

UCLA

UCLA Women's Law Journal

Title

Trauma Abounds: A Case for Trauma-Informed Lawyering

Permalink

<https://escholarship.org/uc/item/7mx6n04n>

Journal

UCLA Women's Law Journal, 26(1)

Author

Peña, Claudia

Publication Date

2019

DOI

10.5070/L3261044345

Copyright Information

Copyright 2019 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

Peer reviewed

TRAUMA ABOUND: A Case for Trauma-Informed Lawyering

Claudia Peña*

. . . and when we speak we are afraid
our words will not be heard
nor welcomed
but when we are silent
we are still afraid

So it is better to speak
remembering
we were never meant to survive

—Audre Lorde¹

In September 2018, I walked through the halls of the school where I teach and observed as students, staff, and faculty alike watched the Kavanaugh confirmation hearing. Some silently looked on in shock. Others laughed nervously, probably wondering if what they were watching was actually real. Still others had tears streaming down their faces as they watched, in horror, what they felt was a desecration to the legal institution they cherished. As a survivor myself, I assumed that many were reliving their own traumas attached to sexual assault and feeling keenly the humiliation of not being believed or having had their ordeals belittled for the personal gain of others.

* Claudia Peña is lecturer at law at UCLA School of Law and a faculty member of the UCLA Gender Studies Department. She is cofounder of Repair, an organization based in Los Angeles that addresses how systems of oppression and exploitation, such as racism, traumatize and disable communities. She provides CLE for nonprofits, government agencies and private firms on trauma-informed lawyering, and teaches advocates how to address their own secondary trauma. She has testified at Senate hearings with regard to sex trafficking and the traumatizing effects of current systems in place. She previously directed the California Civil Rights Coalition for 5 years where she focused on voting rights, racial justice, equal opportunity and progressive taxation. Peña earned her B.A. at Mills College in Sociology and her J.D. at UCLA School of Law, where she specialized in the Epstein Program in Public Interest Law and Policy and Critical Race Studies. Her work has been published in *California Lawyer*, *Non-Profit Quarterly*, and *Georgetown Journal of Modern Critical Race Perspectives*.

1. AUDRE LORDE, *THE BLACK UNICORN: POEMS* 31 (W. W. Norton & Co. Inc., 1st ed. 1978).

Events that involve extreme helplessness, fear, humiliation, instability, insecurity, injury, violation, grief, or danger can cause trauma, though this list is not exhaustive. Trauma results from an experience that breaks past normal coping and defense mechanisms. I was recently craft-making at my mother's house. I used an X-Acto knife on a self-healing mat. The knife I used had a sharp blade, and the mat was worn and had seen better days. It had dozens of scrapes and scratches and when I cut, it sliced right through the mat and marked my mother's table. If you are not an avid craftmaker, you may not know that the blade should *not* have cut through the mat. It's referred to as a self-healing mat because the cuts generally close up as soon as the blade slides through. While my mom and I laughed about the fact that I had destroyed her tool, I thought about the comparison to trauma.

Our psychological defenses can withstand a certain amount of difficulties, obstacles, and painful experiences. Human beings live in a world where plenty of sad, disappointing, and appalling incidents take place all the time. And we don't walk around traumatized all the time because we are self-healing mats. Our bodies have evolved to heal themselves as much as possible, and our psyches have all sorts of tools to tolerate trials and pain. As for self-healing mats, if the mat is already weakened from overuse; or if you use something strong enough to cut through the mat, such as a machete or butcher knife; or if you happen to hit the mat in some particularly vulnerable spot and it just kind of hacks off; then a permanent cut is the result. Like the mats, if a person has already confronted so much hardship that they are vulnerable just by way of having faced too much—or if something particularly serious occurs, such as robbery, rape, or sudden homelessness—then trauma might result. A group of people could experience the same fire or flood and you might find that nine of ten were able to withstand the tragedy, but one person might end up really traumatized because it was something they'd always feared. This is because whether or not someone experiences trauma depends on countless factors and differs from person to person.

Trauma manifests in myriad ways and can last a day, a year, or a lifetime. It's always both psychological and physical: body and mind are inseparable. A physical trauma (such as the loss of a limb) will have psychological impacts; and emotional trauma (such as intimate partner abuse) will lead to physical manifestations in the body. Trauma can lead to varying effects such as hopelessness, inability to recall, loss of sleep, distrustfulness, disassociation, difficulty concentrating, exaggerated startle response, hyper- or hypoarousal, irritability, outbursts of anger, hypervigilance, or efforts to avoid any reminders of

the traumatic event. Long-term, unaddressed trauma is often at the root of abuse, neglect, substance abuse, reckless behavior, and aggression. Though it is *not* true that people suffering from trauma will all behave in these ways, it is true that people who behave in these manners often have untreated trauma. So understanding trauma, how it manifests, and strategies to work with people who have been traumatized are essential to a healthy society.

