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Me Too? The Invisible Older Victims of Sexual Violence

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ME TOO? THE INVISIBLE OLDER VICTIMS OF
SEXUAL VIOLENCE

*Ruthy Lowenstein Lazar**

A review of legal research on violence against women and elder abuse reveals a disturbing picture. There is hardly any American legal research examining sexual abuse of older women and its conceptualization in legal literature and treatment in the legal system.

This Article attempts to fill the abovementioned gap and to bring the hidden issue of sexual violence against older women to light. Scholars writing on rape, violence against women, and elder abuse tend to analyze age and gendered sexual violence separately from each other, without accounting for their interplay. This Article proposes a conceptual framework of sexual abuse of older women that integrates age and gender in the analysis.

To achieve this end, this Article examines 109 publicly available American cases involving sexual violence against women over the age of 60, between the years 2000 and 2018, which are based on a search of 1,308 American cases. Based on this new empirical database, this Article offers an opportunity for analyzing the social and legal “taboo” regarding sexual abuse of older women.

Despite findings indicating that sexual abuse of older women (and older people in general) is a significant issue creating serious consequences for victims, the Article shows that legal actors, social workers, health professionals, family members, and society miss its signs. Sexual abuse of older women is being noticed and treated by the criminal justice system only when it reflects a “real rape”¹ scenario. The obstacles to effective prosecution and to full access to the criminal justice system are distinctive in the case of

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1. See *infra* note 68 and accompanying text; see also *infra* Section IV.B.1.

older victims because of the effect of age, the way age shapes the experience of older victims of sexual violence, the effects of sexual violence on the victims, and its interplay with gender.

Although sexual violence against older women is a form of elder abuse, it should be viewed separately from other forms of elder abuse and should be understood as part of a wider context of gender-based violence. There is a need for a holistic approach to sexual violence of older women, which perceives the sexual violence as a unique phenomenon and provides older women with legal and social mechanisms that fit their needs and experience both as women and elderly people.

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*“The invisibility of older people who have been raped or sexually assaulted in research and in practice is an indictment of our society and needs urgent redress.”*²

INTRODUCTION

A review of legal literature on violence against women and the legal research on elder abuse reveals that older³ women⁴ victims of sexual violence are largely excluded from this literature. The goal of the “Me Too” movement to illuminate hidden acts of sexual violence⁵ has left one group almost untouched by this feminist wave. Older women victims of sexual violence were left out of the public discourse, similarly to how they were marginalized in the academic discourse.⁶ Elder mistreatment, social ageism, and human rights are increasingly powerful discourses in positioning older people in society but are still invisible in the legal arena.

Current United Nations figures estimate that by 2050, the global population over the age of 60 will double.⁷ One in every five people will be 60 years of age or older.⁸ These estimated numbers pose new challenges in various legal areas related to elders. One such challenge is elder abuse, more specifically sexual abuse of older people.

Around the 1960s, elder abuse began gaining academic attention in American scholarship,⁹ and there was an increased response to it in the

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2. Susan J. Lea et al., *Sexual Assault of Older Women by Strangers*, 26(11) J. INTERPERSONAL VIOLENCE 2303, 2317 (2011).
 3. Older women are defined in laws and in gerontological research as women aged 60 and over. See SELECT COMM. ON AGING, 97TH CONG., ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM (1981); *infra* Section I.B.1.
 4. Although older men are also victims of sexual abuse, this Article focuses on women for several reasons discussed at length below. Some of these include the fact that the majority of victims of sexual abuse later in life are women; that a large percent of the abuse occurs as part of intimate partner violence, which is also perpetrated mostly by men against women; and that the intersection of gender and age generates unique challenges in analyzing sexual violence against older people.
 5. Jamie R. Abrams, *The #MeToo Movement: An Invitation for Feminist Critique of Rape Crisis Framing*, 52 U. RICH. L. REV. 749, 750 (2017).
 6. See *infra* Section I (discussing the marginalization of older women in feminist scholarship and the marginalization of women in elder abuse scholarship).
 7. U.N. Department of Economic & Social Affairs Population Division, *World Population Ageing*, U.N. Doc. St/Es/Ser. A/397 (2017).
 8. *Id.*
 9. Martin J. Gorbien & Amy R. Eisenstein, *Elder Abuse and Neglect: An Overview*, 21 CLINICS IN GERIATRIC MED., 279, 287–88 (2005).

United States criminal justice system.¹⁰ Despite this, and although women are significantly more likely to be victims of elder sexual and physical abuse than are men,¹¹ the literature on elder abuse has failed to focus on the gendered implications of this phenomenon. The legal academy has been almost entirely silent on sexual abuse of older people.¹²

Violence against women also gained academic attention around the 1960s, producing a comprehensive scholarship on gendered violence and resulting in varied legal reforms.¹³ Notwithstanding the extensive academic and legal focus on women victims of violence, most feminist literature on domestic violence has dealt with young or middle-aged women and ignored age as a significant element in violence against women.¹⁴

In time, research on elder abuse began exploring violence against older women in the family, particularly by their intimate partners, and American scholarship has linked elder abuse to domestic violence.¹⁵ Still,

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10. See Alan Clarke et al., *Access to Justice for Victims/Survivors of Elder Abuse: A Qualitative Study*, 15(2) SOC. POL'Y & SOC'Y, 207 (2016); Candace J. Heisler & Lori A. Stiegel, *Enhancing the Justice System's Response to Elder Abuse: Discussions and Recommendations of the "Improving Prosecution" Working Group of the National Policy Summit on Elder Abuse*, 14(4) ELDER ABUSE & NEGLECT J. 31 (2002); Nina A. Kohn, 49 *Elder (In)Justice: A Critique of the Criminalization of Elder Abuse*, 1 AM. CRIM. L. REV. 1 (2012).
 11. See *infra* Section II.B.1.
 12. Kohn, *supra* note 10, at 2.
 13. In 1994, Congress passed the Violence Against Women Act, marking feminists' research and activism on violence against women. See Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (1994). Feminist literature focusing on gender inequality and discussing the legal and social changes in the area of violence against women is vast. Selected scholarship includes: SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT (1982); ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING (2000); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 116-20 (1994) (discussing the way male violence shapes women's lives); Michele Bograd, *Feminist Perspectives on Wife Abuse: An Introduction*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 11, 14 (Kersti Yilo & Michele Bograd eds., 1988); S. Phyllis Goldfarb, *Intimacy and Injury: How Law Has Changed for Battered Women*, in THE HANDBOOK OF WOMEN, PSYCHOLOGY, AND THE LAW. (Andrea Barnes, ed. 2005); Elizabeth M. Schneider, *The Violence of Privacy*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 36-58 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).
 14. See *infra* Section I.B.1.
 15. Taylor Jillian Altman, *A Crime at Any Age: Intimate Partner Abuse in Later Life*, 105 CALIF. L. REV. 1543 (2017); Bonnie Brandl & Tess Meuer, *Domestic Abuse in Later Life*, 8 ELDER L. J. 297, 300 (2000); Eloise Rathbone-McCuan, *Elder Abuse Within the Context of Intimate Violence*, 69 U. MO. KAN. CITY L. REV. 215 (2000); Sarah S. Sandusky, *The Lawyer's Role in Combating the Hidden Crime of Elder Abuse*, 11

there remain significant gaps in the literature regarding sexual violence against older people. Most of the existing research examines a fairly narrow range of violence and abuse and often devotes scant attention to sexual violence against older women.¹⁶ Almost all studies have been conducted within the framework of social work, criminology, and sociology.¹⁷ This Article attempts to fill the abovementioned gap and bring the hidden issue of sexual violence against older women to light.

This Article seeks to contribute to legal scholarship on elder abuse and to legal and feminist research on violence against women in three ways: (a) it explores a topic that has been neglected by research, and offers a new empirical legal account of cases of sexual violence against older women; (b) it suggests a critical distinction between elder abuse and sexual abuse of older women, which reflects the unique intersection of age and gender; (c) it exposes misplaced assumptions about sexual violence in late age, which assume that older women are not exposed to sexual violence.

To achieve this end, this Article examines 109 publicly available American cases involving sexual violence against women over the age of 60 in the United States, between the years 2000 and 2018, based on a search of 1,308 American cases. Based on this new empirical database, this Article develops a discussion of several concepts that reflect the three goals mentioned above: the invisibility of a group of victims, older women, in the criminal justice system; the under-reporting of elder abuse and sexual abuse in particular and the barriers to identifying the problem; the significance of integrating age and gender in legal scholarship on elder abuse and in feminist literature on violence against women; the way age, gender, and sexuality intersect to shape the “ideal victim” image; the effect of a “rape culture” on the recognition of sexual abuse of older women; and the legal complexities in responding to sexu-

ELDER L. J. 459 (2003); Mary Twomey et al., *From Behind Closed Doors: Shedding Light on Elder Abuse and Domestic Violence in Late Life*, 6 J. CTR. FAMILIES, CHILD. & CTS. 73, 75 (2005).

16. I will use the terms “sexual violence against older women,” “sexual abuse of older women,” “rape of older women,” and “rape in late age” interchangeably throughout the Article. Sexual violence is defined as any sexual act perpetrated using coercion. Older women are defined as women aged 60 and above. This age was chosen based on gerontological research that defines older people as people over the age of 60. This research includes studies on various issues relating to the older population. Also, most American laws that deal with elders also refer to the age of 60 in their definitions of elder people.
17. See *infra* Section II (presenting various studies from non-legal disciplines on sexual abuse of older women).

al abuse of older women and the resulting limited access to justice for older women victims of sexual violence.

A key theme that emerges from the analysis is the gap between research on sexual violence against older women and the judicial reflection of this issue in case law. Reported legal decisions do not purport to paint a complete picture of the overall phenomenon, reflect many sorts of selection bias, and thus are not fully representative. Regardless, a comprehensive review of cases sheds light on sexual abuse of older women in the criminal justice system. It also offers an opportunity to analyze and discuss the social and legal “taboo” regarding sexual abuse of older women.

By examining several themes, the discussion explains why stranger rape against older women (rape by a person whom the victim is not acquainted with), although only a small fraction of the sexual violence that older women experience, makes up almost all the cases brought to court, and why other categories of rape of older women, particularly marital rape and rape in institutional settings, are hardly reflected in case law.

Section I of this Article proposes a theorization of the phenomenon of sexual abuse of older women. Section II reviews research on the prevalence of sexual abuse of older people and its characteristics, examining the gender of the parties involved, the type of the relationship between the abuser and the victim, location of the abuse (whether at home, in the public sphere, or in an institutional setting), types of sexual abuse of older people, and outcomes of the sexual abuse. Section III provides an overview of case law from the United States which is compared with case law analysis in Canada, conducted by Janine Benedet and Isabel Grant in a pioneering paper on sexual violence against older women in Canada.¹⁸ Drawing on the case law analysis, Section IV develops a discussion of key concepts in the scholarship on elder abuse and sexual violence. This Section looks at the barriers for “naming, blaming, and claiming” sexual abuse of older women and presents a discussion of the “missing victims” and “missing elements” in the judicial account of rape of older women. It is organized around several themes. First, this Section discusses the stereotypical paradigms of “real rape” and an “ideal” rape victim and the way they affect the type of case that goes to trial. The image of the “ideal” older woman victim is then challenged by discussing the concurrent constructions of age, gender, and sexuality. A discussion of the interplay between age, gender, and disability resulting in the absence of victims in institutional settings in case law follows.

18. Isabel Grant & Janine Benedet, *The Sexual Assault of Older Women: Criminal Justice Responses in Canada*, 62(1) MCGILL. L. J. 41 (2016).

The fourth and fifth themes focus on intimate relationships and the hidden sexual abuse by an intimate partner in case law. The sixth theme looks at the absence of consent in the judicial picture of sexual abuse in late age. The discussion reflects the subliminal social and legal rejection of the idea that older women can be raped and the implications of this rejection for accurately conceptualizing this phenomenon.

I. THEORIZING AND CONCEPTUALIZING SEXUAL ABUSE OF OLDER WOMEN

A. *Elder Abuse and the Marginalization of Women*

Elder abuse is not a new phenomenon. As in the case of violence against women by intimate partners and child abuse, acknowledging the phenomenon, naming it, and treating it took decades. It was only in the late 1960s and early 1970s, in the United Kingdom and Canada, that elder abuse gained academic and social attention.¹⁹ In the United States, a landmark report on elder abuse was published in 1981, stating that it was prevalent, unrecognized, and consequently under-reported.²⁰ Following this report, many states enacted laws dealing with elder abuse,²¹ and social and academic discourse on the topic expanded.²²

19. JORDAN I. KOSBERG & JUANITA L. GARCIA, *ELDER ABUSE: INTERNATIONAL AND CROSS-CULTURAL PERSPECTIVES* (2013).

20. SELECT COMM. ON AGING, *supra* note 3.

21. There are many laws regarding elder abuse, and it is beyond the scope of this Article to discuss all of them. In each state the laws vary in their scope and goals, but all 50 states and the District of Columbia have enacted some sort of legislation addressing elder abuse. In the criminal sphere, elder abuse is prosecuted under the general criminal code of a given jurisdiction (rape, assault, sexual assault, battery, kidnapping, etc.). Some states have enacted special laws governing elder abuse. For example, California enacted Section 368 of the California Penal Code, which addresses abuse of persons 65 and older and provides the following rationale for the legislation in its first section: "The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf." CAL. PENAL CODE § 368(a)-(k) (Westlaw current with urgency legislation through Ch. 860 of the 2019 Reg.Sess.). The Elder Justice Act, 42 U.S.C.A. § 1397(j) et seq. (Westlaw through P.L. 116-47), is the first comprehensive legislation to address the abuse, neglect, and exploitation of older adults at the federal level. The law seeks to provide federal responses to elder abuse through "promot[ing] elder justice research and innovation, support Adult Protective Services systems, and provid[ing] additional protections for

Elder abuse is a broad phenomenon, encompassing physical, emotional, verbal, financial, and sexual violence. It also includes neglect and abandonment of elderly people.²³ Contrary to initial definitions of intimate partner violence, which were narrow and included mostly physical battering,²⁴ elder abuse was defined broadly since its inception to include various types of abuse.²⁵ The understanding was that elder abuse has many forms; while some are less perceptible, they are no less harmful to the victims.

In the Federal Elder Justice Act, elder abuse is defined as “the knowing infliction of physical or psychological harm or the knowing deprivation of goods or services that are necessary to meet essential needs or to avoid physical or psychological harm.”²⁶ According to the United States Department of Health and Human Services (HHS), elder abuse is defined as “harm or serious risk of harm to a vulnerable adult by a caregiver or other person.”²⁷ The World Health Organization (WHO) defines elder abuse as “a single or repeated act . . . which causes harm or distress to an older person . . . includ[ing] physical, sexual, psy-

residents of long-term care facilities.” See U.S. DEP’T FOR HEALTH AND HUMAN SERVICES, THE ADMINISTRATION FOR COMMUNITY LIVING, THE ELDER JUSTICE ACT (2017), <https://www.acl.gov/about-acl/elder-justice-act>. Another applicable federal law is the Older Americans Act, 42 U.S.C.A. ch 35 § 3001 et seq. (Westlaw through P.L. 116-47). Other relevant laws include mandatory reporting laws requiring law enforcement officials, health professionals, long-term care facility employees, and others to report elder abuse. Adult Protective Services (APS) laws are designed to provide services to adults 18 years of age or older who are unable to protect themselves from abuse, neglect, or exploitation because of physical or mental impairments, and adults over a specified age, usually 60 or 65.

