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Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to

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Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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PROFILING A CRIMINAL: PSYCHOLOGY, LOGIC AND COGNITION

Authoed by - Manya Saxena

“I refer to what is called mysterium iniquitatis, meaning, as I see it, that a crime in the final analysis remains inexplicable inasmuch as it cannot be fully traced back to biological, psychological and/or sociological factors.”

- Viktor E. Frankl, Man’s Search for Meaning¹

Offender profiling as a discipline is not known to many and if known then not understood as simply. This article seeks to, therefore bring closer the idea that is Offender Profiling while analyzing the history and the development through the years. It is as known that profiling of offender is described as an art which in all aspects could also be dealt with as a science. David V. Canter has observed that ‘Criminal profiling’ is a term which has been coined by the FBI in the wake of 1970s² and described their investigative strategies as analysis work. Canter explained that when FBI first started with their investigative work, they coined the term “Offender Profiling”. He also saw the criminals and convicts as ‘Criminal Shadows’ and observed further that a criminal always leaves behind certain psychosomatic traces, and various other patterns of his personality and behavior. These patterns and traces are subtle and elusive than those that are apparent on the face of it.

These traces and smidgeons cannot be taken into the laboratory and be tested and requires other scientific approaches to understand and evaluate. These could easily be understood as flickering shadows in those dim streets, the monster that hides and lurks in dark; as a dark cloud amidst the field of blossoming flowers. Meaning thereby, it is always present but is seldom understood. This article will try to discuss and answer the central question of offender profiling as evidence. The other questions which this article seeks to gain clarity on are, first, Whether Offender Profiling is sufficiently reliable as evidence?, Second, Whether

¹ Frankl, Viktor E., “Man’s Search for Meaning”, Verlag für Jugend und Volk (1959).

² Jessica, Toye, Kirsty, “An empirical test of the assumptions of case linkage and offender profiling with serial commercial robberies.” *APA PscArticles* 59 (2007).

Offender profiling acts as a reliable criterion to judge and identify the Offender? And Third, Is the concept of Offender profiling beneficial in a country like India? It is to be noted that the science of Offender Profiling does not affirmatively point out if the defendant has in fact committed the crime or not, rather, it helps in identifying the elements that are unique and common in a crime.

1.1. PSYCHOLOGY OF INVESTIGATION

It was 1951, when a person named George Merensky, who later was famously known to be the “Mad Bomber”³, was caught after being flying under the police’s nose for 16 years. He was solely responsible for planting 30 bombs around the New York City and was liable for causing damage to the property and grievous injury or death to the people who were part of such bombings. The lack of any justification and success in getting hold of the culprit or culprits, the New York Police being frustrated by this process contacted James Brussel, the commissioner of Mental Hygiene in the state of New York, to look into the mental space of the Offender in hopes of finding any clue about the same. Brussels, after reviewing the crime scene pictures and other relevant evidence, prepared a Psychological Profile of the offender. This ultimately led the New York Police to catch Metesky and get a confession thereof⁴.

Canter in his book ‘*Investigative Psychology*’ explained how the profiles of the offenders fall in three comprehensive categories: 1) the nature of the behavior of the offender, 2) the psychology behind the crime done by a group and crime of terrorism, and 3) the investigative decision taken by the law enforcement and their investigators. It is also stated by Canter that cognitive analysis of a Criminal’s behavior is as important evidence as any other evidence of forensics and before convicting a person of a crime, certain questions are to be answered, such being, the important behavioral aspects of a person convicted or has allegedly committed a crime, characteristics associated to the person which may be helpful in identifying him or her, the likelihood of further offences of similar nature to be committed by the same person.

The psychology of investigations involves a collection of pre-existing information regarding already existing subjects (who have been deemed offenders) and using this data in identifying future offenders. These profiles are made to carry out a risk or threat assessment.

³ “The Mad Bomber strikes in New York” www.history.com (Viewed at 05.04.2020).

⁴ *People v. Metesky*, 336 N.Y.S.2d 581.

