reader who is interested in hospitalization and civil commitment with applicability to psychopathic disorders in England can simply read Chapter 2 by Zinkler and Priebe. Some background on civil law, however, can be helpful in understanding any one of the particular legal topics. Therefore, at the beginning of the section on civil law is a chapter on the structure and procedures of the civil law by Morris (Chapter 1), and a parallel chapter by Goldstein (Chapter 11) should orient the reader to the criminal law. Because these two chapters are intended only to familiarize the reader with legal structures and procedures, they do not themselves address psychopathic disorders. Also, as for all authors, Morris and Goldstein write from their country’s perspective and so describe primarily the legal system in the United States. Accordingly, some international authors with laws that differed significantly expanded on significant differences.

What should be done with the individual with a psychopathic disorder? Perhaps nothing? If there are no suitable services for treatment or rehabilitation, if the individual does not agree to whatever services are available, if no crime has been committed, perhaps nothing. The disposition of the psychopathic individual is a recurrent theme in this book. The chapter on hospitalization and civil commitment in Germany, Russia and the United States (Chapter 3) presents the civil commitment law and its relevance, or lack thereof, to the laws in these three countries. There are interesting commonalities and contrasts: although authors from each country offer some opinion and analysis, the views, like the laws themselves, are somewhat diverse.

Zinkler and Priebe describe hospitalization and civil commitment in England, and explain how it applies to individuals with psychopathic disorders. Bruce Winick and colleagues, writing from a US perspective, argue that involuntary outpatient treatment for individuals with psychopathic disorders would be inappropriate and wrong (Chapter 4).

Persons with psychopathic disorders can present a variety of problems at the workplace. They can be counterproductive, disruptive and in some cases violent. Wylonis and Sadoff summarize employment law, including in the US, the Americans with Disabilities Act, and explain how it may or may not apply to individuals with psychopathic disorders (Chapter 8).
The psychopathically disordered individual and the workplace is addressed in terms of disability law, with clinical aspects having been addressed by Corcoran in Volume I (Chapter 29). Interestingly, although professional regulation does not give attention to psychopathic disorders, the military does attend to personality disorders that interfere with performance and safe practices. A member can be discharged from the military after, through proper procedures, she or he is found to be unfit for military service (see Walker and Bourgeois, Chapter 7). This ability of the military to release members who would risk harm to captives, civilians, fellow members of the military and the mission serves a useful purpose. Interesting in contrast, are civilian positions involving high risk of assault, such as direct line staff in maximum security hospitals, where the incidence of assault is high, but no such mechanism is in place.

Even though the prediction of future violence based only upon diagnosis lacks accuracy, a high level of psychopathy is associated with a risk for violence. If a person is violent as a result of serious mental illness, hospitalization is universally the rule. However, if a person threatens to commit serious harm, but is not mentally ill and has only a psychopathic disorder, the person may or may not be subject to involuntary hospitalization. In some jurisdictions in some countries the clinician may have a legal duty to warn identifiable victims; in other jurisdictions the clinician could be in violation of confidentiality law for making a protective disclosure. Even within the same jurisdiction the law is something contradictory. This legal situation, as it could apply to patients with psychopathic disorders, is described for the countries of Canada, France, New Zealand, Spain and the United States (Chapter 5).

In child custody disputes and for termination of parental rights, evaluating forensic clinicians will look for mental health and psychopathology including presence of a psychopathic disorder in the parent(s) in question. Billick and Jackson discuss legal standards, psychiatric evaluation and psychological testing used in such assessments for custody and parental fitness (Chapter 6).

Drukteinis describes the relevance and lack thereof of psychopathic disorders to disability determinations, and in particular how to conduct the assessment whenever psychopathic disorder is suspected (Chapter 9).

Negligence, such as that producing a vehicular accident, can result in brain trauma, including acquired psychopathy, and the resulting damage can in turn lead to a lawsuit under tort law. Granacher and Fozdar describe and compare the systems and procedures for litigating such cases in India and the United States (Chapter 10).

