BOOK REVIEW

A REVIEW OF *PUTTING TRIALS ON TRIAL: SEXUAL ASSAULT AND THE FAILURE OF THE LEGAL PROFESSION*

Suzy Flader *

CITED: (2019) 24 *Appeal* 179

INTRODUCTION

In the wake of the Time's Up and Me Too movements, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* provides a necessary analysis of Canadian sexual assault law.[1] Author Elaine Craig thoughtfully analyzes the statements and practices of defence lawyers, Crown attorneys, and trial judges through the sexual assault trial process. She effectively identifies how the legal profession unnecessarily and sometimes unlawfully contributes to the harms experienced by complainants in the sexual assault trial process.

Craig exposes how some lawyers and judges continue to violate sexual assault laws at trials through abusive tactics and gender-based stereotypes. She also suggests areas of reform, where parties within the criminal justice system can help mitigate the trauma that sexual assault complainants face. Thus, Craig provides a needed step towards conceiving a justice system that gives particularly vulnerable members of Canadian society the power to speak their truths.

This review explores some strengths and weaknesses of Craig's book. Part I draws attention to five primary factors that contribute to the success of Craig's book: (a) repetition of key legal principles; (b) comparative analyses of the contributions of various trial parties; (c) a focus on the underlying factors affecting sexual assault complainants at trial; (d) descriptive language choices; and (e) realistic solutions for modifying the sexual assault trial process. Part II then provides two modest criticisms of Craig's approach.

I. CRAIG'S STRENGTHS

A. The repetition of key legal principles

Craig repeatedly iterates several legal principles that are crucial to her analysis of the legal failures of Canadian sexual assault law. These include section 276 of the Criminal Code,[2] which limits a lawyer's ability to examine sexual assault complainants about their past sexual behaviour, and the accused's fair trial rights. These reminders are useful for readers unfamiliar with sexual assault laws.

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* Suzy Flader holds an Honours B.Arts Sc. from McMaster University and is currently in her third year of the combined J.D./M.P.A. program at the University of Victoria. She sincerely thanks Professor Donna Greschner for her support and assistance with this paper, and Nico Bernardi and the rest of the Appeal Editorial Board for their revisions and encouragement.

1 Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* [*Putting Trials on Trial*] (Montreal & Kingston: McGill-Queen's University Press, 2018).

2 *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

Parliament enacted sections 276 and 277 of the Criminal Code to dispel the "twin myths" that: (1) unchaste women are more likely to lie, and (2) they consent indiscriminately.[3] These sections create the defence application procedure that allows a trial judge to exclude evidence of a complainant's past sexual history raised by the defence if its prejudicial effect substantially outweighs its significant probative value. The use of gender-based stereotypes to impeach the credibility of sexual assault complainants during cross-examinations is also illegal. However, Craig cites multiple examples of how defence lawyers are still able to rely on material barred by sections 276 and 277 to attack the credibility of sexual assault complainants.

Craig's exposé reflects her respect for the fair trial rights guaranteed by the *Charter of Rights and Freedoms*.[4] The accused has the rights to remain silent, to confront his accuser at trial, and to be presumed innocent. Craig argues that sexual assault trials must be modified to accord with these "worthy feminist rights".[5] She also recognizes the importance of the adversarial trial process and understands that this process will always force sexual assault complainants to answer explicit and uncomfortable questions. Thus, Craig is rightfully realistic about her suggested sexual assault trial reforms.

B. The comparative analysis of the contributions of various trial parties

Craig provides a well-rounded analysis of the current sexual assault trial from the perspectives of defence lawyers, Crown attorneys, and trial judges. Particularly illuminating is when Craig points to the failures from more than one of these perspectives within a single case. While she argues that all three of these legal professionals inflict unnecessary trauma upon sexual assault survivors, her attention primarily focuses on defence lawyers and their problematic cross-examination tactics.

