

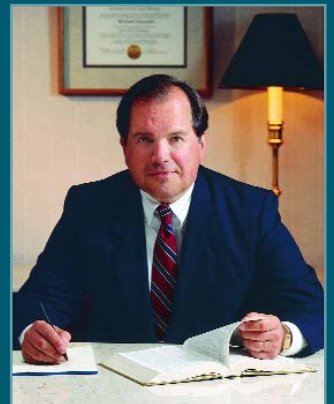
# Insight

## The Traumatologically Brain Injured and the Law

*Richard Alexander, Esq.*

**RICHARD ALEXANDER** is certified as a specialist in civil litigation by the National Board of Trial Advocacy, accredited by The Board of Legal Specialization of The State Bar of California and is recognized as a Trial Lawyer by the Consumer Attorneys of California. After graduating from Ohio Wesleyan University, where he was the Owens-Illinois Scholar and elected to Pi Sigma Alpha [national political science honorary], he was awarded a National Honor Scholarship by the University of Chicago Law School, where he graduated in 1969. A past President of the Santa Clara County Bar, Governor of The State Bar of California and Vice President of CAOC, he is a regular lecturer at legal seminars, a founding member of the National Association of Consumer Advocates and publisher of The Consumer Law Page, a legal information website that has won acclaim. The firm holds Martindale-Hubbell's highest rating and is recognized in the List of Preeminent Law Firms in the U. S.

The law firm of Alexander, Hawes & Audet, LLP based in San Francisco and San Jose represents plaintiffs in catastrophic injury and wrongful death cases across the United States. [www.alexanderlaw.com](http://www.alexanderlaw.com) or 800.921.1776.



*The following presentation was given by Richard Alexander at Santa Clara Valley Medical Center's Fifteenth Annual Brain Injury Rehabilitation Conference in 1992. Mr. Alexander's insights are still applicable today and relevant to communities in all states.*

California's civil courts routinely consider, understand and appreciate the significant impact of brain injury, but when it comes to criminal prosecutions our criminal justice system is not designed to provide any special consideration for survivors of traumatic brain

injury. Brain injury is considered in sentencing criminal offenders, providing the survivor has a well-informed advocate, but that's really not much solace, when many survivors of brain injury should be diverted from the criminal justice system from the outset.

To understand how the system works requires a very basic course in criminal law and practical politics. As a personal injury trial lawyer, I am not the best informed on all the intricacies of criminal law, but from years of representing survivors of major trauma, I unfortunately

understand well the public policies issues that drive our legal system and I know the devastating long-term aftermath of a major head injury. So, let's look at how our legal system operates.

California's criminal justice laws are driven by political decisions, which are based on social and moral views concerning crime. In general there is an extremely wide range of opinion about how to best deal with crime, stemming from three different positions.

From the first perspective, American society has been too lenient with those who break the law. Accordingly, the most promising solution is to get tougher with all criminals, to step up enforcement efforts, appoint tougher judges, impose longer jail sentences and build more jails and prison facilities.

The second view believes we can control violent crime by identifying the relatively small group of criminals who are high-rate offenders and recognize that in important ways they are not deterred by harsher prison sentences. The only realistic way to deal with such chronic criminals is to acknowledge that they are incorrigible. Considering the threat they pose to society, they should be locked up indefinitely.

Lastly, a third view argues that it is essential to recognize the corrosive social and economic forces that lead to criminality, and make a serious effort not just to contain crime, but to prevent it. Proponents of this position recognize that it is no small task to change the social and economic conditions which now provide a breeding ground for crime. As an immediate measure, alternatives to incarceration should be explored; alternatives which promise to help offenders return to productive lives.

Each of these perspectives begins with a claimed explanation of why people commit crime. Because very few people are well informed about criminal justice issues, political decisions about the causes of crime are based upon totally inaccurate information, largely from television and newspapers.

News by definition is the unusual, strange, aberrant, and the exception to the norm, i.e. it is newsworthy.

In today's world, on a slow news day criminal violence that occurred somewhere you never heard of is reported locally, not just once, but

more than a 1,000 times a day in morning television, drive-time radio, TV, "Live at Five" evening news, and the statistical 1.7 newspapers skimmed by your average metropolitan Californian. We are inundated with news concerning crime because it presents visually and it "sells newspapers."

The end result is that day-after-day repetition of the strange, the exotic and the unusual has led many voters to believe the criminal justice system is bizarre. So it is no surprise that nearly every voter will tell you that the criminal

**In large part, our criminal justice system has been dictated by the average politician's response to voters who know that the answer is to "lock them up." Like any other field of endeavor, if without special training or experience someone immediately knows the answer to a complex problem and can readily dictate an obvious solution, they clearly have not thought through the question or considered the ramifications of their solution. That is our criminal justice system in a nutshell.**

does not work, that wholesale numbers go scott free, that the courts are run by lunatics and are supervised by appellate courts which are even worse.