One of the most harmful things that can happen to someone who has been traumatized are experiences of disempowerment. Much of trauma stems from a feeling of helplessness; so situations where someone is or feels powerless can provoke memories of the traumatic event causing them to have flashbacks, disassociate, become anxious or nervous, break out into a sweat, or experience various other reactions. This is why when I train practitioners to use trauma-informed practices, much of the client engagement centers around empowerment of the client. An empowered client is more dependable, more open, and more cooperative. Thus an attorney is more likely to succeed in her case when she has her client's trust. Similarly, when I teach, I create a classroom environment where my students are empowered because they are then more open, more trusting, and more willing to speak their minds, which in turn allows them to learn more. And because my sole goal in teaching is for my students to learn, I am more successful at teaching when they are empowered.

When students, women, and survivors everywhere watched the Kavanaugh confirmation hearings, many felt profoundly disempowered. Given that Dr. Blasey Ford was telling the truth about the assault she experienced at the hands of Brett Kavanaugh and his friends, it was especially difficult to watch Senator after Senator ingratiate themselves so much to Kavanaugh and even apologize to him for what he and his family were facing.² Instead of facing consequences, instead of being investigated, and instead of being denied one of the highest honors paid to any American citizen, we all watched as the Republicans on the Senate Judiciary Committee made it clear the assault of Dr. Blasey Ford held no weight in

2. Some have pointed to the criminal law standards of innocent until proven guilty and "beyond a reasonable doubt." Adhering to both of these still leads me to the conclusion that Brett Kavanaugh assaulted Dr. Christine Blasey Ford when they were teenagers. Dr. Blasey Ford was a very credible witness with insufficient reason to lie. Some have said she had enough reason to lie because she wanted to curtail Kavanaugh's prospects of serving on the Supreme Court of the United States. This is similar to accusations such as, "We never went to the moon. The government lied about it because it wanted to seem strong in the face of the Cold War." Some naysayer arguments are just silly and frankly nonstarters. This is one of them. Many articles have explicitly spelled out why it's clear that Dr. Blasey Ford is telling the truth, so I will not do so now.

determining whether or not to confirm Kavanaugh to the Supreme Court. Much like the Judiciary Committee proceedings of 1991, where Anita Hill relayed that Clarence Thomas sexually harassed her while they worked together at the Equal Employment Opportunity Commission, the Senators sought to protect the nominee of their choice despite the allegations.³ The rules, written and unwritten, for how a Supreme Court Justice is chosen and confirmed do not contemplate the experiences of women vis-à-vis the inappropriate and/or illegal behavior of the nominee. Survivors and their allies watching felt helpless because they knew their voices, concerns, and experiences did not seem to matter to the men who made up the majority of the Judiciary Committee.

The video of Ana María Archila and Maria Gallagher imploring Senator Jeff Flake, while he was in an elevator, to rethink his position is a prime example of the impact of the decisionmaking process on survivors everywhere.⁴ The women approached Flake before he voted to move the nomination through the committee. They outed themselves as survivors, which they had never done up until a few days before the confrontation with Flake. They felt compelled to speak because they saw themselves in Dr. Ford. In the video, Gallagher says, "I was sexually assaulted and nobody believed me. I didn't tell anyone, and you're telling all women that they don't matter, that they should just stay quiet because, if they tell you what happened to them, you are going to ignore them. That's what happened to me, and that's what you are telling all women in America, that they don't matter. They should just keep it to themselves because if they have told the truth, you're just going to help that man to power anyway."

Sexual assault is one of the most unreported crimes. Three out of every four incidents are not reported.⁵ Though there are various reasons for this, one of the main considerations is that the survivor knows they will not be believed. And not being believed is so painful that it is determined to be not worth the risk. There is not much to be gained from sharing about such painful events, especially since victim-blaming/shaming is so common and accountability is so rare. Those who commit sexual assault have always relied on the

3. Anita Hill is an attorney and serves as Professor at Brandeis University.

4. David Morgan, *Woman Who Confronted Jeff Flake on Elevator: We Connected Because He's a Father, I'm a Mother*, CBS NEWS (Oct. 8, 2018), <https://www.cbsnews.com/news/ana-maria-achila-on-elevator-confrontation-with-jeff-flake-he-and-i-connected-because-he-is-a-father-i-am-a-mother> [<https://perma.cc/Q7B7-LZCA>].

