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***Mens Rea*, Neurobiology, and the Indian Courtroom: A Critical Inquiry into Criminal Psychology, Forensic Deception Detection, and the Evolution of Legal Insanity from the IPC to the *Bharatiya Nyaya Sanhita* (2023)**

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Abstract

Criminal law operates on the foundational presumption of *liberum arbitrium*—that the human agent is a rational, autonomous actor capable of exercising free will in choosing between lawful conduct and criminal transgression. However, contemporary advancements in criminal psychology, forensic psychiatry, and cognitive neuroscience increasingly challenge this binary legal construct of culpability. This research paper conducts an interdisciplinary, doctrinal, and empirical evaluation of the intersection between **Criminal Psychology** and the **Indian Criminal Justice System**, specifically analyzing the transition from the colonial statutory regime (IPC, 1860; CrPC, 1973; IEA, 1872) to the newly enacted *Bharatiya Nyaya Sanhita* (BNS), *Bharatiya Nagarik Suraksha Sanhita* (BNSS), and *Bharatiya Sakshya Adhiniyam* (BSA) of 2023. First, the study examines the psychological etiology of criminal behaviour, contrasting psychopathy (Antisocial Personality Disorder), prefrontal cortex dysfunction, and socio-criminogenic conditioning against the strict legal threshold of *mens rea*. Second, it critically evaluates the legislative decision to reframe "unsoundness of mind" under Section 84 of the IPC into "mental illness" under **Section 22 of the BNS**, exploring its harmonization—and lingering dissonance—with the **Mental Healthcare Act, 2017**. Third, the paper investigates the constitutional and evidentiary admissibility of psychological investigative tools—namely Narco-analysis, Polygraph, and Brain Electrical Oscillation Signature (BEOS) profiling—under the shadow of *Selvi v. State of Karnataka* (2010) and the mandatory forensic paradigm of **Section 176(3) of the BNSS**. Finally, the study addresses the role of criminal psychology in capital sentencing post-*Bachan Singh* and *Manoj v. State of Madhya Pradesh*

(2022), advocating for the institutional integration of forensic psychologists across Indian district courts and correctional facilities.

Keywords: *Criminal Psychology, Section 22 Bharatiya Nyaya Sanhita, Legal vs. Medical Insanity, M'Naghten Rules, Forensic Deception Detection, Selvi v. State of Karnataka, Psychopathy and Mens Rea, Psychological Autopsy, Capital Sentencing Mitigation.*

1. Introduction: The Epistemological Divide Between Law and Psychology

At the heart of criminal jurisprudence lies the Latin maxim "*Actus non facit reum nisi mens sit rea*"—an act does not make a person guilty unless the mind is also guilty. While substantive criminal law requires the prosecution to establish a blameworthy mental state (intention, knowledge, recklessness, or negligence), the discipline of **Criminal Psychology** investigates the deeper cognitive, affective, developmental, and neurobiological mechanisms that drive an individual toward deviant and antisocial conduct.

Historically, a sharp epistemological divide has separated the courtroom from the clinic:

- **The Legal Paradigm is normative, binary, and retrospective.** It seeks to answer a singular question at a frozen moment in time: *Did the accused, at the exact moment of committing the offence, possess the cognitive capacity to know the nature of the act or that it was contrary to law?* Based on this determination, the law assigns a binary outcome: guilty (deserving of retributive or deterrent punishment) or not guilty by reason of mental incapacity.
- **The Psychological Paradigm is descriptive, dimensional, and longitudinal.** It views human agency not as an all-or-nothing switch, but as a continuum shaped by genetic predispositions (such as MAOA gene polymorphism), neuroanatomical deficits (such as amygdala hypo-reactivity and prefrontal cortex impairment), childhood trauma, personality pathology, and situational stressors.