22. See e.g. THE NATIONAL CENTER ON ELDER ABUSE, THE AMERICAN PUBLIC HUMAN SERVICES ASSOCIATION, NATIONAL ELDER ABUSE INCIDENCE STUDY FINAL REPORT (1998); BRIAN PAYNE, CRIME AND ELDER ABUSE: AN INTEGRATED PERSPECTIVE (2d ed. 2005) [hereinafter Payne, CRIME AND ELDER ABUSE]; Richard Kennedy, *Elder Abuse and Neglect: The Experience, Knowledge, and Attitudes of Primary Care Physicians*, 37 FAM. MED. 481, (2005); Jordan Kosberg, *Preventing Elder Abuse: Identification of High Risk Factors Prior to Placement Decisions* 28 GERONTOLOGIST, 43 (1988).
23. *Elder Abuse and Neglect: In Search of Solutions*, AM. PSYCHOL. ASS’N (2012), <http://www.apa.org/pi/aging/resources/guides/elder-abuse.aspx>.
24. See WALTER S. DEKESEREDY, VIOLENCE AGAINST WOMEN: MYTHS, FACTS, CONTROVERSIES (2011).
25. For example, financial abuse was recognized as one of the main forms of elder abuse. See FAQs, NATIONAL CENTER FOR ELDER ABUSE, <https://ncea.acl.gov/FAQ.aspx>.
26. U.S.C.A. § 1397(j) (Westlaw).
27. U.S. DEP’T OF HEALTH & HUMAN SERVS. ADMIN. FOR CMTY. LIVING, ADMINISTRATION ON AGING (AOA), WHAT IS ELDER ABUSE? (2019) <https://acl.gov/programs/elder-justice/what-elder-abuse>.

chological, and emotional abuse[.]”²⁸ Elder abuse can occur both at home, inflicted by family members or other caregivers, and in institutional settings, such as nursing homes and living facilities.²⁹

Data shows that 90 percent of elder abuse is committed by family members, usually spouses or adult children.³⁰ The fact that most abusers of elders are known and close to the victims is emblematic of the phenomenon of violence against women, where the assailants are mostly men who are known to the abused women—particularly spouses, fathers, and other family members, close friends, and dating partners.³¹ Both phenomena are associated with stereotypical societal views of age and gender, cultural perceptions of family, intimacy and privacy, and dependency of the victims on the abusers. These issues create barriers to reporting the violence and acknowledging it. Thus, both phenomena are challenging for legal authorities and various other professionals (such as health professionals and social workers).

Studies found that victims of elder abuse are disproportionately women.³² The feminization of ageing³³ is due to the fact that more women than men live to an older age.³⁴ Still, that alone does not explain why older women are more likely to be abused than older men. A range of factors explain why older women are vulnerable to abuse. Feminist theories suggest that lifetime socioeconomic power relations between women and men leave women more vulnerable to abuse and neglect in old age.³⁵ Intimate partner violence, rape, sexual assault, sexual harassment, stalking, and various other forms of gendered violence do not

28. WORLD HEALTH ORGANIZATION, ELDER ABUSE (2018), <http://www.who.int/en/news-room/fact-sheets/detail/older-abuse>.

29. Altman, *supra* note 15, at 1549.

30. Karen Aileen Howze & Jennifer L. White, *Judicial Response to Elder Abuse*, 61 JUV. & FAM. CT. J. 57, 63 (2010); Twomey et al., *supra* note 15, at 75. *See also* David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 97 (2012).

31. F. Stephen Bridges et al., *Domestic Violence Statutes and Rates of Intimate Partner and Family Homicide: A Research Note*, 19 CRIM. JUST. POL. REV. 117, 118 (2008); Alanna Vagianos, *30 Shocking Domestic Violence Statistics That Remind Us It's An Epidemic*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/2014/10/23/domestic-violence-statistics_n_5959776.html.

32. Howze & White, *supra* note 30, at 63.

33. The feminization of ageing refers to the fact that women are more represented in older populations than men.

34. *See* Bertrand Desjardins, *Why Is Life Expectancy Longer for Women Than It Is for Men?*, SCIENTIFIC AMERICAN (Aug. 30, 2004), <https://www.scientificamerican.com/article/why-is-life-expectancy-lo/>.

35. Patricia Brownell, *Review Article, Neglect, abuse and violence against older women: Definitions and research frameworks*, 1 S. E. EUR. J. PUB. HEALTH 4–5 (2014).

stop at a certain age but continue and intensify when women are 60 and over because of their increased vulnerability.³⁶

Age and gender are key factors in “the feminization of poverty.”³⁷ Accordingly, many older women have low socioeconomic status. This leaves older women more vulnerable to abuse. Often, in late age, economic opportunities are limited due to lack of employment, limited mobility, health problems, and societal perceptions that older people are not qualified for work.³⁸ Compared to men, older women are less likely to have adequate economic resources (such as pensions) that can guarantee their economic independence.³⁹ The gendered nature of the labor market further constrains the economic welfare of older women. There are fewer women in the formal employment market because they make up most of the informal employment market (like households).⁴⁰ Women are more likely than men to work in harmful patterns of employment⁴¹ and also earn less than men for the same work or work of equal

36. See *infra* Sections II.B.2 and 3 (discussing the extra vulnerability of older people because they are physically weaker, have fewer economic opportunities, often experiencing mental and physiological disabilities, and more).

37. The “feminization of poverty” is a term referring to the gender dimension of poverty—the notion that women are poorer than men and that women are over-represented among poor people. It was first coined by Diane Pearce in 1978. Pearce stated that almost two-thirds of the poor over age sixty in the U.S. were women. Pearce further pointed out that single mothers, particularly black women, are extremely vulnerable to poverty. See DIANE PEARCE, *THE FEMINIZATION OF POVERTY: ONLY IN AMERICA?* (Gertrude Schaffner Goldberg & Eleanor Kremen eds., 1990); Diane Pearce, *The Feminization of Poverty: Women, Work, and Welfare*, 11 *URB. & SOC. CHANGE REV.* 28 (1978). See also Gregory R. Day & Salvatore J. Russo, *Poverty and the Hidden Effects of Sex Discrimination: An Empirical Study of Inequality*, 37 *U. PA. J. INT’L L.* 1183 (2016). But see Athena Mutua, *Why Retire the Feminization of Poverty Construct?* 78 *DENV. U. L. REV.* 1179 (2001) (arguing that the ‘feminization of poverty’ construct should be retired).

38. Brownell, *supra* note 35, at 4–5.

39. *Id.* at 4.

40. See Jacqueline Scott et al., *Introduction: Changing Lives and New Challenges*, in *WOMEN AND EMPLOYMENT: CHANGING LIVES AND NEW CHALLENGES* 1 (Jacqueline Scott et al. eds., 2008). See generally Deborah Dinner, *Beyond “Best Practices”: Employment-Discrimination Law in the Neoliberal Era*, 92 *IND. L.J.* 1059 (2017) (arguing that feminist and neoliberal abandonment of maternal labor standards made it much more difficult for women to achieve workplace equality with men); Laura T. Kessler, *Employment Discrimination and the Domino Effect*, 44 *FLA. ST. U.L. REV.* 1041 (2017) (offering a hypothetical that illustrates pressures that women face in the work place and their lack of legal ramifications that create a “domino effect” resulting in their decreased and/or less productive participation in the work force).

41. Donna E. Young, *Working Across Borders: Global Restructuring and Women’s Work*, 2001 *UTAH L. REV.* 1. 3–4 (2001).

value.⁴² Additionally, women experience gender-based discrimination in the labor market.⁴³

Human rights discourse also refers to gender inequality in the analysis of elder abuse.⁴⁴ The Madrid International Plan of Action on Ageing, for example, states that discriminatory gender inequality, societal attitudes towards women, and inadequate human rights protection of women result in greater risk of women in old age.⁴⁵ Sexual abuse of older people is a violation of human rights and a significant cause of injury, illness, loss of productivity, isolation, and death.⁴⁶ It violates women's right to safety and security and the right of physical and mental health.

Rape and other acts of sexual assault are gendered crimes because they are mostly perpetrated by men against women.⁴⁷ These crimes are associated with societal and cultural conceptions of sexuality, sex, and gender, emphasizing their gendered nature.⁴⁸ In a study comparing cases of physical abuse with sexual abuse of elders in institutional settings, two thirds of sexual abuse cases involved a female victim, compared to one half of physical abuse cases.⁴⁹

42. *Id.*

43. FRANCES RADAY, *ECONOMIC WOMAN: GENDERING INEQUALITY IN THE AGE OF CAPITAL* 87–112 (Routledge 2019) (discussing discrimination against women in the sale of their human capital, referring to discrimination in wages, promotion, dismissal, sexual harassment, pensions etc.). *See also id.* at 126–129 (discussing the unfulfilled promise of equal employment opportunity).

44. Moon Choi et al., *International Movement to Promote Human Rights of Older Women with a Focus on Violence and Abuse against Older Women*, 60(1) INT'L SOCIAL WORK 170, 170–171 (2017).

45. Second World Assembly on Ageing, *Political Declaration and Madrid International Plan of Action on Ageing*, ¶ 108, U.N. Doc. (Apr. 8, 2002), https://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf.

46. *See* WORLD HEALTH ORGANIZATION, *WORLD REPORT ON VIOLENCE AND HEALTH* 132 (Etienne G. Krug et al. eds., 2002), https://apps.who.int/iris/bitstream/handle/10665/42495/9241545615_eng.pdf. *See also* WORLD HEALTH ORGANIZATION, *ELDER ABUSE* (Jun. 8, 2018), <https://www.who.int/news-room/fact-sheets/detail/elder-abuse>.

47. *See generally* Charlotte Watts & Cathy Zimmerman, *Violence against Women: Global Scope and Magnitude*, 359 THE LANCET 1232 (2002); *Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence*, WORLD HEALTH ORGANIZATION (2013), https://apps.who.int/iris/bitstream/handle/10665/85239/9789241564625_eng.pdf.

Note that men and LGBT people are also victims of rape and there is a growing awareness to this phenomenon.

48. *See infra* Section I.B.2.

49. In cases of sexual abuse of the elderly, the likelihood of a male offender was nearly three times higher than in cases of physical abuse. In 78 percent of the elder sexual abuse cases the offenders were male, compared to 26 percent of elder physical abuse cases. Brian K. Payne, *Understanding Elder Sexual Abuse and the Criminal Justice Sys-*

The similarities between violence against women and elder abuse should have instigated a discussion on the gendered aspects of elder abuse and pointed to a possible link to domestic violence. But both legal and non-legal research on elder abuse has failed to acknowledge older women as a uniquely vulnerable group because of their gender and age. Academic and social focus has kept elders as a separate category in research and in legal reforms. Academics and society perceive elders as a group whose characteristics, needs, and vulnerability to abuse are similar to those of children.⁵⁰ Accordingly, the theoretical paradigm in elder abuse research was based on models derived from research on child abuse.⁵¹

B. Older Women in Feminist Literature

1. Domestic Violence and the Marginalization of Older Women

Most research on domestic violence, including feminist research, has focused on young and middle-aged women. Older women have hardly been included in research on violence against women and “have lacked status as battered women in domestic violence research and activism.”⁵² The “identity politics”⁵³ in feminist literature and activism and the theories of intersectionality have focused mainly on race, socioeconomic status, and sexual orientation.⁵⁴ The critique of essentialism, arguing that first and second wave feminist theories focused on gender as the sole identity in women’s lives, has hardly acknowledged the combined effect of age and gender and its unique complexities.

tem’s Response: Comparisons to Elder Physical Abuse, 27(2) JUST. Q. 206, 214 (2010) [hereinafter Payne, *Understanding Elder Sexual Abuse*].

50. GERALD BENNETT & PAUL KINGSTON, ELDER ABUSE: CONCEPTS, THEORIES AND INTERVENTIONS 47 (1993).

51. *Id.*

52. Brownell, *supra* note 35, at 3.

53. Identity politics offers a variety of identities from which women can choose. Instead of being restricted to one general and necessary hierarchical category of “women,” they can choose an identity that fits them, one that resonates with the situation. *See, e.g.*, Susan Hekman, *Beyond Identity: Feminism, Identity and Identity Politics*, 1(3) FEMINIST THEORY 289 (2000).

54. *See, e.g.*, Tamar W. Carroll, *Intersectionality and Identity Politics: Cross-Identity Coalitions for Progressive Social Change*, 42(3) J. WOMEN CULTURE & SOC. 600 (2017); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Nira Yuval-Davis, *Intersectionality and Feminist Politics*, 13(3) *Eur. J. Women’s Stud.* 193 (2006).

One of the first to do so was Elizabeth Schneider in the 1990s. In a discussion of elder abuse (and of lesbian and gay male battering), Schneider demonstrated how feminist analysis of battering as male domination is consistent with a conceptualization of domestic violence as an exercise of power and control in intimate relationships.⁵⁵ Schneider used the phenomenon of elder abuse to strengthen the idea of male domination in the analysis of violence against women not necessarily to include older women in feminist analysis. Still, integrating older women into feminist discussion of violence against women was novel and significant.

The issue of battered older women illustrates the unique complexities resulting from the combination of gender and age. Battered elderly women differ from younger victims because they experience numerous difficulties in breaking the cycle of abuse, which are exacerbated by their age.⁵⁶ Older battered women are more dependent on their abusers because of health problems, lack of employment, limited economic opportunities, lack of mobility, and a variety of physical disabilities associated with their age.⁵⁷ The emotional dependency that characterizes the dynamic of abusive relationships increases in late age.⁵⁸ These difficulties contribute to isolation, loneliness, and depression in battered older women and constrain their ability to seek external help and support.⁵⁹ It is thus significant to consider how age and life stages affect the needs, difficulties, and overall experience of older battered women. Age is a central element in understanding the dependency of older women on their abusers and also in breaking the silence of older battered women.

Over time, the evolving research on intimate partner violence and elder abuse have converged to produce a shift in the research on elder abuse. Scholars have started conceptualizing elder abuse as part of the paradigm of power and control, which is typically used to explain violence against women by their intimate partners.⁶⁰ Older women's narratives of abuse reflect the escalating cycle of violence as described by young battered women.⁶¹ It has been acknowledged that in many cases, elder abuse is considered a form of domestic violence, and therefore it

55. Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U.L. REV. 520, 545–48 (1992).

56. For further discussion, see *infra* Part IV.

57. Tova Band-Winterstein & Zvi Eisikovits, *Towards Phenomenological Theorizing About Old Women Abuse*, 35 AGEING INT. 202, 203 (2010).

58. Altman, *supra* note 15, at 1552.

59. *Id.* at 1547. For a detailed discussion, see *infra* Section IV.B.

60. Altman, *supra* note 15, at 1545.

61. *Id.* at 1551.

should be understood and treated through the lens of domestic violence.⁶²

The above discussion focuses on the neglect of women in academic discourse on elder abuse and the shift in research caused by linking intimate partner violence and elder abuse. Recognizing battered women as a distinct group within the older population that suffers from abuse helped emphasize the gendered aspects of elder abuse.⁶³

However, some pieces are still missing in the “puzzle” of gender, age, and violence. Both bodies of scholarship have failed to devote attention to sexual violence as a distinct form of violence that older women experience by intimate partners, caregivers, and strangers. The interplay between age, gender, and sexual violence remained untouched by scholars, and theorizing sexual violence against older women continued to be complicated.

