



PROJECT 39A  
EQUAL JUSTICE  
EQUAL OPPORTUNITY

4TH PROJECT 39A ANNUAL LECTURE (2021)

# LOOKING BEYOND THE CRIME

BioPsychoSocial Insights  
for Criminal Law

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Dr. Pratima Murthy,  
Director and Professor of Psychiatry,  
NIMHANS, Bangalore

ANNUAL LECTURE SERIES IN CRIMINAL LAW  
PROJECT 39A, NATIONAL LAW UNIVERSITY, DELHI





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# Project 39A Annual Lecture (2021)

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Good evening to everyone. Thank you very much for inviting me to deliver the fourth Project 39A lecture in criminal law. In this year's lecture, I want to share my thoughts on criminal law and punishment, individual accountability, and social responsibility, and touch upon the idea of the individual itself.

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# Introduction

Criminal law and processes are a formal mechanism of condemning and prohibiting certain acts such as violence. Trials are conducted to assess evidence, to call into account the suspected individual who may ultimately be pronounced as guilty or not guilty. Guilt is followed by punishment, but not necessarily as a sacred idea of repentance. Depending on which legal philosopher you ask, either the individual deserves the punishment for their own good and to respect their agency or for the good of society and to protect society from violence. In India, punishment comes in the form of fine, imprisonment, and the death penalty. The individual is caught, held guilty, and punishment is pronounced all within a legal framework. In today's lecture, I propose a different and a more useful way of understanding individual violence and criminal behaviour and consequently, criminal punishment. I want to examine what lessons or insights the streams of mental health and social sciences can offer to the idea of capital punishment. After all, these areas deal with question of the mind, are concerned with behaviours and outcomes, and ultimately focus on the individual's life. But where criminal law seeks to communicate what behaviours may be prohibited, in mental health and social sciences we are concerned about the roots of certain behaviours and the context in which the individual life develops.

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**Therefore, while the legal discipline is concerned with the concept of guilt, the mental health sciences try to understand the background to a particular behaviour exhibited by an individual. These non-legal disciplines and knowledge systems therefore form an important companion to criminal law, particularly for matters of punishment.**

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We're all now quite familiar with the varying levels of sensationalism that often accompany reports of violent crimes. We are also equally familiar with the violence that such crimes themselves beget, be it calls for violent punishments or encounters. On these occasions, while we concern ourselves with the offense, we may also need to understand that not only the harm provokes us, but it also colors our vision. We see the individual responsible for such criminal acts as an evil entity or as an inherently demonic person. We assume certain traits about the offender, traits that make it easier to imagine the person as not human, but that is our collective imagination. The reality is that this entity is a person, an individual human life which evolved among us in our society. Professor Craig Haney talks about the crime master narrative, a narrative which considers that the entity, the individual, the not human as existing in a vacuum. It implies that the criminal's thoughts, behaviours, and actions are fixed and unchanged, and that they were always like that. It paints a picture where the criminal act is a direct and sole result of a bad choice and nothing else. The criminal chose to act a certain way without any internal or external compulsion or influence.

One of its assumptions is of unencumbered free will and that the person who engaged in a certain kind of violence had a choice to not engage in it, but nonetheless went ahead with it. A similar assumption is at the heart of criminal law and punishment as well. The emphasis is always on the individual's ability to make a choice, whether the law punishes, to deter or to communicate to the offender and the society that certain acts are condemnable and ought to indicate to the moral agent that they deserved punishment. But these assumptions on which philosophies and systems of criminal law have been built are turning out to be not true. Research tells us that individual behaviour and actions are not the sole domain of the individual, but are influenced by factors far as well as near. We know that free will is not the free will that criminal law presupposes, that

our will might be relatively free at best. It is this idea of free will and choice that I'd like us to think about. Our choices, our will, our abilities and minds are context dependent. They are influenced and developed by factors internal and external to us. I do not suggest that we have no choice, that we have no will, that everything is determined for us and we live through life as automatons. What I am suggesting is that our choices, our will may not be equally free because our individual contexts are not identical.

