

THE SEXUAL ASSAULT OF OLDER WOMEN: CRIMINAL JUSTICE RESPONSES IN CANADA

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This article examines sexual violence against older women, a problem that has been largely hidden from view in the societal and legal discussion of sexual assault. The article identifies a significant disconnect between the social science description of sexual assault against older women, on the one hand, and the available case law, on the other. The social science literature suggests that older women are most likely to be sexually assaulted by somebody they know and that a disproportionate number of the sexual assaults against older women take place within care facilities. The case law, however, paints a very different picture of sexual violence against older women—a majority of the reported cases involve women attacked in their homes by strangers in the context of a robbery or home invasion. We argue that this portrayal of sexual violence against older women in the case law resembles that of the case law of sexual assault against younger women thirty years ago, before the women's movement brought acquaintance and spousal sexual assault into the public eye. We conclude that these types of sexual assaults continue to be under-reported for older women, and we explore some of the reasons for the failure of the criminal justice system to respond to this group of complainants.

Cet article examine la violence sexuelle commise envers les femmes âgées, un problème qui a largement été écarté des discussions juridiques et sociétales concernant les agressions sexuelles. L'article détermine qu'il existe une divergence considérable entre, d'une part, le portrait dressé par les sciences sociales de l'agression sexuelle envers les femmes âgées, et, d'autre part, la réalité décrite par la jurisprudence disponible. Une revue de la littérature en sciences sociales suggère que les femmes âgées sont plus à risque d'être victimes d'agression sexuelle par une personne qu'elles connaissent et qu'il y a un nombre disproportionnellement élevé d'agressions sexuelles dans des centres de soins. La jurisprudence décrit pourtant une situation très différente de la violence sexuelle envers les femmes âgées, puisqu'une majorité des cas reportés impliquent des femmes attaquées dans leur demeure par des étrangers dans le cadre d'un vol ou d'une entrée par infraction. Nous avançons que l'image dépeinte par la jurisprudence actuelle est similaire à celle des agressions sexuelles envers les femmes plus jeunes il y a trente ans, avant que le mouvement féministe ne sensibilise le public à l'existence des agressions sexuelles commises par des conjoints ou des connaissances. Nous concluons que ces formes d'agressions sexuelles sont largement sous-rapportées chez les femmes âgées et nous explorons certaines des raisons expliquant l'échec du système de justice criminelle à répondre à ce groupe de plaignantes.

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Introduction

Despite the efforts by feminists over the last four decades, the “typical” rape victim is still positioned as a young attractive female who is attacked by a stranger, motivated by sexual desire. This is compounded by the lack of feminist attention towards, and inclusion of, older women in research, campaigns and policies.¹

This article considers, for the first time in Canadian legal scholarship, the criminal law’s treatment of the sexual assault of older women.² This work is influenced by, and builds on, our earlier scholarship regarding sexual assault against women with mental disabilities. In particular, our published research has examined: challenges in applying the legal doctrine of affirmative consent to women with mental disabilities;³ problems with an “all or nothing” approach to incapacity to consent;⁴ barriers created by particular evidentiary and procedural rules in the criminal trial process;⁵ problems with the existing practice of cross-examination when applied to complainants with mental disabilities;⁶ issues around competence to testify;⁷ and the role of abuses of trust, power, and authority in determining non-consent.⁸

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- ¹ Hannah Bows & Nicole Westmarland, “Rape of Older People in the United Kingdom: Challenging the ‘Real-Rape’ Stereotype”, (2017) 57:1 *Brit J Crim* 1 at 13 [references omitted].
 - ² The issue of sexual violence against older women came briefly to public attention in 2015 through a case in Iowa in which a man was acquitted of sexual assault charges that arose from his sexual intercourse with his wife, who suffered from dementia. The case only came to light because the complainant’s adult children expressed concern about her capacity to consent to sexual activity (see Pam Belluck, “Sex, Dementia and a Husband on Trial at Age 78”, *The New York Times* (13 April 2015), online: <www.nytimes.com>; Pam Belluck, “Iowa Man Found Not Guilty of Sexually Abusing Wife with Alzheimer’s”, *The New York Times* (22 April 2015), online: <www.nytimes.com>).
 - ³ See Janine Benedet & Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief” (2007) 52:2 *McGill LJ* 243 [Benedet & Grant, “Consent, Capacity, and Mistaken Belief”].
 - ⁴ See Janine Benedet & Isabel Grant, “A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law” (2011) 43:1 *Ottawa L Rev* 1.
 - ⁵ See Janine Benedet & Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues” (2007) 52:3 *McGill LJ* 515 [Benedet & Grant, “Evidentiary and Procedural Issues”].
 - ⁶ See Janine Benedet & Isabel Grant, “Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases” (2012) 50:1 *Osgoode Hall LJ* 1.
 - ⁷ See Janine Benedet & Isabel Grant, “More Than an Empty Gesture: Enabling Women with Mental Disabilities to Testify on a Promise to Tell the Truth” (2013) 25:1 *CJWL* 31.
 - ⁸ See Janine Benedet & Isabel Grant, “Sexual Assault of Women with Mental Disabilities: A Canadian Perspective” in Clare McGlynn & Vanessa E Munro, eds, *Rethinking*

We wondered whether the insights we developed in this work would be useful for considering the legal response to the sexual assault of older women, who confront unique challenges in having sexual violence against them recognized through the criminal justice system.⁹ Mental disability and age are, of course, overlapping categories. Some older women have dementia or other age-related conditions, while younger women with mental disabilities age and become older women. More generally, legal scholarship and the broader public discourse on sexual violence are almost silent about both of these groups of women, as if sex and sexual violence were not a part of their lives.

Of course, “older women” are not a homogenous group. Many older women do not experience any cognitive disability and yet may still be vulnerable to sexual violence as they face social marginalization for reasons related to disability, poverty, social isolation, and ageism, as well as sex inequality.¹⁰ We thus sought to examine whether and how the criminal justice system is responding to such sexual violence and to identify the barriers to the effective prosecution of these cases. We also suspected that many of these cases might be entirely outside the sight of the criminal law and instead managed through other means. This article thus grapples with the difficult problem of how to identify and understand what is *not* there in terms of judicial decisions.¹¹

Rape Law: International and Comparative Perspectives (Abingdon, UK: Routledge, 2010) 322; Janine Benedet & Isabel Grant, “Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities” (2014) 22:2 *Fem Leg Stud* 131.

⁹ For a discussion of our decision to use the term “older women”, see Part I-A, below.

¹⁰ See Karen A Roberto & Pamela B Teaster, “Sexual Abuse of Vulnerable Young and Old Women: A Comparative Analysis of Circumstances and Outcomes” (2005) 11:4 *Violence Against Women* 473 at 474. The use of the language of “vulnerability” in discussing older people is not without its critics, because of the connotations of frailty that may reinforce stereotypes about older people (see Law Commission of Ontario, *The Law as it Affects Older Adults: Developing an Anti-Ageist Approach* (Toronto: LCO, 2011) at 57–59). Martha Fineman, who has written extensively on vulnerability across the lifespan, has in turn criticized this approach: “Unfortunately, denial of human vulnerability and the possibility of dependency will not eliminate the experience of either in individual lives, and policies not engaging with their implications likely will be inadequate or ineffective” (Martha Albertson Fineman, “Elderly’ as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility” (2012) 20:1 *Elder LJ* 71 at 90). We agree with Fineman that “[a] vulnerability approach might well reveal the ways in which safety and security are prerequisites for the meaningful exercise of autonomy, not in conflict with it” (*ibid* at 92).

¹¹ Some of these cases may be dealt with through provincial adult protection statutes such as sections 44 through 60.1 of the British Columbia *Adult Guardianship Act*, dealing with reports of abuse or neglect of an adult person and the powers of designated agencies to investigate allegations of abuse or neglect (RSBC 1996, c 6).

We expected that many of the legal issues we had addressed in the context of women with mental disabilities—such as capacity to consent and competence to testify—would have particular relevance to the population of older women. Yet, our findings paint a somewhat different picture. By the time a very small sample of cases makes its way to court, older women do not typically face the legal and evidentiary barriers confronted by younger women, whether disabled or not. The greatest challenge appears to be in detecting and reporting the sexual violence against older women. It is difficult to determine how much this challenge can be attributed to women not disclosing the sexual violence to anyone (or not reporting it to the police) or whether women are reporting incidents of sexual violence to the police and the cases are not going forward. Since barriers to reporting are so high for this group of women, however, we suspect that non-reporting plays at least a significant explanatory role.

In this article, we seek to explore in the Canadian context what has been described as “one of the final taboos of modern life”¹²—sexual violence against older women—with a view to stimulating further legal research in this area. We argue that older women face greater barriers to reporting sexual assault than any other age group of women. We demonstrate that certain types of sexual assault against older women are virtually invisible in the case law. If one uses the case law as a guide to what is actually happening, one would assume that sexual assault against older women is overwhelmingly committed by strangers who break into a woman’s house late at night and sexually assault her, while committing serious acts of physical violence.¹³

Familial sexual assault, particularly spousal sexual assault, is virtually invisible in our case sample. In some respects, this picture of sexual assault resembles what one might have seen for younger women thirty years ago, before the women’s movement pushed for the recognition of sexual violence in intimate relationships.¹⁴ In this article, we present our

¹² H Jones & JL Powell, “Old Age, Vulnerability and Sexual Violence: Implications for Knowledge and Practice” (2006) 53:3 Intl Nursing Rev 211 at 212.

¹³ Bows & Westmarland describe this portrayal of sexual violence against older women as a crime committed largely by strangers as the “‘real-rape’ myth”:

According to this model, older rape victims are usually female and attacked by a stranger, considerably younger than they are, usually in the victim’s home (or a care home) or in an outdoor public location. This model exhibits similarities with the prominent “real-rape” myth of younger women, which also centres around a stranger rape on a female victim, usually in an outdoor location but sometimes in the victim’s home or elsewhere (*supra* note 1 at 11).

¹⁴ See e.g. Janine Benedet, “Sexual Assault Cases at the Alberta Court of Appeal: The Roots of *Ewanchuk* and the Unfinished Revolution” (2014) 52:1 Alta L Rev 127 at 131–

findings and begin to untangle the complex reasons for the limited representation of sexual assault against older women in the case law.

The article begins by outlining our theoretical perspective and conducting a review of the social science literature on sexual violence against older women, much of which is taken from the American and British contexts. We then present our findings from an extensive case law review and contrast these findings with what has been presented in the social science literature. Finally, we move on to explore potential reasons for the disconnect between the depiction of sexual assault against older women in the case law and that in the social science literature, and urge feminists and other scholars to bring this group of women back into focus in scholarship and advocacy surrounding sexual assault.

Our focus on older women does not mean to imply that older men are never subjected to sexual violence.¹⁵ We focus on women for two reasons. First, our analysis is informed by the belief that sexual violence is profoundly gendered at all stages of the life cycle.¹⁶ Second, the social science studies consistently support this position, revealing that the proportion of older victims of sexual violence (as opposed to physical violence) who are women is extremely high. For example, studies suggest that between 93% and 95% of older victims of sexual assault are women, and over 90% of perpetrators are men.¹⁷ These figures are similar to the demographics of sexual assault in the larger population.¹⁸ While one study of elder sexual

35 (where the author describes what sexual assault cases looked like in Alberta courts prior to the landmark decision of the Supreme Court in *R v Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193).

¹⁵ See e.g. *R v Lekiqi*, 2010 ONSC 2739, [2010] OJ No 2155 (QL) [*Lekiqi*].

¹⁶ See e.g. Holly Johnson, “Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 613 at 613. Johnson reports that in Canada in 2007, only 3% of sex offenders were women, whereas 86% of victims of sexual assault were women and girls. According to Statistics Canada’s crime victimization survey, fewer than 10% of cases were reported to the police in 2004 (*ibid*).

¹⁷ See Tony Rosen, Mark S Lachs & Karl Pillemer, “Sexual Aggression Between Residents in Nursing Homes: Literature Synthesis of an Underrecognized Problem” (2010) 58:10 *J American Geriatrics Society* 1070 at 1074–75; Ann W Burgess, *Elderly Victims of Sexual Abuse and Their Offenders* (Rockville: National Criminal Justice Reference Service, 2006) at 50.