2. Sexual Violence and the Marginalization of Older Women

Radical feminist theories focus on gendered power relations as the analytical framework of sexual violence.⁶⁴ Feminist analysis has exposed and challenged the “rape culture”⁶⁵ that exists in society. Rape culture is a belief system based on patriarchal dominant-submissive models of women, gender roles, sexuality, sex, and femininity.⁶⁶ It encourages the sexualization of violence and erotization of aggressiveness, perpetuating sexual violence against women.⁶⁷

62. See Kohn, *supra* note 10, at 13 (arguing that there is an overlap between the phenomena of domestic violence and elder abuse, both in the characteristics of the phenomenon and the criminal justice’s response to both phenomena. Drawing on the feminist paradigm of domestic violence, the author calls for critical reassessment of how the criminal justice system should respond to elder abuse.)

63. LYNDIA AITKEN & GABRIELE GRIFFIN, GENDER ISSUES IN ELDER ABUSE 31 (1996).

64. CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 14–15 (1989); SUSAN BROWN MILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 256 (1975). Intersectional feminist theories were later developed, partly in contrast to the essentialism that characterized radical feminist theories, focusing on other elements such as race, socio-economic status, religion, etc. and the way these elements shape women’s experience of rape. See *supra* note 53; *Infra* Section IV.B.

65. Dianne F. Herman, *The Rape Culture*, in 20 WOMEN: A FEMINIST PERSPECTIVE (J. Freeman ed., 1989); Erin Sheley, *A Broken Windows Theory of Sexual Assault Enforcement*, 108 J. CRIM. L. & CRIMINOLOGY 455, 465, 470–74 (2018).

66. Herman, *supra* note 65; Sheley, *supra* note 65, at 465, 470–74

67. Catharine MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L. J. 2038 (2016); Catharine MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000); Catharine MacKinnon, “Sexuality, Pornography, and Method.” *Pleasure Under*

Feminist legal scholarship has demonstrated the effect of “rape culture” on societal and legal discourses of rape. “Rape myths”⁶⁸ regarding women’s sexual behavior, gender roles, and victims’ responses to rape shape the reporting of rape (indeed, its under-reporting), the legal processing of rape, and the treatment of rape victims by police, judges, juries, prosecutors, and defense lawyers.⁶⁹ Scholars have pointed out how defense lawyers use “rape myths” in cross examination to discredit rape

Patriarchy, 99(2) ETHICS 314 (1989). See also Emilie Buchwald et al., *Are We Really Living in a Rape Culture?*, in TRANSFORMING A RAPE CULTURE (Emilie Buchwald et al. eds., 1993) (Buchwald defines rape culture as “a complex of beliefs that encourages male sexual aggression and supports violence against women.”).

68. Rape myths are beliefs and assumptions regarding women, rape and rape victims. These beliefs are based on patriarchal conceptions of the way women should behave in sexual interactions, the “proper” responses of rape victims to coerced sex, and more. Some examples are: the assumption that when a woman says “yes” to sex once, she is more prone to consent to other sexual interaction; that rape victims promptly complain about the rape; that rape is perpetrated by strangers; that women who are drinking and partying are more prone to consent; and more. See Katie M. Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761 (2011); Christina E. Wells & Erin Elliot Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127 (2001); Rebecca M. Hayes et al., *It’s Her Fault: Student Acceptance of Rape Myths on Two College Campuses*, 22(13) VIOLENCE AGAINST WOMEN, 1540 (2016); Jesse Fox et al., *Sexualized Avatars Lead to Women’s Self-Objectification and Acceptance of Rape Myths*, 39(3) PSYCHOLOGY OF WOMEN QUARTERLY 349 (2015); Michelle E. Deming et al., *Exploring Rape Myths, Gendered Norms, Group Processing, and the Social Context of Rape Among College Women: A Qualitative Analysis*, 19(4) VIOLENCE AGAINST WOMEN 465, 466 (2013).
69. Meagan Hildebrand & Cynthia J. Najdowski, *The Potential Impact of Rape Culture on Juror Decision Making: Implications for Wrongful Acquittals in Sexual Assault Trials*, 78 ALB. L. REV. 1059 (2015) (discussing the way rape myths impact jurors’ decisions in rape trials in the United States); MARIANNE HESTER, FROM REPORT TO COURT: RAPE CASES AND THE CRIMINAL JUSTICE SYSTEM IN THE NORTH EAST (2013); Amy Dellinger Page, *True Colors: Police Officers and Rape Myth Acceptance*, 5 FEMINIST CRIMINOLOGY 315, 325–27 (2010); Mary Margaret Giannini, *Redeeming An Empty Promise: Procedural Justice, the Crime Victims’ Rights Act, and the Victim’s Right to Be Reasonably Protected From the Accused*, 78 TENN. L. REV. 47 (2010) (discussing the importance of procedural justice in cases of rape. Procedural justice theories focus on giving voice to victims, transparency in the criminal process, and various other elements that strengthen the justice narrative of victims in the criminal trial); Deming et al., *Exploring Rape Myths, Gendered Norms, Group Processing, and the Social Context of Rape Among College Women: A Qualitative Analysis*, 19(4) VIOLENCE AGAINST WOMEN 465 (2013); Janice Du Mont et al., *The Role of “Real Rape” and “Real Victim” Stereotypes in the Police Reporting Practices of Sexually Assaulted Women*, 9(4) VIOLENCE AGAINST WOMEN 466 (2003).

victims, resulting in the depiction of cross examination of rape victims as a “second rape.”⁷⁰

Rape myths have also served to strengthen the one-dimensional conceptualization of rape as having only one form: the rape of a young, chaste woman by a stranger in a dark alley, using physical violence to overcome her resistance. This “stranger rape” myth reinforces the dichotomy between “real” rape and “simple” rape.⁷¹ Although this view is now long outdated in mainstream rape scholarship and case law, rape has continued to be perceived as an act committed solely against young women,⁷² as if sexual violence stops at a certain age and is not perpetrated against older people.

Although it is well documented that rape is not always related to sexual desire, it is perceived as an act committed against young women as a result of their perceived sexuality or as a result of their sexual behavior.⁷³

These myths fail to reflect the reality of rape, to recognize older women as potential victims of rape, and, accordingly, exclude older women from the analysis of sexual violence.

The feminist theoretical paradigm of sexual violence has transformed the discourse on sexual violence and has resulted in a variety of

70. JENNIFER TEMKIN, *RAPE AND THE LEGAL PROCESS* (2002); JENNIFER TEMKIN, *SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE* (2008); Katherine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 690 (1999) (offering to use shame sanctions rather than traditional criminal tools in order to decrease date rape); Katherine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 235–45 (2015) (suggesting to abandon criminal law when dealing with sexual violence, particularly in campus rape date, and use instead other mechanisms such as a discrimination doctrine).

71. SUSAN ESTRICH, *REAL RAPE* 1092, 1173 (1987) [hereinafter Estrich, *REAL RAPE*]. A rape is “real” when it occurs is in line with common stereotypes regarding women’s behavior and rape victims’ responses to rape. “Real” rape is described as rape by a stranger, in a dark alley, accompanied by physical violence. The woman physically resists the rape and reports the rape immediately to law enforcement. In contrast, “simple” rape refers to rape that is perpetrated by someone whom the victim knows, with no physical violence on top of the sexual violence. Martha R. Burt, *Rape in the United States: Progress, Stability or Retrogression*, 26 CRIM. JUST. REV. 253, 261 (2001).

72. Hannah Bows & Nicole Westmarland, *Rape of Older People in the United Kingdom: Challenging the “Real-Rape” Stereotype*, 57 BRITISH J. CRIMINOLOGY 1, 13 (2015) [hereinafter Bows, *Rape of Older People in the United Kingdom*].

73. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 55 (2002); Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1587 (2007) (“Traditionally, successful rape allegations involved a virtuous, ideally virginal woman, who is attacked by a creepy stranger.”).

legal reforms in all Western jurisdictions.⁷⁴ However, like scholarship on domestic violence, it has neglected older women.⁷⁵ Feminist insights were neither relevant nor applicable to older women who experienced rape or sexual assault, since many of the discreditable rape myths used in court are not relevant to older women. Older women are not “suspected” of sending confusing messages regarding sex, wanting it, “inviting” the rape, or lying about it. Consent, which is at the heart of rape cases and associated with stereotypical assumptions about women, rape, and rape victims, is often not relevant to the legal discourse of rape in older age since older women are not perceived as wanting sexual relations or as sexual beings.⁷⁶ The marginalization of older women in various disciplines discussed above is illustrative of the complexity in theorizing sexual abuse of older women. Is it a rape issue, one of elder abuse, or of domestic violence? Is it all three of them? How should we categorize this phenomenon? What is the theoretical framework that best explains it? The discussion below seeks to answer some of these questions and to discuss some of these dilemmas.

74. Some of these reforms included the removal of the marital rape exemption, the rape shield law, the re-definition of the rape offense, and more. See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L. J. 1940, 1954–59 (2016); Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957 (2008) (discussing the complexities in the concept of consent); KATHERINE T. BARTLETT & ANGELA P. HARRIS, GENDER & LAW 832 (2d ed. 1998) (discussing rape shield laws); Maria Los, *The Struggle to Redefine Rape in the Early 1980s*, in CONFRONTING SEXUAL ASSAULT: A DECADE OF LEGAL AND SOCIAL CHANGE 20 (Julian V. Roberts & Renate M. Mohr eds.) (1994) (describing feminist reforms in Canada); Susan Estrich, *Rape*, 95 YALE L. J. 1087 (1986) (discussing various law reforms). See also ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS (2014); Cassia Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRIC J. 119, 126 (1999); Ronet Bachman and Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554 (1993); Ronald J. Berger, et al., *The Dimensions of Rape Reform Legislation*, 22 L. & SOC'Y REV. 329, at 334–36 (1988).

75. A recent paper stated that “[t]he lack of feminist empirical research and theory underpinning sexual violence against older women has not gone unnoticed . . . however, to date, there has been a lack of concerted effort to address this gap.” See Hannah Bows, *Sexual Violence Against Older People: A Review of the Empirical Literature*, 19(5) TRAUMA, VIOLENCE & ABUSE 567 (2018) [hereinafter Bows, *Sexual Violence Against Older People: A Review of the Empirical Literature*]. See also Lea et al., *supra* note 2, at 2304, (“Sexual violence as a facet of ageing and vulnerability is not only over-looked in practice but also is relatively marginalized in mainstream criminology and feminism in particular.”).

76. See *infra* Section IV.B.2 (discussing the interplay between age, gender and sexuality and the stereotypical (and negative) perception of older women’s sexuality).

Sexual abuse of older women remains unnamed, unrecognized, under-reported, and, as such, at the margins of legal research. The next Section presents the prevalence and characteristics of elder sexual abuse, focusing on sexual abuse of older women.

II. THE REALITY OF SEXUAL VIOLENCE AGAINST OLDER WOMEN

In their article on sexual violence against older women in Canada, Grant and Benedet state that “no studies have yet attempted to determine the overall prevalence of sexual violence against older adults in the general population.”⁷⁷ This Section reviews studies on the prevalence of sexual abuse of older people in the United States and other countries to establish the scope of the problem. The Section also describes some of the characteristics of sexual abuse of older people, mainly the gender of the victim and the offender, the relationship between the two, types of sexual abuse of older people, and the location of the crime (home, public space, or institutional setting). The descriptive discussion establishes a framework for the legal analysis in Section III, where I investigate whether cases of sexual violence against older women prosecuted and heard in courts reflect the characteristics of the phenomenon described in research.

Because of the dearth of research on sexual abuse of elders, and because of sparse reporting of this phenomenon, the data may not accurately reflect the rates of sexual abuse of older women.

Studies on the prevalence of sexual abuse of older people are conducted in three fields of research: elder abuse, domestic violence, and sexual violence. A variety of research methods used in these fields produce various prevalence rates. Furthermore, studies employ different definitions of sexual abuse and of old people, and the data have been collected in various geographic areas across the United States as well as in other countries.⁷⁸

77. Grant & Benedet, *supra* note 18 at 55. See also Wenche Malmedal et al., *Sexual Abuse of Older Nursing Home Residents: A Literature Review*, NURSING RESEARCH & PRACTICE (2015).

78. In a recent study that reviewed the empirical literature on sexual abuse of older people, the author described various methodological challenges in estimating the prevalence of sexual abuse of older people. See Bows, *Sexual Violence Against Older People: A Review of the Empirical Literature*, *supra* note 75.

A. *The Prevalence of Sexual Abuse of Older People,
in Particular of Older Women*

Sexual abuse of older people is the least reported and substantiated form of elder abuse.⁷⁹ According to a comprehensive study from 2017, documented by the World Health Organization, the prevalence of sexual abuse reported by older victims in community settings was 0.9 percent. In institutional settings, 1.9 percent was reported by victims or their proxies, and 0.7 percent was reported by staff.⁸⁰ In an American study on the prevalence of various forms of elder abuse, it was estimated that 0.6 percent of people aged 60 years or older were exposed to some form of sexual violence.⁸¹ In a national study of sexual abuse in care facilities, conducted in six states, the researchers analyzed data involving vulnerable adults age 18 and older and found that of the alleged victims in 429 cases, 29 percent were elders (people over the age of 60).⁸²

A study examining practitioners' views on the challenges of supporting older victims of sexual violence also reveals the limited attention paid to this issue.⁸³ Over a five-year period, 23 social work practitioners witnessed sexual violence committed against approximately 100 older people.⁸⁴ Practitioners working at support agencies, such as rape crisis centers and domestic violence shelters, and independent professionals had assisted between one and five older people in a five-year period.

79. See Pamela B. Teaster & Karen A. Roberto, *The Sexual Abuse of Older Adults: APS Cases and Outcomes*, 44(6) THE GERONTOLOGIST 788 (2004); Payne, CRIME AND ELDER ABUSE, *supra* note 22, at 208; Tova Band-Winterstein et al., *Breaking the Taboo: Sexual Assault in Late Life as a Multifaceted Phenomenon—Toward an Integrative Theoretical Framework, Trauma, Violence and Abuse*, TRAUMA VIOLENCE & ABUSE, Feb. 27, 2019, at 1.

80. The study was based on evidence from 52 studies in 28 countries from diverse regions. Yon Yongjie et al., *Elder Abuse Prevalence in Community Settings: a Systematic Review and Meta-analysis*, 5 LANCET GLOBAL HEALTH 147, 147, 154 tbl.2 (2017); See also *Elder Abuse, Fact Sheets*, WORLD HEALTH ORGANIZATION, (June 8, 2018), <https://www.who.int/news-room/fact-sheets/detail/elder-abuse>.

81. Ron Acierno et al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, 100(2) AM. J. PUB. HEALTH 292 (2010).

82. An old person is defined as one over the age of 60. Holly Ramsey-Klawnsnik et al., *Sexual Predators Who Target Elders: Findings from the First National Study of Sexual Abuse in Care Facilities*, 20(4) J. ELDER ABUSE & NEGLECT 353, 354 (2008) [hereinafter Ramsey-Klawnsnik et al., *Sexual Predators Who Target Elders*].

83. See Hannah Bows, *Practitioner Views on the Impacts, Challenges, and Barriers in Supporting Older Survivors of Sexual Violence*, 24(9) VIOLENCE AGAINST WOMEN 1070, 1080 (2017) [hereinafter Bows, *Practitioner Views*].