5. RAINN, *The Criminal Justice System: Statistics*, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/4NK2-QLMR>].

silence of their victims and the complicity of those who love them. This is what Archila and Gallagher refer to when they accuse Flake and his fellow Senators of sending the message to survivors everywhere that their assault doesn't matter.

Lest some confuse the protesters' arguments, they were not saying that Kavanaugh, or anyone else who has been accused of sexual assault, should never work again or be given any opportunities. The crux of the issue is that instead of any form of accountability, Kavanaugh would be given the highest honor in the legal field: a seat on the Supreme Court of the United States. Archila is heard saying:

Do you think that he's able to hold the pain of this country and repair it? That is the work of justice. The way that justice works is you recognize hurt, you take responsibility for it and then you begin to repair it. You are allowing someone who is unwilling to take responsibility for his own actions and willing to hold the harm he has done to one woman, actually three women, and not repair it. You are allowing someone who is unwilling to take responsibility for his own actions to sit in the highest court of the country and to have the role of repairing the harm that has been done in this country to many people.

This lack of accountability caused further harm to survivors everywhere, including women, men, and nonbinary, gender nonconforming, and intersex individuals. It deepened and further entrenched the idea that perpetrators must only vehemently deny their actions and those in power, especially members of their own in-group, will loudly apologize to them for the inconvenience of having the past dredged up. The more privilege one has, the more defended he will be by others who share or aspire towards that privilege. Brett Kavanaugh, as a straight White man from an upper middle class family, educated at private schools, had no shortage of defenders in the all-White cast of men who serve as the Republican members of the Senate Judiciary Committee. He thus faced zero accountability. Regardless of the #MeToo moment that stole headlines in 2017–18, a few fallen heroes does not a changed culture make. The Kavanaugh confirmation to the Supreme Court is evidence of this. And the lack of accountability was painful to all the survivors who have experienced the same absence of any kind of justice.

In 2014, I accompanied a dear friend—let's call her Selena—to downtown Los Angeles to secure a “civil harassment restraining order” against the man who raped her. We'll call him Matt. As go the statistics, he was a colleague of hers.⁶ Selena had known Matt

6. In eight out of ten cases of rape, the victim knew the person who sexually assaulted them. NAT'L SEXUAL VIOLENCE RES. CTR., STATISTICS ABOUT SEXUAL VIOLENCE (2015), <https://www.nsvrc.org/sites/default/files/>

for years: he was supposed to be a friend. I remember speaking to her the day afterwards. She was so shaken up, so rattled. And this was a woman who does not suffer fools easily, and who has always insisted on being heard and is quick to defend herself, and punch back when need be. But *that* day . . . that day was different. Always articulate, Selena could barely speak. She was a wreck.

Despite the potential fallout, she courageously pursued every avenue of protection. Understandably, Selena was weary of Matt, worried that he would try to hurt her again because she'd reported the incident to their employer and to the police. She secured a temporary restraining order. When the hearing for the civil harassment restraining order (a longer-term restraining order) came up, neither Matt nor Selena had an attorney. The judge, of his own volition, said to Matt, "The consequences for you are dire; I am going to reschedule this hearing so that you can go find yourself an attorney to defend you." Upon landing on a new date, Selena said, "Your honor, I have a job interview that day. Matt and I work together and I'm trying to keep myself safe by finding a new job." The judge responded that her job interview was not something he could accommodate. It was striking because he'd made such effort to protect Matt but felt disinclined to assist Selena in trying to protect herself. Maybe the difference in accommodation was the result of his bias in favor of men over women, or White over Latina, or accused over accuser, or maybe some combination of the three. As the judge was a White man—though it's not a foregone conclusion that everyone acts on their in-group bias—it is safe to theorize that the judge saw himself in Matt, a fellow White man, and wanted to help him at the expense of Selena's understanding of her safety.

On the morning of the rescheduled hearing for the restraining order, we received the news that the District Attorney had decided to drop the rape charges against Matt. The District Attorney called Selena and said, "We all believe this happened. You are a very credible witness. But the supervisor says we'll have a tough time with the jury and reasonable doubt because you knew him and it was at your house. We're really sorry." It's just more confirmation that the criminal justice system is not set up to facilitate safety and security for victims (much less rehabilitation for those who cause harm) and why so many vulnerable communities, including communities of color, immigrants, LGBTQI people, people with disabilities, the working class, and survivors choose *not* to pursue criminal charges.⁷

publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf.