¹⁸ Data from 2013–2014 show that 99% of sexual assault cases involved male accused (see Statistics Canada, *Adult Criminal Court Statistics in Canada, 2013/2014*, by Ashley Maxwell, Catalogue No 85-002-X (Ottawa: Statistics Canada, 28 September 2015) at 7 [Statistics Canada, *Adult Criminal Court Statistics*]). 2011 data show that women are eleven times more likely than men to be victims of sexual violence (see Statistics Canada, *Measuring Violence Against Women: Statistical Trends*, by Maire Sinha, Catalogue

abuse found that the percentage of female victims was only two-thirds of the sample,¹⁹ this study appears to be an outlier. Thus we seek to explore how sex, old age, disability, race, and class intersect in the context of sexual violence.

I. Theoretical Perspective

A. *Who Is “Old”? Concepts and Language*

Any study of older women must address the preliminary questions of how the group is described and who is included within the category of “older”. We have decided to use the term “older”, recognizing that it is not without difficulties. For instance, by using the comparative “older”, one could be seen as implying that “younger” is the norm and that the group under study departs from the norm. It defines those who are old only in comparison to those who are not. In the context of sexual assault of older women, however, this comparative reference point is precisely what renders the sexual assault of older women invisible in our society. Older women are not seen as typical victims in the context of sexual assault. In fact, older women are generally not seen as sexual subjects at all.²⁰

The word “old” typically has pejorative connotations when used to label others. Of course, that construction is problematic and ought to be contested, since it contributes to the marginalization of older people. Nonetheless, we have chosen not to use this term because many in the group of women under study here are not old by traditional measures (i.e., over sixty-five or seventy-five years of age) but rather are simply *older* as compared to typical sexual assault complainants. As Paul Luken points out, “old age ... is not simply a matter of how old one is; rather, it is a matter of how one is perceived to be old in specific situations.”²¹

Defining who is in and who is out of the descriptive term “older” is a challenging endeavour and one that shifts over time:

No 85-002-X (Ottawa: Statistics Canada, 25 February 2013) at 11 [Statistics Canada, *Measuring Violence Against Women*].

¹⁹ See Brian K Payne, “Understanding Elder Sexual Abuse and the Criminal Justice System’s Response: Comparisons to Elder Physical Abuse” (2010) 27:2 Justice Q 206 at 214.

²⁰ We note that a recent study of police reports of sexual violence against older people in the United Kingdom has chosen to use the word “older” to describe the population under study (see Bows & Westmarland, *supra* note 1).

²¹ Paul C Luken, “Social Identity in Later Life: A Situational Approach to Understanding Old Age Stigma” (1987) 25:3 Intl J Aging & Human Development 177 at 184.

The onset of what is seen as “old age” has varied historically by at least 4 decades, from a person’s mid-30s to 70s, according to different configurations of the life span over the centuries. Nowadays it is no easier to say exactly when we reach old age, with health, class, poverty, and other entrenched inequalities playing a critical role.²²

Age is described through many lenses. Chronological age is often used as a criterion for entitlement to benefits or withdrawal from the paid workforce. Various jurisdictions define this cut-off differently, but sixty and sixty-five are commonly used.²³ Some studies of sexual violence against older women borrow these chronological markers to define who is older.²⁴ But chronological age is only one way of circumscribing the category. Age is also socially constructed, and what constitutes older is highly gendered. Women are constructed as older at a younger age than men. For women, aging is more about the body and may be seen as a function of the point at which women lose sexual attractiveness to men and, as such, become socially invisible. “[T]he older female body is both invisible—in that it is no longer seen—and hypervisible—in that it is all that is seen.”²⁵ As such, women beyond their reproductive years are often construed as no longer desirable and ostensibly old.²⁶ Julia Twigg explains the gendered dimension of perceptions of aging as follows:

[C]ultural judgements concerning the body bear particularly harshly on women, traditionally prized for their sexual attractiveness seen to reside in youth. ... Aging undermines women’s traditional source of power. Male power by contrast resides in money, status, social dominance, so that early signs of aging such as gray hair are read as marks of maturity and authority.²⁷

²² Lynne Segal, “Temporal Vertigo: The Paradoxes of Ageing” (2014) 15:3 *Studies in Gender & Sexuality* 214 at 215 [references omitted].

²³ See e.g. Australian Research Centre in Sex, Health and Society, *Norma’s Project: A Research Study into the Sexual Assault of Older Women in Australia* (Monograph Series No 98) by Rosemary Mann et al (Melbourne: ARCSHS, 2014) [Mann et al, *Norma’s Project*] (indicating that Australian public policy “generally defines older people as those aged 65 years and over” at 10). In developing countries, the idea of a socially constructed retirement age has little meaning (see World Health Organization, *World Report on Violence and Health*, ed by Etienne G Krug et al (Geneva: WHO, 2002) at 125).

²⁴ See e.g. Bows and Westmarland, *supra* note 1 at 1–2, 5 (where the authors use sixty as the cut-off in their new study of the rape of older people); Mann et al, *Norma’s Project*, *supra* note 23 at 1, 7 (where the authors define older women as being sixty-five years and above).

²⁵ Julia Twigg, “The Body, Gender, and Age: Feminist Insights in Social Gerontology” (2004) 18:1 *J Aging Stud* 59 at 62.

²⁶ See Mann et al, *Norma’s Project*, *supra* note 23 at 6.

²⁷ Twigg, *supra* note 25 at 62.

Sexual violence against older women is therefore more likely to be construed as deviant in contrast to sexual violence against younger women, which is normalized.²⁸

Other kinds of inequality may also impact how one defines who is considered older.²⁹ For example, a study of elderly homeless persons used the age of fifty-five to distinguish younger from older shelter seekers.³⁰ A lower cut-off age was used because of the vulnerability of the population under study and their reduced life expectancy. In a study of older women with intellectual disabilities, the age of forty was used as a cut-off in order to capture a broader picture of women in this category, some of whom may have shorter life expectancies.³¹ Similarly, a younger age may be used to define “old” in studies of prisoners, because of the poor lifestyles and premature aging of the prison population.³² In the context of the present study, one might define a woman living in institutional care in her forties as “older”, because of her corresponding vulnerability, whereas a woman of the same age living and working in the community might not be considered an older woman.

Our perceptions of declining capacity also shape our construction of who is older. Persons experiencing significant disability are more likely to be labelled as old at a younger age than those without an identifiable disability. These types of vulnerability also put women at higher risk of sexual violence. Thus the point at which one is labelled as older will vary depending on other “intersecting inequalities”, such as gender, ability, class, and race.³³

Studies have sometimes distinguished between “young-old” and “old-old”, with the younger category varying depending on the context and the older category usually describing those over eighty years of age.³⁴ This dis-

²⁸ See Bows & Westmarland, *supra* note 1 at 11–12.

²⁹ See e.g. Anthony W Fox, “Elder Abuse” (2012) 52:3 *Med Sci Law* 128 at 128.

³⁰ See Laura Hecht & Bonita Coyle, “Elderly Homeless: A Comparison of Older and Younger Adult Emergency Shelter Seekers in Bakersfield, California” (2001) 45:1 *American Behavioral Scientist* 66 at 66.

³¹ See Iva Strnadová & David Evans, “Older Women with Intellectual Disabilities: Overcoming Barriers to Autonomy” (2015) 12:1 *J Policy & Practice in Intellectual Disabilities* 12 at 13.

³² See Mary Davoren et al, “Older Men and Older Women Remand Prisoners: Mental Illness, Physical Illness, Offending Patterns and Needs” (2015) 27:5 *Intl Psychogeriatrics* 747 at 747–49.

³³ Toni Calasanti, Kathleen F Slevin & Neal King, “Ageism and Feminism: From ‘Et Cetera’ to Center” (2006) 18:1 *National Women’s Studies Assoc J* 13 at 20.

³⁴ Bernice Neugarten seems to be the first scholar to differentiate between “young-old” and “old-old” persons: Bernice L Neugarten, “Age Groups in American Society and the

inction recognizes that people live much longer today than in the past and that older adults face different challenges at different stages of their lives.

There is no agreement in existing studies on sexual violence against older women as to where this cut-off should be made. Studies use anywhere from age forty-five through sixty-five as the lower boundary of “older”.³⁵ We believe that it is important in studies of sexual violence against older women to recognize that gender plays a significant role in who is defined as older, particularly in the context of sexuality. Accordingly, we do not support simply borrowing an age from a context like retirement or entitlement to benefits, but rather seek to adopt a definition that recognizes that society ages women prematurely in the context of sexuality. Because we suspected that sexual violence against older women would be under-reported, and because we wanted to study as broad a sample as possible, we have chosen the age of fifty years as our bottom cut-off point to describe the category of older. We recognize that choosing any cut-off point is an arbitrary exercise, which may result in excluding some women from the analysis and possibly including others who should not be included. We also acknowledge that “women over fifty” is not a homogenous group. Women in their fifties may well experience sexual violence differently, for example, than women in their eighties. Similarly, within the category of older women, a woman’s social location will also be relevant in defining her vulnerability to sexual violence. As Rachel Pain has indicated, “The structures of class, gender, race and ability are the key determinants of how older people experience old age.”³⁶ Fifty was the youngest age used in the literature to define this category and, in our view, for women in the context of sexual assault, fifty is clearly “older”.

B. Locating Older Women in Feminist Literature

The theoretical literature on sexual abuse of older women is largely “uncharted territory”.³⁷ Feminist literature more broadly has failed to put older women at the centre of the analysis of sexual violence and has been

Rise of the Young-Old” (1974) 415 *Ann Am Acad Pol & Soc Sci* 187 at 191. See also Roberto & Teaster, *supra* note 10 at 481.

³⁵ See e.g. Mann et al, *Norma’s Project*, *supra* note 23 at 10; Susan J Lea, Laura Hunt & Steve Shaw, “Sexual Assault of Older Women by Strangers” (2011) 26:11 *J Interpersonal Violence* 2303 at 2309.

³⁶ Rachel Pain, “Old Age and Victimization” in Pamela Davies, Peter Francis & Victor Jupp, eds, *Victimization: Theory, Research and Policy* (New York: Palgrave Macmillan, 2003) 61 at 73.

³⁷ Kari Brozowski & David R Hall, “Aging and Risk: Physical and Sexual Abuse of Elders in Canada” (2010) 25:7 *J Interpersonal Violence* 1183 at 1187.

criticized for neglecting this group of women altogether.³⁸ In their article, “Ageism and Feminism: From ‘Et Cetera’ to Center,” Toni Calasanti, Kathleen Slevin, and Neal King urge us “to recognize that just as gender, race, class, and sexual orientation serve as organizing principles of power, so too does age.”³⁹ While old age clearly intersects with other social inequalities, such as gender and class, it “is a social location in its own right, conferring a loss of power for all those designated as ‘old’ regardless of their advantages in other hierarchies.”⁴⁰

Sexual assault has long been seen as an offence that is primarily committed against younger women.⁴¹ The misconception that sexual violence against younger women is about male sexual desire, together with the stereotypes that older women are neither sexually desirable nor interested in sex, perpetuates the taboo around the discussion of the sexual assault of older women.⁴² As long as we continue to assume that sexual violence is about misdirected sexual desire, those who are not considered desirable are rendered invisible. When sexual assault is seen instead as an exercise of sex inequality by men with more power over women with less, it is not surprising that older women, particularly those who are dependent on others for care, are vulnerable to sexual violence because of their relative powerlessness.

C. Older Women and “Rape Culture”

Feminist analyses of sexual violence are based on the recognition that such violence is not simply the aberrant act of a few random men, but rather represents the product of a “rape culture” that normalizes aggressive masculinity in sexual relations:

Rape is the logical outcome if men act according to the “masculine mystique” and women act according to the “feminine mystique”. But rape does not have to occur. Its presence is an indication of how widely held are traditional views of appropriate male and female behavior, and of how strongly enforced these views are. Our society is a rape culture because it fosters and encourages rape by teaching

³⁸ See e.g. Calasanti, Slevin & King, *supra* note 33.

³⁹ *Ibid* at 25.

⁴⁰ *Ibid* at 17.

⁴¹ See Payne, *supra* note 19 at 207.