On the other side of the ledger, nobody ever reports, let alone any newspaper editor, assignment editor or reporter, how many people were sentenced to state prison in the Bay Area this month, or the total number of county jail inmates at any one time, because that just isn't news. So in large part, our criminal justice

system has been dictated by the average politician's response to voters who know that the answer is to "lock them up." Like any other field of endeavor, if without special training or experience someone immediately knows the answer to a complex problem and can readily dictate an obvious solution, they clearly have not thought through the question or considered the ramifications of their solution. That is our criminal justice system in a nutshell.

Historically the principal issues in every criminal trial are two fold: did he/she commit a specified act and did he/she intend to do it.

Largely intent is derived from the fact that some complex act was attempted, such as armed robbery of a bank. By the time the robber obtains the gun, walks in, presents the demand note and terrorizes the bank teller, it is pretty clear he/she intended to rob a bank.

Analysis of levels of intent is critical to determine the level of punishment in our justice system.

For instance, if a person commits murder, but is legally insane, there is no criminal punishment because in large part, they are outside the system of rational adults and are unable to appreciate the nature or quality of their act and do not know the difference between right or wrong.

If there is no cold, cunning, preconceived and premeditated plan to kill, but a momentary rage or blindness to reality driven by an emotional outburst which results in a death, most states recognize this mental state as less culpable than cold-blooded murder, and hold the wrongdoer responsible for second degree murder, with a lesser penalty. If there is no specific intent to kill, but conduct in conscious or reckless disregard of life results in death, we generally find those persons not guilty of murder, but of manslaughter, with a lesser penalty.

The key to understanding these different levels of murder is that the criminal justice system is focusing on the actor's cognitive skills to determine the extent of liability and only in cases where the actor meets a 100% standard does exculpation occur.

The rules are simplistically designed to be "all or nothing" because they were generated by a political process. Either the killer was insane or not. There is no middle ground or sliding scale. We all know that, except in the rarest of cases, nothing is 100% pure and "all or nothing" rules do not reflect clinical realities.

Similarly, in the evaluation of competency to stand trial, we also evaluate cognitive skill on an absolute basis. In order to stand trial one must be presently free of a mental disease, mental defect or mental disorder, the nature or severity of which precludes the accused [that also is a 100% standard] from understanding the nature of the proceedings or the ability to cooperate with his/her attorney.

This inflexibility in defining mental status by absolute "either/or" rules occurs because our criminal justice system serves many functions. First it is a blend of political, constitutional, moral, and personal judgments forged in a political

process controlled by voter expectations. It states the moral values of the community. It is intended to deter the populace generally. It is intended to specifically deter wrongdoers by taking them out of circulation with the general populace, and it is intended to punish.

There is one thing it is not designed to do and that is, it is no longer designed to treat or rehabilitate, although unquestionably 90% of all convicted criminals at some time will be back on the street. The American public has not figured that out just yet, because the bill has not gotten big enough, although that day appears to be coming soon.

This is not a cynical view, but in a world of limited resources choices have to be made about allocating resources. Until such time as the public understands that our prison system is the most pervasive, and unnecessarily expensive, in the world - once that fact becomes a reality for the body politic - the next step will be to determine why the politicians have been approaching the issue "unscientifically" or perhaps "with little business or economic sense." Once the case is stated in those terms, as opposed to the current public fear of crime and concern for personal safety, there will be wholesale changes in our criminal law.

As it stands today, the criminal justice system is primarily intended to serve public safety. Criminal law is drafted to reflect widespread public fear and misinformation about the causes and prevention of crime. As a result, there is no special place for or appreciation for the role or impact of traumatic brain injuries in the current system, because the survivor of traumatic brain injury does not fit into the "all or none" thinking of our law.

The only arena in which traumatic brain injury is considered is in post-conviction settings, even though a good case can and should be made that politically, morally, and economically many survivors of brain injury should not be involved in the criminal justice system at all, but the traumatically brain injured have not sufficiently impacted the criminal justice system in any one county to merit economic consideration. It is only a matter of time until that occurs since the rate of persons being diagnosed as brain injured has been occurring at a relatively constant rate of approximately 2,000 per year here in Santa Clara County, and once seriously injured complete cures are rare.