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**If we look at the criminal only at the time of the offence, therefore, we may not be able to understand how the violence came to be perpetrated by only looking at the immediate default. We have to zoom out and see the topography to know the terrain of the person's life, and we will find things on how this person and this violence came to be.**

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Clues that have been empirically linked with violent outcomes, clues that also tell us where help might have changed the course of a person's life and prevented the crime in the very first place.

# The Biopsychosocial Model

Then we go on to talk about the biopsychosocial model. This zooming out allows us to investigate the person from what is known as the lens of the biopsychosocial. This model originated in the context of psychiatry and was pioneered by the psychiatrist George Engel. Essentially, this approach looks at mental illness as not just an outcome of individual biological factors, but as a multidimensional interplay and an outcome of a complex mix of biological, psychological, and social factors. This model today is the foundation of contemporary theories of human development, which has been established fairly well, and we are not the result of nearly nature, and neither are we solely the result of nurture. This biopsychosocial model helps us to understand that human development is the result of a complex, multilevel influence of factors residing both in our nature as well as the processes of nurture in an inextricably fused developmental system. These factors range from genes and individual mental and behavioural functioning to the social and cultural to ecology and even history, and play a role in an individual's development from their prenatal stage to their childhood, adolescence, and adult years. In addition to this, we also know that conditions like trauma to the head or epilepsy can also play a part in affecting an individual, and in this trajectory, developmental stages play a crucial part, and consequences of negative or positive experiences at this stage are as if embedded and play a big part throughout our lives.

The manner in which the biological, psychological, and social factors shape an individual's life is not just limited to the varied social outcomes, or broadly, the life circumstances of a person, such as degrees one may have gotten or income or social position. But more importantly, the amalgamation of psychosocial factors influence and



shape the individual's personality, behaviour, the ability to internalise or externalise certain expressions, their perspectives as well as world view, their ability to make decisions, the ability to control action, and so on. There is now overwhelming evidence that the model holds the key to explain and contextualise violent behaviours as well. There's a famous study by the noted psychologist Walter Mischel, which tested self control in children around four years and made connections with how they performed in later life. The marshmallow test, as it's popularly known as, offered children food of their preference, such as marshmallows, candies or cookies, as a way to test self control. If a child waited for some time, they got two items, but if they immediately ate their candy or cookie, they could not get the second one. The study found that children who waited also did better at academics. But importantly, the study found that children who did not display the skill of self control were largely from poorer households. There were social factors which were shaping their behaviour and the eventual outcome of whether they did better at school. This is a crucial connection. The takeaway was not just that children with self control do better or that children from poor families have no control. It was that there are psychological influences of poverty, such as response to resource scarcity, that the children may be motivated by. These are factors entirely invisible if one were to narrow the focus on the short transaction of waiting or taking the candy, but which weren't actually governing the person's behaviour.

Let me give you another example. The famous story of Phineas Gage. Born in 1823, young Phineas worked in railroad construction and he had an unfortunate accident. A doctor who knew him before the accident described him as the perfectly healthy, strong and active young man possessing an iron will as well as an iron frame, a muscular system unusually well developed, having had scarcely a day of illness from his childhood until the date of the injury. In an unusual accident, an iron rod pierced Phineas's skull and brain right

through to his jaw. Phineas survived the accident, though he suffered a serious brain injury. But was he really Phineas anymore? Post his injury, Phoenix's personality was set to change to such an extent that he was no longer Gage. There was a biological alteration in Phineas Gage's personality, which he did not cause, but which affected him at such a level that it changed his personality. Once again, here we see the interplay between biological, psychological and social factors that brought about changes in Phineas Gage that he could not control. People with brain injuries are known to be aggressive and violent. A more recent incident comes to mind. Earlier this year in the United States, a former football player, Phillip Adams, shot dead six people. He then shot himself as well. What led to a successful, rich football player to murder so many? It turns out that Adams had a degenerative brain disease, CTE or Chronic Traumatic Encephalopathy, a disease which is linked to repeated head trauma or brain injury. He had no past criminal record and yet this violence. In fact, studies show that instances of brain injuries are very common in the prison population. But just like the Marshmallow test, it would not be quite accurate to say that people with brain injuries will commit more crimes. I think a more nuanced way is to understand it this way, brain injury may bring about changes in an individual's personality, control and regulation and when unsupported, and when help with medication or other requisite support is not provided, it may lead to violence. What I am trying to say is that there is no one determinant factor for violence. But when certain circumstances come together, circumstances which are not always in the control of the person, things can go very wrong.