With the implementation of the **Bharatiya Nyaya Sanhita (BNS), 2023**, the **Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023**, and the **Bharatiya Sakshya Adhiniyam (BSA), 2023** on July 1, 2024, Indian criminal law has attempted to modernize its terminology and forensic architecture. Yet, the fundamental tension between psychological determinism and legal responsibility remains one of the most contested frontiers in Indian jurisprudence.

2. Theoretical Frameworks of Criminal Psychology: Understanding the Offender's Mind

Before examining statutory provisions, a rigorous legal analysis requires categorizing the primary psychological models that explain criminogenic behaviour and their direct implications for *mens rea*.

Theoretical Model	Core Psychological / Neurobiological Mechanism	Key Proponents / Landmark Studies	Legal & Forensic Implication in Criminal Trials
Neurobiological & Prefrontal Dysfunction Theory	Damage or reduced glucose metabolism in the Prefrontal Cortex (PFC) impairs executive functioning, impulse control, and moral reasoning, while Amygdala dysfunction diminishes fear conditioning and empathy.	Adrian Raine (<i>The Anatomy of Violence</i> , 2013); Phineas Gage paradigm.	Challenges volitional control; predominantly used in capital sentencing mitigation rather than total exoneration under Sec. 22 BNS.
Psychopathy & Antisocial Personality (ASPD)	Characterized by callous-unemotional traits, pathological lying, grandiose self-worth, lack of remorse, and	Hervey Cleckley (1941); Robert Hare (PCL-R — Psychopathy Checklist-Revised).	Psychopaths know <i>what</i> they are doing and that it is <i>wrong</i> , meaning they fail the legal

Theoretical Model	Core Psychological / Neurobiological Mechanism	Key Proponents / Landmark Studies	Legal & Forensic Implication in Criminal Trials
	behavioral disinhibition, alongside intact cognitive rationality.		insanity test, despite severe affective abnormality.
Social Learning & Differential Association	Criminal behaviour is not innate but learned through observational conditioning, peer reinforcement, and internalization of procriminal cognitive scripts.	Albert Bandura (<i>Bobo Doll Experiment</i> , 1961); Edwin Sutherland (1939).	Crucial for juvenile justice assessments under Section 15 of the Juvenile Justice Act, 2015 (preliminary assessment of mental capacity).
Cognitive Distortion & Moral Disengagement	Offenders neutralize internal moral self-sanctions through cognitive restructuring: blaming the victim, diffusing responsibility,	Albert Bandura (1999); Sykes & Matza (<i>Techniques of Neutralization</i> , 1957).	Directly explains hate crimes, Mob Lynching (Sec. 103(2) BNS) , and Organised Crime syndicates (Sec. 111 BNS) .

Theoretical Model	Core Psychological / Neurobiological Mechanism	Key Proponents / Landmark Studies	Legal & Forensic Implication in Criminal Trials
	or dehumanizing the target.		

2.1 The Paradox of Psychopathy in Criminal Law

One of the most profound dilemmas in forensic psychology is the status of the **psychopathic offender** (evaluated clinically using Robert Hare's *Psychopathy Checklist-Revised* or PCL-R). Neuroimaging studies consistently demonstrate that individuals scoring high on psychopathy exhibit structural and functional deficits in the paralimbic system, rendering them incapable of experiencing genuine empathy, guilt, or fear of punishment.

However, under Indian criminal law (both Section 84 IPC and Section 22 BNS), **emotional or moral insanity is not recognized as a defence**. Because a psychopath possesses intact *cognitive* faculties—understanding the physical nature of murder and knowing that the law prohibits it—the Indian judiciary treats the psychopath as fully culpable, frequently citing cold-bloodedness and lack of remorse as aggravating factors warranting the death penalty under the "*rarest of rare*" doctrine (*Bachan Singh v. State of Punjab*, 1980).