84. *Id.* at 1076.

These numbers are unrealistically low, even considering the under-reporting of sexual abuse of older people.

A study in Hong Kong has described similarly low numbers, with prevalence rates of sexual assault of older people being less than one percent.⁸⁵ A study in Ireland, which focused on rape victims of all ages, analyzed quantitative data from 15 rape crisis centers and found that over one third of older women experienced sexual violence.⁸⁶ A U.K. study examined all recorded sexual offenses over a five-year period. The researchers found that 3.1 percent of the records of sexual violence were against people aged 55 years or older.⁸⁷ Another U.K. study that examined more than 10,000 cases of murder, rape, and abduction, where the relationship between the victim and the offender is unknown, or where the offender is a stranger, and the motive is sexual, found only 53 cases of stranger rape of older victims.⁸⁸ More recent research in the U.K. analyzed records of rape⁸⁹ cases from almost all police forces in the U.K. and found that 0.75 percent were cases of sexual violence against older victims.⁹⁰

As noted, prevalence rates vary across studies and research fields. Some have yielded higher rates than others, depending on the goal of the research, the targeted population (older people over the age of 60 or rape victims of all ages), and the method used. A common theme, however, is the low rate of sexual abuse of older people, ranging from zero percent to a few percent rates.⁹¹ These numbers tell a misleading story of sexual abuse against elderly people. According to this story, sexual violence in late age is a marginal and minor phenomenon. Research, however, tells the broader story that victims of sexual violence in late age do not disclose the violence.

85. DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, UNITED NATIONS, *NEGLECT, ABUSE AND VIOLENCE AGAINST OLDER WOMEN* 21 (2013).

86. Stacey Scriver et al., *Older Women and Sexual Violence: Recognizing and Supporting Survivors*, 15 J. ADULT PROTECTION 301, 303 (2013).

87. Hadrian N. Ball & David Fowler, *Sexual Offending Against Older Female Victims: An Empirical Study of the Prevalence and Characteristics of Recorded Offenses in a Semirural English County*, 19 J. FORENSIC PSYCHIATRY & PSYCHOL. 14 (2008).

88. This study focuses exclusively on stranger rape cases. Lea et al., *supra* note 2, at 2309.

89. The researchers examined “serious” sexual offenses, which were defined as rape or sexual assault by penetration.

90. Bows, *Rape of Older People in the United Kingdom*, *supra* note 72, at 7.

91. One study presented in Bows’s empirical literature review found that of all women who were victims of recent sexual violence, 17 percent were aged 65 and older. See Bows, *Sexual Violence against Older People: A Review of the Empirical Literature*, *supra* note 75, at 571 tbl.2.

The discussion in Section IV reveals some of the reasons for the hidden nature of sexual violence against older women and aims to correct the above description. Understanding the hurdles in naming sexual abuse of older women and acknowledging it may explain why the above numbers represent only the tip of the iceberg of the phenomenon.

B. *Characteristics of Sexual Abuse of Older Women*

1. Gender of the Victims and Perpetrators

Sexual abuse of elders is a gendered phenomenon. Although the prevalence of sexual abuse varies across studies, the gender of the victim is similar in almost all studies; older women are at greater risk than are older men for physical abuse, sexual abuse, and neglect.⁹² Most victims of sexual violence in late life are women. For example, in a study of 284 cases of sexual abuse of older people, 261 were female.⁹³ In another study, 92 percent of reported complaints of rape and sexual assault to the police by older people were filed by women.⁹⁴

Research indicates that most perpetrators of sexual abuse of older people are men.⁹⁵ This is contrary to the findings regarding non-sexual elder abuse cases, in which more than half of identified offenders are female.⁹⁶ In one study, cases of elder sexual abuse were approximately three times more likely than were cases of elder physical abuse to have

92. Bows, *Rape of Older People in the United Kingdom*, *supra* note 72; Ann W. Burgess et al., *Comparing Routes of Reporting in Elder Sexual Abuse Cases*, 20(4) J. ELDER ABUSE & NEGLECT 336, 342–44 (2008); Aileen Wigglesworth et al., *Screening for Abuse and Neglect with People with Dementia*, 58 J. AM. GERIATRICS SOC'Y 493 (2010); Payne, *Understanding Elder Sexual Abuse*, *supra* note 49, at 209; Ron Acierno et al., *National Elder Mistreatment Study* (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/226456.pdf>.

93. Ann W. Burgess & Steven L. Phillips, *Sexual Abuse, Trauma and Dementia in the Elderly: A Retrospective Study of 284 Cases*, 1(2) VICTIMS & OFFENDERS 193, 195 (2006).

94. Bows, *Sexual Violence Against Older People: A Review of the Empirical Literature*, *supra* note 75, at 570, 572–73.

95. Burgess et al., *supra* note 93, at 337; *see also* Bows, *Rape of Older People in the United Kingdom*, *supra* note 72, at 8.

96. *See* Jessie L. Krienert et al., *Elderly in America: A Descriptive Study of Elder Abuse, Examining National Incident-Based Reporting System (NIBRS) Data, 2000-2005*, 21 J. ELDER ABUSE & NEGLECT 325, 334 (2009) (finding in a national sample of over 87,000 reports of elder abuse that males were significantly more likely to be perpetrators of abuse than were women).

male offenders.⁹⁷ These findings emphasize the importance of gender in the analysis of sexual abuse in older age, and the interplay between age and gender.

2. Forms of Sexual Violence against Older People

The literature describes six types of sexual abuse of elders: sexual abuse by strangers, acquaintance violence, abuse by non-family care providers, incestuous abuse by children, marital or partner abuse, and resident-to-resident abuse in care facilities.⁹⁸ Data shows that the most prevalent type of sexual abuse is that committed by family members, usually spouses or children.⁹⁹ For example, one study found that 55.4 percent of the sexual abuse of older women was perpetrated by spouses.¹⁰⁰ This finding hints at the complexities in naming sexual abuse of older women, as the intimacy of the relationship affects the reporting of the phenomenon and its recognition by society.

In institutional settings (nursing homes, hospitals, care facilities), scholarship focuses on sexual abuse perpetrated by caregivers. Resident-to-resident sexual abuse has been at the margins of research on elder abuse, but recent studies suggest that it is a growing problem and more prevalent than other forms of abuse in institutional settings.¹⁰¹

3. Disability

Many older victims of sexual abuse are women with cognitive limitations or physical care needs.¹⁰² Dementia, which plagues many older people, is common among victims of abuse. In one study, 60.7 percent

97. Payne, *Understanding Elder Sexual Abuse*, *supra* note 49, at 215.

98. Holly Ramsey-Klawnsnik, *Elder Sexual Abuse Within the Family*, 15(1) J. ELDER ABUSE & NEGLECT 45 (2004) [hereinafter Ramsey-Klawnsnik, *Elder Sexual Abuse Within the Family*].

99. Bows, *Sexual Violence Against Older People: A Review of the Empirical Literature*, *supra* note 75, at 578; Grant & Benedet, *supra* note 18, at 58; Horton, *supra* note 30, at 97; Twomey et al., *supra* note 15, at 75.

100. DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, UNITED NATIONS, NEGLECT, ABUSE AND VIOLENCE AGAINST OLDER WOMEN 14 (2013).

101. See generally Tony Rosen et al., *Sexual Aggression Between Residents in Nursing Homes: Literature Synthesis of an Underrecognized Problem*, 58 J. AM. GERIATRICS SOC'Y 1970 (2010).

102. Burgess & Phillips, *supra* note 93; Payne, *Understanding Elder Sexual Abuse*, *supra* note 49, at 217–18; Page Ulrey, *Prosecuting Elder Abuse: A First-Hand Account*, 53 CT. REV. 70 (2017).

of the elders had a physical limitation and 60 percent had cognitive impairment or dementia.¹⁰³ This illustrates the way in which age and disability interact to exacerbate the vulnerability of older people to sexual abuse and to generate various hurdles in recognizing the abuse, reporting it, and addressing it legally.

4. Location of the Sexual Violence

Data regarding the location of the abuse varies across studies. Most studies in the fields of sexual violence and domestic violence indicate that the majority of elders, more than 70 percent in one study,¹⁰⁴ were abused in their own home or in a family member's home. This is consistent with the above-mentioned finding, according to which most abusers are family members, particularly intimate partners. Even though abuse mostly occurs by a family member or a caregiver, the elder abuse research focuses mainly on institutional settings. Therefore, most studies in this field point to nursing homes and care facilities as central locations of abuse.¹⁰⁵

5. Outcomes of Sexual Abuse of Older People

The outcomes of sexual abuse of older women are devastating. Physical effects include serious bodily injury,¹⁰⁶ long-term health problems, and at times, the death of the victim.¹⁰⁷ Emotional trauma is amplified because of the age of the victims. For older victims, sexual violence carries social stigma and results in embarrassment, self-blame, and fear.¹⁰⁸ Many older victims live alone or lack supportive family and social networks.¹⁰⁹ Loneliness and social isolation increase the emotional trauma and limit the possibilities of treatment.¹¹⁰ Often, both the physical

103. Naiara Demnitz et al., *A Systematic Review and Meta-Analysis of Cross-Sectional Studies Examining the Relationship Between Mobility and Cognition in Healthy Older Adults*, 50 *GAIT & POSTURE* 164 (2016); Xin Qi Dong, *Elder Abuse: Systematic Review and Implications for Practice*, 63 *J. AM. GERIATRICS SOC'Y* 1214 (2015).

104. Burgess & Phillips, *supra* note 93.

105. Teaster & Roberto, *supra* note 79, at 790 (substantiated APS case filed over a 5-year period).

106. Research indicates that older women tend to suffer more serious genital trauma than do younger women. Bows, *Practitioner Views*, *supra* note 83, at 1072, 1083.

107. *Id.*

108. *Id.*

109. *Id.* at 1077.

110. *Id.*

and emotional effects of sexual violence result in lifestyle changes, such as loss of independence and moving to a nursing home or other care facilities.¹¹¹

The above descriptions shed light on some important aspects of sexual abuse of older women. First, gender plays a central role in understanding sexual abuse in late life. The fact that most victims are women and most perpetrators are men requires the use of feminist theoretical analysis that focuses on the broader context of violence against women. It will allow us to construct rape in older age as part of a wider pattern of gender-based violence and not just as another form of elder abuse. Second, as mentioned above, many older victims of sexual abuse are women with cognitive limitations, or conditions that increase their vulnerability to sexual abuse. Third, most perpetrators are the victim's spouse or close family members creating further dependence on the perpetrator and likely contributing to the low reporting rates. Fourth, sexual violence usually occurs either in the victim's home or in an institutional setting where the victim lives. Fifth, sexual abuse of older women is a significant cause of injury (even death), illness, loss of productivity, and isolation. It violates the equal rights of men and women, women's right to safety and security, and the right to physical and mental health.¹¹²

III. CASE LAW ANALYSIS

This Section introduces a new account of cases of sexual abuse of older women in the United States and a comparison with a case law analysis conducted in Canada.¹¹³ The Section begins by describing cases of sexual violence against older women in the United States. This type of legal analysis has not been carried out before in legal research, and as such, introduces an original perspective on the nature and characteristics of cases of sexual abuse of older women, emphasizes the significance of the interplay between age and gender in the analysis of sexual violence

111. *Id.*

112. Carole Cox & Manoj Pardasani, *Aging and Human Rights: A Rights-Based Approach to Social Work With Older Adults*, 2 J. HUM. RTS. SOC. WORK 98 (2017); Frédéric Mégret, *The Human Rights of Older Persons: A Growing Challenge*, 11 HUM. RTS. L. REV. 37 (2011).

113. Canada was chosen based on its criminal justice system's similarity to the United States' and similarities in cultural and social framework. Lastly, the Canadian study uses a similar database, which allows for a credible and reliable comparison.

against older women, and exposes misplaced assumptions about this phenomenon.

This Section tells the story of sexual violence against older women as it is reflected in reported case law. It explores the types of cases of sexual abuse of older women that make their way into the courts and their characteristics: the relationship between the offender and the victim, whether they knew each other before the assault, the location where the sexual abuse occurred, whether additional offenses were committed, whether consent was an issue at trial, the implications for the victim, and the types of sentences imposed. It also examines the characteristics of the victims, such as their age, whether they were independent, whether they experienced mental or physical disability, and whether they lived in their own homes or in an institutional setting.

A. Methodology

Legal databases (LexisNexis, Westlaw, and Google Scholar case law) of federal and state case law, including the United States Supreme Court, United States Courts of Appeals, Federal District Courts, and state case law for all states between the years 2000 and 2018 were searched, using interchangeably the terms: “rape,” “sexual assault,” “elderly,” “older women,” “older woman,” “elderly women,” and “elderly woman.” In order to include as many relevant cases as possible, the search was not limited to criminal cases. For example, some criminal cases did not appear in the legal database, but defendants later filed *habeas corpus* petitions pursuant to 28 U.S.C. § 2254 to challenge their convictions, sentences, or both. Based on these proceedings, I was able to obtain a broader picture of the relevant criminal cases. Based on the definitions of older people in the gerontological literature and in American legislation regarding elders, I defined an older person as anyone over the age of 60.

This search produced 1,052 cases, which formed the starting point database. After a review of all 1,052 cases, I conducted an additional and more focused search, on the terms “nursing home,” “elderly,” and “rape,” which produced 256 additional cases.¹¹⁴ Overall, I reviewed 1,308 American cases from all levels of courts (state courts, federal courts, etc.) between the years 2000 and 2018.

114. This additional search was conducted since the first search showed that cases of sexual abuse perpetrated in nursing homes or care facilities were rarely mentioned.

I omitted the term “old men” from the case search. Although older men are also victims of sexual abuse,¹¹⁵ the goal of the research was to examine the legal context and the judicial reality of sexual abuse of older women for the purpose of establishing a theoretical framework that accounts for the interplay of age, gender, and sexual violence. Because of the unique challenges that age and gender produce, together with the fact that the majority of older victims of sexual abuse are women, I chose to omit male victims of sexual abuse from the discussion.

Note that the search may have missed several relevant cases. An exhaustive search of all United States cases of sexual assault and rape in the selected years (2000-2018) is beyond the scope of this Article because it reveals more than 10,000 cases. Therefore, I narrowed the search to older women. However, by not limiting the search to criminal cases and by using various terms and various legal databases (such as LexisNexis, Westlaw, and Google Scholar case law), I was able to obtain a broad picture of case law of sexual abuse of older women. After a review of all 1,308 cases, the final empirical basis included 109 relevant cases describing some form of sexual violence against a woman over the age of 60.¹¹⁶

The Canadian study, which I used for comparison,¹¹⁷ was based on 109 cases, 78 of which were taken from a case law search of 3,000 cases, and 31 cases from a review of newspaper reports.¹¹⁸ Unlike this Article, the Canadian study included cases between 1995 and 2015, and selected victims aged 50 and above. These differences are not significant, however. The two periods are nearly identical in length and cover almost the same years. Notwithstanding the differences in the chosen age of the victim, the majority of relevant Canadian cases are about victims over the age of 60. Because of the under-reporting of sexual abuse in late life, the search of Canadian cases, similar to this Article, was not limited to criminal proceedings in order to obtain as broad a picture as possible.

