

# TRAUMA and TESTIMONY

## Sexual assault in the gaze of the law

By Dr Juliet Rogers

Much has been written about the damage to women, and indeed to men,<sup>1</sup> who experience sexual assault.



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**T**he damage is said to be to a survivor's sense of self and to their sense of control over their world. This can then impact on what is often described as self-esteem, self-worth, and a survivor's capacity to imagine a life free from fear, pain or suffering.

The legal process that a survivor endures after the assault is then said to be a second form of assault,<sup>2</sup> a vehicle for the damage to be inflicted again by virtue of the survivor's story

being unheard, ignored or simply re-written by the defence, or by the effects of due process. This re-writing can lead a survivor to feeling further disempowered and re-traumatised. But notions such as 'disempowerment' or 'damage to self-esteem' have become easy catch-phrases for the complexity of emotions that a survivor of sexual assault endures. They do little to illuminate the experience of sexual assault or the experience of testifying to that assault in a courtroom. This article goes beyond the rhetoric that is often employed about

the rape survivor and the trauma of the courtroom, and provides a psychoanalytic framework for understanding some of the trauma survivor's experience, and why.

### TRAUMA TO THE 'I'

The sexual assault survivor, from a psychoanalytic perspective, can be understood to have experienced a trauma to the person or subject they perceive themselves to be. All trauma, in psychoanalysis, is a trauma to identity, or a fragmentation of what Jacques Lacan calls the 'I, I take myself to be'.<sup>3</sup> The 'I' begins to develop from the moment infants see themselves being seen by another (usually the mother). This moment is when they imagine they can be seen in a particular way. For infants, the way they imagine themselves to be seen becomes an image (an *imago*) that they continually aspire to achieve at any given time.<sup>4</sup> For Lacan, the image of oneself is an ideal of what we imagine we are. While this image is constantly in danger of fragmenting – when others perceive us in a way counter to our own sense of self – trauma occurs when this image is fragmented to the extent that it disintegrates to a point that is intolerable.<sup>5</sup>

When sexual assault occurs, this image disintegrates because the physical and mental capacity of the survivor does not articulate with their sense of who they are. Literally, their sense of control over their bodies, their surroundings and even their feelings is overcome by the will or force of another, or others. This does not differ depending on whether the survivor struggled, or not; whether there was use of a weapon, or not; whether there are injuries, or not. The only thing that can be said about the relation between trauma and the degree of force used against the survivor is that it is likely that any physical struggle, screams or counter-force employed by a survivor may dislocate their sense of themselves further, in that few women ever imagine themselves as fighters. Alternatively, if the woman who is assaulted identifies with the popular culture image of the woman who fights and screams, not doing so in the face of her own experience may also be traumatic. The trauma is because the survivor sees herself as someone else – not as the infant, the child, the teenager or adult they have always imagined themselves to be. A sense of mastery is lost, as well as a sense of what it was that was to be mastered. In the face of assault, the survivor literally does not know herself any more.

### MASTERING THE IMAGE

In an effort to counter the effects of this loss, survivors often engage in what sounds like 'guilt' and appear to take responsibility for what has happened. Women often talk of the sense that they contributed to the assault. They make comments like "if only I hadn't gone to the bar", "if only I hadn't let him in", "if only I hadn't walked outside at the party". This kind of talk is an effort to regain a sense of mastery as if the events, and in fact the will of the perpetrator, were precisely in the survivor's control. From a psychoanalytic perspective, this imagination collects the events and represents an image of the survivor being able to manage their world. This sense of guilt, or responsibility,

The legal process is often described as a second form of assault.

is in fact an attempt to reinvent the event as if it could have been avoided, as if the survivor had omnipotent control over the world around her.<sup>6</sup>

A mastery over one's image is impossible – even at the best of times: our bodies betray us with ageing and illness; other people tend to intervene in our lives in the most ordinary ways; we fall in love; our hearts are broken; we are misunderstood when we speak. Thus, the idea that one can completely master ourselves and our worlds is a fantasy that can only fail. From a psychoanalytic perspective, the survivor – like any person – lives in a constant state of ordinary anxiety about this, but for the survivor this anxiety is exacerbated by the very real events that disturb any sense of mastery. Jacques Lacan suggests that we employ language to try to achieve a mastery around us. Language, for Lacan is used in order to continually constitute our self-image in the gaze of others, and more specifically in the gaze of those with the capacity to author our realities – initially parents, but then teachers, judges, police – being the obvious powerbrokers for most of us. Speech serves to re-constitute the fragmented image of ourselves. The trauma survivor, having endured a severe disturbance of their self-image, can be more compelled to employ speech to engage the gaze of others in an effort to reconstitute their world.

Some survivors are simply unable to speak of the events at all, the risk of misunderstanding and the impossibility of translating the events into a shared reality for the listener proving too great a hurdle, but for others it can make them desperate to speak of their own sense of what happened as a method of trying to recover themselves in the gaze of the listener. This certainly partly explains why many survivors feel the pull of the courtroom and wish for their 'day in court'. However, the language of the survivor is often difficult to relate to. Their focus on their own responsibility can make it hard for most people to understand why they blame another, but they are also often split between rage at themselves and rage at the perpetrator. This, too, can be difficult to hear because it can sound disproportionate to the event and thus contribute to a sense of fraudulence emanating from the survivor. The survivor's speech is thus destined to sound fraudulent because she is striving for certainty – a definitive sense of whether she is a victim or a perpetrator of her own fate – this certainty of self (separate from a certainty of legal culpability) can never be possible.