7. See generally Mariame Kaba, *Justice, in* THE FEMINIST UTOPIA PROJECT:

Upon finishing that phone call, we walked into the courtroom. The hearing began with Selena asking for a continuance. She told the judge she'd just learned about the District Attorney's decision, and that information changed the evidence she planned on presenting to secure the restraining order. She requested a few more days to secure the services of an attorney. The same judge who insisted on a continuance so that Matt could secure legal representation denied Selena any extra time and instead plunged into questioning. He promptly asked if she and Matt had dated. Selena responded with a resounding "No," and Matt stayed silent. After making the typical remark about it being his word against hers, the judge asked Selena what happened. She shared her story—Selena was articulate and emotional, crying through many of her words but still capable of compelling testimony. After she spoke, Matt's attorney interjected to remind the judge that the District Attorney had dropped charges, so clearly, "nothing had happened." Evidently finally moved by Selena's recollection of her experience, the judge replied sternly, "Look at her. Do you see her? I am inclined to believe her. The District Attorney drops charges for all kinds of reasons and it does *not* mean that nothing happened. I believe this happened." Unfortunately, the judge still felt as if his hands were tied by the dropped charges and did *not* grant the restraining order despite finding Selena credible. With the District Attorney having dropped the charges, the judge felt as if he needed more than Selena's honest statements. As Matt exited, the judge stopped us and somewhat apologized. I can't be sure, but it seemed he regretted some of his earlier decisions and maybe some of his behavior towards Selena. But by then, it was certainly too little, too late. The damage was already done. And another assault went unaccounted for.

Looking back, it seemed maybe the judge had taken the position early on that Selena was a woman who probably wanted to date this guy, had been rejected, and now here she was accusing an innocent guy of rape. Though we know the number of "false reports" is somewhere between two and ten percent, this type of thinking seems to be prevalent.⁸ Coupled with the fact that only 23 percent of incidents of rape and sexual assault were reported to the police in 2016 according to the National Crime Victimization Survey,⁹ it becomes obvious why this is such a deeply rooted, controversial, and fraught issue.

FIFTY-SEVEN VISIONS OF A WILDLY BETTER FUTURE 80 (Alexandra Brodsky & Rachel Kauder Nalebuff eds., 2015).

8. NAT'L SEXUAL VIOLENCE RES. CTR., FALSE REPORTING (2012), https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf.

9. RACHEL MORGAN & JENNIFER L. TRUMAN, CRIMINAL VICTIMIZATION,

In both of these situations—the Kavanaugh confirmation process and Selena's restraining order hearing—it is unmistakable how much our field would benefit from trauma-informed practices. It is perhaps an unfair assumption, but I will go out on a limb and state that everyone wants the world to be better and would like to play a role in improving society. If that is true, then the desire to learn trauma-informed practices should be universal. No ideological or political divide is necessary. So long as one desires that people succeed and that they have access to opportunity and resources in order offer their best to the world, then understanding trauma and being conscious of its impacts should be part of our toolkit.

For example, when people hear about posttraumatic stress disorder (PTSD), they generally imagine male combat veterans. In reality, women tend to experience PTSD at twice the rates of men because women who are raped have a higher chance of ending up with it and it lasts longer.¹⁰ This is, of course, to say nothing of women who have been raped and are also veterans. Though decidedly understudied, transgender people seem to be disproportionately represented in PTSD statistics.¹¹ There are various theories as to why this is true, but the fact that transgender individuals tend to experience sexual assault at higher rates is certainly relevant.

PTSD is generally characterized by four primary symptoms. These are: (1) flashbacks or persistent intrusive thoughts about the traumatic event; (2) avoidance of anything related to the event e.g. music, pictures, people, locations etc.; (3) negative thoughts leading to behaviors such as emotional numbing, addiction, detachment or disassociation; (4) increased or decreased arousal or reactivity, such as hyper- or hypovigilance, exaggerated startle response, irritability or outbursts of anger. Though not all trauma leads to diagnosable PTSD, most people who are traumatized will experience some aspect of the symptoms listed above. And this is why trauma-informed practices should be an essential component of teaching the law (or teaching anything) and practicing the law. Understanding these manifestations of trauma and planning accordingly makes it so we may be more successful in our teaching endeavors or our ethical commitments to practice the law to the best of our ability.

2017 (2018), <https://www.bjs.gov/content/pub/pdf/cv17.pdf>. In 2017, the number rose to 40 percent.