A review of reported legal decisions conveys a limited picture of the legal reality of a criminal phenomenon. Cases represent only criminal acts that could make their way to the courts, leaving behind complaints that for various reasons were not pursued by the prosecution. Moreover,

115. Steve Stanko, *Assault on Men: Masculinity and Male Victimization*, in CRIME, CRIMINAL JUSTICE, AND MASCULINITIES 133, 133–48 (Stephen Tomsen ed., 2017); Ramsey-Klawnsnik et al., *Sexual Predators Who Target Elders*, *supra* note 82, at 355.

116. For the list of the cases see Appendix 1.

117. Grant & Benedet, *supra* note 18.

118. Although the differences between a database including only reported cases and one that includes newspaper reports could be significant, the Canadian database consists mostly of cases. Even if we omit the newspapers data, we are left with 78 cases that reflect similar trends in the legal process of sexual violence against older women.

a review of cases does not reflect criminal acts that were not reported to legal authorities by the victims and therefore are not even known to the criminal justice system. Many criminal cases do not appear in the formal reporter, which introduces a methodological limitation in any research based on case analysis.¹¹⁹ Finally, cases do not fully and inclusively reflect what goes on during trials, but rather offer a partial depiction of the questions that were asked, the behaviors of the parties, the responses of the judge and juries, and the thoughts and emotions of the people taking part in the proceedings.

In discussing rape and other acts of sexual violence, a review of case law introduces additional challenges as most acts of rape go unreported.¹²⁰ Similarly, many elder abuse acts do not proceed to trial or are not reported to law enforcement. In the United States, the Adult Protective Service (APS), which is a civil service, investigates cases of abuse, neglect, and exploitation of elders and people with disabilities.¹²¹ Because these services do not necessarily work with law enforcement,¹²² many instances of elder abuse do not result in criminal proceedings.

Notwithstanding these limitations, given the dearth of legal research on sexual violence in late age, an examination of more than 1,000 cases over a period of eighteen years can offer a thorough and detailed description of the patterns, characteristics, and nature of the cases. The analysis sheds light on a criminal phenomenon that has not been examined in the legal literature and on the way in which it is reflected in the criminal justice system. A comparative analysis to a different jurisdiction strengthens the reliability of the analysis, particularly since the Canadian legal picture of sexual violence against older women is similar to the American legal account of this phenomenon.

119. Reported cases often do not include plea bargains, acquittals, and (usually) cases that are not appealed.

120. BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION 2 (2002), <https://perma.cc/7LXE-UU4Y> (noting that 63 percent of completed rapes, 65 percent of attempted rapes, and 74 percent of completed and attempted sexual assaults against females were not reported to the police). See also Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U.L. REV 1271, 1334 (1994) (“‘Normal’ women . . . don’t report being raped at all.”).

121. See, e.g., NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION, <http://www.napsa-now.org>.

122. Anne Palmer, *Law Enforcement and Adult Protective Services Working Together: A Team Approach to Elder Abuse Cases*, 19 AGE IN ACTION 1–4 (2004) (describing a cooperation between various agencies, including police and APS service in combating elder abuse.)

Analysis of the case law enhances our knowledge of a neglected issue and opens a window into the way in which rape of older women is understood by courts. In this research it offers an opportunity for asking various questions, such as: How should we define and conceptualize this phenomenon? Is it a rape issue? Is it an elder abuse issue? Is it a domestic violence issue? These questions relate to the invisibility of elder sexual abuse as it is not clear how to name and recognize it. What are the unique challenges raised by the societal and cultural constructions of age and gender, and by the interplay between them, with regard to sexual abuse of elder women? These challenges create misplaced assumptions regarding sexual abuse of older women. Do older victims have adequate access to law and justice? Is the criminal justice system the best mechanism for treating sexual abuse in late age?

B. Findings

Analysis of the cases shows that there is a significant gap between the scholarly work on sexual violence against older women and the legal reality reflected in case law. Research reveals various forms of sexual abuse, including abuse in institutional settings by caregivers or other residents, abuse by a spouse, and abuse by a family member.¹²³ According to case law, older women are more likely to be raped by strangers than by people they know.¹²⁴ Although rape by an intimate partner or family member is a prevalent form of sexual abuse according to literature,¹²⁵ it is absent in the legal analysis of American cases. Sexual abuse by other family members, which is also discussed extensively in the literature, hardly appears in United States case law.¹²⁶ Rape in institutional settings is a prevalent form of sexual abuse of older women and a main topic in the research on elder abuse.¹²⁷ The search, however, reveals few cases of sexual abuse in nursing homes, care facilities, or hospitals.¹²⁸ The Canadian study presents a similar picture regarding sexual violence by intimate partners, by family members, and in institutional settings.

123. See *supra* notes 27–28; Ramsey-Klawnsnik, *Elder Sexual Abuse Within the Family*, *supra* note 98.

124. See *infra* note 129.

125. See *supra* Section II.B.2 (discussing forms of sexual violence against older women).

126. See *infra* Section III.B (discussing the findings regarding rape by family members, including spouses).

127. See *supra* Section II.B.2 (discussing forms of sexual violence against older women and locations of the abuse); see also Altman, *supra* note 15.

128. See *supra* Section III.B (discussing the findings regarding rape in institutional settings).

Seventy-three of the 109 American cases (68 percent) involved strangers as the perpetrators of the sexual violence.¹²⁹ In the majority of

129. See cases in the Appendix involving rape by a stranger at the victim's home: *Thomas v. State*, 532 N.W.2d 147 (Tex. Crim. App. 1995) (also *Thomas v. State* No. AP-77,052 Crim. App. Unpub. LEXIS 126 (Feb. 7, 2018); *State v. Greathouse*, No. 99 JE 58, 2000 WL 875322 (Ohio. Ct. App. Jun. 29, 2000); *State v. Roseboro*, 528 S.E.2d 1 (N.C. 2000); *State v. Papisavvas*, 790 A.2d 798 (N.J. 2000); *Garland v. State*, 528 S.E.2d 550 (Ga. App. 2000); *State v. Dean*, 76 S.W.3d 352 (Tenn. Crim. App. 20010; *People v. Davis*, No. D033892, 2001 WL 1295411 (Cal. Ct. App. Oct. 25, 2001); *State v. Davidson*, 2002 Ohio App. LEXIS 2944 (Jun. 3, 2002); *United States ex rel. Montgomery v. McAdory*, 2003 U.S. Dist. LEXIS 16049 (N.D.III. Sep. 8, 2003); *State v. Harder*, 2003 WI App 201, 267 Wis. 2d 277, 670 N.W.2d 557 (Wis. Ct. App. 2003); *People v. Murrell*, No. 243807, 2004 Lexis 195 (Mich. App. Jan. 22, 2004); *State v. Holmes*, 605 S.E.2d 19 (Cal. 2004); *State v. Leach*, 148 S.W.3d 42 (Tenn. 2004); *State v. Ferguson*, No. C-040114, 2004 LEXIS 6662 (Ohio. Ct. App. Dec 30, 2004); *People v. Gray*, 37 Cal. 4th 168 (2005); *State v. Forte*, 629 S.E.2d 137 (N.C. 2005); *People v. Johnson*, B182606, 2005 Cal. Ct. App. LEXIS 11775 (Dec. 22, 2005); *People v. Gary*, No. F046262, 2005 WL 2981106 (Cal. Ct. App. Nov. 7, 2005); *Powell v. State*, 612 S.E.2d 916 (Ga. Ct. App. 2005); *State v. Cannon*, No. E2005-01237-CCA-R3-CD, 2006 WL 3787915 (Tenn. Crim. App. May 16, 2006); *State v. Cox*, No. 05CAA060041, 05CAA070043, 2006 Ohio App. LEXIS 1926 (Apr. 25, 2006); *Davis v. Bd. of Parole & Post-Prison Supervision*, 144 P.3d 931 (Ore. 2006); *State v. Hawkins*, No. C-060114, 2006 Ohio App. LEXIS 5985 (Nov. 17, 2006); *Gryson v. King*, 460 F.3d 1328 (11th Cir. 2006); *Porter v. McGrath*, No. 1:03-cv-05339-TAG, 2006 WL 734944 (E.D. Cal. Mar. 23, 2006); *Heugatter v. State*, No. 03-06-00127-CR, 2007 WL 2462014 (Tex. Ct. App. Aug. 30, 2007); *Merritt v. State*, No. CACR 06-582, 2007 WL 678490 (Ark. Ct. App. Mar 7, 2007); *People v. Wallace*, 189 P.3d 911 (Cal. 2008); *State v. Crump*, No. M2006-02244-CCA-R3-CD, 2009 WL 723524 (Tenn. Crim. App. Mar. 18, 2008); *Blankenship v. Hall*, 542 F.3d 1253 (U.S. App. 2008); *State v. Bounds*, No. 2009-CA-0063, 2009 WL 2914259 (Ohio Ct. App. Sep 10, 2009); *McWatters v. Trombley*, Civil No. 06-13780, 2009 U.S. Dist. Lexis 39544 (May 11, 2009); *Clark v. State*, 683 S.E.2d 93 (Ga. Ct. App. 2009); *State v. Morgan*, 34 So. 3d 1127 (La. Ct. App. Apr. 4, 2010); *Gray v. Epps*, 616 F.3d 436 (5th Cir. 2010); *People v. Gomez*, 959 N.E.2d 1178 (Ill. 2011); *State v. Newman*, 718 S.E.2d 737 (N.C. App. 2011); *State v. Richardson*, 71 So. 3d 492 (La. Ct. App. 2011); *Saldana State v. Roach*, No. A-1890-07T4, 2011 WL 3241467 (N.J. Super. Aug. 1, 2011); *Jones v. Hedgpeth*, No. CV 07-4130-JVS(CW), 2011 WL 7561306 (C.D. Cal. Nov. 14, 2011). Report and recommendation adopted: *Jones v. Hedgpeth* No. CV 07-4130-JVS(CW), 2012 WL 928222 (C.D. Cal. Mar. 19, 2012); *Griggs v. Thaler*, No. 3:08-CV-2137-B, 2011 WL 1563273 (N.D. Tex., Apr 26, 2011); *People v. Arroyo*, No. Do59741, 2012 WL 3024208 (Cal. Ct. App. July 25, 2012); *Lott v. Trammell*, 705 F.3d 1167 (10th Cir. 2013); *Foy v. Lamas*, No. 2:12-0088 2013 WL 838191 (W.D. Pa. Mar 6, 2013); *State v. Smith*, No. W2012-00259-CCA-R3-CD, 2013 WL 5938017 (Tenn. Crim. App. Feb 5, 2013); *Berry v. Plamer*, No. 10-1591, 2013 U.S. App. Lexis 6049 (6th Cir. Mar 22, 2013); *State v. Angilda*, 297 P.3d 311 (Kan. Ct. App. Mar. 2013); *Gaines v. State*, No. 59892, 2014 Lexis 841 (Nev., May 30, 2014); *Commonwealth v. Vega*, No. 1391 EDA 2013, 2014 WL 1091704 (Pa. Super. Jun. 30, 2014); *People v. Chambers*, No. 323024, 2015 WL 853928 (Mich. Ct. App., Dec. 10, 2015); *Holland v. Lackner*, No. 13-cv-

these cases (61 cases), the rape took place in the context of a home invasion, burglary, robbery, or battery.¹³⁰ In five cases, the perpetrator broke

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- 02094-JD, 2015 Lexis 139323 (N.D. Cal, Oct. 13, 2015); *Buffey v. Ballard*, 782 S.E. 2d 204 (W. Va. 2015); *Martinez v. Ryan*, No. CV-13-02423-PHX-DLR, 2015 Lexis 34349 (U.S. Dist. Mar. 19, 2015); *Commonwealth v. Hoffman*, Nos. 254-1996, 256-1996, 258-1996, 255-1996, 257-1996, 2015 Pa. Dist. & Cnty. Dec. LEXIS 9141 (C.P. Oct. 8, 2015); *People v. Jackson*, 1 Cal. 5th 269 (2016); *Yablonsky v. Montgomery*, No. EDCV 14-01877-PA (DTB), 2016 Lexis 26490 (C.D. Cal. Jan. 14, 2016); *Marino v. Commonwealth*, No. 2014-CA-001163-MR, 2016 WL 1719129 (Ky. Ct. App. Apr. 29, 2016); *State v. Funderburk*, 379 P.3d 1144 (Kan. Ct. App. 2016); *People v. Shinti*, No. B275417, 2017 WL 2533541 (Cal. Ct. App., Jun. 12, 2017); *Corce v. Miller*, No. 1:15-CV-1758, 2017 U.S. Dist. Lexis 124245 (Jul. 12, 2017); *Romero v. Nogan*, No. 14-6344-BRM, 2018 WL 2148945 (D.N.G. May 9, 2018). Cases in the Appendix involving rape by a stranger in the public sphere: *People v. Delgado*, No. B155944, 2003 Lexis 3045 (Cal. Ct. App. Mar. 27, 2003); *State v. Odom*, 137 S.W.3d 572 (Tenn. 2004); *People v. Boutta*, No. A120292, 2009 WL 4878631 (Cal. Ct. App. Dec 17, 2009); *People v. Bell*, Cal: Court of Appeal, 1st Appellate Dist., 5th Div. 2011; *People v. Malanche*, No. F060845, 2012 Lexis 1669 (Cal. Ct. App., Mar. 2, 2012); *State v. Ranger III*, No. CA-CR 2015-0468, 2016 WL 7439004 (Ariz. Ct. App. Dec 27, 2016); *People v. Morrison*, 84 N.Y.S.3d 819 (N.Y. App. 2018). Cases in the Appendix involving rape by a stranger in an institutional setting: *State v. Williams*, N.E.2d 446 (Ohio. 2003); *Goss v. State*, No. W2005-02842-CCA-R3-PC, 2006 WL 929287 (Tenn. Ct. Crim. App. Mar. 7, 2006); *In re Civ. Commitment of Tallman*, 2007 Minn. App. Unpub. LEXIS 468, 2007 WL 1412979; *Simoneaux v. State*, 29 So. 3d 26 (Miss. App. 2009); *Yablonsky v. Montgomery*, No. EDCV 14-01877-PA (DTB), 2016 Lexis 26339 (C.D. Cal. Mar. 1, 2016).
130. *Thomas v. State*, 532 N.W.2d 147 (Tex. Crim. App. 1995) (also *Thomas v. State* No. AP-77,052 Crim. App. Unpub. LEXIS 126 (Feb. 7, 2018); *State v. Greathouse*, No. 99 JE 58, 2000 WL 875322 (Ohio. Ct. App. Jun. 29, 2000); *State v. Roseboro*, 528 S.E.2d 1 (N.C. 2000); *State v. Papasavvas*, 790 A.2d 798 (N.J. 2000); *Garland v. State*, 528 S.E.2d 550 (Ga. App. 2000); *State v. Dean*, 76 S.W.3d 352 (Tenn. Crim. App. 20010); *People v. Davis*, No. D033892, 2001 WL 1295411 (Cal. Ct. App. Oct. 25, 2001); *State v. Davidson*, 2002 Ohio App. LEXIS 2944 (Jun. 3, 2002); *United States ex rel. Montgomery v. McAdory*, 2003 U.S. Dist. LEXIS 16049 (N.D.III. Sep. 8, 2003); *State v. Harder*, 2003 WI App 201, 267 Wis. 2d 277, 670 N.W.2d 557 (Wis. Ct. App. 2003); *People v. Murrell*, No. 243807, 2004 Lexis 195 (Mich. App. Jan. 22, 2004); *State v. Holmes*, 605 S.E.2d 19 (Cal. 2004); *State v. Leach*, 148 S.W.3d 42 (Tenn. 2004); *State v. Ferguson*, No. C-040114, 2004 LEXIS 6662 (Ohio. Ct. App. Dec 30, 2004); *People v. Gray*, 37 Cal. 4th 168 (2005); *State v. Forte*, 629 S.E.2d 137 (N.C. 2005); *People v. Johnson*, B182606, 2005 Cal. Ct. App. LEXIS 11775 (Dec. 22, 2005); *People v. Gary*, No. F046262, 2005 WL 2981106 (Cal. Ct. App. Nov. 7, 2005); *Powell v. State*, 612 S.E.2d 916 (Ga. Ct. App. 2005); *State v. Cannon*, No. E2005-01237-CCA-R3-CD, 2006 WL 3787915 (Tenn. Crim. App. May 16, 2006); *State v. Cox*, No. 05CAA060041, 05CAA070043, 2006 Ohio App. LEXIS 1926 (Apr. 25, 2006); *Davis v. Bd. of Parole & Post-Prison Supervision*, 144 P.3d 931 (Ore. 2006); *State v. Hawkins*, No. C-060114, 2006 Ohio App. LEXIS 5985 (Nov. 17, 2006); *Gryson v. King*, 460 F.3d 1328 (11th Cir. 2006); *Porter v. McGrath*, No. 1:03-cv-05339-TAG, 2006 WL 734944 (E.D. Cal. Mar. 23, 2006); *Heugatter v. State*, No. 03-06-00127-CR, 2007

into a nursing home and sexually attacked the victim, whom they did not know.¹³¹ In seven cases, the victim was attacked in a public space—on the street, while walking in the park, or in the building where the victims resided.¹³² In the Canadian study, over 60 percent of cases in-