2.2 Psychology of Collective Violence: Mob Lynching under Section 103(2) BNS

The newly introduced **Section 103(2) of the BNS**, which prescribes death or life imprisonment for murder committed by a group of five or more persons acting in concert on grounds of race, caste, community, sex, language, or personal belief, is a direct legislative response to the psychological phenomenon of **Deindividuation** (Festinger, Pepitone, & Newcomb, 1952; Zimbardo, 1969). In a crowd setting, individual self-awareness and personal moral accountability dissolve into an anonymous collective identity, drastically lowering the threshold for extreme brutality. By imposing joint and equal maximal liability on every member of the lynching mob, Section 103(2) BNS attempts to erect a powerful statutory counter-deterrent against psychological diffusion of responsibility.

3. From "Unsoundness of Mind" (Sec. 84 IPC) to "Mental Illness" (Sec. 22 BNS): A Doctrinal Shift

3.1 Textual Evolution of the Insanity Defence

For 164 years, **Section 84 of the Indian Penal Code, 1860** embodied the classic 1843 English **M'Naghten Rules**, stating:

*"Nothing is an offence which is done by a person who, at the time of doing it, by reason of **unsoundness of mind**, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."*

In the **Bharatiya Nyaya Sanhita, 2023**, this provision is re-enacted as **Section 22**, with one deliberate lexical substitution:

*"Nothing is an offence which is done by a person who, at the time of doing it, by reason of **mental illness**, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."*

3.2 Critical Evaluation of Substituting "Unsoundness of Mind" with "Mental Illness"

At first glance, replacing the archaic Victorian phrase "*unsoundness of mind*" with "*mental illness*" appears to be a progressive alignment with contemporary psychiatric nomenclature and **Section 2(1)(s) of the Mental Healthcare Act, 2017 (MHCA)**—which defines mental illness as "*a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, **but does not include mental retardation**...*"

However, a rigorous doctrinal analysis reveals three complex legal challenges arising from this substitution:

1. **The Narrowing vs. Broadening Dilemma (Intellectual Disability):** Under the IPC, "*unsoundness of mind*" was a wide, non-clinical legal umbrella that effortlessly encompassed both psychiatric disorders (e.g., paranoid schizophrenia, bipolar mania) and severe neurodevelopmental conditions (such as Intellectual Disability / "mental retardation" or severe Autism Spectrum Disorder). If courts interpret "*mental illness*" under Section 22 BNS strictly by importing the definition from Section 2(1)(s) of the Mental Healthcare Act, 2017—which **explicitly excludes mental retardation**—an unintended statutory lacuna could emerge regarding offenders with severe intellectual disabilities, unless courts read Section 22 BNS expansively alongside the Rights of Persons with Disabilities Act, 2016.

2. **Retention of the Cognitive-Only Test (Rejection of Volitional Insanity):** Despite updating the diagnostic label to "mental illness," Section 22 BNS retains the rigid 19th-century M'Naghten cognitive filter ("*incapable of knowing...*"). Modern psychiatry recognizes that severe mental illnesses (such as Obsessive-Compulsive Spectrum Disorders, severe impulse-control disorders, or command hallucinations in affective psychoses) frequently destroy an individual's **volitional capacity** (the ability to control one's conduct) even when their **cognitive awareness** remains technically intact. Unlike the American Law Institute (ALI) Model Penal Code Test or the *Irresistible Impulse Test*, Section 22 BNS still affords no protection to an accused who knew the act was wrong but was pathologically incapable of restraining the impulse due to mental illness.
3. **Legal Insanity vs. Medical Insanity (Surendra Mishra & Dahyabhai Precedents):** Under settled Supreme Court jurisprudence—most notably *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat* (AIR 1964 SC 1563), *Surendra Mishra v. State of Jharkhand* (2011 11 SCC 495), and *Prakash Nayi v. State of Goa* (2023)—the mere clinical diagnosis of a medical mental illness (medical insanity) does not automatically establish exemption from criminal liability (legal insanity). Under **Section 108 of the Bharatiya Sakshya Adhiniyam, 2023** (formerly Section 105 IEA), the burden of proving the existence of circumstances bringing the case within the general exception of Section 22 BNS remains squarely on the accused (on a preponderance of probabilities), while the court must presume the absence of such circumstances until proved otherwise.