This risk assessment is done to act as a basis for a crisis or offence that hasn't happened yet or there is an apprehension that such an offence might occur. Psychological profiling comes under a unique sphere of behavioral differentiation which gives attention to the differences amongst the different crime scenes on various factors including characteristics of the victim, the recorded interactions with the victim, the complexities of the crime, and all the other activities which the offender was part of or was engaged in. This analysis is made out with the sole aim of understanding the pattern of the offender which is demonstrated and is readable through his actions. This form of profiling is best suited for cases pertaining to Murder⁵, Manslaughter, Burglary, Theft⁶, Arson, Rape, Homicide, Fraud and cases concerning Pedophilia or crimes committed by young offenders. It remains an undisputed fact that a criminal activity is either bought about by intent of the person committing the crime or is an action carried out by the manifestation of a trauma from the offender's past⁷.

Such behavioral pattern acts as a key to understand why some accused persons treat their victims as an object or lose their control so frequently or act in an impulsive manner. By this process the profilers try to look into the offender's past and then made deductions necessary to defend the offender's actions in the present.

"Profiles are not a result of some magical or extra-terrestrial incantations and are sometimes not at all accurate" claims Ault and Reese⁸. The profilers are people having exposure to the criminal antics and the criminal conduct of the people. They also have impeccable knowledge of the psychology of the person and have a remarkable ability to read the crime scene. When the investigative team is seeking the assistance of a criminal profiler, they are required to send the following:

1. The photographs of the crime scene inclusive of those of the victim, in case of homicide;
2. The complete autopsy report inclusive of any other lab test run on the victim;
3. The report of the incident inclusive of the alleged date and time of the offence, the location, the weapon so used and the examination of the surviving victims and witnesses.

Psychological profiling/autopsy works the best in analyzing and apprehending the kind of crime and the person who could commit it. For example, if we take the case of Colleen

⁵ U.S v. Williams, 299 F.3d 673.

⁶ Hartless v. State, 611 A.2d 581.

⁷ U.S. v. Steil, 916 F.2d 485.

⁸ R. L. Ault and J. T. Reese, "Psychological Assessment of Crime – Profiling" 29 *FBI Law Enforcement Bulletin* 22 (1980).

LaRose, her profile didn't fit the profiles created pursuant to the 9/11 tragedy, however, her capabilities and her actions created a brand-new set of profile for the upcoming dangers. It was observed, during investigation, the ploy that the online world builds in order to get what the person at the end of the screen wants and how people with a certain vulnerability falls prey to it. As was ascertained in the summer of June 2011, when Adam Gadahn, a spokesperson for Al-Qaeda's Media Wing As-Sahab, got himself featured in a video message which was titled "*Do not rely on Others, Take the Task upon Yourself*" perpetrating the ideology of radicalizing oneself and promoting a belief of taking it upon self to do a certain action which a being consider to be immoral or unethical, without judging the consequences⁹. Such actions would include the 2013 Boston Marathon Bombing¹⁰, 2001 London Bombing¹¹, Centennial Olympic Park bombing¹², 1999 London Nail Bombings¹³ and instances of like nature.

While Psychological profiling helps build a structured system of identifying the offenders who are likely to commit a crime in the future, psychological autopsy happens after the death of a person to determine the cause and the manner of death. It is most valuable in cases of Suicide or Murder and helps in identifying the information relating to the Mental Health and circumstances surrounding such act. Canter observed that in cases of alleged Suicides, the autopsy procedure along with other relevant documents such as any written material in form of a Diary or Suicide Notes comes in handy. On finding a "Suicide Note" and various other written notes to constitute a diary, explaining how the events of everyone dying around the deceased had forced her to take her life, was taken as relevant materials to prove the deterioration in Mental Health that pushed the deceased to take her life¹⁴.

Even though, such autopsy would help in explaining the veracity of mental element in certain cases, the practice of the same are still questioned on its admissibility. This raises a debate regarding the admissibility of evidence given by a psychologist. We know now, the criterion for accepting the Expert Evidences but in certain cases still, the crown court have on the grounds of diminished responsibility held such evidence by the psychiatrist to be

⁹ *ibid*

¹⁰ "Boston Marathon Bombing" www.brittanica.com (Viewed on 14.04.2020).