Demographically, three quarters of the victims are males, one half of whom are ages 15 to 34. They are the "go for the gusto," high speed, consumers of alcohol who are going to live forever and who dominate ERs Friday night through Sunday morning and the Monday morning arraignment calendars in the courthouse. From a public health perspective, the top priorities for public education are alcohol abuse, roll bars, air bags, and helmet protection for motorcyclists, bicyclists, skateboarders, and skiers. Annual brain injury conferences clearly are making an important contribution to raising the public's knowledge on this issue, but the number of TBI persons is not expected to significantly diminish over the next ten years.

Helping You Live Life on Your Own Terms

## Supports Without Limits

A Full Service Home Care and Home Health Agency

**Our services include:**

- Skilled Nursing
- Physical, Occupational and Speech Therapy
- Personal Care/Companionship
- Housekeeping/Transportation

A full service home care and home health agency, serving the Central Texas area.

Our staff is available 24 hrs/day, 7 days/wk to provide you with the services you need in the comfort of your own home.

For more information please call toll free

# 866.421.1775

512.396.1406  
or visit  
[www.supportswithoutlimits.com](http://www.supportswithoutlimits.com)

Our Payor Sources include Private Pay, Medicare, Insurance and Workers Compensation

In my practice I have learned that there is widespread misunderstanding concerning traumatic brain injury even in otherwise knowledgeable medical circles. Anecdotal evidence does not replace scientific research, but recently in one of my cases, a well regarded Welch Road neurologist concluded that a moderate head injury in a bicycle/truck collision, which resulted in a fractured bicycle helmet, was not responsible for chronic fatigue six months post-injury. Even after presented well documented medical references describing fatigue as the most common complaint in two-thirds of all minimal to moderate head injury patients, the practitioner still opined that the fatigue was simply secondary to depression, unrelated to the head injury. Such a misinformed view by a treating physician is devastating for the victim, and in this case, her ability to achieve fair compensation in a strongly contested case of liability.

At the criminal justice level, next to nobody, including public defenders and judges, appreciates that TBI has been closely associated with criminal histories and specifically with violent rages. Current research from the University of Chicago by Dr. Stuart Yudofsky shows that the most common cause of explosive anger is brain injury or neurological disease and that there are now medications available to control violent rage. Beta-blockers can be used to effectively treat not only high blood pressure, but also violent rages. This research is confirmed by the University of Pennsylvania study of 286 psychiatric patients who showed unprovoked rage; in that cohort 94% had some kind of brain damage.

And all this is of dramatic consequence since it correlates with the studies by

Dr. Dorothy Lewis of the NYU School of Medicine, and others, of 15 death row inmates in the American Journal of Psychiatry [143:7, July, 1986] and a separate study of 31 incarcerated delinquents reported in the Journal of the American Academy of Child and Adolescent Psychiatry [1987, 26, 5:744-752]. There is no question that much violent crime can be traced to brain injury, especially in criminals who are repeatedly violent. While brain damage alone may not be likely to promote intense violence, the most lethal combination is a history of neurological damage and abuse in child-



hood. When a child has some organic vulnerability, like a brain injury, and is raised in a violent household in which the child has been brutally abused and has witnessed extreme violence, then the end result is a very violent person.

In addition, Dr. Lewis's research found that victims of physical abuse were readily distinguished as more aggressive. As Dr. Lewis explains, "children imitate what they see." \* \* \* Second, the kind of abuse to which such children are subject often results in injury to the central nervous system. This injury, in turn, contributes to the impulsiveness, emotional instability, and cognitive impairment that diminish their ability

to control their behaviors. \* \* \* Finally, the brutality directed toward these children engenders extraordinary rage and contributes to their paranoid orientation. \* \* \* (T)his rage is rarely directed toward the abusing parent but rather is displaced onto a host of others in the abused child's environment, teachers, peers and police."

As a consequence, individuals with "this combination of vulnerabilities are especially at risk for committing violent acts when confronted with stressful stimuli, such as interpersonal discord, sexual frustration, and verbal or physical provocation. Their threshold for aggression is lowered even further by ingestion of alcohol or drugs."

Dr. Lewis terms this condition Limbic Psychotic Aggressive Syndrome, which is an important step forward in forensic psychiatry, rather than trying to explain the conduct of repeatedly violent individuals whose disorders do not fit current diagnoses conduct disorders or anti-social personality.

Lewis's work confirms that there is a "constellation of neuropsychiatric and experiential factors that differentiate" violent delinquents from non-delinquents and provides a scientific foundation for the forensic psychiatrist to move the debate from issues of guilt and punishment to treatment and prevention.

Against these exciting developments in understanding the causes of violent crime, we find ourselves confronting the real world where millions are spent on modern jails that lack funding for adequate operating budgets and where the director of the county's mental health unit resigns after a team of state experts roundly criticized the county jail's program from inadequate staffing, to failing

to diagnose and treat, to ignoring mental health patients, to failing to prevent suicides.