In her critique of defence lawyers, Craig focuses on cross-examination tactics that are abusive, repetitive, or that rely on gender-based stereotypes. Craig's critiques are mindful of the law of cross-examinations established in *R v Lyttle*, [6] in which the Supreme Court of Canada upheld a broad scope of cross-examination that also bars defence lawyers from relying on excessive behaviours. When critiquing specific cross-examinations, Craig is careful to specify which tactic(s) a lawyer used. This is important given that she names individuals. For example, in the cross-examination conducted by Brett White in *R v L(G)*,[7] Craig notes that while he was repetitive and abusive, he did not rely on gender-based myths.[8]

Putting Trials on Trial focuses on three common myths that some defence lawyers rely on to argue that sexual assault trials unjustly favour complainants. These myths are: (1) legal reforms have unjustly limited the ability of accused individuals to conduct thorough and probing challenges to allegations of sexual violence; (2) an overwhelming culture of feminism and political correctness has compromised the fair trial rights of those accused of sexual offences; and (3) that legal protections consistently insulate complainants from abusive tactics and discriminatory stereotypes about sexual violence.[9] Craig draws from multiple sources to provide examples to debunk each myth. She rightfully argues that by continuing to rely on problematic trial tactics, defence lawyers contribute to complainant trauma.[10]

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3 *Ibid* ss. 276-77.

4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

5 *Putting Trials on Trial* at 16, 13.

6 *R v Lyttle*, 2004 SCC 5.

7 *R v L(G)*, 2014 ONSC 3403.

8 *Putting Trials on Trial* at 71.

9 *Ibid* at 27.

10 *Ibid*.

Craig debunks multiple myths by relying on the cross-examination conducted by Calvin Barry in *R v Finney*. The Ontario Court of Appeal later described Barry's technique as "lengthy, at times repetitive, and often difficult to follow."[11] Craig relies on *Finney* to debunk myth one by showing that defence lawyers are still able to ask complainants thorough questions, even when minimally relevant. Barry was able to ask the complainant more than ten times how many days it took for her body to recover enough to endure the pain of a bowel movement following a violent anal rape, despite this point's minimal probative value.[12] *Finney* also debunks the second myth, because Barry was allowed to question the complainant about her failure to resist performing oral sex on the accused.[13] This questioning falsely implied that the complainant consented.[14]

When discussing the third myth, Craig convincingly argues that defence lawyers continue to "whack" complainants with humiliating or prolonged cross-examinations that put the complainant on trial rather than the accused.[15] Craig also explains how some defence lawyers use section 276 applications to obtain aspects of a complainant's record that will invoke gender-based stereotypical assumptions. This tactic may prevent complainants from testifying.[16] An example of complainant "whacking" comes from *R v Wright*. The defence lawyer, Jody Ostapiw, questioned the complainant about highly prejudicial sexual activities with little probative value, including whether her nickname was "Perky Tits" and whether she often danced topless at parties.[17] Ostapiw did not bring forth a section 276 application prior to asking these questions, nor did the trial judge request one. Thus, both Ostapiw and the trial judge are to blame for the complainant's humiliation.[18]

With respect to Crown attorney behaviour, Craig helpfully focuses on two Crown duties: (1) to appropriately intervene during trials and (2) to properly prepare witnesses for trial.[19] Craig is clear that Crown attorneys cannot obstruct an accused's rights, but then argues that Crowns can intervene during cross-examinations without doing so.[20] She then provides examples of appropriate Crown interventions.

Craig provides positive examples of lawyer and judge conduct throughout her book, but most explicitly mentions Crown attorney and trial judge behaviours that she thinks others should replicate. For example, Craig's highlights the intervention tactics used by Crown attorney, Jennifer Lofft, in *R v Ururyar*. Lofft was successfully able to block a section 276 application by strongly asserting the sexual history evidence proposed by the defence was irrelevant.[21] By including examples of exemplary trial conduct, Craig emphasizes that many Canadian legal professionals are properly applying sexual assault laws and limiting complainant trauma.