### TRUTH AND TESTIMONY

Of course, the sound of fraudulence is the kiss of death in a survivor's testimony in the courtroom, particularly when there are no witnesses and it is only the perpetrator's word against the survivor's, often with minimal corroborating evidence. This fraudulence is also further exacerbated by >>

the impossibility of knowing the truth about what actually happened. Trauma and truth are antagonistic concepts. There can be no witnessing of an event in any objective way for the trauma survivor because trauma disturbs a sense of what we call reality. As the psychoanalyst, Dori Laub, suggests:

'The traumatic event, although real, took place outside the parameters of "normal" reality, such as causality, sequence, place and time. The trauma is thus an event that has no beginning, no ending, no before, no during and no after. This absence of categories that define it lends it a quality of "otherness", a salience a timelessness and a ubiquity that puts it outside the range of associatively linked experiences, outside the range of comprehension, of recounting and of mastery.'<sup>7</sup>

Thus, the survivor cannot witness the event in any legally helpful way. Capturing reality in the form of a fixed language is absolutely antagonistic to the survivor's sense of what occurred. The recounting of facts – time, place, sequence, body parts – are themselves fractured by the unconscious insistence of the survivor that 'this could not happen to her', and hence could not happen at all.

The prosecution in a rape trial faces the impossible task of trying to make an event real to a judge or jury, when it is not 'real' to the person who experienced it. The problem of this experience of non-reality, in the event of trauma, impacts significantly on a survivor's capacity to give credible or often even understandable testimony. Speech, from a psychoanalytic perspective, requires the employment of symbols that translate to meaning for the listener – in this case, the judge or jury. 'Symbol' is simply a word for 'pact' between speaker and listener, but the symbol chosen is able to confer understandable meaning on an event only if the pact is understandable to both parties – that is, if there is a common understanding of the meaning of the word.<sup>8</sup> When an event occurs 'outside normal reality', as is the case with trauma, there is no symbol that can describe accurately what has occurred. The survivor exists inside their own reality, at least for a time, and struggles to translate the event into a shared reality.

The survivor stumbles and falls over their words in an effort to find the best symbol; they struggle to hold at bay the anxiety aroused from having lost a sense of themselves, while trying to translate that very experience into common parlance in a credible form, at a time when they neither feel in control, credible or able to recall the event with any degree of certainty. Indeed, what often appears as certainty can resonate as the most fraudulent of speeches, because the survivor is attempting to clamp a definitive form to a fluid and fractured reality. It rarely fits well. The effects of cross-examination can certainly render the efforts to speak with credibility more difficult. The renowned techniques of the defence in trying to confuse the survivor and represent

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their accounts as incredible, by virtue of contradiction and complicity, do little to assist the survivor in their efforts to produce a credible account of events.<sup>9</sup> However, while these efforts are often cruel and painful for survivors, I would argue that the trauma occurs in the gaze of the law – that is, in the rendering of judgement.

### THE TRAUMA OF JUDGEMENT

Judgement of the guilt or innocence of the perpetrator can be understood, at least in the mind of the survivor, as an assessment of the credibility of their account. While the punishment of the

perpetrator may be something the survivor wishes for, either out of a desire for safety or as a sanctioning of their reality, punishment is rarely a relief from the trauma of sexual assault beyond, perhaps, a short period of elation. Elation, however, is no salve for trauma. Any real relief from trauma occurs when the event can be externalised in a form that is recognised by an authoritative presence. And recognition is the key.

To validate the survivor's experience is not simply a matter of recognising what they say as reality, but of understanding the representation of themselves as precisely in the image they are trying to transmit. As Laub states of the process of healing from trauma:

're-externalising the event – has to be set in motion. This can occur and take effect only when one can articulate and transmit the story, literally transfer it to another outside oneself and then take it back again, inside.'<sup>10</sup>

The judge is not simply a person who is able to hear a story, sentence a perpetrator, or say a crime has been committed. The judge represents a figure whose knowledge and perception seems omnipotent and is often held as the one who can sanction the image of ourselves as good or bad, right or wrong – indeed, the legal reality is precisely the giving or withholding of this sanction.

For the trauma-survivor, the receipt of their speech as understandable, the sanctioning of their internal reality, making it external to a judge, could not be more crucial to healing from the trauma of sexual assault. The pact, for the survivor, is really between the judge and the survivor-witness in the rape trial. This is not to suggest that the actions of the defence, the prosecution or the jury are irrelevant, but the judge holds the key to recognising the survivor's self-image.<sup>11</sup> This image cannot help but be fractured through the trauma, but the possibility of disintegration can be fuelled by the frustrations, resistance and obtuseness of the judge. Conversely, recognition of the survivor's story with its flaws and fraudulences, with its confusions and uncertainties, can help to pull the fragments back together, perhaps not the same fragments, and certainly with many pieces askew, but recognising the uncertainties and contradictions that sexual assault evokes in survivors, can enable them perhaps to see their own realities reflected in the gaze of the law.