¹¹ "Timeline - Worst IRA bomb attacks on mainland Britain" www.uk.reuters.com (Viewed on 14.04.2020).

¹² Luke O'Reiley, "The Centennial Olympic Park bombing: The true story of security guard Richard Jewell", *Evening Standard*, Jan. 31, 2020.

¹³ Sarah Lee, "London nail bombings remembered 20 years on", *BBC News*, Apr. 03, 2019.

¹⁴ R v. Gilfoyle, [2000] EWCA Crim 81.

inadmissible¹⁵. The court in the Gilfoyle Case¹⁶ held that the key difference between taking evidence of psychiatrist to convict a person is much more drastic than that of using such data for investigation by the Police. In India, the Supreme Court has time and again observed the medical and psychiatric evidence to require corroboration in order to fulfil the admissibility criterion and the co-morbidities that lead a person to commit a certain crime. It was expressed by the apex court in the landmark judgement titled *Sharad Birdhichand Sarada v. State of Maharashtra*¹⁷ in matters where the oral testimony of the relatives or family members are relied on, the same needs to be taken with caution as the same are deemed to be subject to conscious exaggerations met out by love and affection towards the family.

1.2. CONTEMPORARY CHALLENGES TO FORENSIC PROFILING

Even though Forensic Profiling benefits in apprehending the dangers yet to come, it is still not free from shortcomings, both practical and ethical. “Personality” as defined in Latin as a Mask or Façade. A person’s personality is ever changing and is built upon his Morals, Virtues, Teachings and Goals. To say that a person’s Personality switches according to his goals will be an appropriate way of explaining the fluctuating nature of one’s personality. This fact rules out the possibilities of correctly profiling an offender based on just the crime scene, whereas a person’s personality can neither be judged based on the crime scene or blood splatters.

It was observed by the Jury and the Californian Court of Appeal in *People v. Robbie*¹⁸ where the inconsistencies with the trends of Offender profiling were very essentially noticed. Where the jury had convicted Robbie for kidnapping and raping a 16-year-old Jane Doe and sentenced him to imprisonment for 15 years which may extend to life. The conviction was based on the testimony of the victim which was completely opposite to that of the Defendant. The witnesses of the defendant, comprising of his family members, testified about the good and humble nature of the defendant. Meanwhile, the witnesses of the Victim all spoke against him.

The expert who was called to assist the court and profiled the Offender in her statement asserted to the fact that the defendant did fall into the profile so made¹⁹. The expert claimed

¹⁵ Pinfeld and Anr v. R, [2003] EWCA Crim 3643.

¹⁶ *Supra Note 14*.

¹⁷ AIR 1984 SC 1622.

¹⁸ 92 Cal.App.4th 1075.

¹⁹ *Ibid*.

that not all rapes end up violent and cause any injury to the victim and more often than not the victim is dropped back to the place from where they were taken from, one of the reasons for it could be perhaps the area being the common ground of residence. On being asked whether it is normal for an ordinary Rapist to engage in a said small talk with the victim or person he had apprehended, the expert said that such behavior is odd but is one of the most common patterns amongst the profiled Rapists. This usually happens to feed the inherent want of taking consent and forming consensual relationships in order to make the brain believe that the consent was indeed taken. This is called delusion by some but is a part of “Cognitive Distortions”²⁰.

In Cognitive Distortions, the offender doesn't always use force or violence to get what he wants, instead follows a rather, submissive approach. The expert in the *Robbie Case* went on to explaining how there is little to no difference between a consensual setup and a setup that initiates from an act done solely for the purpose of getting the consent and is then converted into a crime giving the offender a benefit of doubt as to the deep-rooted Cognitive Distortions. The “*Idiographic Approach*” that is often used to profile an individual by taking him/her as a subject and base all the other offenders (believed to be associated with the similar crime) on that basis is flawed from the very inception. It overlooks the basic criterion or Motive and the act itself (*Mens Rea* and the *Actus Reus*).

In a usual parlance, the source material for profiling of Offenders is usually done through various surveys which are administered by the local police or personnel's working towards the same goal²¹. These surveys do not profile the Offenders per se but provide an insight into the crime and any criminal activity that is persistent in and around the locality. It was however found that while making use of surveys to actually profile the offenders, 77% of the Police officials found it helpful in starting any investigation while only 17% considered the information helpful enough to get hold of the Offender²².