With respect to criminality or individual violence too, there are factors from among the spectrum of biopsychosocial factors which have been identified as risk factors. These factors can be identified in the individual as well as in the environment. Many of you know of something called adverse childhood experiences which are

interrelated negative experiences coupled with a lack of positive factors in a child's family, community and social environment. These could include poverty, childhood neglect, absent parent figures, parental substance use, dropping out of school early, etc. and these factors have repeatedly been linked to violence in later life. It is not that each factor directly causes violence or that there is a causal link between these factors and violence, but they are predictive of violence, including sexual violence. The presence of these factors in the individual's life makes him or her more vulnerable to aggression or violence as compared to another individual whose life might have been protected from such risk factors if they had the right kind of support.

Let me offer you a real life example of Jaikumar. This name, of course, has been changed to protect the identity of the individual. But the facts that I narrate are real and were collected during the fieldwork for *Deathworthy*, a recently released report at Project 39A, in which two of my colleagues at NIMHANS, Dr. Jane and Dr. Gitanjali as well as myself are associated. This is a story of Jaikumar, who was born into a rural family of farmers. He was a naughty and stubborn child and would often pick up fights with other children and break their things. The reasons for these fights were never very clear. He would often miss school. His parents and older siblings would farm and contribute to the family's earnings. Days on which Jaikumar would miss school he would smoke *bidis* and soon the *bidis* turned to *Ganja*. Left unattended, he would smoke with the people around him, and he was part of a peer group which smoked *Ganja* a lot, and *Ganja* was available easily enough. Jaikumar eventually dropped out of school soon after class five and joined his family on the farm. By twelve he had started engaging in self harming behaviours and would also sometimes hurt others. He was married at 18 years, but much like his inability to attend school, he was not regular at work either. By this time, he became dependent on *Ganja*

and would often be high for long parts of the day. He would hit his wife and children. He would file false FIRs thinking that people were out to get him and started sleeping with a sword next to him. His brother would refer to him as a madman, and though he was taken to a local healer, he was never able to access formal mental health care services. When he was around 50 years old, Jaikumar ended up killing his wife and five of his six children. He was sentenced to death. Looking at the broader terrain of Jaikumar's life, one is able to see not only that his choices themselves were limited, but also that the extent of choice making avenues which can allow considered and informed choice making for equity compromise. It is therefore not as simple to just conclude. But did he know that the act was wrong? He did, and accountability must ensue. But it raises the question that with avenues which promote conditions of considered choice making being absent, to what extent is he solely responsible? If a person has seen their world in only two colours, black and white, even the possibility that the colour purple may exist is beyond their realm of consideration, and it will therefore impact their choices and their decisions. If someone were to ask them what colour do they like? The options available to them are only black, white and perhaps gray. This is what I mean when I say that the choices themselves are limited, and the consequent extent to choice making is therefore restrictive.

The importance of the biopsychosocial model is that it provides context. In providing context, it also offers possible solutions. If there had been an intervention early in Jaikumar's life, such as a safe space for school, could his substance use have been avoided? Could the subsequent events of his life take a different turn? Did he actively decide to consume substances? Yes, he decided. But at what age? What behaviour was seen as desired and therefore to be followed? Was there someone to pay attention and to guide him? Could they have realised the reasons for Jaikumar's bad performance at school?

But the family's poverty meant that everyone was working with little time to notice Jaikumar's behaviour and realise that he needed support. Was he psychotic? Was it induced by cannabis? Had Jaikumar been able to access quality treatment for his mental health or had he been able to access support for his substance use, would things have been different for Jaikumar? I think the answer is undoubtedly yes. There is a vast time difference, of course, between his not going to school and using substances and when he committed the offence. But one can trace right back to his childhood that there were crucial and glaring cracks in his life.

Seen from this lens, while these were choices in much as they were his decisions, the question is, how considered were his choices? How free from his unhelpful social surroundings, for instance, was his will? Jaikumar is responsible for his decisions and for the ensuing consequences for himself and people he may have harmed or hurt. Not holding him responsible would also take away his agency. But how much is he responsible, and how much is the lack of support and the lack of protective factors and the presence of adverse experiences responsible for getting him to the point where the law found him?