3.3 Procedural Safeguards for Accused with Mental Illness under BNSS, 2023

Correspondingly, **Chapter XXVII of the Bharatiya Nagarik Suraksha Sanhita, 2023 (Sections 367 to 382)**—replacing Chapter XXV of the CrPC—modernizes the procedural handling of accused persons who are incapable of making their defence due to mental illness or intellectual disability, mandating referral to a psychiatrist or **clinical psychologist**, and emphasizing care and treatment in public mental health establishments in harmony with the Mental Healthcare Act, 2017.

4. Forensic Psychology in Investigation: Deception Detection, Profiling, and Constitutional Limits

Modern criminal psychology extends far beyond the insanity defence; it plays an operational role during crime investigation through **Offender Profiling, Psychological Autopsies, and Forensic Deception Detection Tests (FDDTs)**.

4.1 The Constitutional Boundary: *Selvi v. State of Karnataka* (2010)

During the early 2000s, Indian investigating agencies increasingly relied on three neuro-psychological techniques to extract investigative leads from suspects:

1. **Polygraph Examination (Lie Detector):** Measures autonomic physiological arousal (respiration, galvanic skin response, blood pressure, heart rate) triggered by the psychological stress of deception.
2. **Narco-Analysis (Truth Serum):** Involves the intravenous administration of **Sodium Pentothal** (thiopental sodium), a barbiturate that depresses the central nervous system, lowers inhibitions, and induces a hypnotic, semi-conscious state in which the subject is presumed less capable of fabricating complex lies.
3. **Brain Electrical Oscillation Signature (BEOS) Profiling / P300 Brain Mapping:** An electroencephalographic (EEG) technique developed in India by Dr. Champadi Raman Mukundan that measures event-related potentials (specifically the P300 wave and electrical oscillations) to detect "**Experiential Knowledge**"—distinguishing whether a suspect personally participated in an act ("remembrance") versus merely hearing about it ("knowing"), without requiring any verbal response from the subject.

In the landmark judgment of *Selvi & Ors. v. State of Karnataka* (2010 7 SCC 263), a three-judge bench of the Supreme Court of India struck down the **involuntary** administration of all three techniques, laying down foundational rules of constitutional neuro-law:

- **Violation of Article 20(3) (Right Against Self-Incrimination):** Rejecting the narrow view that brain-mapping or polygraph readings are merely "physical/bodily measurements" akin to fingerprints or DNA, Chief Justice K.G. Balakrishnan held that extracting information stored in a person's neural pathways or subconscious mind constitutes **testimonial compulsion**.
- **Violation of Article 21 (Mental Privacy and Cognitive Liberty):** Nearly seven years before *K.S. Puttaswamy v. Union of India* (2017), *Selvi* recognized a person's right over their own mental processes, holding that forcible intrusion into an individual's mind violates substantive due process and amounts to cruel, inhuman, and degrading treatment.
- **Evidentiary Status under BSA, 2023:** Even when administered **voluntarily** with informed consent recorded before a Judicial Magistrate (following the 2000 National Human Rights Commission guidelines), the direct test results cannot be admitted as substantive evidence of guilt. However, any physical fact or material object subsequently discovered as a consequence of information obtained during a voluntary test is admissible

under **Section 23(2) Proviso of the Bharatiya Sakshya Adhiniyam, 2023** (equivalent to the iconic Section 27 of the Indian Evidence Act).