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- WL 2462014 (Tex. Ct. App. Aug. 30, 2007); *Merritt v. State*, No. CACR 06-582, 2007 WL 678490 (Ark. Ct. App. Mar. 7, 2007); *People v. Wallace*, 189 P.3d 911 (Cal. 2008); *State v. Crump*, No. M2006-02244-CCA-R3-CD, 2009 WL 723524 (Tenn. Crim. App. Mar. 18, 2008); *Blankenship v. Hall*, 542 F.3d 1253 (U.S. App. 2008); *State v. Bounds*, No. 2009-CA-0063, 2009 WL 2914259 (Ohio Ct. App. Sep. 10, 2009); *McWatters v. Trombley*, Civil No. 06-13780, 2009 U.S. Dist. Lexis 39544 (May 11, 2009); *Clark v. State*, 683 S.E.2d 93 (Ga. Ct. App. 2009); *State v. Morgan*, 34 So. 3d 1127 (La. Ct. App. Apr. 4, 2010); *Gray v. Epps*, 616 F.3d 436 (5th Cir. 2010); *People v. Gomez*, 959 N.E.2d 1178 (Ill. 2011); *State v. Newman*, 718 S.E.2d 737 (N.C. App. 2011); *State v. Richardson*, 71 So. 3d 492 (La. Ct. App. 2011); *Saldana State v. Roach*, No. A-1890-07T4, 2011 WL 3241467 (N.J. Super. Aug. 1, 2011); *Jones v. Hedgpeth*, No. CV 07-4130-JVS(CW), 2011 WL 7561306 (C.D. Cal. Nov. 14, 2011). Report and recommendation adopted: *Jones v. Hedgpeth* No. CV 07-4130-JVS(CW), 2012 WL 928222 (C.D. Cal. Mar. 19, 2012); *Griggs v. Thaler*, No. 3:08-CV-2137-B, 2011 WL 1563273 (N.D. Tex., Apr. 26, 2011); *People v. Arroyo*, No. Do59741, 2012 WL 3024208 (Cal. Ct. App. July 25, 2012); *Lott v. Trammell*, 705 F.3d 1167 (10th Cir. 2013); *Foy v. Lamas*, No. 2:12-0088 2013 WL 838191 (W.D. Pa. Mar. 6, 2013); *State v. Smith*, No. W2012-00259-CCA-R3-CD, 2013 WL 5938017 (Tenn. Crim. App. Feb. 5, 2013); *Berry v. Plamer*, No. 10-1591, 2013 U.S. App. Lexis 6049 (6th Cir. Mar. 22, 2013); *State v. Angilda*, 297 P.3d 311 (Kan. Ct. App. Mar. 2013); *Gaines v. State*, No. 59892, 2014 Lexis 841 (Nev., May 30, 2014); *Commonwealth v. Vega*, No. 1391 EDA 2013, 2014 WL 1091704 (Pa. Super. Jun. 30, 2014); *People v. Chambers*, No. 323024, 2015 WL 853928 (Mich. Ct. App., Dec. 10, 2015); *Holland v. Lackner*, No. 13-cv-02094-JD, 2015 Lexis 139323 (N.D. Cal., Oct. 13, 2015); *Buffey v. Ballard*, 782 S.E. 2d 204 (W. Va. 2015); *Martinez v. Ryan*, No. CV-13-02423-PHX-DLR, 2015 Lexis 34349 (U.S. Dist. Mar. 19, 2015); *Commonwealth v. Hoffman*, Nos. 254-1996, 256-1996, 258-1996, 255-1996, 257-1996, 2015 Pa. Dist. & Cnty. Dec. LEXIS 9141 (C.P. Oct. 8, 2015); *People v. Jackson*, 1 Cal. 5th 269 (2016); *Yablonsky v. Montgomery*, No. EDCV 14-01877-PA (DTB), 2016 Lexis 26490 (C.D. Cal. Jan. 14, 2016); *Marino v. Commonwealth*, No. 2014-CA-001163-MR, 2016 WL 1719129 (Ky. Ct. App. Apr. 29, 2016); *State v. Funderburk*, 379 P.3d 1144 (Kan. Ct. App. 2016); *People v. Shinti*, No. B275417, 2017 WL 2533541 (Cal. Ct. App., Jun. 12, 2017); *Corce v. Miller*, No. 1:15-CV-1758, 2017 U.S. Dist. Lexis 124245 (Jul. 12, 2017); *Romero v. Nogan*, No. 14-6344-BRM, 2018 WL 2148945 (D.N.G. May 9, 2018).
131. *See, e.g.*, *In re Civ. Commitment of Tallman*, 2007 Minn. App. Unpub. LEXIS 468, 2007 WL 1412979 (in which the defendant raped two older women, one in a nursing home and one in her own home.).
132. *Hernandez v. Superintendent, Cocksackie Corr. Facility*, Civ. 2457 (WHP)(AJP), 2018 WL 502784 (S.D.N.Y. Jan. 22, 2018); *Labon v. Martel*, No. CV 14-6500-DSF(KES), 2016 WL 8470181 (C.D. Cal. July 21, 2016), *report and recommendation adopted by* No. CV1406500DSFKES, 2017 WL 986358 (C.D. Cal. Mar. 13, 2017); *People v. Malanche*, No. F060845, 2012 WL 688069 (Cal. Ct. App., Mar. 2, 2012); *People v. Bell*, 194 Cal. Rptr. 3d 93 (Cal. Ct. App. 2015); *People v. Boutta*,

volved stranger rape, also occurring in the course of home invasion and burglary.¹³³ In six additional cases that occurred in a seniors' apartment building,¹³⁴ the perpetrators were also strangers.

The majority of stranger rape cases present a disturbing picture of horrific and brutal sexual crimes, including vaginal rape, anal rape, aggravated sexual assault, forcible oral sex, and more.¹³⁵ In addition to the sexual violence, most of the stranger rape cases involved extreme physical violence causing serious bodily injuries.¹³⁶ Twenty-eight women died during the acts of sexual violence because of grave physical violence inflicted on them, compounded by their old age. Two of the victims died later as a result of the attack.¹³⁷ The Canadian cases of sexual violence against women in the community also involved significant additional violence, beyond the violence inherent in the sexual offense. Of the 74 women in the Canadian study, 11 women were killed in the course of the violent sexual act.¹³⁸

Thirteen cases (12 percent) can be characterized as acquaintance rape, where the victim knew the perpetrator to some extent. In some of

No. A120292, 2009 WL 4878631 (Cal. Ct. App. Dec 17, 2009); *People v. Delgado*, No. B155944, 2003 WL 1564487 (Cal. Ct. App. Mar. 27, 2003); *State v. Odom*, 137 S.W.3d 572 (Tenn. 2004).

133. *Grant & Benedet*, *supra* note 18, at 66.
134. Researchers differentiated between sexual violence that occurred in the community, such as the women's home or in the public sphere, and sexual violence that occurred in supported settings, such as seniors' apartment building or long-term residential care.
135. *See, e.g.*, *Grayson v. King*, 460 F.3d 1328 (11th Cir. 2006); *Lott v. Trammell*, 705 F.3d 1167 (10th Cir. 2013); *McWatters v. Trombley*, No. 06-13870, 2009 WL 1313320 (E.D. Mich. 2009); *Thomas v. State*, NO. AP-77, 052, 2018 WL 739093 (Tex. Ct. Crim. App. 2018); *Buffey v. Ballard*, 782 S.E.2d 204 (W.Va. 2015).
136. The following are only some extreme examples. In the case of *Gomez*, the court described the rape as "an absolute nightmare" and "monstrous." *People v. Gomez*, 959 N.E.2d 1178, 1200 (Ill. App. Sept. 30, 2011). In the case of *Thomas*, the defendant entered the victim's house with a few other men. *Thomas v. State*, NO. AP-77, 052, 2018 WL 739093 at *2 (Tex. Crim. App. Feb. 7, 2018). They beat the victim, who was 73, until she was unconscious, and then two of them tied the victim's hands behind her and raped her vaginally and anally. *Id.* The medical examiner stated that out of the 15,000 autopsies he had performed over the course of his career, this was the worst injury he had ever seen. *Id.* In the case of *Jackson*, the victim stated, "I couldn't understand why I couldn't get up and—until I looked around and noticed that there was a garden rake handle that he had thrust into my vagina." *People v. Jackson*, 376 P.3d 528, 548 (Cal. 2016).
137. *See, e.g.*, *Yablonsky v. Montgomery*, No. EDCV 14 01877 PA, 2016 WL 807960 (C.D. Cal. Jan. 14, 2016); *Lott v. Workman*, No. CIV-05-891-M, WL 1302286 (W.D. Okla. Mar. 31, 2011); *State v. Forte*, 629 S.E.2d 137 (N.C. 2006); *State v. Leach*, 148 S.W.3d 42 (Tenn. 2006).
138. *Grant & Benedet*, *supra* note 18, at 66.

these cases,¹³⁹ the victim hardly knew the perpetrator, which makes these cases more similar to stranger rape than acquaintance rape. For example, in the case of Barton, because the defendant used to wash the victim's neighbor's car, the victim recognized him and opened the door for him.¹⁴⁰ In other cases, the assailants were neighbors, maintenance workers in the buildings where the victims lived, performed chores or cleaned for the victims. In one case, the perpetrator's mother was a resident in the institution where the victim resided.¹⁴¹ The Canadian study found a higher number of acquaintance rape cases—32 percent of the women living in the community were sexually assaulted by a neighbor, acquaintance, or friend.¹⁴²

The status of rape in institutional settings, as reflected in reported case law, is almost the opposite of what can be concluded from research. Only 19 cases (17.4 percent) involved sexual violence that occurred in an institutional setting. In 13 cases (about 12 percent) the perpetrators were caregivers,¹⁴³ in four cases (about 3.7 percent) they were other residents,¹⁴⁴ and in one case the perpetrator was unknown.¹⁴⁵ Most of these were not criminal but civil cases, in which the victim's family sued the institution for negligence. It is not clear from the cases whether the sex-

139. See *People v. Barton*, No. G043659, 2011 WL 3568545 (Cal. Ct. App., Aug. 15, 2011); *People v. Pizzo*, No. B152191, 2002 WL 31029152, (Cal. Ct. App., Sept. 11, 2002).

140. *Barton*, 2011 WL 3568545 at *2.

141. *Maness v. Allbaugh*, No. CIV151108D, 2017 WL 6542755 at *1 (W.D. Okla., Dec. 21, 2017).

142. Grant & Benedet, *supra* note 18, at 65.

143. See, e.g., *State v. Roach*, No. 06-03-0342, 2011 WL 3241467 (N.J. Super. Ct. App. Div., Aug. 1, 2011); *People v. Morrison*, 109 N.E.3d 1119 (N.Y. 2018); *State v. Cook*, No. 87265, 2007 WL 475444 at *1 (Ohio App. Ct. Feb. 15, 2007); *Ward v. Commonwealth*, 570 S.E.2d 827, 829 (Va. 2002).

144. *Dupree v. Plantation Pointe L.P.*, 892 So.2d 228, 231 (Miss. 2004); *Maplewood Care v. Arnold*, 991 N.E.2d 1, 2 (Ill. App. Ct. 2013); *Gracy Woods I Nursing Home v. Mahan*, 520 S.W.3d 171, 174 (Tex. App. Ct. 2017); *Carlton v. Vancouver Care*, 231 P.3d 1241, 1243 (Wash. App. Ct. 2010).

145. *Alcoy v. Valley Nursing Homes*, 630 S.E.2d 301, 302 (Va. 2006).

ual violence was reported to police¹⁴⁶ or whether it was reported but did not proceed to trial.¹⁴⁷

Although this form of abuse is a central topic in elder abuse research, it appears as a marginal issue in the legal picture of sexual violence against older women in the United States. The Canadian study presents a similar pattern, according to which only in 10 of the cases (10 percent) were the perpetrators, caregivers, or volunteers at the elder facility.¹⁴⁸

Resident-to-resident sexual abuse is also not reflected in the criminal justice system. As noted, of the 109 American cases, only four involved sexual violence perpetrated by another resident in a care facility.¹⁴⁹ All of these were civil cases that appeared in the additional search using the phrase “nursing home.” The Canadian study included seven resident-to-resident (or patient-to-patient) sexual violence cases (6.4 percent), a number that is also low and not representative of this form of abuse in the literature.¹⁵⁰ Contrary to sexual violence in the community, which is accompanied by life-threatening physical violence and various additional criminal offenses, there was rarely any additional violence in cases of sexual violence by other residents beyond that inherent in the sexual act, and no additional offenses were committed.¹⁵¹

Although the literature indicates that most sexual offenses against older women are committed by intimate partners, the present research, similar to the Canadian study, provides different data of sexual abuse of older women. Of 1,308 American cases covering a period of 18 years, I could not find a single case of rape in an intimate relationship. In a period of 20 years, the Canadian researchers found only one case involving sexual assault by a spouse.¹⁵² A similar picture emerges with regards to rape by family members. The current research reveals only two cases

146. Research shows that elder abuse, including sexual abuse, in nursing homes is often not reported by family members and caregivers for various reasons, including, fear of family members that the victim will be forced to leave the nursing home, the non-recognition of the act as abuse, the fear of nursing homes' management of negative publicity and more. See Robert A. Hawks, *Grandparent Molesting: Sexual Abuse of Elderly Nursing Home Residents and Its Prevention*, 8 MARQ. ELDER'S ADVISOR 159, 167–68 (2006).

147. It is possible that the cases proceeded to trial but were not revealed in the search. But the fact that only 11 cases were identified out of 1,308 cases reviewed indicates that they are not common in the criminal justice system.