⁴² See Brozowski & Hall, *supra* note 37 at 1187; Amy R Rotberg, “An Introduction to the Study of Women, Aging, and Sexuality” (1987) 5:3 *Physical & Occupational Therapy in Geriatrics* 3 at 4.

males and females that it is natural and normal for sexual relations to involve aggressive behavior on the part of males.⁴³

Early feminist writings on rape culture did not specifically limit their analysis to younger women.⁴⁴ Rather, they saw the concept of rape culture as having explanatory potential for the largely unacknowledged problems of date and spousal rape, and for the way in which rape as a cultural practice constrained the lives of all women, whether they actually experienced sexual violence or not. Nonetheless, discussions of rape culture have noted how these attitudes are reflected and reinforced in popular culture, with high school and university campuses being a particular site for explorations of this idea.⁴⁵ When applied to the legal system's treatment of complainants, criticisms have focused on the tendency toward victim-blaming, by cross-examining women on their sexual history or their alcohol consumption, or by insisting that they must have consented, because they failed to adequately object or resist to the assault.⁴⁶

While this analysis is cogent and helpful in many cases, it does not speak to the way in which rape culture plays out in the legal context when the victim is not seen as a legitimate object of sexual attention due to her age. Popular culture does not eroticize older women as taboo in the same way that it does with girls. Nor are older women typically portrayed as “asking for it” because of their dress or their intoxication. The irony, of course, is that victims of sexual aggression are targeted not because of their sexual attractiveness, but because of their vulnerabilities, which both decrease their ability to resist and make it less likely that they will be able to successfully complain to persons in authority. When dominance

⁴³ Dianne F Herman, “The Rape Culture” in Jo Freeman, ed, *Women: A Feminist Perspective*, 4th ed (Mountain View, Cal: Mayfield, 1989) 20 at 39.

⁴⁴ See e.g. Andrea Dworkin, *Our Blood: Prophecies and Discourses on Sexual Politics* (New York: Perigee Books, 1981) at 35–36; Lorene Clark & Debra Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Educational Press, 1977) at 144–46.

⁴⁵ See generally Peggy Reeves Sanday, *A Woman Scorned: Acquaintance Rape on Trial* (New York: Doubleday, 1996) (narrating the case of a gang rape at a university). For a prominent collection of essays on this topic, released in 1993 and revised in 2005, see Emilie Buchwald, Pamela R Fletcher & Martha Roth, eds, *Transforming a Rape Culture* (Minneapolis: Milkweed, 1993). See also Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (New York: Routledge, 2005).

⁴⁶ See e.g. Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010) 22:2 CJWL 397; Lise Gotell, “When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records” (2006) 43:3 Alta L Rev 743.

itself is eroticized for the male aggressor, victims with intersecting vulnerabilities are at greater risk.⁴⁷

The judicial treatment of sexual assault, and sexual assault complainants specifically, is very different for older women. Rarely is consent contested at trial. One does not see references to an older woman's past sexual history,⁴⁸ attempts to admit third-party records to undermine her credibility,⁴⁹ or references to her failure to effectively manage the risk of sexual violence faced by all women on a daily basis.⁵⁰ Complainants are not put on trial and found wanting in their resistance to sexual violence. One might conclude that older women escape the negative effects of rape culture, at least in the legal context. In fact, older women are not recognized as sexual subjects at all. This lack of recognition has implications for how we see older women in society and for the steps we take to prevent sexual violence against this group of women. The myth that sexual assault is just

⁴⁷ Consider the following quotation from the director of Action on Elder Abuse in the United Kingdom, explaining why older women may be targeted for sexual violence:

People find it hard to understand why anyone would want to abuse an old person, but someone suffering some mental and physical frailty is the perfect victim: they can't defend themselves, they can't get away, and if they're able to communicate they're probably not believed. What more could any abuser want? ...

It's not about sex, it's about power. ... There are even pages on paedophile websites encouraging men finding it hard to access children to gain employment at care homes. They say the sex is just as good and there's far less risk of getting caught (Director of Action on Elder Abuse, cited in Amelia Hill, "Hidden Plague of Sexual Abuse Grips Care Homes", *The Guardian* (25 February 2001), online: <www.theguardian.com>).

An English study on perpetrators of sexual violence against older women found that one in five of the convicted men under study also had a criminal record for sexually assaulting children (see Katharine Jeary, "Sexual Abuse and Sexual Offending Against Elderly People: A Focus on Perpetrators and Victims" (2005) 16:2 *J Forensic Psychiatry & Psychology* 328 at 341).

⁴⁸ Attempts to undermine a complainant's credibility through reference to her past sexual history is common in cases involving younger women as complainants (see Christine Boyle, "Sexual Assault in Abusive Relationships: Common Sense About Sexual History" (1996) 19:2 *Dal LJ* 223; Benedet & Grant, "Consent, Capacity, and Mistaken Belief", *supra* note 3 at 268, 281, 286). See generally Benedet & Grant, "Evidentiary and Procedural Issues", *supra* note 5 at 532–37 (on the use of sexual history as evidence in sexual assault trials since 1976); John McInnes & Christine Boyle, "Judging Sexual Assault Law Against a Standard of Equality" (1995) 29:2 *UBC L Rev* 341 at 342, 360, 365–66 (on the way such practices reinforce inequality toward female victims).

⁴⁹ See Randall, *supra* note 46 at 405–06 (for a description of attempts to have third-party records admitted in sexual assault cases involving younger complainants).

⁵⁰ See Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41:4 *Akron L Rev* 865 (exploring the ways in which women are expected to take steps to avoid sexual violence against them).

an extension of normal male sexual desire makes the sexual assault of older women inexplicable. Older women are not supposed to talk about sexual things, and sexual violence against them is not talked about either.

II. The Empirical Reality of Sexual Violence against Older Women

A. *Scope of the Problem*

Social scientists have only recently begun to study sexual violence in older populations.⁵¹ The United States National Center on Elder Abuse defines elder sexual abuse as “[n]on-consensual sexual contact of any kind” with an elderly person, including sexual contact with any person not capable of giving consent.⁵² Under Canadian criminal law, if a complainant acquiesces to the sexual touching based on an abuse of trust, power, or authority, there is no consent.⁵³ As the population ages, and as the feminization of poverty continues, we can expect the number of older women who experience sexual violence to rise.⁵⁴ Aging, and the increased dependency and social isolation that accompany it, can make women targets for sexual violence,⁵⁵ just as the consumption of intoxicants or peer group norms of hostile masculinity can render younger women vulnerable. This problem is magnified for visible minority women and for those experiencing other forms of social disadvantage.⁵⁶ In Canada, for example, Indigenous women are disproportionately targeted for sexual violence at all ages.⁵⁷

While there is a vast body of scholarly and professional literature on elder abuse, this term is not defined consistently in the literature. In cer-

⁵¹ See e.g. Margaret W Baker, Naomi F Sugar & Linda O Eckert, “Sexual Assault of Older Women: Risk and Vulnerability by Living Arrangement” (2009) 6:4 *Sexuality Research & Social Policy* 79 at 79–80; Payne, *supra* note 19 at 206–08; Giannetta Del Bove, Lana Stermac & Deidre Bainbridge, “Comparisons of Sexual Assault Among Older and Younger Women” (2005) 17:3 *J Elder Abuse & Neglect* 1 at 2–5; Brozowski & Hall, *supra* note 37 at 1183–84.

⁵² “Frequently Asked Questions”, *National Center on Elder Abuse*, online: <ncea.acl.gov>.

⁵³ See *Criminal Code*, RSC 1985, c C-46, s 273.1(2)(c).

⁵⁴ See Linda O Eckert & Naomi F Sugar, “Older Victims of Sexual Assault: An Underrecognized Population” (2008) 198:6 *American J Obstetrics & Gynecology* 688.e1 at 688.e6; Terri Whittaker, “Violence, Gender and Elder Abuse: Towards a Feminist Analysis and Practice” (1995) 4:1 *J Gender Studies* 35 at 40.

⁵⁵ See Brozowski & Hall, *supra* note 37 at 1186.

⁵⁶ See *ibid* at 1185–86.

⁵⁷ See *ibid* at 1193; Statistics Canada, *Measuring Violence Against Women*, *supra* note 18 at 61–62. See also Tracey Lindberg, Priscilla Campeau & Maria Campbell, “Indigenous Women and Sexual Assault in Canada” in Sheehy, *supra* note 16, 87 at 98–99.

tain studies, elder abuse is defined broadly to include sexual abuse,⁵⁸ whereas in other research contexts, it includes only physical abuse and neglect,⁵⁹ and in others yet it is expanded to include physical, sexual, emotional, and financial abuse.⁶⁰ It is more difficult to find studies dealing only with sexual abuse. Canadian literature on the incidence and nature of sexual assault against older women is particularly lacking, with the majority of English-language studies coming from the United States, England, and Australia. Ontario has taken some steps to monitor abuse in the context of nursing homes; however, the reporting requirements do not require that the type of abuse be specified. As such, the generalities used to describe particular incidents make it difficult to draw any conclusions about sexual violence specifically.⁶¹ The tendency to include sexual assault as merely a form of elder abuse obscures both its actual prevalence and its highly gendered nature. Overwhelmingly, it is older women who are subjected to sexual violence by men.

No studies have yet attempted to determine the overall prevalence of sexual violence against older adults in the general population, even in the United States.⁶² Of studies investigating elder sexual abuse in particular populations, findings vary depending on several factors, including: the

⁵⁸ See e.g. Bridget Penhale, “Older Women, Domestic Violence, and Elder Abuse: A Review of Commonalities, Differences, and Shared Approaches” (2003) 15:3–4 *J Elder Abuse & Neglect* 163 at 166–67; “Definition of Elder Abuse”, *NYC Elder Abuse Center*, online: <nyceac.com/about/definition>.

⁵⁹ See e.g. Lynn McDonald et al, “Institutional Abuse of Older Adults: What We Know, What We Need to Know” (2012) 24:2 *J Elder Abuse & Neglect* 138 at 142–43.

⁶⁰ See e.g. *ibid.*

⁶¹ The *Long-Term Care Homes Act*, SO 2007, c 8 [*LTCHA*], enacted in 2010, requires that every long-term care home be inspected at least once per year without notice (at ss 143–44), and that any alleged, suspected or witnessed incident of abuse or neglect be investigated, reported, and responded to (at ss 20(2)(e), 23–25). The Long-Term Care Task Force on Resident Care and Safety was created in 2011, following a *Toronto Star* investigation of abuse and neglect in Ontario’s 627 licensed nursing homes. The Task Force released its major report in 2012 (see Ontario, Long-Term Care Task Force on Resident Care and Safety, *An Action Plan to Address Abuse and Neglect in Long-Term Care Homes* (Toronto: Long-Term Care Task Force, 2012)). This report indicates that over 3,200 incidents of abuse and neglect were reported to the Ministry in 2011, but does not break this number down by the type of abuse (see *ibid* at 21–22). Reports issued pursuant to the *LTCHA* are available online, but are listed by institution name rather than by the frequency or type of abuse. The language used in these reports varies and does not always specify in clear terms what took place, making it impossible to discern what type of abuse—sexual or otherwise—occurred or at what rate. For reports pursuant to the Long-Term Care Task Force on Resident Care and Safety, see “Updates”, *Long-Term Care Task Force on Resident Care and Safety*, online: <longterm-caretaskforce.ca/index.php/Updates>.

⁶² See Ann Wolbert Burgess et al, “Sexual Abuse of Older Adults: Assessing for Signs of a Serious Crime—and Reporting It” (2005) 105:10 *American J Nursing* 66 at 66.

population studied (e.g., older people⁶³ or older women⁶⁴); the definition of “older”; how the data was obtained (e.g., from police reports, emergency room visits, adult protection services, or offender interviews); and where the abuse occurred (e.g., at a woman’s home or in a nursing home).⁶⁵

Sexual abuse of older women is a form of victimization that warrants its own study because of its devastating consequences.⁶⁶ For example, older women are more likely than younger women to suffer serious injury from sexual violence. One study demonstrated that over one half of sexual abuse victims in a nursing home died within twelve months of the assault.⁶⁷ For many of these women, the impact of the assault is profoundly life-changing.⁶⁸ Women who are assaulted in their own homes may feel unable to remain in that home, forcing them to move into residential care or to move in with family members, thereby losing a significant degree of independence.⁶⁹ Women who lack the capacity to consent because of dementia or other conditions also suffer severe psychological trauma from sexual abuse, which is often evident through behavioural changes, even though they may have more difficulty in communicating their distress.⁷⁰ It is important to recognize that older women who are victims of sexual assault may have experienced sexual violence earlier in their lives, particularly where the abuser is a spouse or an intimate partner. Many women in abusive relationships are subject to violence and sexual violence over a long period of time. Thus, in understanding the impact of sexual violence on older women, it is important to consider the impact of cumulative sexual violence over the course of the lifespan.