Craig's discussion of trial judges is well-balanced. She states the duty of trial judges to protect sexual assault complainants from unnecessary trauma through proper application of the law, while recognizing that trial judges cannot have an in-depth understanding of every substantive law topic.[22] However, Craig argues that the need for trial judges

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11 *R v Finney*, 2014 ONCA 866 at para 2.
12 *R v Finney*, Trial Transcript, Volume II (30 September 2011) Lindsay C55780 (ONSC) at 548:4-549:2.
13 *R v Finney*, Trial Transcript, Volume III (4 October 2011) Lindsay C55780 (ONSC) at 700:15-32.
14 *Putting Trials on Trial* at 33.
15 *Ibid* at 42.
16 *Ibid* at 42.
17 *R v Wright*, Trial Transcript, Volume I (28 May 2012) Winnipeg CR11-01-31550 (MBQB) at 35:13-29.
18 *Putting Trials on Trial* at 48.
19 *Ibid on Trial* at 139.
20 *Ibid* at 140.
21 *R v Ururyar*, Trial Transcript, Volume I (1 February 2016) Toronto (ONCJ) at 42-3.
22 *Putting Trials on Trial* at 168, 207.

to understand and apply foundational legal concepts related to sexual assault law is particularly important because of the role that discriminatory stereotypes continue to play in this area.[23] Craig also examines a trial judge's duty to intervene in cross-examinations that are unduly repetitive, insulting, or unlawful.[24] The misapplication of section 276 and failed understandings of the definition of consent seem to be two of the gravest errors made by trial judges in sexual assault trials.[25] Craig's critiques of trial judge conduct often come directly from the overturning decisions of appellate courts, which helps strengthen her arguments.

When highlighting judicial failure to intervene, Craig provides trial transcript excerpts from *R v B(S)*.[26] The accused was charged with multiple counts of assault and sexual assault against his former spouse. Defence lawyer Robert Simmonds, Q.C., brought a section 276 application and was permitted to read graphic sexual texts between the complainant and a third party with whom she was having an affair.[27] The affair was a collateral issue in this case.[28] Simmonds claimed the rationale behind this evidence was to show the complainant had lied to the police about her extramarital affair, thereby damaging her credibility.[29] However, the complainant had already admitted that she had lied to the police about cheating on her husband, so it was unnecessary to subject her to what the Newfoundland Court of Appeal later called "gratuitous humiliation".[30] Craig argues that the trial judge allowed the defence lawyer to "whack" the complainant in *B(S)* by allowing her to be questioned about irrelevant evidence of her sexual history.[31]

Craig uses Justice Robin Camp's conduct in *R v Wagar*[32] to emphasize judicial ignorance of consent law. Justice Camp implied disdain for the legal definition of consent, and his failure to understand the concept was apparent throughout his questioning of the complainant.[33] For example, Justice Camp asked the complainant why she did not "keep [her] knees together"[34] to prevent the accused from raping her—a question that relied on the gender-based stereotype that a lack of evidence of force or fear means that the complainant consented to sex.[35] The Crown attempted to explain consent law to Justice Camp throughout the trial, in one instance by explaining the reasonable steps requirement under section 273.2(b) of the Criminal Code.[36] Justice Camp overlooked this explanation, asserting that the definition of consent is "not the way of the birds and the bees".[37]

C. Focus on underlying factors affecting sexual assault complainants at trial

Putting Trials on Trial draws attention to the perspectives of sexual assault complainants and the underlying factors affecting them throughout trials in two important ways.

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23 *Ibid* at 205.
24 *Ibid* at 167.
25 *Ibid* at 168, 191.
26 *R v B(S)*, 2014 NLTD(G) 61, 114 WCB (2d) 571.
27 *Putting Trials on Trial* at 76.
28 *Ibid* at 79.
29 *R v B(S)*, Trial Transcript, Volume II (16 May 2014) St John's 201301G4957 (NLTD) at 16:7.
30 *R v B(S)*, 2016 NLCA 20 at para 43.
31 *Putting Trials on Trial* at 169.
32 *R v Wagar*, 2015 ABCA 327.
33 *Putting Trials on Trial* at 199.
34 *R v Wagar*, Trial Transcript (9 September 2014) Calgary 130288731P1 (ABPC) at 119:10-11, 199:14-15 [*Wagar* Transcript].
35 *Putting Trials on Trial* at 199-200.
36 *Criminal Code*, *supra* note 2.
37 *Wagar* Transcript at 384:27-385:9.