It is oftentimes seen that DNA evidences are used as a tool to convict people to fulfill a personal vendetta against them. The root cause of these wrongful convictions is still amidst the realm of uncertainty. The cruel miscarriage of justice was recently observed in *Adambhai Sulemanbhai Ajmeri and Others v. State of Gujarat*²³, wherein the accused post his acquittal

²⁰ Sigre-Leirós V, Carvalho J and Nobre PJ, “Rape-related cognitive distortions: Preliminary findings on the role of early maladaptive schemas” 48 *International J Law Psychiatry* (2015).

²¹ A. J. Pinizzotto, “Forensic Psychology: Criminal Personality Profiling” 12 *J Police Sci Admin* 32 (1984).

²² Holmes and Holmes, *Profiling Violent Crimes: An Investigative Tool* (Sage, Thousand Oaks, 2nd Edn., 1996).

²³ (2014) 7 SCC 716.

recalled various forms of atrocities not just in the nature of physical torture but extending to emotional torture and sexual violence. Adambhai was named a terrorist, wrongfully and spent 11 years in the prison with being 8 years on death row for his supposed involvement in the Akshardham Terrorist Attacks in Gandhinagar in 2002. The division bench of the Supreme Court of India on 16th May, 2014 acquitted all the five accused charged with the same crime on account of error in investigation. Justice A. S. Patnaik and Justice Gopala Gowda while commenting on the shoddy investigative practice of the Police and other investigative authorities observed that,

“Before leaving the judgement, we mean to express the agony and the torment that we feel about the incompetent behavior of the investigating agencies that conducted the investigation and lowered down it to the shoddy self which it has reduced to. This kind of practice not only show cases the irresponsibility of the people in whom the general public finds security. Such behavior from such persons of repute shakes not only the trust of the victim but the society at large.”

The Supreme Court of India has time and again denounced the practice of “Fabricating of Evidence” to further the motive of making a strong case to fit the prosecution. It was comprehended, as a consequence of the *Post-Godhra Riots case*²⁴ that “Fabrication of Evidence” amounts to the utmost form of dishonesty; whoever does it commits a serious offence. Likewise, under the 4th Amendment of the Constitution of United States provides every American citizen a right against illegal search and seizure and the following of due process as is guaranteed under the 14th Amendment. Such right and power makes “falsifying and Fabrication” of Evidence as a crime.

1.3. DEVIATION FROM FORENSIC PRINCIPLES AND CONCLUSION

The Supreme Court of India opined that in case there is not sufficient evidence to constitute or convict the Offender to the said crime, benefit of doubt must be given and the Offender must be set free. The similar approach was followed in the *2008 Noida Double Murder Case*²⁵. The Aarushi Talwar’s murder case wasn’t just a murder of two individuals; it was also a murder of two important disciplines, Forensics and Investigation.

In one of the reports the Forensic scientist who was heading the team, claimed to have found multiple fingerprints on the scene of crime owing to multiple members of the press walking

²⁴ National Human Rights Commission v. State of Gujarat and Others, (2009) 6 SCC 342.

²⁵ Nupur Talwar v. CBI and Anr, Crl. Rev. P. 85/2018

freely which contaminated the crime scene further. It was also reported by the Central Bureau of Investigation that 90% of the evidence on record was destroyed by the police officials. The CBI also tainted the investigation by not following the protocols to the mark and wasting the resources bestowed on to them. The CBI officials were seen much interested in knowing the situation of chaperone during any sleepovers when they must have been interested in finding out the answers to “*Why there was no blood on Nupur Talwar’s Clothes? Why Hemraj’s blood was not found in Aarushi’s room if, in fact he was murdered there and at the same time? And why hours after the murder, the network that Hemraj was using, was traced to some random tower in Punjab?*” The phone was never found and the reason for such discourse was never looked into.