⁶³ See e.g. Burgess, *supra* note 17 at 2–3.

⁶⁴ See e.g. Eckert & Sugar, *supra* note 54 at 688.e1.

⁶⁵ See Burgess et al, *supra* note 62 at 66–67.

⁶⁶ See Payne, *supra* note 19 at 220; Jeary, *supra* note 47 at 335–36; Eckert & Sugar, *supra* note 54 at 688.e5.

⁶⁷ See Ann Wolbert Burgess, Elizabeth B Dowdell & Robert A Prentky, “Sexual Abuse of Nursing Home Residents” (2000) 38:6 J Psychosocial Nursing & Mental Health Services 10 at 17. This study does not demonstrate that sexual assault caused these deaths, as it is just as possible that women with higher levels of disability were more likely to be sexually assaulted. In a study of elder mistreatment more generally, the researchers found that “older adults who have been mistreated were more likely to be dead at the end of a 13-year follow-up period than either their self-neglected counterparts or those cohort members who had no interaction with adult protective services” (Mark S Lachs et al, “The Mortality of Elder Mistreatment” (1998) 280:5 J American Medical Assoc 428 at 431).

⁶⁸ See Jeary, *supra* note 47 at 335.

⁶⁹ See *ibid.*

⁷⁰ See Ann W Burgess & Steven L Phillips, “Sexual Abuse, Trauma and Dementia in the Elderly: A Retrospective Study of 284 Cases” (2006) 1:2 Victims & Offenders 193 at 196. See also Mann et al, *Norma’s Project*, *supra* note 23 at 13–14.

In addition to being under-studied,⁷¹ scholars agree that sexual violence against older women is greatly under-reported.⁷² Older women may be more concerned with the stigma and embarrassment involved in reporting sexual violence;⁷³ they may fear reprisal, particularly if they are dependent on the person who is assaulting them, or reporting may be made difficult, if not impossible, by cognitive or communication difficulties.⁷⁴ Older women, like women generally, may be afraid that if they do report sexual abuse, their claims will not be believed.⁷⁵ In their review of 284 cases of elder sexual abuse reported to the police or to adult protection authorities, Ann Burgess and Steven Phillips found that 62% of the older population without dementia made a self-report regarding sexual violence, but only 12.8% of those with dementia made a self-report.⁷⁶ Reporting is estimated to be even lower in nursing homes than in the community,⁷⁷ particularly where the woman is unable to verbalize what has happened to her or where the perpetrator is another resident with dementia. Even where witnessed by staff, sexual assault may be confused with consenting activity among residents or with a spouse, or assumed to cause no harm to a resident with cognitive impairments.⁷⁸ We suspect that many cases are dealt with internally, without police involvement, which may often be seen as too traumatic for the complainant or inappropriate where the assailant is another resident of the facility. Accordingly, reported cases represent merely “the tip of the iceberg.”⁷⁹ Even where police complaints are pursued, Crown prosecutors may decide that the barriers to prosecution are too great, especially where the complainant is unable to testify. Where charges are initiated, the delay involved in going to trial may mean that the complainant, who may have once been able to testify, is no longer available as a witness due to either death or incapacity.

While empirical studies suggest that familial sexual assault is the most prevalent form of sexual assault against older women in the community, there is a dearth of literature examining its features and effects.

⁷¹ See Eckert & Sugar, *supra* note 54 at 688.e1.

⁷² See *ibid* at 688.e6; Burgess & Phillips, *supra* note 70 at 194; Burgess, *supra* note 17 at 76.

⁷³ See Brozowski & Hall, *supra* note 37 at 1183–84; Burgess et al, *supra* note 62 at 68.

⁷⁴ See Rosen, Lachs & Pillemer, *supra* note 17 at 1073.

⁷⁵ See Burgess et al, *supra* note 62 at 68.

⁷⁶ See Burgess & Phillips, *supra* note 70 at 195–96.

⁷⁷ See Rosen, Lachs & Pillemer, *supra* note 17 at 1073–74.

⁷⁸ See Holly Ramsey-Klawnsnik et al, “Sexual Abuse of Vulnerable Adults in Care Facilities: Clinical Findings and a Research Initiative” (2007) 12:6 J American Psychiatric Nurses Assoc 332 at 334.

⁷⁹ Baker, Sugar & Eckert, *supra* note 51 at 81.

There is even less literature on women who are sexually assaulted in their homes by family members, although the existing studies suggest that familial sexual assault is the most prevalent form of sexual assault against older women in the community. A European Union study, for example, found that 55.4% of sexual abuse against older women was perpetrated by spouses.⁸⁰ Such sexual violence can take several forms. For example, a woman may be sexually assaulted by her spouse over many years, with her vulnerability to this form of domestic violence increasing with age, as her options for supporting herself independently diminish. In addition, older women who themselves have a physical or mental disability may become particularly vulnerable to sexual violence at the hands of their familial caregivers. Their male partners may believe they are entitled to sex with their spouse regardless of her ability to consent.⁸¹ Likewise, women acting as caregivers to family members with dementia may be a victim of sexual violence at the hands of their loved one, particularly where that person is their spouse.⁸² Women in this situation may be particularly afraid that, if sexual violence is reported, their spouse will be removed from their care. Older women may be more likely than their younger counterparts to believe that sexual relationships are private and kept within the family. Women may also not have the support of their family in reporting sexual violence, often because those family members do not believe the allegations or simply want to protect their family mem-

⁸⁰ See UN, Department of Economic and Social Affairs, Division for Social Policy and Development, *Neglect, Abuse and Violence Against Older Women*, UN Doc ST/ESA/351, 2013, at 14.

⁸¹ For literature on the extent to which spousal relationships change where one partner is engaged in significant caregiving, see Jeanne Hayes, Craig Boylstein & Mary K Zimmerman, “Living and Loving with Dementia: Negotiating Spousal and Caregiver Identity through Narrative” (2009) 23:1 *J Aging Studies* 48. In this study, the authors demonstrate that intimacy within couples changes when one spouse is engaged in a significant caregiving role to the other spouse with dementia. For example, women taking care of husbands with dementia reported that the lack of expressions of love, emotional support, and warmth made intimacy difficult. Caregiving husbands were less bothered by these concerns. Women caregivers also reported feeling a conflict between their role as caregiver, which they saw as analogous to mothering, and lover. Men did not report the same concern (see *ibid* at 54–55). Hayes, Boylstein, and Zimmerman’s explanation for these differences is as follows:

[W]ives with [dementia] often had less status and power relative to their husbands throughout their marriage, and this changed little after wives’ diagnosis. ... In contrast, women caring for a cognitively impaired spouse were uncomfortable with continuing sexual relations when husbands’ status changed from competent male provider to child-like and dependent. The identity of husbands receiving care was tarnished more by the illness (*ibid* at 55).

⁸² See Mann et al, *Norma’s Project*, *supra* note 23 at 24.

ber from prosecution.⁸³ It may be even more difficult for older women to contemplate leaving an abusive relationship for various reasons, including financial dependence, lack of access to the work force, and their general health status. “Starting over” may not appear to be a feasible option for women in this situation.

An analysis of the literature reveals that there is a lack of clarity surrounding the relative frequency of sexual violence against older women in institutions and in the community. Most studies suggest that between 23% and 33% of reported sexual assaults against older women take place in care facilities⁸⁴—although these estimates may be low, given the low rates of reporting for institutional sexual assault. Some studies find that a much higher percentage of sexual assaults take place against women in care facilities. For example, a large study of older adults receiving attention from Adult Protective Services conducted in Virginia over a five-year period found that as many as 72% of sexual assaults took place in the institutional context.⁸⁵ The wide variation in statistics across these studies may reflect the different populations under study and the levels of reporting involved. Whatever the correct percentage, these numbers are disproportionate to the percentage of older people living in institutional care, which in Canada has remained relatively stable since 1981 at about 7% of the population over the age of sixty-five⁸⁶—although the percentage may vary across different provinces and territories. As of 2009, the equivalent American statistic was 4%.⁸⁷ Women’s longer life expectancy means that a higher percentage of residents in care are female, especially for those over eighty years of age.⁸⁸ Due to an increase in the older population, however, the actual number of older women living in institutions has increased significantly in recent decades.⁸⁹

Dementia increases the risk of sexual violence against older women more than the risk of physical violence. In one study, for example, 36% of sexual abuse victims in nursing homes had some form of cognitive impairment compared to about 23% of victims of other forms of non-sexual

⁸³ See *ibid* at 20–24.

⁸⁴ See e.g. Baker, Sugar & Eckert, *supra* note 51 at 83 (reporting that 29% (58/198) of those sexually assaulted were living in institutional care).

⁸⁵ See Pamela B Teaster & Karen A Roberto, “Sexual Abuse of Older Adults: APS Cases and Outcomes” (2004) 44:6 *Gerontologist* 788 at 790–91.

⁸⁶ See McDonald et al, *supra* note 60 at 139.

⁸⁷ See US, Department of Health and Human Services, *A Profile of Older Americans, 2011* (Washington, DC: The Department, 2011) at 5.

⁸⁸ See McDonald et al, *supra* note 60 at 139.

⁸⁹ See *ibid*.

abuse.⁹⁰ Dementia represents a risk factor for sexual violence both in institutions and in the home.⁹¹ The presence of dementia increases the risk to women, especially from people they know.⁹² Sexual assault cases become particularly complex where the perpetrator, often another resident in a nursing home, also suffers from dementia, which is overwhelmingly the case in resident-to-resident sexual assaults.⁹³

American studies have demonstrated that where an older woman is living will have an impact on the nature of the sexual assault. Older women living in institutions are most likely to be assaulted by male residents⁹⁴ and paid caregivers.⁹⁵ Caregivers are often repeat offenders who victimize a number of complainants before being detected.⁹⁶ Older women living in their homes are more likely to be sexually assaulted by family members and acquaintances.⁹⁷ In one study of the risk of sexual assault among older women living in their homes, in long-term care facilities, and in homeless settings, 75% of women across the three groups reported knowing the suspected offender.⁹⁸ In institutional settings, service providers accounted for 67% of suspected offenders. Women in institutional settings were more likely to be coerced through an abuse of authority than women in the community, where physical violence was more prevalent.⁹⁹ The researchers found that women living in the community and homeless women were more likely than women living in institutions to be subjected to more violence than that inherent in the sexual assault,¹⁰⁰ a finding that is confirmed by our own case law analysis below. In a 2015 study of police reports of rape among persons over the age of sixty in the United King-

⁹⁰ See Brian K Payne & Randy R Gainey, “The Criminal Justice Response to Elder Abuse in Nursing Homes: A Routine Activities Perspective” (2006) 7:3 *Western Criminology Rev* 67 at 76.

⁹¹ See Burgess & Phillips, *supra* note 70 at 198.

⁹² See *ibid.*

⁹³ See *ibid.*

⁹⁴ See Rosen, Lachs & Pillemer, *supra* note 17 at 1074; Baker, Sugar & Eckert, *supra* note 51 at 84.

⁹⁵ See Payne, *supra* note 19 at 214; Baker, Sugar & Eckert, *supra* note 51 at 84.

⁹⁶ See Payne, *supra* note 19 at 216–19.

⁹⁷ See Karen A Roberto, Pamela B Teaster & Joy O Duke, “Older Women Who Experience Mistreatment: Circumstances and Outcomes” (2004) 16:1–2 *J Women & Aging* 3 at 12; Roberto & Teaster, *supra* note 10 at 489.