148. Grant & Benedet, *supra* note 18, at 71–73.

149. See Hawks, *supra* note 146.

150. Grant & Benedet, *supra* note 18, at 71–73.

151. Hawks, *supra* note 146.

152. Grant & Benedet, *supra* note 18, at 76.

perpetrated by family members. One of these was a rape of a 96-year-old woman by her grandson,¹⁵³ and in the other, the victim was raped, sodomized, and murdered by her son. But because the son had been put up for adoption when he was young, had not been raised by the victim, and was not living with her, the circumstances of this case are somewhat similar to stranger rape cases.¹⁵⁴ In Canada, four cases of family sexual violence were included.¹⁵⁵

The present research includes 147 victims, since some cases include more than one victim. The age of the victims varies. Thirty women were between the ages 60 to 70, 29 were between ages 70 to 80, 36 women were between 80 to 90 and seven were age 90 and over, with one victim at the age of 96.¹⁵⁶ The case law did not mention the age of the other victims. The majority of the victims were relatively independent and healthy. Some had health problems but not serious health issues or mental incapacities. Of a total of 147 victims in the United States, 11 experienced physical health issues; 19 experienced dementia, Alzheimer's, or cognitive limitations; and four experienced both cognitive and physical problems.¹⁵⁷ The majority of the women who experienced dementia (17 women) lived in nursing homes or other care facilities. The other victims were described as having no physical or mental impairments or as living relatively independent lives.¹⁵⁸

Seventy percent of the victims (104 out of 147) lived in their own homes, mostly alone.¹⁵⁹ Of these 104, only six victims were described as experiencing some disabilities and health issues.¹⁶⁰ It is reasonable to as-

153. See *Johns v. Sec'y. Fla. Dep't of Corr.*, No. 3:09-cv-341-J-34JBT, 2012 U.S. Dist. LEXIS 25024 at *18 (Feb. 28, 2012).

154. *People v. Abilez*, 161 P.3d 58 (Cal. 2007). The circumstances of this case also resemble those of stranger rape cases in the extreme physical violence inflicted by the perpetrator.

155. *Grant & Benedet*, *supra* note 18, at 70.

156. *Johns v. Sec'y. Fla. Dep't of Corr.*, 2012 U.S. Dist. LEXIS 25024, at *18 (M.D. Fla. 2012).

157. Note that in the other cases there was no indication of any health or cognitive problems of the victims.

158. See, e.g., *State v. Holmes*, 605 S.E.2d 19 (Cal. 2004); *People v. Spicer*, 884 N.E.2d 675 (Ill. 2011); *Johns v. Sec'y, Fla. Dep't of Corr.*, 2012 LEXIS 25024; *State v. Ranger III*, No. CA-CR 2015-0468, 2016 WL 7439004 (Ariz. Ct. App. Dec 27, 2016).

159. In two cases, the location of the assault and the women's residence is not mentioned. *State v. Ranger III*, No. CA-CR 2015-0468, 2016 WL 7439004 (Ariz. Ct. App. Dec. 27, 2016); *State v. Greathouse*, No. 99 JE 58, 2000 WL 875322 (Ohio Ct. App. Jun. 29, 2000).

160. See, e.g., *State v. Leach*, 148 S.W.3d 42 (Tenn. 2004); *Wash. v. State*, No. PM 98-1623, 2005 R.I. Super. LEXIS 115 (Jul. 18, 2005); *Powell v. State*, 612 S.E.2d 916 (Ga. Ct. App. 2005); *State v. Bounds*, No. 2009-CA-0063, 2009 WL 2914259

sume that these women were less vulnerable to abuse than women in care facilities because of their independence and the fact that they lived alone and did not need special assistance. But the relative independency of older women who live alone may be a double-edged sword, because their independency may have made it easier for the perpetrators to attack them. In Canada, the majority of the victims were also independent. Out of 93 women living in the community, only one suffered from dementia. Similar to the present research, in the Canadian study, 80 percent of the complainants living in the community were sexually assaulted in their homes.¹⁶¹

Most rapes of older women in case law occur in their private homes. Being raped in one's own home is an attack on the privacy, autonomy, and confidence of victims. It resembles the depiction of rape in cases of sexual violence against children, battered women, and people with disabilities, which mostly takes place behind closed doors, in the privacy of the home, with no outside witnesses. The independence of most victims in the cases cited, and the minor role of disability and health issues in their lives are different than the description in the elder abuse literature, according to which it is women with disabilities who mostly suffer from sexual violence at a late age.¹⁶²

Unlike the majority of rape and sexual assault cases, consent is not a central element in cases of sexual violence against older women. In the United States cases, consent was raised by the defense in 12 out of 109 cases: in six cases of acquaintance rape, five stranger rape cases, and in one case of rape by a caregiver. In one case the defense argued that the victim had sexual relations with many men and sought to admit sexual history evidence, which is often related to the consent defense and is used to discredit complainants. The consent defense was not successful in any of these cases.¹⁶³ In Canada, consent was argued twice in cases in

(Ohio Ct. App. Sep 10, 2009); *People v. Malanche*, No. F060845, 2012 Lexis 1669 (Cal. Ct. App., Mar. 2, 2012); *People v. Mclaughlin*, No. A092987, A100180, 2003 Lexis 8198 (Cal. Ct. App. Aug. 28, 2013).

161. Grant & Benedet, *supra* note 18, at 65.

162. See *infra* Section IV.B.3.

163. See cases in the Appendix where a consent defense was raised: *State v. Williams*, N.E.2d 446 (Ohio. 2003); *People v. Shelton*, 307 A.D.2d 370 (N.Y. 2003); *Ingersoll v. State*, 2007 Ind. App. Unpub. LEXIS 1371 (Apr. 12, 2007); *State v. Bounds*, No. 2009-CA-0063, 2009 WL 2914259 (Ohio Ct. App. Sep 10, 2009); *People v. Saldana*, 2011 Cal. App. Unpub. LEXIS 9224 (Nov. 30, 2011); *State v. Smoot*, No. ED95499, WL 6776068 (Mo. Ct. App. Dec. 27, 2011); *People v. Mclaughlin*, No. A092987, A100180, 2003 Lexis 8198 (Cal. Ct. App. Aug. 28, 2013); *State v. Angilda*, 297 P.3d 311 (Kan. Ct. App. Mar. 2013); *State v. Williams*, 2015 Ohio App. Lexis 3861 (Sep. 30, 2015); *Yablonsky v. Montgomery*, No. EDCV 14-01877-PA

which the victim and the offender were both elderly and in a relationship.¹⁶⁴ It was successful in one case.¹⁶⁵

The outcomes of sexual abuse for older women are overwhelming and life changing, both in the Canadian and the American cases. Many of the women had to leave their lifelong homes, enter institutional care, or other care facilities.¹⁶⁶ Some suffered permanent injuries and significant deterioration of their overall health.¹⁶⁷

The picture described in case law of sexual abuse of older women is similar in the United States and Canada. Both present a one-dimensional account of rape at late age, and neither accord with the scholarly work on sexual abuse of older people, and older women in particular.

IV. THE “MISSING” VICTIMS AND THE “MISSING” ELEMENTS

A. Overview

Section III has shown that the legal account of sexual abuse of older women does not represent the accurate scope, nature, and characteristics of the phenomenon. The disparity between case law and the reality of sexual violence against older women raises questions regarding the societal and legal invisibility of older women who are victims of sexual violence and their limited access to the criminal justice system. The judicial picture represents a failure to account for the interplay between age and gender and to conceptualize sexual violence against older women as part of a wider pattern of violence against women.

Below I consider the “missing victims” and the “missing elements” in cases of sexual violence against older women in the context of the scholarship on elder abuse, rape literature, and domestic violence re-

(DTB), 2016 Lexis 26490 (C.D. Cal. Jan. 14, 2016); *Labon v. Martel*, No. CV 14-6500-DSF(KES), 2016 WL 8470181 (C.D. Cal. July 21, 2016). Report and recommendation adopted: *Labon v. Martel*, No. CV1406500DSFKES, 2017 WL 986358 (C.D. Cal. Mar. 13, 2017).

164. Grant & Benedet, *supra* note 18, at 68 n.139.

165. *Id.*

166. *See, e.g.*, *State v. Holmes*, 605 S.E.2d 19, 21 (S.C. 2004) (less than a year after her rape, the victim was transferred to a nursing home where she died a month later of pneumonia, which developed as the result of her severe brain injury, which was caused by her assailant).

167. *See, e.g.*, *Thomas v. State*, No. AP-77,052 2018 Tex. Crim. App. Unpub. LEXIS 126 (Feb. 7, 2018); *State v. Holmes*, 605 S.E.2d 19, 21 (Cal. 2004); *State v. Harder*, 670 N.W.2d 557 (Wis. Ct. App. 2003).

search. I examine what the cases reveal and also what they fail to present and why. These types of questions are prompted by the narrow, partial, and one-dimensional legal picture reflected in case law.

Although case law generally undercounts acquaintance rape, spousal/partner rape, and intrafamily rape against younger women as well, the legal picture of sexual abuse of older women in the case law is unique from the larger picture of sexual abuse reported in the case law. This is because of the unique deterrents to reporting for older women, and the unique deterrents to believe the issue, based on ageist beliefs.¹⁶⁸

There are relatively few cases of rape and sexual assault of older women compared to other cases of rape. The research reveals only 109 cases describe sexual violence acts against older women during the years 2000-2018. Note that not all of these 109 cases are criminal cases. Although this relatively small number is consistent with research indicating that sexual abuse of older women is under-reported, and although reported cases do not reflect the real scope of the criminal phenomenon, as discussed above, it is still surprising that sexual abuse of older women is almost absent in criminal trials of rape and sexual assault in a period of 18 years. Why are there so few cases of rape of older women? Based on the literature, this limited number of cases can be explained by one or all of the following reasons. First, most older victims of sexual abuse do not report the abuse because a variety of reasons discussed in this study.¹⁶⁹ Second, if and when they report sexual abuse, their complaints do not proceed to trial but rather stop at early stages of the criminal proceedings owing to disbelief, ignorance, or difficulties in proving the crimes,¹⁷⁰ or end in plea bargains. Third, in situations where the victims are not able to report the sexual abuse because of mental or cognitive limitations, professionals who work with them fail to report the abuse out of ignorance, unawareness, or disbelief.¹⁷¹ Fourth, professionals who work with elders are not aware of the problem of sexual abuse of older people,¹⁷² and often miss its signs.¹⁷³ Some of these explanations also ap-

168. See *infra* Section IV.B.

169. See *supra* Section I and *infra* Section IV.B.

170. Arthur Meirson, *Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State*, 60 HASTINGS L.J. 431, 448 (2008).

171. See Bows, *Practitioner Views*, *supra* note 83, at 1079; see generally Ramsey-Klawnsnik, *Elder Sexual Abuse Within the Family*, *supra* note 98.

172. For example, a recent study conducted in Israel examined the awareness of social workers and nurses working with elders in the welfare and health care systems. The study showed that less than half of the participating professionals had encountered sexual violence against older women. See Sara Alon et al., *Professionals' Awareness of Sexual Abuse in Late Life: An Exploratory Survey*, 24 J. AM. PSYCHIATRIC NURSES ASS'N 53, 57 (2018).

ply to younger victims and some of these dimensions are distinctive in the case of older victims as discussed below.

The interaction between age and gender plays a key role in the above explanations, whether they concern under-reporting of the abuse by victims or professionals, under-prosecuting the issue by the state, or general under-awareness of the phenomenon. The unique challenges brought about by the interaction between age and gender are discussed below in an effort to explain the marginalization of sexual abuse of older women in the criminal justice system and in scholarship.

The discussion of the “missing victims” and “missing elements” is organized around six themes. I begin with a discussion of the stereotypical paradigm of “real rape,” the ancient conception of the “ideal” rape victim, and the way both shape the legal picture of sexual violence against older women. Next, I challenge the image of the “ideal” older woman victim by discussing the concurrent constructions of age, gender, and sexuality. These two themes are followed by an examination of the interplay between age, gender, and disability. The fourth and fifth themes focus on intimate relationships and the hidden sexual abuse by an intimate partner in the case law of rape in older age. The sixth theme examines the absence of the element of consent in the judicial picture of sexual abuse in late age.

These themes expose stereotypical assumptions about rape in old age and the difficulties in naming and recognizing sexual abuse of older women. These themes also reflect the importance of integrating age and gender in the analysis of sexual abuse of older women and the importance of conceptualizing sexual violence against older women as a distinct phenomenon.

B. *Discussion*

Grant and Benedet point out in their study on sexual violence against older women in Canada that “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.”¹⁷⁴ The American legal picture of sexual abuse of older women, like the Canadian one, resembles rape before the feminist reforms of the 1980s.¹⁷⁵ The

173. Altman, *supra* note 15, at 1548; Ramsey-Klawnsnik, *Elder Sexual Abuse Within the Family*, *supra* note 98, at 55.

174. Grant & Benedet, *supra* note 18.

175. These reforms focused on the criminal justice system and amended the substantive, procedural, and evidentiary laws. For a discussion of rape law reform, see Ronald J.

historical legal picture of rape and sexual assault reflected mainly stranger rape cases, while other forms of sexual violence were hardly represented in case law or noticed by law enforcement. Rape was acknowledged when it fit the paradigm of stranger rape, and victims were noticed by law enforcements when they fit the criteria of the “ideal victim.”¹⁷⁶ This response to sexual violence was consistent with rape myths and outdated assumptions about women, sexuality, rape, and rape victims.

1. The “Ideal” Victim and “Real Rape”

The “shadow of rape” is a theoretical perspective used to explain the fear of women of being raped and sexually assaulted.¹⁷⁷ This fear is shaped by the stranger rape scenario, according to which a stranger violently rapes a woman at night, in a dark alley, using physical violence to overcome the resistance of the woman.¹⁷⁸ According to this scenario, the woman attempts to resist the rape and promptly reports it to authorities. The physical violence used by the attacker, the woman’s resistance, and her immediate complaint to the authorities result in corroborative evidence and strengthen the woman’s credibility. However, this description does not reflect the reality of rape, as most acts of rape are perpetrated by someone whom the victims know, without physical violence beyond that inherent in the rape itself, and with no resistance on the part of the woman.¹⁷⁹ Nevertheless, it is this description that is socially and culturally perceived as the common form of rape.¹⁸⁰

Berger et al., *The Dimensions of Rape Reform Legislation*, 22 LAW & SOC’Y REV. 329, 329–32 (1988); Stacy Futter & Walter R. Mebane, *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN’S L.J. 72, 78–80 (2001); Cassia C. Spohn, *The Rape Reform Movement: the Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119 (1999). For a discussion of the first wave of reforms regarding the definition of rape and the role of consent, see Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335, 335–38 (2017).

176. See *infra* Section IV.B.1 (discussing the themes of the “ideal victim” and “real rape”).

177. Mine Özascilar, *Predicting Fear of Crime: A Test of the Shadow of Sexual Assault Hypothesis*, 19 INT’L R. VICTIMOLOGY 269, 269–71 (2013); Pamela Wilcox et al., *Fear of Acquaintance Versus Stranger Rape as a “Master Status:” Towards Refinement of the “Shadow of Sexual Assault,”* 21 VIOLENCE & VICTIMS 355, 360–68 (2006).