The technique that was meant to be relied on in the *Aarushi Talwar’s Murder Case* was “Touch DNA” the success of which was observed in the murder trial of *JonBenet Ramsey*²⁶ where the name of the previously convicted family member was cleared after 12 years. Touch DNA is a method of testing the DNA without requiring any samples of blood or semen. It involves analyzing the skin cells which are left behind by the alleged offender. This method was opted by the CBI to be taken in consideration while analyzing the hand prints on the terrace and the bottle of whiskey found in Talwar’s home. The CBI however, rejected the idea of getting the treatment done after consulting with a doctor who had some expertise in this. What is so bizarre about this case is that, even when there were certain loopholes in the theories so formed, the major questions which were raised during the faulty investigations were still kept out of those theories. There have been many instances in the United Kingdom where the cases were reopened and the offenders were found even after a decade²⁷. Whenever there is any mishandling of evidence, the investigation is so far contaminated that the courts following the principle of “*taking the view that fits the accused*” have no other no other choice but to let the accused go free. Will that then be wrongful conviction or a case of wrongful acquittal?

As discussed before, in case of mistaken identities, even if is an “honest” mistake, the entire system is not deemed to a corrupt one. It’s not just the counsels or the judges who botch up the case but most of the times it’s the investigators and the forensics who shall be held accountable for any shoddy investigation. The error on the face of the crime could be an intentional misconduct or the one with complete irresponsibility on the part of the agencies. The scientific principles of DNA profiling and other technologies including Brain Mapping,

²⁶ Hoffmann-Pugh v. Ramsey, 193 F. Supp.2d 1295.

²⁷ Stephen Moss, “Case Closed”, *The Guardian*, Jan. 16, 2008.

lie detection and the like are used to help the investigating agencies to further the investigation. The lack of care and precision in collection of such evidence and its treatment is what makes the evidence so unreliable.

In India, visual identification is given utmost importance. It acts as the most compelling form of evidence²⁸. Reliance placed excessively on eye witness testimony more often than not leads to mistaken identification and ultimately to wrongful conviction. Memory plays an important role in these testimonies. It is not logically possible to remember each and every detail regarding a crime that happened years ago and with cases being stretched to more than a decade, the witness testimonies seem to diminish with time.

Basing an entire conviction on a witness statement then becomes appallingly imprudent and thoughtless, a practice that is prevalent in Indian Judicial setup. In a recent case, still in motion titled *State v. Md. Salim*²⁹, where Ankit Saxena, the victim, was brutally murdered in a street packed with people and his parents. This murder happened in the wake of 2018 and is still being heard at the stage of cross examination. It is quite understandable the position India's judiciary is at, where each and every step leads to something big and important with the constant apprehension of evidence being contaminated. Even in situations above mentioned, the counsels making a case based on irrelevant considerations such as "*The color of their shirt, the amount of blood they think they saw, the color of the clothes as worn by the accused*" may work to profile the accused but in a long run is a futile attempt to delay the proceedings.

It was observed in *DPP v. Harper*³⁰ where the court observed that the defense of insanity cannot be taken or shall not be taken in crimes done without *mens rea*. Automatism would mean to include a state where the offender has no control over his body or mind and does something in pursuance of that state. It was later discussed by the Law Commission in its report³¹ how the ruling in the *Harper case* was highly improper if in fact, a case consisting of no *mens rea* would have no objection regarding the defense of Insanity to be taken if it is being tried in a Crown's Court but not in a Magistrate Court.

This makes it pertinent to mention how the Indian courts follow the rule of preferring Ocular Evidence over the Medical Evidence. It was observed by Rajasthan High Court in *Mani Ram*

²⁸ Jill Copeland, "Helping Jurors Recognize the Frailties of Eyewitness Identification Evidence" 46 *Criminal Law Quarterly* 188 (2002).

²⁹ FIR 23/2018.

³⁰ [1997] 1 WLR 1406.

³¹ Law Commission of England and Wales, "*364th Report on Unfitness to Plead Volume: II*", 2016.

*v. State of Rajasthan*³² that evidence which is medical in nature cannot be taken as primary for it is a testimony given by an expert and cannot be as decisive as the ocular evidence. In general usage, ocular evidence is given more priority over the medical or forensic whenever there is a conflict amongst the two. The fact which cannot be discredited here is that in certain cases where the medical evidence is completely against the ocular, then in such a case, the ruling of medical evidence shall be taken over the ocular testimonies.