⁹⁸ See Baker, Sugar & Eckert, *supra* note 51 at 83 (where approximately 35% of the victims of sexual assault lived at home, 29% resided in an institution, 11% were homeless, and 25% in unknown living arrangements).

⁹⁹ See *ibid* at 83–84.

¹⁰⁰ See *ibid* at 84.

dom, the researchers found that “women aged 60 and over were most likely to be raped by an acquaintance, a partner or husband, or someone else known to them.”¹⁰¹

There is not a great deal of literature on the perpetrators of sexual assault against older women beyond the victim and perpetrator relationship. One English study found that stranger sexual assaults against older women tended to involve younger perpetrators between sixteen and thirty years of age, whereas men perpetrating offences against women known to them, or in care homes, tended to be in an older age group between thirty-one and sixty years of age.¹⁰² Several of the men in the study (who were all offenders) also had a previous record of sexual offences against children. Many of the men indicated that, in the context of stranger assaults that began as robberies, drugs or alcohol emboldened them to commit sexual violence.¹⁰³ Older women were often deliberately targeted because of their perceived vulnerability.¹⁰⁴

B. Criminal Justice Responses

While one must be cautious about applying studies on the American criminal justice system directly to Canada, the American literature on criminal justice responses to elder sexual abuse is at least instructive with respect to trends that warrant investigation in Canada. These studies have shown a disproportionately low rate of prosecution and conviction, particularly for cases of institutional sexual assault. For example, in their review of the criminal justice response to 120 cases of sexual abuse against older women, Burgess and her colleagues found that law enforcement was notified in 96% of cases, the offender was identified in 75% of cases, charged in 55%, and found guilty in approximately 25% of cases.¹⁰⁵ In another study of 82 substantiated sexual abuse cases against female residents in nursing homes, the researchers found that of the 95% of perpetrators identified, only 5% were prosecuted and three convictions were secured.¹⁰⁶ Low prosecution rates may result from evidentiary problems,

¹⁰¹ Bows & Westmarland, *supra* note 1 at 11. Further research is needed in Canada to identify the prevalence of police reports of sexual violence against older women, in order to determine the degree to which non-reporting and the police classification of cases as unfounded are each responsible for the lack of prosecutions.

¹⁰² See Jeary, *supra* note 47 at 333.

¹⁰³ See *ibid* at 337.

¹⁰⁴ See *ibid* at 338–39.

¹⁰⁵ See Ann W Burgess, Nancy P Hanrahan & Timothy Baker, “Forensic Markers in Elder Female Sexual Abuse Cases” (2005) 21:2 *Clinics in Geriatric Medicine* 399 at 406–07.

¹⁰⁶ See Teaster & Roberto, *supra* note 85 at 792.

trouble with witnesses, or delay in or failure to report.¹⁰⁷ Delays in the criminal justice system may also result in the complainant dying or becoming incapable of testifying before the case makes it to trial.

The presence or absence of dementia is also relevant to the criminal justice response.¹⁰⁸ Even though those with dementia often do communicate their distress through behavioural signs,¹⁰⁹ it is extremely difficult to prosecute where the complainant is unable to testify against her perpetrator, unless there were witnesses to the actual abuse. This allows perpetrators to sexually assault women with dementia without any real risk of being held accountable as long as they keep their conduct hidden from witnesses. Thus it is not surprising that offenders in the institutional setting target women with dementia.

III. The Case Law Disconnect

While the social science evidence is somewhat hard to disentangle, it is consistent in finding that women in nursing homes are at an elevated risk of sexual violence relative to the proportion of women living in care facilities. Where women are sexually assaulted in their homes, they are much more likely to be sexually assaulted by persons they know than by strangers, most often by family members. When one looks at the pattern of sexual violence in the Canadian case law, however, there appears to be a significant discrepancy between that pattern and the picture painted by social scientists. Our case law review examined sexual assaults of all levels¹¹⁰ against women over fifty over the last two decades (1995–2015) in every Canadian province and territory. Because we suspected that this type of crime would be vastly under-reported, we wanted to be as inclusive as possible. Our search therefore included other types of decisions that indicated that there had been a criminal trial, such as deportation proceedings¹¹¹ and *Criminal Code* review board decisions.¹¹² We recognize

¹⁰⁷ See Payne & Gainey, *supra* note 90 at 70.

¹⁰⁸ See Burgess & Phillips, *supra* note 70 at 203–04.

¹⁰⁹ See *ibid* at 196, 203–04.

¹¹⁰ Canadian sexual assault law includes three gradations of sexual assault. Level 1 refers to sexual assault, level 2 refers to sexual assault causing bodily harm or sexual assault with a weapon, and level 3 refers to aggravated sexual assault, the most serious form of sexual assault (see *Criminal Code*, *supra* note 53, ss 271–73).

¹¹¹ See *Guzman v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 899, 82 Imm LR (3d) 219 [*Guzman*].

¹¹² See *Re Bodnar*, [2010] ORBD No 1332 (QL), 2010 CarswellOnt 6142 (WL Can); *Re Wurzl*, [2011] ORBD No 1666 (QL), 2011 CarswellOnt 8641 (WL Can); *Re Ratkajec*, [2013] ORBD No 2019 (QL), 2013 CarswellOnt 11581 (WL Can). We also looked for ar-

that reported judgments convey only a piece of the picture for all cases that are prosecuted. Guilty pleas and jury trials, for example, will only be reported where there are written reasons for sentencing or a dangerous offender application. Not all cases heard by judges sitting alone will result in written reasons. Nonetheless, given the dearth of information on this group of complainants, we hope that this preliminary examination of the case law will provide the impetus for more in-depth research.

Out of the over 3,000 cases of sexual assault that we reviewed, we found 111 cases involving sexual violence against older complainants. 109 (98%) of these cases involved older female complainants with only 3 cases, in acute care hospital and seniors' apartment settings, involving male complainants.¹¹³ Our study examined the 109 cases involving female complainants. These 109 cases included 154 complainants because, in several cases, the accused sexually assaulted multiple older women.¹¹⁴ 78 of these cases were identified through extensive case law searches and the remaining 31 were taken from newspaper reports of convictions or sentences. Most of the cases are trial judgments or reasons for sentence. All of the alleged perpetrators were men. 81 of the 109 cases (74%) involved women living in the community, 5 cases involved women in an acute care hospital setting, and 23 cases involved women living in some form of supported living.

bitration decisions that might have dealt with caregivers in the institutional context through employment mechanisms, but no such cases emerged.

¹¹³ One of the cases involving a female complainant also included a male complainant, which explains why these numbers do not add up to 109 (see "Retirement Home Rapes: Court Told Accused Attacked Two Women—Then a Man", *The Province* (18 January 2002) A4 [*Billy*]). See also *Lekiqi*, *supra* note 15; "Surrey Man Charged with Sexually Assaulting Seniors", *The Vancouver Sun* (5 December 1996) B2; Craig Babstock, "Former Nurse Sentenced for Sex Assault: Kevin Lee Tomilson Given Eight Months in Jail for Nursing Home Incident", *The Times & Transcript* (15 January 2011) A6.

¹¹⁴ See *Re Ratkajec*, *supra* note 112 (involving two complainants); *R v Doodnaught*, 2013 ONSC 8022, 112 WCB (2d) 199 [*Doodnaught*] (ten complainants over the age of fifty); *R v SH*, 106 WCB (2d) 608, [2013] OJ No 2031 (QL) (Sup Ct) [*SH Sup Ct*] (two complainants); *R v Brown*, 2013 ONCJ 203, 106 WCB (2d) 140 [*Brown*] (two complainants); *Re Wurzl*, *supra* note 112 (two complainants); *Re Bodnar*, *supra* note 112 (four complainants); *R v Orlias*, 2005 NWTSC 43, 2005 CarswellNWT 31 (WL Can) [*Orlias*] (two complainants); *R v Elbasani*, 2012 BCPC 211, 103 WCB (2d) 335 (two complainants); *R v Nicholas*, [2004] 70 OR (3d) 1, 61 WCB (2d) 9 (Ont CA) (two complainants); *R v Grayer*, 2003 CarswellOnt 9122 (WL Can) [*Grayer Sup Ct*], *aff'd* 2007 ONCA 13, 215 CCC (3d) 505 (four complainants); *R v Burrows*, [2005] OJ No 2173 (QL), 2005 CarswellOnt 2162 (WL Can) (Sup Ct) [*Burrows Judgment*] (eight complainants); *R c Létourneau*, 2008 QCCQ 9624 (available on CanLII) [*Létourneau*] (eleven complainants); Jim Rankin, "Cleaner Faces More Charges: Women Claim They Were Drugged, Sexually Assaulted", *Toronto Star* (18 March 1999) (ten complainants); *Billy*, *supra* note 113 (two female complainants).

With respect to women in supported living situations, there are a number of living arrangements for older women, which can be seen along a spectrum of level of support provided. We have divided these cases into two groups: the first comprises women living in facilities with some support but where the residents lead predominantly independent lives. The second group includes women who are living in a long-term residential care facility, where much more support is provided and residents have a greater dependency on caregivers. Many women in this group have significant cognitive impairments. We draw these lines simply to provide context to the cases presented. The following table provides a summary of the age breakdown of the complainants in these cases.

	Age of Complainant (N = 155)						Total
	50–59	60–69	70–79	80–89	90+	Age Unknown**	
Women living in the community	18	11	31	20	2	11	93
Women in acute care hospital	5	3	5	1	0	0	14
Women in supportive housing*	0	4	10	4	3	8	29
Women in long-term care facilities	0	1	3	4	1	9	18
Total	23	19	49	29	6	28	154

*Includes retirement homes, seniors' apartments and, in one case, a convent

**Included in the sample because of descriptors such as "elderly" used to describe the complainant

A. Women Living in the Community

We found eighty-one cases of men sexually assaulting older women living in the community. These eighty-one cases included ninety-three women because in six cases, the accused was charged with assaulting

more than one woman. Seventy-four of these complainants (80%) were sexually assaulted in their own homes. In the remaining cases, the sexual assaults took place in a public place, for instance when the victim was walking to get groceries¹¹⁵ or walking to meet a family member¹¹⁶. One case involved a seventy-one-year-old homeless Indigenous woman who was sexually assaulted and murdered in the garage in which she had been staying.¹¹⁷

Of these ninety-three women, fifty-six (60%) were sexually assaulted by a stranger, thirty (32%) were sexually assaulted by a neighbour, acquaintance or friend, five (5%) involved sexual assaults by a family member, and in two cases (2%) the nature of the relationship between the complainant and the accused was unclear from the report.¹¹⁸ Of the five cases involving sexual assaults by family members, three cases involved an adult son sexually assaulting his mother,¹¹⁹ including one case that involved the sexual assault of a woman who was the foster and later adoptive mother of the accused.¹²⁰ In one case, the fourteen-year-old accused had sexually assaulted and murdered his grandmother.¹²¹ Only one case involved a spousal sexual assault.¹²² Although the social science evidence

¹¹⁵ See *R v Toews*, 2012 ABQB 283, 103 WCB (2d) 330 [*Toews*].

¹¹⁶ See *R v Nowdlak*, 2012 NUCJ 19, 103 WCB (2d) 685 [*Nowdlak*].

¹¹⁷ See *R v Sam*, 2008 BCCA 169, 425 WAC 96. See also “2006 Year in Review”, *Bremerton Patriot*, (13 July 2006), online: <www.bremertonpatriot.com>.

¹¹⁸ Note that *R v CJD*, 2012 SKQB 101, [2013] 1 WWR 376 [*CJD Judgment*] is counted twice because it involved two complainants: one family member and one acquaintance.

¹¹⁹ See *R v W*, 2002 NWTSC 60 (where the accused was sentenced to six years for the sexual assault of his mother); *R c EN*, 2008 QCCQ 7724 (available on CanLII) (where the accused was sentenced to a global sentence of seven years for the sexual assault and uttering death threats against his mother).

¹²⁰ See *CJD Judgment*, *supra* note 118, where there were a number of complainants, including a woman who had formerly been the accused’s foster mother. The judgment also suggests that she is his adoptive mother which is why we included this case in the family category. This case was reported in the context of a dangerous offender application.

¹²¹ The accused was sentenced to the maximum youth sentence of six years in custody in addition to four years of community supervision (see Mike McIntyre, “Sexual Sadist Goes Back Behind Bars”, *Winnipeg Free Press* (10 October 2012) A4).

