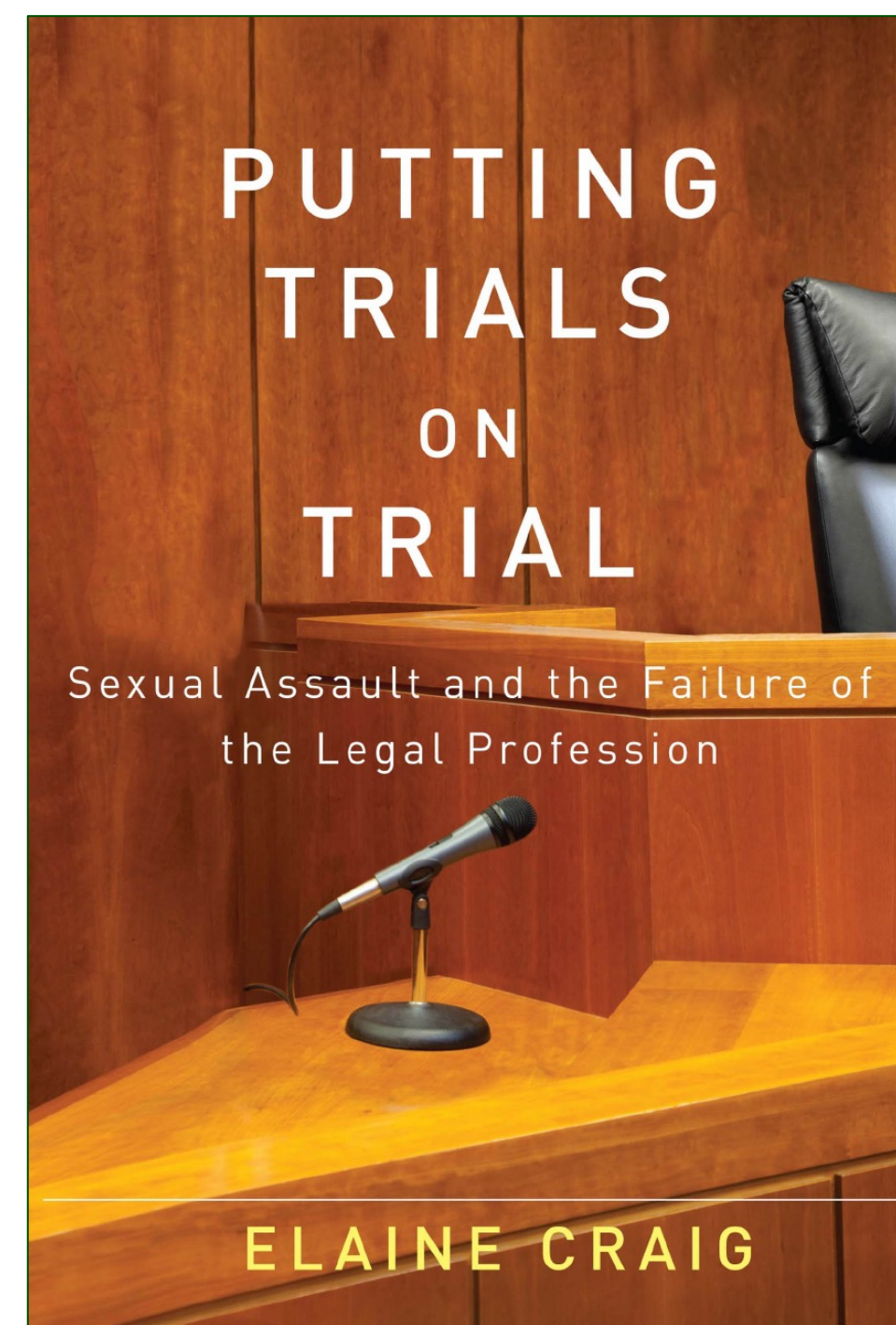


THE BOOK



The objective of this book is to identify ways the criminal justice system harms complainants of sexual assault (at 11).

Below are some of what it identifies followed by ways these problems are being addressed (or not) by the legal community.

WHAT'S IN THE BOOK

“...the reality that **almost all sexual assault in Canada occurs with legal impunity** reflects a profound injustice. To the extent that the legal profession contributes to this legal immunity by practicing in ways that unnecessarily traumatize complainants and discourage other survivors from engaging the legal system, the profession must make changes” (at 222).

For sexual assault complainants, **the trial process is often traumatizing** all over again (at 4).

ROLE OF THE CROWN



The biggest factor in how a complainant feels about their trial is how available the prosecutor was to them (at 165).

Is re-traumatizing a complainant...

...in the public interest?