As with the civil law section, an introductory and orienting chapter is provided for the section on criminal law. Intended to be descriptive, not hortatory, this section emphasizes constitutional rights that US citizens have should they become suspects or defendants in a criminal matter.

One of the first questions to be faced by a criminal defendant is whether to confess to the criminal charge. Thus, competence to confess or, in the United States, competence to waive Miranda rights, may need to be considered. It is widely assumed that a psychopathic disorder alone would not compromise a suspect’s capacity in this respect. Possible exceptions to this usually true statement are counter-intuitive, therefore, in Gudjonsson and Grisso’s discussion (Chapter 12). In outlining the historical development and purposes of the competence to stand trial, Ciccone concludes that usually a psychopathic disorder alone does not render one incapacitated; even so, the evaluation should include consideration of such
a disorder for a comprehensive assessment and to help assess for deception or malingering (Chapter 13).

Within the criminal law, much attention has been given to the value of psychopathic disorders and criminal responsibility. Approaches by different countries to insanity in general are similar but not the same. How psychopathic disorders are addressed vis-à-vis legal defenses of mental disturbance are of special interest. Countries represented in the chapters on criminal responsibility include Australia, Austria, England, Germany, Switzerland and the United States. Again, there is the question of whether psychopathic offenders should be considered as sufficiently defective to be hospitalized or sufficiently functional to be held responsible and subject to criminal punishment. A third alternative is that even severe psychopaths can be considered both defective and responsible. In any event, the chapters will provide ample discussion of contrasting approaches, including approaches to address unique cases wherein the offender is both psychopathic and mentally ill. Grubin (Chapter 17) explains the use of diminished responsibility in England (and Wales) and Nair and Weinstock (Chapter 19) in the United States. Other mental disorder defenses in the United States, not generally available to defendants with only psychopathic disorders, are discussed by Slovenko (Chapter 20).

Inevitably, most serious offenders with antisocial personality disorder or psychopathy will be sent to prison. A description of the history and purposes of criminal punishment and the role of mental health professionals in criminal sentencing stresses the special considerations for psychopathic disorders. Gunn presents a cogent argument for abolishing capital punishment (Chapter 23).

Arboleda-Flórez (Chapter 25) comprehensively examines special issues presented by the psychopathically disordered prisoner, Konrad (Chapter 24) unpacks the challenging question of under what circumstances hospitalizing a psychopathically disturbed prisoner is appropriate. Two special programs, the Patuxent Institution in Maryland, USA (Chapter 26), and the Special Treatment Programs in the Netherlands (Chapter 27) are each described. Goodman discusses probation and parole, describing in particular the development of the system in Great Britain (Chapter 28).

Part III on special issues includes several topics too important to overlook but not easily placed in another section. In their review, Resnick and Zuchowski (Chapter 30) cast skepticism on the assumption of a strong link between malingering and psychopathic disorders. Ruiz and coauthors address the cultural context, not only of the prevalence of psychopathic disorders, but also of their diagnoses (Chapter 31). An economic argument against providing more treatment/rehabilitation for the psychopathically disordered is that such programs would be expensive but yield little in the way of positive results. Parker and colleagues (Chapter 32) describe a faith-based model for treating substance abusers that is effective in limiting both recidivism and cost. Quality and comprehensive training in forensic psychiatry is described by Reeves and colleagues in Canada, England and the United States (Chapter 33). Interestingly, high-quality and otherwise comprehensive fellowships include little to no information about psychopathic disorders. Finally, Felthous and Saß (Chapter 34) raise quality assurance issues from the topics covered in forgoing chapters. These discussion points, made with an eye towards the future, provide some modest suggestions for improvements, with the hope of more vigorous and rigorous investigations into the nature, diagnosis and treatment of psychopathic disorders and of evidence-based and guided development of programs to rehabilitate offenders with psychopathic disorders.
REFERENCES
