Elaine Craig
Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession. Montreal & Kingston: McGill-Queen's University Press, 2018, 227 pp.

In *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession*, Elaine Craig offers a compelling, timely, and empirically rigorous indictment of Canadian legal professionals for their collective failure to act lawfully and ethically towards complainants in sexual assault cases.

In Canada and beyond, public discourse on gendered sexual violence has reached a polarized zenith. While some add their voices to the flood of sexual harassment and assault allegations against powerful men, or express support for survivors, others worry about the consequences of vilifying accused individuals without the benefit of due process. Of course, allegations made through the media must be distinguished from formal criminal charges and the special protections they trigger. Perhaps the first question to ask, then, is why have survivors of sexual violence largely eschewed the criminal process in favour of other responses (such as speaking out publicly)?

It is here that Craig's book begins. Noting the "almost complete legal immunity" for sexual assault in Canada, due in part to very low levels of reporting, Craig explains that many women cite "distrust and fear" of the criminal justice system as their main reason for not coming forward to legal authorities (3). She then poses the question: "Is this fear well-founded?" (3) It does not take long for her to come to an answer. By page 6, Craig has already concluded, on the basis of compelling anecdotal evidence and social science research, that sexual assault trials continue to be seriously harmful and traumatic for complainants. Indeed, her main inquiry is not whether such harms exist, but how the legal profession contributes to them in ways that are unnecessary and that can be mitigated through changes to current legal practice.

For many in the legal community, this question will invoke a debate similar to the one that has emerged in broader public discourse. On one hand, the criminal justice system's response to sexual assault complainants has proven deeply unsatisfactory. But how can this be addressed without weakening the rights of the accused so fundamental to our justice system? Craig's book succeeds largely because she is able to transcend this basic tension. Rather than try to weaken the presumption of innocence or the accused's right to a fulsome defence in sexual assault cases, Craig affirms their importance without hesitation (13; 181–82). Still, she argues, there are things we can do to improve the experience of complainants that do not at all detract from these fundamental protections (and that may in fact promote them). As she puts it, "[T]hese changes could be achieved without having to confront the difficult (and controversial) proposition of balancing the rights of the criminally accused with those of their victims. A failure on the part of the legal profession to assume responsibility for reforms of this nature is inexcusable" (15).

That this is not a radical project is precisely what makes it so compelling, and so hard to ignore.

Craig's book expertly combines a wealth of empirical evidence about sexual assault lawyering and judging in Canada with astute theoretical analysis, leading to

https://doi.org/10.1017/cls.2019.2 Published online by Cambridge University Press

a set of informed and pragmatic prescriptions for improvement. The book proceeds in three parts, aimed at examining the role of three distinct legal actors in sexual assault trials: criminal defence lawyers (Chapters Two to Four), Crown lawyers (Chapter Five), and judges (Chapters Six and Seven). Craig begins, in Chapter Two, by scrutinizing a number of claims put forward by members of the defence bar to the effect that recent, feminist-driven changes to the law and culture of legal practice not only protect complainants from abusive and discriminatory tactics, but actually tip the scales unfairly in their favour. To debunk these claims, Craig provides numerous recent examples of lawyers pursuing so-called "whack the complainant" tactics and defying legal protections meant to prohibit reliance on discriminatory stereotypes.

Craig goes on, in Chapter Three, to show that despite the common (and generally accurate) refrain from the defence bar that "a kinder and gentler approach" to complainants is more effective than whacking (61), the most renowned criminal defence lawyers continue to be celebrated by the profession for their extreme aggressiveness. Chapter Four brings to light further contradictions between what defence lawyers say and do. Here Craig brilliantly draws on interviews with senior lawyers across Canada to "assess the practices of sexual assault lawyers on their own terms, within the ethical framework criminal defence lawyers themselves have articulated" (111). This allows her to argue that some of the tactics employed by defence counsel in sexual assault trials are actually at odds with their own understanding of their professional role and values.

In Chapter Five, Craig examines the important effect that Crown lawyers can have on the experience of sexual assault complainants at trial, while also recognizing the need to provide complainants with their own state-funded legal counsel. Regardless of the latter possibility, Craig argues that Crown counsel have a duty to prepare complainants effectively for trial, to intervene when complainants are being treated in an abusive or discriminatory manner, and to pursue appeals of problematic decisions.

Finally, Craig turns her attention to the role of judges in sexual assault trials and appeals. In Chapter Six, she argues that judges have a duty to enforce legally enshrined protections for complainants, and to intervene when complainants are being cross-examined in an abusive or improper manner. Here, Craig does acknowledge that judicial interventions must be carefully balanced against upholding the accused's right to cross-examination—one of the few places where such balancing seems to factor into her proposals (177). The last part of the Chapter, on the other hand, calls upon judges to "humanize" the courtroom experience in ways that would pose no threat to the rights of the accused, for instance by allowing complainants to sit during lengthy cross-examinations (185–86). In Chapter Seven, Craig shows how judicial failures to understand and apply basic aspects of the law, such as the definition of consent, do particular harm to sexual assault complainants, in part due to the discriminatory stereotypes that continue to play into legal decision-making in this area (205–06). In order to address such failures, Craig proposes several reforms to Canada's judicial appointment process and to judicial education.