10. David F. Tolin & Edna B. Foa, *Sex Differences in Trauma and Posttraumatic Stress Disorder: A Quantitative Review Of 25 Years Of Research*, 132 *PSYCHOL. BULLETIN* 959 (2006).

11. Sari L. Reisner et al., *Discriminatory Experiences Associated with Posttraumatic Stress Disorder Symptoms Among Transgender Adults*, 63 *J. COUNSELING PSYCHOL.* 509 (2016).

Throughout Kavanaugh's confirmation process, students at various law school campuses, including in the San Francisco Bay Area, New York, and Los Angeles demanded to hear from their faculty and administrations with regard to the Senate Judiciary Committee hearings. It is my understanding that students were disappointed with the lack of proactive engagement to help them deal with the distress and confusion regarding the hearings and felt abandoned by the leadership at their institutions. If trauma-informed practices were part of legal training, faculty and administrators alike would have been better prepared to offer up the space and language necessary to accommodate people who have been traumatized and were suffering through the confirmation proceedings, whether from PTSD or otherwise.

As professors, our goal is to reach and teach every single one of our students. Often, our pedagogy has two focuses: There are the specifics of the content of the course and, just as importantly, we strive to offer guidance regarding a particular level of professionalism, ethics, and responsibility. If students matriculate through our classes and are able to offer more good to their communities, then we have succeeded. I imagine it is important to all my colleagues to reach each student. However, if we do not engage in trauma-informed practices in spaces such as in educational institutions, we run the risk of 'losing' the student. By losing, I mean the student might dissociate, or shut off, or feel alienated enough from the professor that they do not gain whatever knowledge was meant to be imparted. They might disengage from the lessons or from the class altogether.

Similarly, if an attorney does not use trauma-informed practices, she runs the risk of alienating her client. An alienated client is generally less forthcoming, less cooperative, and less dependable. If something an attorney does puts this much strain on the client, then it becomes impossible to fulfill the duty of zealous representation. And within our legal institutions, the need is the same. To the extent that we care about seeking out truth and serving justice, this cannot be accomplished without trauma-informed practices. It is impossible for judges to suss out the truth if a witness does not feel empowered to share that truth, or if they've become so alienated from the process that they are no longer present or contributing to the proceedings, or if the judge's own bias impedes their ability to offer a fair hearing.

CONCLUSION

Legal practitioners represent and serve people during some of the most vulnerable times of their life. Divorce, foreclosure, bankruptcy, criminal allegations, removal proceedings, and personal

injury are just a few scenarios where clients or litigants are likely to face great upheaval in their lives and the chances of experiencing trauma are magnified. On top of that, sometimes our clients and other involved parties are traumatized from incidents wholly unrelated to the legal issue at hand, and yet it is still necessary to strategize with the trauma in mind. Other professions that serve vulnerable clients, such as medical providers, social workers, and psychologists, receive at least *some* trauma-informed care training. It is high time that the legal profession incorporates trauma-informed practices into its training as well.

Some may take the position that being trauma-informed is unnecessary or overly sensitive and that it is not within the job description for a law professor or legal practitioner to “coddle” those who have been traumatized. To that I would say that trauma-informed practices can only help, not hurt, any given situation. When the debate of climate change comes up in my family, we agree that environmentally friendly practices are good whether one believes in climate change or not. It is good to not be wasteful; it is good to recycle; and it is good to protect the earth's finite resources. Regardless of whether one believes the impacts of trauma are real, the practices are helpful and should be used anyway. What harm can come from being more thoughtful and diligent, or compassionate and empathetic? To reiterate, to the extent we want to offer our best as professors of law or practitioners of the law, we *must* employ strategies that are cognizant of the effects of trauma. If we do not, we are doing a disservice to a portion of the population of would-be lawyers and certainly not zealously representing our clients or the people.

The only way to bear the overwhelming pain of oppression is by telling, in all its detail, in the presence of witnesses and in a context of resistance, how unbearable it is. If we attempt to craft resistance without understanding this task, we are collectively vulnerable to all the errors of judgment that unresolved trauma generates in individuals. It is part of our task as revolutionary people, people who want deep-rooted, radical change, to be as whole as it is possible for us to be. This can only be done if we face the reality of what oppression really means in our lives, not as abstract systems subject to analysis, but as an avalanche of traumas leaving a wake of devastation in the lives of real people who nevertheless remain human, unquenchable, complex and full of possibility.

—Aurora Levins Morales, *Medicine Stories: History, Culture and the Politics of Integrity*¹²

12. AURORA LEVINS MORALES, *MEDICINE STORIES: HISTORY, CULTURE AND THE POLITICS OF INTEGRITY* (1999).