4.2 Non-Invasive Psychological Investigative Methods under BNSS & BSA

Unlike invasive narco-analysis, two non-invasive branches of investigative psychology have gained strong judicial recognition in India:

- **Criminal Investigative Profiling (Behavioural Evidence Analysis):** Originating from the FBI's Behavioral Science Unit (distinguishing *Organized* vs. *Disorganized* offenders) and David Canter's *Investigative Psychology* model (Interpersonal Coherence and Geographical Profiling), criminal profiling assists police in serial homicides, cyber-stalking, and sexual offences by deducing offender characteristics from crime-scene behaviour (*modus operandi* vs. *psychological signature*).
- **Psychological Autopsy in Equivocal Deaths:** In cases where the manner of death hovers ambiguously between **Suicide**, **Homicide (Sec. 103 BNS)**, and **Abetment of Suicide / Dowry Death (Sec. 108 & Sec. 80 BNS)**, a *Psychological Autopsy* reconstructs the deceased's cognitive, emotional, and behavioural state prior to death through structured interviews with family, analysis of digital footprints, and psychiatric history. In high-profile investigations (such as the *Burari Mass Deaths* of 2018 involving shared psychotic disorder/*folie à famille*, and *Subhash Kumar v. State*), Indian courts and the CBI (via CFSL's Forensic Psychology Division) have utilized psychological autopsies as corroborative expert opinion under **Section 39 of the Bharatiya Sakshya Adhiniyam, 2023** (formerly Section 45 IEA).

5. The Fallibility of Human Memory: Eyewitness Psychology and Witness Protection

A substantial portion of criminal convictions in India rests on ocular (eyewitness) testimony. Yet, cognitive psychology—pioneered by **Elizabeth Loftus**—has empirically demonstrated that human memory does not function like a video recorder; rather, it is a **reconstructive process** split into three fragile stages: *Encoding*, *Storage*, and *Retrieval*.

1. **Estimator Variables (At the Crime Scene):** High stress activates the sympathetic nervous system (the Yerkes-Dodson Law), causing the "**Weapon Focus Effect**"—where a victim fixates visually on a gun or knife, drastically impairing their ability to encode the perpetrator's facial features. Furthermore, the **Cross-Race Effect** and poor lighting distort initial perception.

2. **System Variables & the Misinformation Effect (During Investigation):**

Post-event exposure to leading police questions, co-witness discussions, or media photographs alters the witness's original memory trace without their conscious awareness (confabulation).

3. **Procedural Corrective in Section 54 of the BNSS (Test Identification Parade - TIP):** Recognizing the psychological vulnerability of eyewitnesses, **Section 54 of the BNSS** (updating Section 54A CrPC) introduces critical safeguards for the Test Identification Parade (regulated substantively as corroborative evidence under **Section 7 of the BSA**, formerly Section 9 IEA):

- Where the person identifying the suspect is **mentally or physically disabled**, the identification process *shall* take place under the supervision of a Judicial Magistrate, who must ensure the person identifies the suspect using methods they are comfortable with.
- Crucially, the entire identification process **must be recorded by audio-video electronic means**, allowing the trial court to scrutinize whether police officers used subtle psychological cues or suggestive positioning during the lineup.

6. **Psychological Evaluation in Capital Sentencing: The *Manoj v. State of M.P.* Paradigm**

Perhaps the most transformative development in Indian criminal psychology over the past five years has occurred not at the stage of determining guilt, but at the stage of **sentencing in capital punishment cases**.

In the seminal judgment of *Bachan Singh v. State of Punjab* (1980 2 SCC 684), the Constitution Bench mandated that before imposing the death sentence, courts must weigh both the crime and the criminal, giving liberal and expansive weight to **mitigating circumstances**—including whether the offence was committed under the influence of extreme mental or emotional disturbance, and the probability that the accused can be reformed and rehabilitated. For four decades, however, trial courts frequently conducted sentencing hearings on the same day as conviction, evaluating reformation without any empirical psychological assessment.