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**The idea that crime is the outcome of one individual acting at one given point unaffected by their past or current brushes beside the realities of how violence and criminal behaviour come about.**

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These neural connections between our present and past are neither causal determinative nor visible. But a life spent with little or no positive intervention, secure surroundings, and healthy resources in its multiple forms such as nurturance, financial stability, health resources, helpful support, healthy food, healthy guidance, and avenues for growth also prevent us from realising our fullest

potential and from being fully formed moral beings as criminal law imagines all, or at least most of its subjects to be. And that is really the irony. I do not intend for morality in this context to be a value system of lesser or greater work. But I refer more to the idea of a moral self and the process of 'coming into'. To become the moral agents that criminal law and punishment require and seemingly promote require the pre-existence and continuity of certain conditions. To be held equally accountable then the prerequisite is that such conditions be equally available to all individuals to aid the realisation of their fullest potential, to fully form themselves, and therefore to become equally modelled. And the reality is that this may not be true. We know that, for instance, more than 70% of death row prisoners are from socially and economically vulnerable and marginalised communities. In other words, more than 70% of them do not have the prerequisite conditions for realising a fully formed self and exercising their free will. In fact, they were in bearing stages of unfreedom, if you could put it that way.

# The Relationship Between the Offender and Punishment

Let's look at the relationship between the offender and the punishment list. What, then, can criminal law borrow from the biopsychosocial lens? Very broadly, criminal law is meant to communicate society's approval of certain actions and to hold accountable the person responsible for such actions punitively. As custodian of social values and society, criminal law establishes a direct link with each individual and with society itself. It is a social institution. The political theory and economy of criminal law, its necessity and sufficiency, and its larger role in society are all issues extremely relevant to what I'm talking about today. But for today, I want to start with the presumption or assumption that criminal law and the punitive consequences it entails as punishment is a legitimate state response to violence, regardless of which exact philosophical purpose it may intend to fulfil. Instead, let's shift our focus to the subjects of criminal law. How does criminal law imagine its subject to be - the essence of the individual whose behaviour it seeks to regulate? And it would appear that as a starting point, the subject of criminal law is an abstraction in the exact same condition as the next and equally free and unconstrained to will, choose and perform their actions and, of course, who share equally the values that the instrumentality of the law seeks to promote. The exceptions are then identified, which largely focus on the immediate and proximal mental state of the person - duress, necessity, insanity, self defence, and a few others. Actions done under these States are not really chosen because the essential condition of the imagined individual is now changed, since their free will is now encumbered. The tools of criminal law lend themselves to establish causal

responsibility. "Who caused the harm?" and questions of intent, motive, knowledge, etc are addressed, among other things. As an aside, defences like the insanity defence are a "yes but" scenario. Yes, 'A' caused the harm, but 'A' is not guilty.

The idea of criminal punishment is broader. It has elements of both causal and moral responsibility. Criminal punishment embodied the idea and penal accountability for the harm caused, and its aims have been theorised by many - retribution, deterrence, incapacitation, and even reform. But even while punishment is meant to be delivered to the individual, theories of punishment rarely focus on the individual. The interest is to prevent crime and protect society. Retributive theories aim for punishment to be proportionate to the harm caused. Deterrence focuses on deterring similar harm from being caused again. Incapacitation seeks to protect society from the individual and reform tries to align the individual with socially and commonly held value systems so that the person can be a part of society. Following in the tradition of criminal law generally, theories of punishment, too, seem to view individuals as abstract, unattached, fully formed entities with little variation. The abstract individual imagined by the theories of punishment is one who is and was always fully realised and fully formed and who decided to inflict harm.