First, Craig acknowledges the feelings of shame and self-blame often experienced by sexual assault complainants after being sexually assaulted. Constant repetition of explicit details at trial often exacerbates these feelings, which are intrinsically tied to gender-based stereotypes and the "twin myths" of sexual assault.[38] Craig states that her book is not about marrying healing with justice, because healing will always be at odds with the adversarial trial process.[39] However, Craig successfully argues that lawyers and judges still have the capacity to mitigate the feelings of shame and self-blame that sexual assault complainants inevitably feel throughout trials by making modest changes that will not interfere with trial fairness. Complainants do not need to feel so much shame throughout the sexual assault trial process.

Second, Craig mentions how barriers additional to gender, including race, Indigeneity, socio-economic status, and disability, have the potential to further disadvantage sexual assault complainants throughout trials.[40] Craig describes the hierarchy that exists within modern Canadian courtrooms, which causes women who face multiple barriers to be more vulnerable to expanded trauma.[41] For example, she mentions how colonial symbols in courtrooms have the potential to make Indigenous sexual assault complainants feel unnecessarily uncomfortable when testifying. This potential is particularly problematic given that Indigenous women are disproportionately the victims of sexual violence in Canada.[42] The feminist theory of intersectionality describes the ways factors such as gender, race, ability, and socio-economic status intersect to oppress people who face multiple barriers.[43] Craig's adoption of an intersectional analysis, while implicit, is integral to her book's inclusivity.

D. Descriptive language choices

Craig makes two particularly bold language choices in her book. First, she relies on graphic content that she chooses not to paraphrase or censor.[44] Second, she provides the names of the lawyers, judges, and law firms whose statements and/or actions she criticizes.[45] While these choices are controversial, both were necessary for Craig to achieve her purpose.

The book's introductory chapter warns readers of the explicit content described therein. Given that many readers may carry their own sexual assault-related trauma, this cautionary note is important as it gives readers the opportunity to stop reading before encountering such material. However, the deliberate sharing of graphic content powerfully portrays the trauma sexual assault complainants are forced to relive when testifying at trial—particularly during cross-examinations. Craig shares specific inappropriate questions still posed to sexual assault complainants, many of which are rooted in gender-based stereotypes. Craig's use of graphic content is strategic and she recycles case material throughout rather than forcing the reader to repetitively encounter new graphic details.

Craig's decision to name lawyers, judges, and law firms is uncommon amongst legal scholars, but she provides adequate justification for her actions. This naming allows Craig to avoid "the obfuscation and distancing" that comes from speaking about roles

38 *Putting Trials on Trial* at 7-8.
39 *Ibid* at 11.
40 *Ibid* at 10.
41 *Ibid* at 186-190.
42 *Ibid* at 187.
43 Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stanford Law Review 1241.
44 *Putting Trials on Trial* at 17.
45 *Ibid* at 15.

and institutions rather than individuals.[46] Had Craig overly generalized, readers may have concluded that every lawyer and judge involved in the sexual assault trial process should be condemned for inappropriate behaviour. Likewise, it would have been easy for lawyers and judges to absolve themselves of responsibility. Craig's use of names allows her to point to *specific* statements and actions of *specific* individuals, which allows readers to question statements or actions of lawyers and judges labeled "heroes of the defence bar".[47]

E. Realistic solutions for adapting the sexual assault trial process

Craig's biggest accomplishment in *Putting Trials on Trial* is her articulation of practical solutions to the current failures of the Canadian sexual assault trial process. Craig does not recommend a complete overhaul of the criminal justice system. Instead, she suggests that current sexual assault laws already have the potential to prevent the unnecessary traumatization of complainants. Craig then provides targeted solutions for defence lawyers, Crown attorneys, and trial judges to ensure they perform their roles less harmfully and more lawfully.