This judicial vacuum was decisively corrected by the three-judge bench decision in *Manoj & Ors. v. State of Madhya Pradesh* (2022 SCC OnLine SC 677) (followed by the Constitution Bench referral in *Re: Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered While Imposing Death Sentences*, 2022). In *Manoj*, the Supreme Court Issued binding operational

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directives that place **Criminal and Clinical Psychology** at the center of capital sentencing:

- The State and the trial court must proactively collect **Mitigation Information** encompassing the accused's early family background, socio-economic deprivation, history of childhood abuse or trauma, educational deficits, and lifelong psychological conditioning.
- The Court mandated that the state must produce a **psychiatric and psychological evaluation report** of the accused conducted by a qualified mental health professional from a premier institution (looking beyond Section 22 BNS insanity to identify sub-clinical trauma, personality disorders, cognitive impairments, and post-incarceration behavioral adaptability).
- By recognizing that an offender's criminal act is often the culmination of cumulative bio-psycho-social disadvantages rather than pure metaphysical evil, *Manoj* integrates the **Biopsychosocial Model of Criminology** directly into Article 21 sentencing jurisprudence.

7. Structural Recommendations and Conclusion

While the enactment of the **Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita, and Bharatiya Sakshya Adhiniyam (2023)** modernizes India's statutory text—replacing "*unsoundness of mind*" with "*mental illness*" (Section 22 BNS), mandating crime-scene forensics for serious offences (Section 176(3) BNSS), and expanding expert opinion definitions (Section 39 BSA)—the institutional integration of criminal psychology in India remains nascent. To bridge the chasm between psychological science and courtroom practice, four structural reforms are imperative:

1. **Statutory Clarification of "Mental Illness" under Section 22 BNS:** The legislature or the Supreme Court should issue an authoritative clarification confirming that "*mental illness*" under Section 22 BNS encompasses severe **Intellectual Disabilities and Neurodevelopmental Disorders** (notwithstanding their exclusion under Section 2(1)(s) of the Mental Healthcare Act, 2017 for clinical governance purposes), ensuring that cognitively impaired defendants are not stripped of a general exception previously available under "*unsoundness of mind*."
2. **Adoption of the Volitional Prong in the Insanity Defence:** In alignment with the 42nd Law Commission of India's contemplation and comparative Commonwealth reforms, Section 22 BNS should be judicially or legislatively expanded to include an **irresistible volitional impairment**

prong ("or was incapable of controlling his conduct in accordance with the law"), bringing Indian law in step with modern neuropsychiatry.

3. **Institutionalizing Forensic Psychologists at District Courts & Prisons:** Currently, India has fewer than a dozen specialized Forensic Psychology divisions within Central and State Forensic Science Laboratories (such as NFSU Gandhinagar/Delhi and CFSL). Every District and Sessions Court complex and Central Prison should be statutorily staffed with licensed **Forensic and Clinical Psychologists** to conduct timely competency evaluations under Section 367 BNSS, assist in child-witness interviews under POCSO, administer structured risk-assessment tools (such as HCR-20) during parole/bail hearings, and prepare *Manoj*-compliant mitigation reports.
4. **Replacing Coercive Interrogation with the PEACE Investigative Interviewing Model:** Rather than relying on fragmented 15-day police custody across 40 or 60 days under **Section 187(2) BNSS** or seeking pseudoscientific shortcuts through narco-analysis, Indian police academies should mandate training in the cognitive-psychology-based **PEACE Model** (*Preparation and Planning, Engage and Explain, Account, Closure, and Evaluation*) and the **Cognitive Interview technique** (Fisher & Geiselman), which scientifically enhance accurate memory retrieval and detect deception without violating constitutional rights under Articles 20(3) and 21.

Conclusion

Criminal law cannot deliver substantive *Nyaya* (justice) if it continues to view the human mind through the static lens of 1843 Victorian morality. As neuroscience and criminal psychology illuminate the intricate architecture of human cognition, trauma, and impulse control, the Indian legal system must evolve from a purely retributive tribunal into a scientifically informed forum. Harmonizing the constitutional guarantees of cognitive liberty and fair trial with rigorous forensic psychology under the 2023 Sanhitas will not weaken criminal accountability; rather, it will ensure that state punishment is calibrated accurately to genuine moral culpability, while channeling pathologically impaired offenders toward evidence-based rehabilitation.

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