Overall, Craig offers a thorough and refreshingly measured look at an area of legal practice that tends to arouse strong, but not always well-informed, opinions.

https://doi.org/10.1017/cls.2019.2 Published online by Cambridge University Press

One of the book's major strengths is the quality of the research undertaken and the breadth of data sources examined. This allows Craig to make a productive intervention into debates that often lack empirical grounding. As she notes, she endeavours as much as possible to use lawyers' and judges' own words and actions to demonstrate issues in current legal practice (17). The result is an extensive record of problematic attitudes and practices in Canadian sexual assault cases that will prove difficult for anyone to deny.

Craig's command of feminist theory strengthens her analysis of the data, allowing her to place issues of legal practice within a broader social context of systemic sexual violence and persistent myths and stereotypes. As she puts it: "Sexual assault complainants bear the burden of participating in an individualized process to respond to a social problem" (223). At the same time, this book departs from other recent feminist legal scholarship on sexual violence by focusing on the ethical responsibilities of legal professionals, rather than on broader, more politicized critiques of law's role in perpetuating inequality. A helpful comparison can be made with one of the most comprehensive recent works in the field: *Sexual Assault in Canada: Law, Legal Practice and Women's Activism,* edited by Elizabeth Sheehy (Ottawa: University of Ottawa Press, 2012). Like Craig's book, this collection addresses the failures of the legal system's response to sexual violence in practice. However, it is much broader in scope (looking not only at criminal trials but at civil lawsuits, policing, grassroots advocacy, etc.), more interested in activist alternatives to law, and more expressly directed at other feminist scholars and activists. Craig, by contrast, seems intent on confronting the legal profession in an accessible and targeted manner capable of persuading even those with limited knowledge of feminist theory.

As a result, Craig's contribution may be of less interest to scholars of a more radically critical or theoretical bent. By focusing on feasible improvements that can be made to legal practice within the current system, Craig tends to sideline more fundamental critiques of the system itself, even while signalling her awareness of them. For instance, despite the growing feminist literature on the violence and oppression perpetuated by the criminal justice system and the resultant dangers of taking a carceral approach to sexual violence, Craig mentions this issue only in passing (221–222). The role of factors such as race, class, Indigeneity, and disability in structuring sexual violence and legal responses to it is also given relatively short shrift in comparison with some other literature in the field. On the other hand, the carefully circumscribed scope of the book may actually heighten its effectiveness, at least with respect to its own targeted aims. Craig's achievement here is not to advance new insights in feminist legal theory (though her analysis may well stimulate such insights moving forward) but to smartly apply existing theory to frame an empirically grounded, practical analysis of professional ethics in a notoriously problematic area.

The persuasiveness of Craig's conclusions is enhanced by her scrupulously fair approach to critiquing members of the legal profession. When commenting on the conduct of particular cross-examinations, for instance, she clearly articulates which aspects were and were not problematic (see, e.g., 71; 83; 92). Nor is she swayed by popular condemnations of certain individuals or roles, hence her finding that the

https://doi.org/10.1017/cls.2019.2 Published online by Cambridge University Press

transcript of the Jian Ghomeshi trial did not reveal any improper conduct on the part of highly scrutinized defence lawyer Marie Henein (62–63) (though Craig does call out Henein for other instances of ethically dubious behaviour at 122). Craig also recognizes the real challenges faced by defence lawyers (see, e.g., 108–09), and expresses respect for the "critically important work" that they and other legal professionals do in sexual assault cases (223; see also Acknowledgments). At the same time, she does not shy away from naming names when it comes to publicly documented instances of egregious behaviour on the part of lawyers and judges alike. This kind of firm but fair critique of one's peers takes courage—and is crucial to ensuring that the legal profession remains accountable for its conduct.

The respect Craig shows for members of the legal profession is, importantly, matched by respect for those who, as she puts it, "serve our justice system as complainants" (3), sometimes against their will (4–6). For instance, in explaining her decision to name specific lawyers, firms, and judges throughout the book, Craig notes the jarring contrast between the personal vulnerability of complainant witnesses in the courtroom and the role-based abstractions conventionally used to refer to legal actors (15–16). In a similar vein, she questions why recent efforts to promote civility in the profession focus largely on politeness between legal professionals (e.g., the Joseph Groia case) while allowing "lawyers to treat young, typically less educated, almost certainly less experienced in a courtroom, and often visibly racialized and impoverished women with [...] disrespect and disdain" (132). By arguing that the duty of civility should apply to all trial participants (176), Craig stands up for sexual assault complainants while calling out elitism in the profession. Her discussion of the need to revise the "hierarchized spatial and aesthetic organization of the courtroom" (187), complete with symbols of colonialism and patriarchy, as well as the "overly formal and archaic language" used at trial (188), brings the point home.

Most importantly, Craig never loses sight of the lived experiences of complainants, making this the guiding perspective for her analysis. In this way, she puts the precepts of feminist politics into practice. Indeed, she makes a point of beginning and ending the book with the stories of complainants who have participated in the trial process. While underscoring the significant harms these and other women have experienced as a result, Craig also points to the "strength, courage, and tenacity" of many of those who have taken on, or have been compelled into, the role of complainant in a sexual assault trial (225). She ends by reiterating the possibility of reducing the harms imposed upon complainants through small but meaningful changes to legal practice. As Craig argues, we owe them this much.

Dana Phillips
PhD Candidate
Osgoode Hall Law School, York University
DanaPhillips@osgoode.yorku.ca

https://doi.org/10.1017/cls.2019.2 Published online by Cambridge University Press