Despite Craig's weighty focus on the negative conduct of defence lawyers, she acknowledges that some advocate for a kinder and gentler approach to cross-examination.[48] Craig suggests three factors to reduce defence counsel from relying on discriminatory, overly aggressive, or humiliating strategies. These factors are: (1) broad recognition within the defence bar that the practice of sexual assault law perpetuates harms to complainants; (2) a more nuanced and balanced articulation of the professional virtues of those who practice criminal defence law; and (3) acceptance that strategies which humiliate complainants and/or rely on rape myths violate lawyers' professional ethics.[49] The final factor may be the most contentious because many defence lawyers believe that their ethical priorities are their clients, not complainants. However, defence lawyers are breaking the law when they introduce irrelevant evidence or pose questions that are unreasonable or calculated to mislead.[50] Craig asserts the accused's right to a fair trial but emphasizes that no one is entitled to discriminatory or illegal defences.[51]

Craig then argues that Crown attorneys must do a better job of adhering to their special duties. Again, it is helpful that she uses examples of what she considers proper Crown interventions to articulate her point. In terms of witness preparation, Craig is correct that complainants should be provided with more information about the trial process to make them feel less intimidated when testifying.[52] Unfortunately, many complainants must rely solely on trial preparation from Crown attorneys, whose true client is the state. To remedy this, Craig suggests that every province offer complainants independent legal advice services through a state-funded program. Craig rightfully explains how this sort of program would not diminish the Crown's onus to prepare and protect complainants, but would rather allow complainants to have additional preparatory resources they are currently lacking.[53]

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46 *Ibid* at 15.
47 *Ibid* at 61.
48 *Ibid* at 61.
49 *Ibid* at 125.
50 *Ibid*.
51 *Ibid*.
52 *Ibid* at 151-157.
53 *Ibid* at 163-164.

Additionally, Craig asserts that trial judges have the duty to properly apply substantive law and interfere when necessary. She further suggests that trial judges should do a better job of humanizing courtrooms to make them less intimidating to complainants.[54] Basic acts of kindness on behalf of a trial judge can go a long way, such as when the judge in *Finney* wished the complainant a happy birthday and allowed her a five-minute break when she was shaking and crying.[55] The Ontario Court of Appeal did not find the birthday wish to have demonstrated any bias from the trial judge.[56] Craig also suggests that trial judges should modify their courtrooms to be more comfortable for complainants. Suggested modifications include allowing complainants to sit and speak into microphones while testifying, removing hierarchical objects from courtrooms, and making the trial language more accessible.[57] While some of Craig's suggestions are more substantial than others, all are feasible without reducing trial fairness.[58]

II. CRITICISMS

Putting Trials on Trial does not attract major criticism. Craig did an excellent job of articulating her stated purpose. However, two topics could have received more of Craig's attention: (1) her intersectional analysis of sexual assault complainants and (2) the jurisdictional breakdown of sexual assault trial failures.

First, Craig could have delved deeper into her discussion of how some women are more likely to experience trauma from sexual assault trials. For example, Craig explains that Indigenous women may feel particularly vulnerable in courtrooms containing colonial symbols. This is an important point. But this one example alone does not provide an inclusive enough portrayal of the various ways in which women with multiple intersecting barriers may experience trauma.

Craig's book would have benefitted from a section dedicated to the unique experiences of women faced with multiple barriers during the sexual assault trial process. This section could have included examples of how defence lawyers have incorporated discriminatory concepts targeted towards certain groups of women in their cross-examinations. It also could have discussed how Crown attorneys or trial judges may have failed to intervene on the basis of potentially inherent racism, ableism, etc. Craig did not need to provide more theoretical perspective or even mention the term "intersectionality" in her book. However, more specific examples could have helped incite more inclusive reform.

Second, Craig should have provided a more explicit jurisdictional breakdown of where sexual assault trial failures are most prevalent in Canada. The use of references at the back of the book made it difficult to keep track of where the mentioned cases took place. Based on Craig's citations, it appears that legal professionals in Alberta and the Maritime provinces may be disproportionately at fault for current failures. It would have been useful for Craig to clarify whether this is true or whether she coincidentally focused on cases from these regions.

54 *Ibid* at 167.
55 *Ibid* at 175.
56 *Ibid* at 176.
57 *Ibid* at 186-188.
58 *Ibid* at 189.

CONCLUSION

Using a detailed and unapologetic approach, Craig successfully exposes the problematic approaches of Canadian legal professionals during sexual assault trials. Craig also challenges lawyers and judges to internalize these failures to improve protecting sexual assault complainants. Though somewhat graphic, *Putting Trials on Trial* is an essential educational tool for legal professionals and the public alike. The changing social climate may or may not diminish rates of sexual assault, but at the very least, trial process reforms may assist survivors.