**CONCLUSION**

Robert Cover says that 'Legal interpretation takes place in the field of pain and death'.<sup>12</sup> This could not be more true for the survivor of sexual assault. The pain of a loss of identity and the death of an image of oneself following assault can readily be exacerbated by the demand for truth and certainty that takes place in the courtroom. The survivor has experienced something 'outside normal reality'. The need for law to re-assert a definitive, shared reality over this experience often drives survivors to adopt a certainty that does not reflect their sense of reality, and thus means they are doubly lost. The role of the judge could not be more crucial in offering relief to the survivor, but this requires a capacity for listening to a reality that may not articulate with their own, and may be marred by confusions and contradictions. It may be hard, even impossible, to render the survivor's testimony probative weight, but a knowledge and understanding of the effects of trauma, beyond an injury to self-worth, is essential for any judge who imagines themselves a thoughtful listener and considered jurist. ■

**Notes:** **1** Sexual assault is a crime that happens mostly to women. The assault of men and boys is also alarmingly prevalent. I will generally adopt plural pronouns, but where I am speaking of a specific experience I will use feminine pronouns for the sake of convention and ease of the reader. **2** C Taylor, *Court Licensed Abuse*. New York: Peter Lang, 2004; C Taylor, *Surviving the Legal System: a handbook for adult and child sexual assault survivors and their supporters*. Melbourne: Coulomb, 2004; P Easteal, and L McOrmond-Plummer, *Real Rape, Real Pain: Help for Women Sexually Assaulted by Male Partners*, Hybrid, Melbourne, 2006; P Easteal, ed, *Balancing the Scales: Rape, Law Reform and Australian Culture*, Federation Press, Sydney, 1998; E Bass, L Davis, *Courage to Heal: A Guide for Women Survivors of Child Sexual Abuse*. Perennial Books, New York, 1988. **3** J Lacan, *The Seminar of Jacques Lacan, Book III: The Psychoses 1955-1956*. J-A Miller (ed), R Grigg (trans) New York: W.W Norton & Company, 1993. **4** J Lacan, 'The mirror stage as formative of the function of the I as revealed in psychoanalytic experience' in *Ecrits: A Selection*. Bruce Fink W.W. Norton & Company: New York, 2002, first published in French 1966. Seminar delivered July 17, 1949, pp3-9. **5** It is important to note that there are levels of disintegration. The degree to which one experiences disintegration of the self-image will depend on the form of the assault and what this means to the survivor. This is why decisions such as that in *R v Hakopian* (unreported) Victorian County Court, 8 August 1991 – in which a sex-worker was deemed to have endured a lesser harm from sexual assault because of her profession – are problematic insofar as sex-workers may see themselves as very in control of their sexuality and sexual terms. Thus, the trauma to the 'I, the sex-worker takes herself to be' when she loses that control, may be extreme. The level of disintegration can depend on the survivor's capacity to hold on to a sense of self in the face of violence. This capacity can be greatly influenced by the supports they have around them and the response they receive from others – including legal structures. For a discussion of *R v Hakopian*, see D Cass, 'R v Hakopian', *Feminist Legal Studies*, Vol. 1, No. 2, pp203-8. **6** This wrangle with omnipotence tends to be heightened after an experience of trauma and can produce effects such as the survivor wanting to control further aspects of her life that she would otherwise be less concerned with – cleaning, appearance, and sometimes others. It is this heightened will to control in the face of trauma that can also make the survivor difficult to help and often a very difficult person to deal with for the police and the prosecution. What needs to be understood is that this difficulty may be in part a temporary form of regression in

which the survivor becomes desperate to regain the prior image of themselves, and to enlist others to help her do so.

**7** D Laub, 'Bearing Witness' in Felman Shoshana and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis and History*. Routledge, New York, 1992, p69. **8** J Lacan, *Ecrits: The First Complete Edition in English*. trans. Bruce Fink w.w. Norton & Company: New York, 2006, first published in French 1966. Seminar delivered July 17, 1949, p225. **9** These techniques and their effects are well documented in A Young, 'The Waste Land of the Law: The Wordless Song of the Rape Victim', *Melbourne University Law Review*, 22, 1998, pp442-6. **10** D Laub, see above, note 7. **11** The recent changes to the rape law, such as the *Crimes Amendment (Rape) Act 2007 (Vic)* are beyond the scope of this article. However, it is worth noting in reference to s37 of the Act – relating to direction to juries regarding consent – that any speech from the judge must be evaluated as to its capacity to provide a space in which the survivor's reality can be heard. More speech from the judge, as instruction to a jury, may not be helpful insofar as it contributes to a further sense of the judge's omnipotence. Ultimately, it depends how those capacities are exercised. **12** R Cover, 'Violence and the Word' 95, *Yale Law Journal*, 1986, p1601.

This article has been peer-reviewed in line with standard academic practice.

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