¹²² This case involved a seventy-nine-year-old man who sexually assaulted his elderly partner over a two-year period. He was sentenced to two years less a day in jail (see Scott Dunn, “Senior Jailed for Sexual Assaults”, *Sun Times* (13 January 2004) A3). A recent news report brought to light the case of an Ontario woman in her sixties who reported sexual and physical assault by her husband. Although he was found guilty by the trial judge, the sentencing judge declared a mistrial (see Duncan McCue, “Making Her Case”, *CBC News* (29 September 2016), online: <newsinteractives.cbc.ca/longform/making-her-case>). This case did not turn up in our sample because the complainant’s

tells us that only about one quarter of women sexually assaulted while living in the community do not know the perpetrator, over 60% of the cases in our sample involved stranger sexual assaults. We labelled cases as “stranger cases” from the perspective of the complainant based on whether she was familiar with or had met the accused prior to the sexual assault. There were a few stranger cases in which the accused had some distant connection to the victim, such as being an acquaintance of the victim’s nephew¹²³ or a guest of her landlord,¹²⁴ which presumably enabled the accused to identify and target the complainant. A large number of these cases involving women in the community took place in the context of other violent crimes, such as home invasion or break and enter incidents, and involved significant violence beyond that inherent in the sexual assault.¹²⁵

The women in these home invasion cases were often beaten or mutilated,¹²⁶ and left for dead.¹²⁷ Eleven of these women were killed in the course of the sexual assault.¹²⁸ Many of these cases involved very elderly women who were targeted because of their evident physical vulnerability. There was evidence of cognitive decline or dementia for only one of these women.¹²⁹ One cannot overstate the devastation caused to the women in these cases. Many women had to leave their lifelong homes,¹³⁰ enter insti-

age was never mentioned in any of the judgments, highlighting how aging can be rendered invisible in these cases.

¹²³ See *R v Kootoo*, 2000 NUCJ 8 (available on CanLII).

¹²⁴ See *R v Moosomin*, 2012 SKQB 386, 406 Sask R 166.

¹²⁵ We identified forty-four cases involving robbery and/or break and enter in this group of cases.

¹²⁶ See e.g. *R v Noiles*, 2012 NSPC 113, 323 NSR (2d) 109 [*Noiles*]; *Orlias*, *supra* note 114; *R v Esquega*, 83 WCB (2d) 377 (available on CanLII) [*Esquega*].

¹²⁷ See e.g. *R v Foster*, 69 BCAC 115, 29 WCB (2d) 348 [*Foster*]; *R v CE*, 2013 ONSC 798, 106 WCB (2d) 264 [*CE*].

¹²⁸ There was one manslaughter conviction and ten first- or second-degree murder convictions. Of the eleven convictions, six involved a stranger, two involved an acquaintance, and the remaining three involved a friend, a neighbour, and a grandson of the victim. Eight of the murders took place in the victim’s home, one took place on a public pathway, one in the offender’s home, and the other is unclear.

¹²⁹ See *R v Osecap*, 2004 CarswellSask 955 [*Osecap* QBD], *aff’d* 2006 SKCA 69, 289 Sask R 4 [*Osecap* CA].

¹³⁰ See e.g. *Grayer* ONSC, *supra* note 114; *R v Dahlnas*, 2004 BCCA 405, 200 BCAC 155 [*Dahlnas*]; *Noiles*, *supra* note 126; *R v Morin*, 2013 ABPC 4 (available on CanLII) [*Morin*].

tutional care, and some suffered permanent injury, major depression, and significant deterioration of their overall health.¹³¹

There were 83 accused in these cases. They were often very young men—sometimes teenagers¹³² with troubled backgrounds. Of those accused from actual case reports, 30% were identified as Indigenous.¹³³ Several had repeatedly targeted older women.¹³⁴

Eight cases, or nearly 10%, involved accused persons charged with the most serious form of sexual assault, aggravated sexual assault (level 3),¹³⁵ and fourteen cases involved a charge of sexual assault causing bodily harm (level 2).¹³⁶ This is much higher than the charging rate for level 2 and 3 sexual assault in the general population, which together make up less than 5% of sexual assault charges.¹³⁷ It has been suggested that police officers generally tend to charge the lowest level of sexual assault

¹³¹ See e.g. *Grayer* ONSC, *supra* note 114, involving four complainants over the course of fifteen years, ranging in age from seventy-four to eighty-three. All four women suffered from depression, experienced severe health problems, and were unable to return to their homes after the assault. See also *Toews*, *supra* note 115; *R v Anderson*, 2011 ONSC 5551, 97 WCB (2d) 410 [*Anderson*]; *R v JW*, 2014 ABPC 234, 116 WCB (2d) 662 [*JW*]; *R v LCW*, 2000 SKQB 302, 195 Sask R 1 [*LCW*].

¹³² See e.g. *R v Fash*, 2000 ABCA 244, 266 AR 336 [*Fash*]; *JW*, *supra* note 131; *Esquega*, *supra* note 126; *R v Robson*, 2008 ONCA 153, 78 WCB (2d) 232; *CE*, *supra* note 127.

¹³³ It was impossible to identify whether the accused was Indigenous in the cases identified through newspaper sources. It was difficult to determine whether the complainant in our cases was Indigenous because, while it was occasionally mentioned, this information was not consistently provided.

¹³⁴ See e.g. *Noiles*, *supra* note 126; *R v Rindero*, 45 WCB (2d) 187 (available on CanLII) [*Rindero* Sup Ct], rev'd 2002 BCCA 619, 174 BCAC 262 [*Rindero* CA]; *CJD* Judgment, *supra* note 118; *Grayer* Sup Ct, *supra* note 114.

¹³⁵ See *Dahlnas*, *supra* note 130; *Osecap* QBD, *supra* note 129; *Anderson*, *supra* note 131; *Toews*, *supra* note 115; *Nowdlak*, *supra* note 116; *CE*, *supra* note 127; *JW*, *supra* note 131; “20-Year Term for Rape, Setting Fire to Woman”, *Edmonton Journal* (27 March 1996) A3.

¹³⁶ See *R v Caron*, 1995 CarswellOnt 3710 (WL Can) (Ct J (Gen Div)), aff'd 37 WCB (2d) 430, 1998 CarswellOnt 1216 (WL Can) (CA); *R v Berikoff*, 2000 BCSC 1024, 47 WCB (2d) 29 [*Berikoff*]; *LCW*, *supra* note 131; *R v Paibomsai*, 71 WCB (2d) 967 (available on CanLII) (Sup Ct) [*Paibomsai*]; *R v Dorfer*, 2009 BCSC 202, 81 WCB (2d) 802 [*Dorfer*]; *Noiles*, *supra* note 126; *Morin*, *supra* note 130; *SH*, *supra* note 114; *R v Taillefer*, 2015 ONSC 2357, 121 WCB (2d) 509; *R v McLaughlin*, 2014 ONSC 6537, 118 WCB (2d) 314 [*McLaughlin*]; Tracy Huffman, “Delusional Man Not Criminally Responsible”, *Toronto Star* (18 May 2001) B5 [*Young*]; “Man Jailed for Assault on Senior”, *Peterborough Examiner* (17 January 2004) A5; Valerie Rossi, “Crown Pushing for Dangerous Offender Status for Guilty Teen: Trail Senior Attacked in ‘08”, *Trail Times* (23 September 2010) 1; Rochelle Baker & Tom Zytaruk, “Police Warn of Sex Offender: Teen Rapist Posed as Charity Worker to Assault Senior”, *Abbotsford Times* (12 April 2011) 1.

¹³⁷ See *Johnson*, *supra* note 16 at 618–19 (reporting that in 2007, 98% of all sexual assaults were recorded as level 1 by police).

even where there is evidence that could support a more serious charge.¹³⁸ This phenomenon does not appear to have been present in our sample of older women.

It is impossible to draw meaningful conclusions about the conviction rate in our sample because many of our cases were sentencing decisions; however, what is striking is that there were only two acquittals in this group of cases, one of which was overturned on appeal.¹³⁹

It was striking to us how many of these cases were reported in the context of a dangerous offender application. Of the eighty-one cases, seventeen (21%) involved dangerous offender applications¹⁴⁰, a much higher rate than that generally found in sexual assault prosecutions.¹⁴¹ The Crown's application succeeded in twelve of these cases, resulting in an indeterminate period of incarceration.¹⁴² A long-term supervision order was

¹³⁸ See Janice Du Mont, "Charging and Sentencing in Sexual Assault Cases: An Exploratory Examination" (2003) 15:2 CJWL 305 at 313–14. While it might appear that the charges are more serious for older women because the crimes are much more violent, in fact with younger women it has been suggested that even where weapons are present or where bodily harm is caused, more serious sexual assault charges are often not laid. Given that sexual assaults with more serious violence are more likely to be reported to the police, one might expect higher amounts of level 2 or 3 (see Johnson, *supra* note 16 at 619–21).

¹³⁹ In Bob Beaty, "Senior Not Guilty in Rape Case", *Calgary Herald* (10 October 1998) B7, the accused was a seventy-eight-year-old male who was acquitted of sexually assaulting a female friend. He testified that she had consented, and only brought the charges forward because she was "jealous" that he was with another woman. In *SH*, the accused was a friend and neighbour of the two elderly victims (*supra* note 114). He was found by the trial judge to have been in a state of automatism at the time of the assaults and so was declared not guilty. This acquittal was set aside on appeal and a new trial was ordered (see *R v SH*, 2014 ONCA 303, 310 CCC (3d) 455).

¹⁴⁰ See *Berikoff*, *supra* note 136; *LCW*, *supra* note 131; *R v McCallum*, 77 WCB (2d) 339, [2007] OJ No 5415 (QL) (Sup Ct) [*McCallum*]; *R v Wolfe*, 2001 SKQB 66, 202 Sask R 1 [*Wolfe*]; *Grayer* ONSC, *supra* note 114; *R v Howdle*, 2003 SKQB 305, 58 WCB (2d) 534 [*Howdle*]; *R c Harding*, 2006 QCCQ 12956 (available on CanLII) [*Harding*]; *R v Bird*, 2007 NSPC 73, 75 WCB (2d) 557 [*Bird*]; *Létourneau*, *supra* note 114; *Dorfer*, *supra* note 136; *Toews*, *supra* note 115; *McLaughlin*, *supra* note 136; *R v Burrows*, [2006] OJ No 5239 (QL), 2006 CarswellOnt 9785 (WL Can) (Sup Ct) [*Burrows* Sentence]; *Pai-bomsai*, *supra* note 136; *Funk*, *supra* note 118; *R v CJD*, 2012 SKQB 198, [2013] 1 WWR 397 [*CJD* Sentence]; *Rindero* Sup Ct, *supra* note 134.

¹⁴¹ We recognize that dangerous offender proceedings may be over-represented in the sample of reported cases. That is, dangerous offender hearings are likely to lead to written reasons, given the serious consequences they entail. The same would be true, however, for dangerous offender proceedings with younger complainants; thus, the high rate of these applications for older women is still noteworthy.

¹⁴² See *Berikoff*, *supra* note 136; *LCW*, *supra* note 131; *McCallum*, *supra* note 140; *Wolfe*, *supra* note 140; *Grayer* Sup Ct, *supra* note 114; *Howdle*, *supra* note 140; *Harding*, *supra* note 140; *Bird*, *supra* note 140; *Létourneau*, *supra* note 114; *Dorfer*, *supra* note 136; *Toews*, *supra* note 115; *McLaughlin*, *supra* note 136.

imposed in four of the cases¹⁴³ and in the remaining case there is no record of the outcome.¹⁴⁴ In one additional case, the Crown sought and obtained a long-term offender designation.¹⁴⁵ Where dangerous offender proceedings were not brought, the sentences imposed in these cases were significant, ranging from eighteen months of incarceration to life imprisonment. In only one case was the accused allowed to serve the sentence in the community,¹⁴⁶ and in thirty-three cases the accused received sentences of ten years or more—although these sentences were often imposed for multiple offences, not just the sexual assault.¹⁴⁷ In two of the cases involving women attacked in their homes, the accused were found not criminally responsible on account of mental disorder.¹⁴⁸

Thus we found no evidence that men who sexually assaulted older women living in the community were not being given significant sentences, as is sometimes alleged for younger women. The sentences imposed for this group of accused are the harshest sentences imposed for any of the cases we identified. Just as with younger women, the harshest sentences are usually given to sexual assaults committed by strangers in the context of violent break-ins. However, when we looked at the level 1 sexual assault cases involving women living in the community, where there was no violence beyond that involved in the sexual assault, the average sentence where the accused was a stranger was approximately seven years, whereas the average sentence for someone known to the complainant was approximately three years. While these numbers are incomplete because the sentences were not available in all cases, the difference is sufficient to at

¹⁴³ See *Burrows Sentence*, *supra* note 140; *Paibomsai*, *supra* note 136; and *Funk*, *supra* note 118 (where the offenders were designated as long-term offenders and long-term supervision orders were imposed); *CJD Sentence*, *supra* note 140 (where the offender was designated a dangerous offender and a long-term supervision order was imposed).