The misuse of this discretion and rule was seen in the high-profile murder case of *Jessica Lal*³³ where 32 eye witnesses turned hostile starting a public outcry. It was further observed how the eye witness testimony was the only evidence that was relied on by the trial courts. The reasons given by the trial court was the lack of sustainable grounds to build a case on the part of the Police authorities. The court held the police to have insufficiently relied on the evidence and stating that the mishandling of evidence was manifold.

In a country like India, where convictions and acquittals are made on the basis of wrongful evidences and mere apprehension without giving much appreciation to the mens rea of the crimes, it is the economically weaker or persons associating themselves to a particular religion who have to face the plight of conviction. It is therefore, the responsibility of the state to ensure effective rehabilitation of the convicts in order to ensure material difference in the convict's life after the punishment is done with.

Similarly, in cases of wrongful conviction or wrongful acquittals, what is necessary to assume is the chain of events which must have unfolded. The psychological basis of the crime is still missing in the Indian Law Enforcement framework. It is but the law enforcement agencies that have to look into the psyche of the accused and make deductions relevant to the same. A criminal act is said to have been committed when two of the elements are found on the face of the events "*Actus reus*" and "*Mens Rea*" i.e., the Act and the Guilty Mind. In case no mens rea can be ascertained, act shall not be deemed as a crime. What is pertinent to note in that situation is the common phraseology or the relevant psychological basis that enabled the act of the offender and the commonalities one could draw from such psychosomatic attribute of that person.

Even though giving and procuring false evidence is made a crime in the IPC, the same does not talk about the rehabilitative measure of the person so wrongly convicted. It deals with the situations where there is malafide intent on the part of the person procuring such wrongful

³² 1978 SCC ONLINE RAJ 60.

³³ Sidhartha Vashisht Alias Manu Sharma v. State (Nct Of Delhi), AIR 2010 SC 2352.

evidence, however, no rehabilitative laws regarding the subsequent lives of the victims of wrongful conviction can be found in any of the codes. It is further submitted the IPC deals with false disposition of the facts of the case or the evidence of the case; it is silent on the treatment of the agent who has mishandled the evidence.

The Supreme Court of India in its landmark judgement of *Selvi v. State of Karnataka*³⁴ extensively discussed the principles as laid down in the *Frye Case*³⁵ and the *Daubert Case*³⁶ having based the current state of affairs in India regarding the Forensic laws with respect to that and subsequently declared the scientific discipline of Brain Mapping, Narco Analysis, Polygraph Test and FMRI to be unconstitutional and void. It is submitted that in the light of corrupt practices that are inherent in this society, the disallowance of these methods may seem fair but is not quite. These principles are used to enable the accused or the relevant witnesses to help the court in getting the required truth for the subject and hence, shall be used only when necessary. The outright declaration of unconstitutionality of a science discovered by the experts in this field is not judicial.

In India, the past criminal antecedents are retrieved from the *National Crime Records Bureau* which deals with all sorts of records from missing vehicles to fingerprint tracking cells. They are oft utilized to procure the criminal records of the individuals. These records however, lack the accuracy which they are required to maintain. The most formidable point here is the spiritless approach that some of the States follow in providing with the data. The role of NCRB is just to assimilate the data it receives from the states and do not bother to cross check the date before coming to a conclusion. The utility of the data is also flawed in the sense that there is an unrequited delay in putting up the data on the website. What is intriguing here is the need for the state to not send the correct figures to the bureau. In a complete Catch-22 situation the public too is willing to report crimes to the state but often find themselves prey to harassment and resort to silence. It is submitted that there must be sensitization of crimes and the rights of the individuals. The state should formulate rules regarding appropriate research and conduct on the part of the police and other law enforcement agencies to ensure that the crimes so reported are not bogus or sham and relevant figures are sent to the center to spread awareness of the areas of crime that needs amending.

³⁴ AIR 2010 SC 1974.

³⁵ 293 Fed. 1013 (1923).

³⁶ 113 S. Ct. 2786.