At the same time, not surprisingly, a nationwide survey has ranked California 31st among the states in the delivery of mental health services, a further decline from its 25th place two years ago. The survey by the National Alliance for the Mentally Ill, which was conducted by the Public Citizen Health Research Group, rates Los Angeles as having the worst public mental health services of any major city in the nation. Particularly striking was the report's conclusion that 3,600 severely mentally ill inmates housed in Los Angeles County Jails comprise the "largest de facto mental institution in the nation."

I know from my own practice and working closely with the families of survivors and their health care providers that there is no organized long-term system of care for the traumatically brain injured in our area. TBI patients without families are relegated to the street or incorrectly diagnosed as mentally ill. For those with families, the families do not simply become care providers: they suffer one of the most outrageous burdens that destroy families, cause siblings to leave home prematurely, and mandate that someone give up their life to care for the injured. That's why the research of Dr. Harvey Jacobs on the long term impact of brain injury is so extremely important and why I seek and value his assistance in court to explain that the real impact is continuous, never ending, and always fraught with on-going disaster.

So it is no surprise that when survivors of traumatic brain injury encounter the courts, it takes substantial litigation muscle to get the system to comprehend the special needs of the brain injured.

So what do I propose?

First, our system of mental health evaluations needs to look at states like Massachusetts, which have established fully operating psychiatric clinics in the courthouse. The clinic provides evaluation, therapy, education and consultation, research and supervision. At the Cambridge Massachusetts Court Clinic, operated by Dr. James C. Beck, the major focus of daily activity involves the evaluation and treatment of individuals referred through their contact with the court system as part of the state Department of Mental Health and as an academic division of the Department of Psychiatry at the Cambridge Hospital, Harvard Medical School. Staff psychiatrists are called on daily for in-court emergency consultations. In addition, psychiatrists and other staff members offer on-going therapy.

What has evolved is an on-going partnership venture between mental health professionals and the trial court which provides a wide variety of clinical services in an effort to serve the generally undeserved court-related individual and his/her family, of which perhaps the most valuable is prompt and early diagnosis, evaluation and referral.

But the real benefit of the system is that it provides the court, judges, probation officers, mental health, schools, social services and youth services with immediate access and daily contact with mental health professionals.

Although no empirical data is available, a system such as this is probably more cost effective than those which fail to identify and divert individuals from the expense of the criminal justice system. Prompt identification is the key.



## Daily Directions

Enjoy the activities of life

### An Adult Day/Health Care Center

Located in San Marcos, Texas

7 a.m. to 6 p.m. Monday through Friday except holidays.

Participants may come for a full day or a half day, Monday through Friday or any combination of days.

For more information about Daily Directions or to schedule a tour, please call

**512.396.3294**

or visit our website

[www.daily-directions.com](http://www.daily-directions.com)

Enjoy the activities of life

Because the numbers of TBI patients present a small problem in any city or county, a stateside system of prompt identification and verification would well serve this population. The State of California's computerized Criminal Information and Identification system, known as C.I. &I., can and should identify victims of TBI. I realize of course the thin line between identification and stigmatization, but when a survivor of brain injury is arrested, anything that can minimize and avoid the abuse of incarceration and result in diversion to a treatment program or special placement should be pursued. The State's computerized system contains substantial controls preventing unauthorized access to the database, including strong documentation and recording of access. In short, this statewide system has extremely good security and will not stigmatize victims, but will aid in providing realistic options. It is used by every law enforcement agency in the state and is routinely accessed at the time of booking. Identification of persons with brain injury at this stage would greatly assist in in-take classification and release on own recognizance decisions. Hopefully, at some time in the future, it would also serve to aid in diversion as well. And that brings me to my last point. In large part, many survivors of brain injury who are not violent do not belong in the criminal justice system. But before the public recognizes that fact a substantial public education effort is needed.

So lastly, I challenge you to make the legal system respond to the advances being made in understanding the role of brain injury by taking the forefront in an educational effort directed to both the bench and bar. A series of local programs for both prosecutors and defenders, followed by presentations to the annual meetings of the California

Judges' Association, California District Attorneys' Association, California Public Defenders' Association and California Attorneys for Criminal Justice, will advance the time for better understanding of the long term impact of traumatic brain injury on the victims as well as the community. Once this occurs the next step of changing state law to aid diversion from the criminal justice system will be more easily accomplished.

*From "The Traumatically Brain Injured and the Law," by R. Alexander, March 26-29, 1992. Presented at the Fifteenth Annual Brain Injury Rehabilitation Conference sponsored by the Santa Clara Valley Medical Center. ©1992 by Richard Alexander. Reprinted with permission of the author/presenter.*