¹⁴⁴ See *Rindero CA*, *supra* note 134, where the appeal by an offender of his dangerous offender designation and indeterminate sentence was allowed and a new hearing ordered. There is no record of the outcome of the subsequent hearing.

¹⁴⁵ See *R v Porter*, 2007 YKTC 37, 74 WCB (2d) 662.

¹⁴⁶ See *R v Hall*, 2010 ABCA 165, 487 AR 182. In this case, the accused was given a fifteen-month conditional sentence for fondling an eighty-one-year-old woman after he impersonated a massage therapist. The pre-sentence psychological report stated that the thirty-five-year-old accused lacked emotional maturity because of his abusive upbringing. After the accused had served five months, his sentence was appealed by Crown on the basis that a conditional sentence order was not allowed under the *Criminal Code*. The conditional sentence order was set aside and replaced with a sentence of time served.

¹⁴⁷ See e.g. *Foster*, *supra* note 127; *Fash*, *supra* note 132; *Dahlnas*, *supra* note 130; *Osecap CA*, *supra* note 129; *R v Beatty*, 2006 ONCJ 468, 72 WCB (2d) 76; *R v Cormier*, 2012 NBCA 76, 393 NBR (2d) 118; *Noiles*, *supra* note 126.

¹⁴⁸ See *R v Branton*, 2004 NSSC 51, 222 NSR (2d) 203; *Young*, *supra* note 136.

least warrant further investigation. This significant differential suggests that stranger sexual assaults may still be seen as inherently more serious even when they did not necessarily involve more violence.

Our case law search certainly suggests that there is a gap in the cases where charges are proceeded with. In a period of twenty years, we only found five cases where family members sexually assaulted older women living in the community, a number which seems dramatically low even taking into account the barriers to reporting. Of these five, only one involved a spousal sexual assault and there were no cases involving caregivers as perpetrators or as complainants. If one used this case law as a guide, one would think that sexual violence against older women is largely a problem of strangers breaking into women's homes. We can only speculate that, in cases involving family members or caregivers, the police may never be called, or cases may be screened out or dealt with by adult protection mechanisms, rather than resulting in criminal charges.¹⁴⁹

B. Women in Acute Care Hospital Settings

We found five cases involving fourteen older complainants in acute care hospitals where the case report suggested that complainants may have been only short-term patients in the facilities.¹⁵⁰ As a result, it is difficult to characterize these cases based on where the woman is living. Four out of five of the hospital cases involved doctors or caregivers as accused¹⁵¹ and one involved another patient.¹⁵² In one of these cases, an anesthesiologist sexually assaulted twenty-one female patients ranging in

¹⁴⁹ In our interview with one Vancouver support organization for victims of sexual violence on 1 February 2016, we were informed that, in recent years, the organization has received thirteen to fourteen complaints of sexual violence per year from women over sixty-five years of age living in the community in the Vancouver area alone. Virtually all of these cases involved a family member as the alleged perpetrator.

¹⁵⁰ See *R v Cocchio*, 56 WCB (2d) 645, 2003 CarswellOnt 767 (WL Can) (Sup Ct) [*Cocchio*]; *R v Poupart*, 2010 QCCA 1956, 283 CCC (3d) 57 [*Poupart*]; *Doodnaught*, *supra* note 114; Michael Aubry, "Gatineau Orderly Pleads Guilty to Sexually Exploiting 99-Year-Old Alzheimer's Patient", *Ottawa Sun* (23 October 2012), online: <www.ottawasun.com> [*Laplante*]; Sarah Simpson, "Man Gets 90 Days Jail for Hospital Sexual Assault: Changes since 83-Year-Old Attacked", *Cowichan Valley Citizen* (1 February 2013) 1 [*Hill*].

¹⁵¹ In *Poupart*, *supra* note 150 and *Laplante*, *supra* note 150, the accused were hospital attendants; in *Cocchio*, *supra* note 150, the accused was a nurse; and in *Doodnaught*, *supra* note 114, the accused was a doctor.

¹⁵² See *Hill*, *supra* note 150.

age from twenty-five to seventy-five; there was no suggestion that he was targeting older women in particular.¹⁵³

C. *Women Living in Supported Settings*

We found twenty-three cases involving a total of forty-seven complainants living in various degrees of supported care. In this section, we subdivide these cases based on the level of support provided.

1. Women Living in Seniors' Apartments or other Supported Housing

Nine men were charged with sexually assaulting a total of twenty-nine women living in seniors' apartment buildings where there was some support provided but the women led largely independent lives.¹⁵⁴ Six of these cases involved attacks by strangers,¹⁵⁵ one involved a sexual assault by a maintenance worker,¹⁵⁶ and two were sexual assaults by another resident.¹⁵⁷ The cases in seniors' apartments resembled community cases more than other institutional cases, particularly in their brutality. Only one accused argued that the complainant had consented.¹⁵⁸ Six of the eight offenders received penitentiary time,¹⁵⁹ including one life sentence, which followed a conviction for manslaughter (where the complainant died in the hospital one month after a particularly violent sexual assault),¹⁶⁰ and there was one dangerous offender designation.¹⁶¹

¹⁵³ See *Doodnaught*, *supra* note 114.

¹⁵⁴ See *R v Cheddesingh*, 60 OR (3d) 721, 168 CCC (3d) 310 (ONCA) [*Cheddesingh*]; *Burrows* Judgment, *supra* note 114; *R c GR*, 2005 CanLII 15308, 2005 CarswellQue 2678 (WL) (CQ crim & pén) [*GR*]; *R v Carnovale*, 2012 ONSC 6854, [2012] OJ No 5829 [*Carnovale*]; *R c Bilodeau*, 2015 QCCQ 1601 (available on CanLII) [*Bilodeau*]; *R v McPherson*, 2013 BCPC 250, 109 WCB (2d) 308 [*McPherson*]; "Man Gets Prison Time for Assault on Woman, 61", *Expositor* (13 February 2004) B12 [*Verrier*]; *Billy*, *supra* note 113.

¹⁵⁵ See *Cheddesingh*, *supra* note 154; *GR*, *supra* note 154; *Burrows* Judgment, *supra* note 114; *Verrier*, *supra* note 154; *Billy*, *supra* note 113.

¹⁵⁶ See *Carnovale*, *supra* note 154.

¹⁵⁷ See *Bilodeau*, *supra* note 154; *McPherson*, *supra* note 154.

¹⁵⁸ See *McPherson*, *supra* note 154.

¹⁵⁹ See *Burrows* Sentence, *supra* note 140; *Cheddesingh*, *supra* note 154; *GR*, *supra* note 154; *McPherson*, *supra* note 154; *Verrier*, *supra* note 154. Note that for the case of *Carnovale*, *supra* note 154, involving a sexual assault on a woman with an intellectual disability by a maintenance worker, we were unable to track down the ultimate sentence.

¹⁶⁰ See *Cheddesingh*, *supra* note 154. See also *Burrows* Judgment, *supra* note 114.

¹⁶¹ See *Létourneau*, *supra* note 114.

There was one case—*R. v. McPherson*¹⁶² (*McPherson*)—which took place in an Indigenous Elders’ Lodge, which we include in this category, although we recognize that this is not a perfect fit. This was the only case in this group in which consent was a live issue at trial. In *McPherson*, the accused and one of the complainants were in an intimate relationship and both were residents of the facility. The complainant acquiesced to sexual intercourse with the accused because he was acting strangely and she wanted to calm him down before he became more violent. He then violently assaulted a younger staff member in the facility. The trial judge quickly dismissed the suggestion that the first complainant had voluntarily consented to the sexual activity.¹⁶³

We have also included one case in this category that involved an accused who sexually assaulted eleven complainants, including ten nuns between the ages of sixty-two and ninety-one in a Quebec convent, even though it does not clearly fit into any of our categories. In this case, the accused pretended to be a doctor treating friends or relatives of the nuns for various sexual health conditions (e.g., for conditions involving elevated levels of sexual hormones). The accused would show the nuns how to “help” their friends or relatives in various sexual ways. This case was reported in the context of a successful dangerous offender application.¹⁶⁴

2. Women Living in Long-Term Residential Care

We found only fourteen cases where complainants were clearly identified as living in long-term residential care (LTRC).¹⁶⁵ These are facilities that provide a high level of support including feeding, dressing, bathing, and administering medications where required. These fourteen cases involved a total of eighteen complainants. Seventeen of these complainants

¹⁶² *Supra* note 154

¹⁶³ See *ibid* at paras 8–13.

¹⁶⁴ See *Létourneau*, *supra* note 114 at paras 1, 6–14.

¹⁶⁵ See *R v Ashley-Pryce*, 2004 BCCA 531, 63 WCB (2d) 566 [*Ashley-Pryce*]; *R v Okumu*, 2006 ABQB 856, 410 AR 366 [*Okumu*]; *Brown*, *supra* note 114; *R v Lizzi*, 2 CR (5th) 95, 32 WCB (2d) 290 (Ont Ct J (Gen Div)) [*Lizzi*]; *Guzman*, *supra* note 111; *Re Bodnar*, *supra* note 112; *Re Wurzl*, *supra* note 112; *Re Ratkajec*, *supra* note 112; *R c Tardif*, 2014 QCCQ 1608 (available on CanLII) [*Tardif*]; “Priest Sentenced for Touching”, *The Globe and Mail* (20 September 2000) A4 [*Fryer*]; “Man to be Sentenced in Sexual Assault Case Involving Senior Citizen”, *Daily Gleaner* (23 February 2010) A1 [*MacDonald*]; Paige Parsons, “No Charges Laid in Alleged Sex Assault at Kipnes Centre”, *Edmonton Journal* (25 July 2015) A4; Ryan Cormier, “Violent Rapist Gets Life Sentence: Elderly Victim Died After Assault During Break-in at Seniors Home”, *Edmonton Journal* (5 September 2013) A3 [*Witzaney*]; Mike McIntyre, “18 Months in Jail for ‘Reprehensible’ Attack on Senior”, *Winnipeg Free Press* (11 March 2015) B3 [*Wendel*].

suffered from a cognitive disability or dementia.¹⁶⁶ In *R. v. Okumu (Okumu)*, for example, the accused, a caregiver, was found having sexual intercourse with a ninety-one-year-old woman with advanced dementia.¹⁶⁷ Of the fourteen accused, there were five male employees of the facility,¹⁶⁸ four residents,¹⁶⁹ two volunteers at the facility (including a priest),¹⁷⁰ two relatives or acquaintances of another resident,¹⁷¹ and one was a stranger.¹⁷² In some of the caregiver cases, there was evidence suggesting that the incident in question was not the first time the accused had sexually assaulted someone under his care.¹⁷³ In almost all of these cases, there was someone who witnessed the assault(s), which made prosecution possible, because complainants were unable to bring their own complaints. In three of the cases, the accused was found unfit to stand trial on account of mental disorder,¹⁷⁴ and in one of the cases, no charges were laid because the investigators determined that the alleged perpetrator was incapable of forming

¹⁶⁶ See e.g. *Ashley-Pryce*, *supra* note 165; *Okumu*, *supra* note 165; *Brown*, *supra* note 114; *Tardif*, *supra* note 165.