Cause of Responsibility having been decided, how do we decide moral responsibility and how much to punish? And it is here that the zooming out that I spoke about before is so crucial. To be able to determine moral responsibility, one has to necessarily undertake an investigation into, first, whether the person is fully formed and a fully realised person that the theory and idea of punishment imagined. To do so we need to be able to zoom out and look at the entire context of a person being punished, because only then will we be in a position to understand the forces that form their moral being from



the time they were born. It is in this exercise that the biopsychosocial lens helps. It is at the same time a framework of analysis and a guidebook to the explorer of what factors to look for towards determining the moral responsibility of a person. Examined under this lens, the context of the person will reveal the forces that help them become, not just factors and facts observable to the naked eye, but much like the Marshmallow experiment which will reveal the psychological and the subterranean. It will perhaps reveal something else - gaps and barriers routinely added and consistently magnified which remained unaddressed because of solely lacking social support structures as well as intervention.

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**The question that is eventually raised is this - who is responsible for an individual's moral becoming? A context is in large part responsible. For instance, a person growing up in poverty is far more likely to be thwarted in their development and moral becoming than a person who is growing up in relative stability.**

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Attendants of poverty such as childhood neglect, abuse, dropping out of school, early adultification, early substance use are crucially connected parts of the neural network that becomes us. The network spreads out. Charting its path and its cumulative strengths and weaknesses lies in individual experiences. These are the distal circumstances that are strongly connected to more proximal events and eventually the offender before the court. They certainly were there in Jaikummar's life. Without examining these distal occurrences, we would not be able to determine how fully formed an individual was and eventually, to what extent does the person fit in the law's imagined offender attributes? Coming back to the question, who is responsible for an individual's moral becoming? And I think the answer necessarily has to be - we are not solely responsible for our being, for our becoming, for who we are. The responsibility is shared

between us and our social context, us and society, us and the presence or often in cases of criminality, the lack of support that was indeed necessary but was not present. And this must play a role in deciding how morally responsible a person is for a particular act.

# Conclusion

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**What then can we conclude? A biopsychosocial lens to violence and criminality reveals an uncomfortable reality for criminal law and punishment. That when deciding how much to punish, in deciding individual accountability, we must look at social responsibility, at the often unfulfilled responsibility of the state and of society.**

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And I think we need to therefore collectively reflect, respond and take responsibility. We are not born fully formed, our thoughts clear and our morality inherent. But through daily interactions with environments around us, we go through a constant becoming and we often find clues. If we were to shift our gaze to the criminal in their context we realise that the process of becoming is likely to have been thwarted oftentimes and in multiple ways. That is what Jaikumar's story illustrates. There is no one aspect directly causing an outcome, and there is no one predetermined outcome. That is the essential learning and question. Had there been systems of effective support in his life, would he still have ended up where he did, killing his family and landing up in prison? The consistent lack of necessary social and structural support systems from a very young age and the lack of medical intervention at that phase of his life ended up in a tragedy not only for those who passed away, but also for Jaikumar. His life, in a way, is a tragedy too. And if I may offer a suggestion, I think systems of punishment need to engage with practitioners of these knowledge streams to fully make sense of the complex lives of the many who come before it for justice.

Criminal law, its theory and practice are vast and complex fields, and talking about all aspects in one lecture would not do them

justice. There are many things that, of course, go into delivering punishment. There is the judge's own developmental trajectory that may play a factor, the human element in judging. So to say, there's a system's ability to fully investigate and appreciate these complexities - rules of procedure and evidence that may play a part in how criminal law punishes and so on. We haven't engaged in many of these issues. I'm sure that would take another lecture. Today was perhaps a conversation starter which we can all in our respective works and studies take forward, reflect, and develop. Through this lecture, I did not intend to provide any answers or solutions, but I wanted to share a few thoughts that I have also had to grapple with in the course of my own work and of course, the work that we did as part of the Project 39A - looking at people on the death row. Whether the solution is to do away with certain punishment or to incorporate it in our current criminal law and punishment schemes, or to revisit theories of criminal law and punishment, or indeed strengthen and ensure social justice policies that can effectively intervene early on and when crucial to eventually and collectively prevent violence. Thank you very much.

## Suggestions for further reading:

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2. José B. Ashford and Melissa Kupferberg, *Death Penalty Mitigation: A Handbook for Mitigation Specialists, Investigators, Social Scientists, and Lawyers* (OUP 2013) ch 5.
3. Joseph Zubin and Bonnie Spring, 'Vulnerability; a new view of Schizophrenia' (1977) 86 *Journal of Abnormal Psychology* 103-126
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