Crowns should:

- **protect** vulnerable witnesses (at 135)
- **prepare** complainants for trial (at 154)
- know how **trauma affects memory and behaviour** (at 162)

Suggestion: independent legal counsel available for sexual assault complainants (at 162/3)

CRIMINAL DEFENCE BAR



Role of the defence lawyer is contradictory and its culture doesn't help.

Eg) Marie Henein, encourages bringing illegal evidence to judges to take advantage of their biases (at 123).

3 changes needed in criminal defence culture:

1. recognition that practice of sexual assault law perpetuates harms to complainants (at 126)
2. acceptance that strategies aimed at **humiliating complainants** or that rely on rape myths violate lawyers' professional ethics
 - lawyers need to stop celebrating the conduct of lawyers that is sociopathic and harms sexual assault complainants (at 127)
3. a more nuanced and balanced articulation of the professional virtues of those who practice criminal defence law (at 125)

THE JUDICIARY

Judicial education is crucial.

Judges who mistake the law of consent have significant impacts on sexual assault survivors (at 204).



Robin Camp: Resigned due to his comments to a sexual assault complainant

Trial judges' interventions must be based on what is **relevant** and should not let lawyers's cross-examinations go too far (at 182).

Courts should be aware of hierarchy and the **power structures** inherent in a courtroom setup (at 185).

The judiciary should attempt to **humanize** the courtroom by using language that everyone understands and removing the “physical articulation of hierarchy” in the courtrooms (at 189).

HOW IT'S BEEN GOING SINCE THE BOOK

What has been done to address the problems and challenges that *Putting Trials on Trial* outlines?

CHANGES TO THE LAW

R v Barton 2019 SCC

- Clarifies how to use s.276 of the *Criminal Code* and gives guidance on the type of language that is appropriate to describe various parties in the trial;

R v Goldfinch 2019 SCC

- If an accused can't point to a reason to adduce evidence other than sexual assault myths, the evidence is not admissible;

R v RV 2019 SCC

- Clarifies when sexual history evidence may be adduced;

R v JC 2021 ONCA

- Stereotypes can't lead to inferences, but inferences can lead to stereotypes;

Bill C-3

- More education for judges
- Enhanced transparency of legal reasoning

CHANGES TO LITTLE ELSE

- A lawyer should “...advance every argument and ask every question, **however distasteful**, that the lawyer thinks will help the client's case and to endeavour to obtain for the **client the benefit** of every remedy and defence authorized by law.” (at 5.5-1 Commentary 1)
 - The Federation of Law Societies of Canada's “Model Code of Professional Conduct”
- **Third-party representation** has had some success in guiding complainants through the legal system, but still has detractors and **more data is needed** to determine how effective it is;
 - See: Tyrone Kirchengast
 - **Since 2019**, an accused has been acquitted because the 11-14 year-old complainant had a general interest in sex, a decision was based on a complainant not wearing a bra and panties under pyjamas, and an accused was acquitted because the judge found it hard to believe no one heard the complainant calling for help.
 - See: Caroline Dick

CONCLUSIONS

“Speaking in opposition to the bill, **Supreme Court Justice Robert Wagner** told reporters in June 2019 that judges do not require mandatory training in sexual assault law.”



- See: Caroline Dick

“...until attitudes towards women and sexual violence change, the social and progressive reforms that are made won't have a huge impact.”

Craig at 222 citing Jennifer Temkin and Barbara Krahe

REFERENCES and ACKNOWLEDGEMENTS

Legislation

Bill C-3, *An Act to amend the Criminal Code and Canada Labour Code*, 1st Sess, 44th Parl, 2021 (assented to 17 December 2021).

Case Law

R v Barton 2019 SCC 33, 54 CR (7th) 231, 2019 CarswellAlta 985 (SCC).
R v Goldfinch 2019 SCC 38, 2019 CarswellAlta 1285, 55 CR (7th) 15 (SCC).
R v JC 2021 ONCA 131, 2021 CarswellOnt 2723.
R v RV 2019 SCC 41, 55 CR (7th) 297, 2019 CarswellOnt 12413 (SCC).

Secondary Sources

Caroline Dick, “Sex, Sexism, and Judicial Misconduct: How the Canadian Judicial Council Perpetuates Sexism in the Legal Realm” (2020) 28 Fem Leg Stud 133.
 Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession*, (Montreal: McGill-Queen's University Press, 2018).
 Tyrone Kirchengast, “Victim Legal Representation and the Adversarial Criminal Trial: A Critical Analysis of Proposals for Third-Party Counsel for Complainants of Serious Sexual Violence” (2021) 25:1 The International Journal of Evidence & Proof: 153.

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 Jeff McIntosh, “Robin Camp,” photograph: *Chatelaine* <<https://www.chatelaine.com/news/robin-camp-reinstated-as-lawyer/>>.
 Markian Lozowchuk, “Marie Henein,” photograph: (Henein Hutchison LLP), <<https://hllp.ca/#team>>.
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