¹⁶⁷ The judge could not determine from the evidence that actual penetration occurred but the accused “was found, with his pants and underwear down, standing between the victim’s legs which were up on his shoulders, making thrusting movements with his pelvis in and out towards the victims exposed genital area” (*Okumu*, *supra* note 165 at para 2).

¹⁶⁸ See *ibid*; *Guzman*, *supra* note 111; *Tardif*, *supra* note 165; *Brown*, *supra* note 114; *Ashley-Pryce*, *supra* note 165.

¹⁶⁹ See *Re Wurzl*, *supra* note 112; *Re Bodnar*, *supra* note 112; *Re Ratkajec*, *supra* note 112; *Parsons*, *supra* note 165. In *Re Wurzl*, the accused was charged with sexual assault as well as indecently interfering with a dead human body by committing a sexual assault. In *Re Ratkajec*, the accused was charged with two counts of sexual assault, one against another resident, and one against a resident in his wife’s nursing home.

¹⁷⁰ See *Fryer*, *supra* note 165; *MacDonald*, *supra* note 165.

¹⁷¹ See *Lizzi*, *supra* note 165 (relative); *Wendel*, *supra* note 165 (acquaintance). It should be noted that *Ratkajec*, *supra* note 112 also involved a sexual assault against an acquaintance. We have included this case as one involving a resident and have not included it in this category to avoid counting the case twice.

¹⁷² See *Witzaney*, *supra* note 165.

¹⁷³ See e.g. *Poupart*, *supra* note 150 at para 14 (the accused had a prior conviction for a “similar offence” in 1996, where he was sentenced to a term of two years less a day and was ultimately pardoned); *R v Okumu*, [2005] AJ No 472 (QL) (Alta Prov Ct (Crim Div)) (while there were no prior convictions for sexual assault, there was evidence that the accused had acknowledged to a staff member that “This is not the first time” at para 35). See also *Brown*, *supra* note 114.

¹⁷⁴ See *Re Bodnar*, *supra* note 112 (the accused with Alzheimer’s dementia, was found unfit to stand trial on seven charges of sexual assault against seven women, all of whom had dementia and each of whom lived in one of several facilities the accused had been a resident of); *Re Wurzl*, *supra* note 112 (the accused was found unfit to stand trial due to dementia); *Re Ratkajec*, *supra* note 112 (the accused was found unfit to stand trial for both charges of sexual assault due to his level of dementia).

the requisite *mens rea* for sexual assault.¹⁷⁵ Given the high rate of dementia among the complainants in the LTRC cases, it is not surprising that none of the accused in these cases directly challenged the assertion of non-consent. In fact, the complainants were overwhelmingly absent in these cases; other witnesses described what had happened and what the long-term consequences of the assault were for the complainants. The women themselves had no voice.

In two of the LTRC cases involving caregivers, the accused argued that he was simply providing nursing care and thus that the touching in question was not sexual. For example, in *R. v. Brown*,¹⁷⁶ the accused worked in a locked unit for residents with Alzheimer's disease. He was charged with sexually assaulting two women living at the facility. With the first complainant he had been seen groping the "cheek of her bum" followed by smiling and smirking.¹⁷⁷ The accused alleged that he had simply been checking her diaper (in a hallway with other people present), even though she was not one of his patients that day.¹⁷⁸ The trial judge had a reasonable doubt as to whether the accused had a sexual purpose and acquitted him on this count. The accused was also seen by two people in the bathroom with the second complainant who was sitting naked on the toilet facing the accused. He had his pants and underwear down at his feet and was standing in front of her. He claimed that the complainant had been playing a game with him and that she pulled his pants down. He testified that he did not pull them back up because he was focusing on her care first. Here the trial judge rejected his explanation that he had been caring for the complainant and convicted the accused of sexual assault.¹⁷⁹

These LTRC cases were different than those against women living in the community. Rarely was any violence beyond that inherent in the sexual assault involved, and there were no cases involving charges more serious than level 1 sexual assault. Particularly where the accused was a caregiver, the sexual assaults may have been one incident within a pattern of sexual assaults by the accused. As with other categories, it is impossible to discuss conviction rates meaningfully from our sample. Nonetheless, it is noteworthy that there was only one acquittal in this category.

¹⁷⁵ In this case, the accused, a resident with Parkinson's disease, sexually assaulted a resident with dementia at their long-term care facility (see Parsons, *supra* note 165).

¹⁷⁶ *Supra* note 114.

¹⁷⁷ *Ibid* at para 14.

¹⁷⁸ See *ibid* at para 17.

¹⁷⁹ See *ibid* at paras 1, 51–61.

ry.¹⁸⁰ With respect to sentencing, these cases tended to receive lower sentences than the level 1 sexual assaults against women in the community, although they still attracted significant sentences compared to sexual assaults of younger women.¹⁸¹ In *Okumu*, the accused was sentenced to five years of imprisonment for having sexual intercourse with the ninety-one-year-old complainant.¹⁸² In *R. v. Ashley-Pryce*, an eighteen-month jail sentence was imposed and upheld on appeal for a care worker who masturbated while holding the hand of an elderly woman with Alzheimer's disease.¹⁸³ The most striking thing about this group of cases is really how small it is given the twenty-year period under study, which suggests that current policies for dealing with sexual violence in these institutions are still inadequate.

The cases involving women in supported living settings suggest to us a number of conclusions that merit further research. The fact that there are very few cases in which women in supported but semi-independent residences report sexual assault by caregivers underscores the vulnerability of these women. They require at least some support in their daily living and yet their relative capacity and independence means that they are often interacting with caregivers in ways that are completely private and unsupervised. It is important that these women know their rights to be free from unwanted sexual contact and receive clear channels for reporting abuse.

For women in long-term residential care, almost all of the cases involve victims with dementia or other cognitive impairments. These cases relied on the evidence of other witnesses to the abuse. Where the abuse was inflicted by another resident, this raises complex issues of the suitability of the criminal justice system to prosecute those with mental impairments. Most of these cases in our sample went through the forensic mental health system, which may also be ill-equipped to deal with accused who themselves have dementia. Where the abuser was a staff member, abusers would either deny sexual contact, or explain or justify their behaviour as part of caregiving.

¹⁸⁰ See *Lizzi*, *supra* note 165, where the accused was a relative of a resident at the victim's nursing home. The victim had Alzheimer's disease and could not report the assault. The accused was convicted and sentenced to three months in prison; however, the conviction was replaced with an acquittal on appeal.

¹⁸¹ The median custodial sentence for sexual assault in Canada in 2013–2014 was 300 days (see Statistics Canada, *Adult Criminal Court Statistics*, *supra* note 18 at 24).

¹⁸² See *Okumu*, *supra* note 165 at para 22.

¹⁸³ See *Ashley-Pryce*, *supra* note 165 at paras 2, 11–12.

Preventing and detecting sexual abuse of older women by caregivers requires that clear standards be set for interactions between caregivers and clients, and that a team approach to care be instituted to ensure adequate supervision of clients, particularly those with cognitive impairments.

Conclusions

The sexual assault of older women is a problem that deserves more attention from researchers and the criminal justice system. With an aging population, the number of such assaults is likely to increase. In Canada, studies of the problem are almost entirely lacking and, even looking more broadly, reports tend to measure different things in different ways, often obscuring sexual violence by combining various forms of abuse under the label of “elder abuse”, making the drawing of reliable conclusions difficult.

The case law that we do have suggests a number of things about the treatment of sexual violence against older women by the criminal justice system that merit further study. First, the available cases of sexual assault against older women resemble sexual assault cases in the general population prior to the reforms of the 1980s and 1990s.¹⁸⁴ Cases involving stranger assaults with significant additional violence are the majority, even though we know these make up only a small minority of sexual assaults. Non-consent is not contested in these cases, not necessarily because the victims lack the capacity to consent to sexual activity, but because of the degree of additional violence and the lack of any relationship between the offender and the victim. Courts have little difficulty recognizing the grave harms of such assaults and sentence offenders accordingly, often to the most severe sentence available in Canadian criminal law: an indeterminate sentence as a dangerous offender. Many of these accused appear to be serial offenders whose behaviour is not successfully interrupted until they cause grave harm or death to their victims. This requires targeted early interventions that give careful consideration to the root causes of such assaults, often committed by very young men with deeply troubled backgrounds.

Second, we found reference to only one case involving a sexual assault by a spouse. It is simply not believable that spousal sexual assaults are not happening for this group of women, particularly in light of the social science evidence to the contrary. It is important to recognize that sexual assault, and its effects, cumulate throughout the lifespan. Older women and younger women are the same women at two different points in time.

¹⁸⁴ See Benedet, *supra* note 14 at 131–35.

Thus, a woman who is sexually abused by her spouse earlier in the relationship and who is unable to leave may see that abuse continue, sometimes in different forms, as they age. Where one of the spouses becomes cognitively impaired, sexual assault may appear for the first time or intensify later in life. Women with dementia may be vulnerable to sexual demands from husbands they no longer recognize, while women who are caring for men with dementia may have to cope with changes in a spouse's behaviour, including the display of sexual aggression. We believe that this type of sexual abuse is the least likely to be reported, much as is true for spousal sexual assaults in the general population. In fact, many older women will have entered their relationships decades before the repeal of the marital rape exemption¹⁸⁵ and may not know that they have the right to refuse such demands.

Third, with respect to women in supported care, different features and complexities emerge. In cases where the offender is a staff member or caregiver, the key challenge is finding sufficient evidence to prove the behaviour occurred, given that women who have significant cognitive disabilities may be targeted precisely because they will be unable to bring a complaint. Offenders may try to explain their behaviour as part of providing intimate personal care or as something unexpectedly initiated by the complainant. We believe that such challenges mean that many, and probably most, of these cases are never reported to police, even if they come to the attention of facility managers. At a minimum, these risks demand staffing protocols that will minimize the risk of such abuse.¹⁸⁶ Because these women may be unable to communicate what has happened to them, staff must be alert to subtle behavioural signs that sexual abuse has taken place.

In cases where the offender is a fellow resident of the complainant, it is even more difficult to assess the appropriate role of the criminal justice system. In our sample, these perpetrators, when charged, were usually found unfit to stand trial. This is a particularly pressing problem given

¹⁸⁵ See Canada, Bill C-127, *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, 1st Sess, 32nd Parl, 1982, cl 6 (assented to 27 October 1982), SC 1980-81-82-83, c 125, amending s 143 of the *Criminal Code*, RSC 1970, c C-34.

¹⁸⁶ In an interview with one of the authors on 13 August 2015, the British Columbia Seniors Advocate, Isobel Mackenzie, indicated that the absence of complaints to police in these cases makes it very difficult for employers to dismiss an employee suspected of sexual assault.

that these individuals may be at a particularly high risk of re-offending in their new facility with no recourse for potential complainants.¹⁸⁷

Finally, cases involving charges of sexual assault against a woman in long-term care committed by a family member are noticeable by their absence. In our interviews with those working in the field, the issue of ongoing sexual activity between spouses, where one spouse has advanced dementia, is a significant issue for staff at these facilities. We plan to explore sexual assault in long-term care facilities in more detail in a subsequent article and to investigate police reports of sexual violence with a view to identifying at what stage these complaints are being filtered out.

Older women face unique challenges in reporting sexual violence. Before we can make progress in minimizing this kind of violence, we have to acknowledge that it is happening and take steps to bring it into public consciousness. We have made significant gains in recognizing the prevalence of sexual violence for younger women over the past three decades, particularly in the area of familial and acquaintance sexual assault. Many of these gains have been made as a result of advocacy on the part of the women's movement. As this generation of women ages, we would hope that older women will be brought into the conversation about sexual violence and that activists will recognize and confront the range of legal and social challenges faced by this group of women. We hope that the information provided in this article will challenge other Canadian researchers to begin to explore this pressing, yet largely invisible, social problem.

¹⁸⁷ The British Columbia Seniors Advocate recently launched an inquiry into inter-resident violence in nursing homes. The inquiry was launched following reports that there were approximately 550 incidents of inter-resident violence resulting in harm at British Columbia care facilities in 2014–2015. This number does not isolate sexual violence (see Dirk Meissner, “B.C. Senior’s Advocate to Probe Deadly Violence Within Care Homes”, *The Canadian Press* (27 January 2016), online: <www.ctvnews.ca>).