178. Estrich, REAL RAPE, *supra* note 71, at 4, 8.

179. Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 645 (2010) (“The classic rape narrative is woven from a racist and sexist mythology specific to American history . . . Extrinsic, violent assaults by a stranger are the weft and warp of the tale: the rapist’s wielding of a knife, his dragging her into an alley, his beating, his threat of death. Despite generations of repeated storytelling, this type of rape is, in terms of ac-

Cases of sexual abuse against older women are the best examples of this fear. According to the description in Section III, older women are attacked mostly by strangers whom they had never seen before, often at night, when they are sleeping in their homes.¹⁸¹ The sexual violence is severe, and it is accompanied by brutal physical violence. While in the U.S. and in other Western countries, the legal picture of rape has changed to reflect various forms of sexual violence and wide-ranging relationships in which rape occurs, the legal description of sexual violence against older women has remained frozen in time and is reminiscent of the legal picture of rape and sexual assault cases in the past.

The depiction of sexual abuse of older women in case law as “real rape” is based on various explanations. First, cases of stranger rape are usually less difficult for law enforcement to deal with. Because of the physical violence that accompanies the sexual violence, these cases provide visible and corroborative evidence, such as photos of the injuries, medical professionals’ reports, and rape kits. Therefore, unlike most rape cases, they are not based on a “he said, she said” scenario, and are easier to prove in court. The existence of corroborative and physical evidence also assists in combatting outdated views about rape victims and women.¹⁸²

Second, in these cases, not only the circumstances but also the victims’ portrayal conforms to the traditional paradigm of “real rape” and the stereotypical image of a “real victim,” one who is frail and innocent. Feminist writing has discussed extensively the paradigm of the ideal victim,¹⁸³ which portrays certain women as quintessential rape victims, excluding other groups of women from the legal and social discourse of rape.¹⁸⁴ The ideal victim is described as virtuous and fragile, one who does not know her assailant and did nothing to provoke the sexual vio-

tual incidence, a statistical outlier—so different from the norm as to be exceptional rather than typical”).

180. Estrich, *REAL RAPE*, *supra* note 71, at 1164.

181. *See supra* Section III.B (discussing the findings of the research).

182. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 33, 38–41 (2017) (discussing the “credibility discount” in rape cases and how prosecutors’ and police’s decisions regarding rape complaints are affected by the “paradigmatic rape” of stranger rape).

183. The “ideal victim” is a term coined in the 1980s by the criminologist Nils Christie. *See* Nils Christie, *The Ideal Victim*, in *FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM*, 17–21 (Ezzat A. Fattah ed., St. Martin’s Press 1986).

184. *See* Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 101, 101–02 (2012) (noting the exclusion of certain women from the discourse of rape); *see also* Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 849–71 (2013) (discussing how rape shield laws harm women who are not perceived as “real” rape victims).

lence, such as drinking, smoking, or dressing and behaving in a promiscuous way.¹⁸⁵ Scholars have also drawn attention to the effect of socio-demographic traits, such as race, ethnicity, and economic status, on the societal image of the ideal victim.¹⁸⁶

Unlike younger rape victims, older women are less likely to be accused of provoking the rape. The victim is unlikely to be blamed for being too promiscuous or wearing specific clothing. The physical violence, particularly when the physical violence is extremely severe, negates any claim of consent on the part of the defense¹⁸⁷ and produces corroborative evidence, strengthening the victim's credibility and making it easier for the judge or jury to believe her. Furthermore, in many cases of stranger rape, the victim reports the rape immediately because she is often severely injured and in need of urgent medical care. Although the recent complaint rule¹⁸⁸ was struck from law, prompt complaint is still perceived as the "right" response of rape victims,¹⁸⁹ and it supports the victims' credibility.

Third, most cases of sexual abuse of older women reflect visible and clear physical power disparities between victims, who are often physically weak due to their age, and perpetrators, who are presumably much stronger as they are much younger than the victims. The age difference also contributes to the power disparity. Unlike many situations of sexual violence, in which older men abuse younger women, in cases of sexual abuse of older women the older party is weaker than the younger one. Thus, the age differences, which often strengthens the vulnerability of

185. Tuerkheimer, *supra* note 183; Capers, *supra* note 183.

186. See Rose Corrigan & Corey S. Shdaimah, *People With Secrets: Contesting, Constructing, and Resisting Women's Claims About Sexualized Victimization*, 65 CATH. U. L. REV. 429, 431, 452 (2016); Dominique E. Roe-Sepowitz et al., *Victim or Whore: The Similarities and Differences Between Victim's Experiences of Domestic Violence and Sex Trafficking*, 24 J. HUM. BEHAV. SOC. ENV'T 883 (2014); Corey S. Shdaimah, *Prostitution/Human Trafficking Courts: Policy Frontline as Fault Line*, 96 TEX. L. REV. ONLINE 14, 22 (2018); Melanie Randall, *Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming*, 22 CAN. J. WOMEN & THE L. 397 (2010) (discussing the way the "ideal victim" model works to discredit complainants of rape in the Canadian context).

187. See *infra* Section IV.B.6 for a detailed discussion of consent in relation to these cases.

188. See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945 (2004) (this rule required a rape victim to complain promptly following the rape. A recent complaint corroborated her testimony and strengthened her credibility).

189. See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945 (2004); Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391 (2006).

the younger party, here reinforces the vulnerability of the older person. These power differences preserve the virtue of older victims.

This one-dimensional depiction of sexual abuse of older women and of older women who are victims of sexual abuse sets the focus mainly on the victim's age as the central element in the analysis. The scenario of a "real rape" committed against an "ideal victim" in the case law fails to offer a deeper discussion of sexual abuse in late age as a phenomenon that is part of a wider pattern of violence against women. It demotes the role of gender as we focus our attention on the victim's vulnerability based on her age.

This depiction also generates a simplistic analysis of victimization in late age. First, it is not reflective of the various types of victims described by research.¹⁹⁰ Second and more important, it relies on the prevailing ageist characterization of older people as weak, reinforcing societal perceptions of elders as fragile and passive. This paradigm of victimization risks the exclusion of certain groups of older women who do not fit this description from the legal and social discourse of elder abuse.

In contrast to the fragile and delicate image of older women victims, the stereotypical image of black women and other women of color in the United States is associated with physical strength and aggressiveness.¹⁹¹ This is the image of the strong, assertive, and angry black woman.¹⁹² Victimhood in the American context is associated with womanhood, which in turn, is associated with whiteness,¹⁹³ and women of color face difficulties in having their victimization recognized. As long as the legal representation of older women victims of sexual violence is based on passivity, weakness, and fragility, older women of color and older women who express anger, physical strength, or assertiveness will be perceived as lesser victims.

190. See *supra* Section II.B.2.

191. See, e.g., Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 196–97 (1991) (discussing the way the battered woman syndrome excludes black women from its analysis because of its focus on learned helplessness and images of passivity and weakness); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 19–23 (1998) ("the stereotypes for black women [are] opposite those for white women, and . . . the prevailing stereotypes of black women do not allow them to fit within the stereotype of the 'good girl' or 'victim'").

192. Allard, *supra* note 191, at 191.

193. See Leigh Goodmark, *When is a Battered Woman Not a Battered Woman - When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 85–86 (2008) ("Victimhood is intimately tied to traditional notions of womanhood, notions that have been largely defined by a white norm.").

Third, the focus on victimization, passivity, and weakness fails to capture other narratives of older women victims as agents.¹⁹⁴ This legal representation creates uniformity in a complicated and diverse reality of sexual abuse of older women. Based on the image generated by that which transpires from the legal cases, there is only one type of older woman who is sexually victimized, and this type conforms to the image of the ideal rape victim.

2. Is There an Ideal Victim? Age, Gender, and Sexuality

The prevailing sexual image of an older woman is one of frigidity.¹⁹⁵ Societal and cultural images of age and sexuality depict older women as asexual and unattractive.¹⁹⁶ Along with prejudicial construction of rape as an act motivated by desire, these perceptions generate societal resistance and ignorance of sexual violence against older women.

The following words by Dostoyevsky reflect the negative image of older women in our culture:

“I could kill that damn old woman and make off with her money, I assure you, without the faintest conscience-prick,” the student added with warmth. “I was joking of course, but look here; on one side we have a stupid, senseless, worthless, spiteful, ailing, horrid old woman, not simply useless but do-

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194. For a critique of the division between victimization and agency in feminist literature, see, e.g., Kathrine Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1998). On the context of domestic violence, see Martha Mahoney, *Victimization or Oppression? Women's Lives, Violence and Agency*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: WOMEN & THE DISCOVERY OF ABUSE 59 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994); Ruthy Lazar, *Reconceptualizing Victimization and Agency in the Discourse of Battered Women Who Kill*, 45 STUD. IN L., POL., & SOC'Y 3 (2008).
195. See generally Beth Montemurro & Jenna Marie Siefken, *Cougars on the Prowl? New Perceptions of Older Women's Sexuality*, 28 J. AGING STUD. 35, 36 (2014) (discussing the interplay between sexuality and age; the authors state that this sexual image refers to women over the age of 40); Rebecca S. Allen et al., *Factors Influencing Young Adults' Attitudes and Knowledge of Late-Life Sexuality Among Older Women*, 13 AGING & MENTAL HEALTH 238, 239 (2009) (presenting stereotypes towards older women's sexuality).
196. See Bows, *Practitioner Views*, *supra* note 83, at 1080 (people assume that older women do not get raped because they are not sexually desirable—a helpline volunteer was quoted saying rape was a compliment: “[N]obody would rape her because she is so old”); Montemurro & Siefken, *supra* note 195; Yvonne Lai & Michaela Hynie, *A Tale of Two Standards: An Examination of Young Adults' Endorsement of Gendered and Ageist Sexual Double Standards*, 64 SEX ROLES 360, 362 (2011).

ing actual mischief, who has not an idea what she is living for herself, and who will die in a day or two in any case.”¹⁹⁷

Many years have passed since Dostoyevsky’s *Crime and Punishment* was written, but negative perceptions of the elderly still shape the societal approach to elders. In the 1960s, Robert Butler coined the term “ageism,” which he defined as: “[a] process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender.”¹⁹⁸ This system of stereotypes regarding age connects with another powerful system of stereotypes regarding women’s sexuality to produce an obsolete and negative image of older women’s sexuality.

Although age affects women’s sexual lives and experiences differently, the dominant social view of older women’s sexuality is one-dimensional. The “sexual script”¹⁹⁹ of older women creates a strong contrast between age and sexuality.

Popular societal myths consider rape as an act inspired by sexual motivation and uncontrolled desire.²⁰⁰ Because older women are not perceived to be objects of sexual desire they are excluded from the societal and legal discourse of rape. It creates disbelief, unawareness, or ignorance of the fact that older people, and older women in particular, may be at risk of sexual violence.

Women’s sexuality serves as an influential mechanism in the analysis of rape and is associated with and reinforces ageism, racism, ableism,²⁰¹ and heterosexism.²⁰² Women of color, for example, have been described as promiscuous and “over-sexual,” resulting in denial and

197. FYODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* 59 (Oxford Univ. Press 2017).

198. ROBERT BUTLER, *WHY SURVIVE? BEING OLD IN AMERICA* 11–12 (Harper & Row 1975).

199. Montemurro & Siefken, *supra* note 195, at 36.

200. *See supra* Section I.B.

201. “Ableism” refers to the social constructions of disability. It is a descriptive and normative concept in critical disability theory that social institutions are designed around a hegemonic (white) able-bodied individual. This idealized view of the human’s bodies excludes and discriminates individuals with disabilities. *See* TOBIN SIEBERS, *DISABILITY THEORY* 7–9 (University of Michigan Press 2008) (discussing the “ideology of ability”). “Ableism,” like sexism and racism, are generated by common origin – power and control of the hegemony. *See* G. Chezia Carraway, *Violence against Women of Color*, 43 *STAN. L. REV.* 1301, 1308 (1991); *see also* Rabia Belt, *Contemporary Voting Rights Controversies through the Lens of Disability*, 68 *STAN. L. REV.* 1491, 1522 (2016) (discussing the connection of ableism to low participation of people with disabilities in the political process and the limited access to voting).

202. This term refers to the social constructions of sexual orientation and to the institutionalized valorization of heterosexual activity.

dismissal of sexual violence against them.²⁰³ Women's sexuality serves as a tool for categorizing victims who deserve visibility and recognition and those who do not. Unlike women of color, who are over-sexualized, older women are denied sexualization. Based on their perceived sexuality, both groups are deemed "unrapeable."

This construction of rape on one hand, and stereotypical assumptions about older women's sexuality on the other, creates a prominent taboo of thinking about older women as sexual beings. It affects not only healthcare practitioners, law enforcement agents, and family members, but also the way older women victims perceive the sexual violence themselves. The following quote illustrates the complexities involved in naming the issue:

I think they find it hard to conceptualize what has happened to them, because of how they look at things and how they look at themselves. We all get to an age where we think we are past it, not attractive, etc. So why would anyone want to engage in that? They see it firstly and foremost as a desire, not as something of control and manipulation.²⁰⁴

Older women may be embarrassed to admit that they have been sexually victimized, may be reluctant to name the event as rape, and to acknowledge themselves as victims of rape.²⁰⁵ Shame and embarrassment also characterize the responses of older people who are victims of other forms of elder abuse, including physical, financial, and emotional abuse.²⁰⁶ The sexual nature of the act intensifies these feelings and strengthens the secrecy surrounding the sexual abuse of older women.

The harmful interaction between age, sexuality, and rape myths makes recognition of older women as victims difficult. Because of societal and cultural beliefs, older women do not conform to the stereotypical image of rape victims. This may explain the dominance of stranger rape cases in the criminal justice system. Because older women are not perceived as potential victims of rape, they are noticed by law enforce-

203. See Reema Sood, *Biases behind Sexual Assault: A Thirteenth Amendment Solution to under-Enforcement of the Rape of Black Women*, 18 U. MD. L.J. RACE, RELIGION, GENDER AND CLASS 405, 413 (2018); Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 67–68 (2002).

204. Bows, *Practitioner Views*, *supra* note 83, at 1080.

205. See Hawks, *supra* note 146, at 167; Bows, *Practitioner Views*, *supra* note 83, at 1078.

206. Seymour H. Moskowitz, *Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education*, 47 LOY. L. REV. 191, 194 (2001).

ment officials, non-legal professionals, society in general and even by themselves only when the rape fits the category of a “real rape.”

All other older victims are essentially absent from cases of sexual violence against older women. These include those who do not conform to the image of the ideal victim, for example, those who are raped by their spouses, by their children, or by other residents in care facilities and nursing homes; those who do not promptly report the rape because of shame, embarrassment, fear, concern for the abusers, or dependence on them; those who are not severely injured; and those who are not able to testify well because of cognitive limitations.

This narrative of rape and rape victims is also relevant to the rape of younger women, particularly acquaintance rape and marital rape and the rape of lesbian, gay, bisexual or transgender (LGBT) people. Nonetheless, in cases of older women, the obstacles to effective prosecution are magnified as they are shaped by the combination of gender and age.

3. Age, Health, and Disability: Older Women in Institutional Settings

In 2014, the number of nursing home residents in the United States was approximately 1.4 million, and the number of residents in residential care communities was approximately 800,000.²⁰⁷ Section II has shown that many older women in nursing homes and care facilities are particularly vulnerable to sexual abuse because of mental and physical disabilities.²⁰⁸ This group of victims, which is the focus of the elder abuse research, is hardly represented in the legal account of sexual violence of older women in the United States.

Mental and physical disability and age are overlapping categories, creating multiple vulnerabilities and susceptibility of older women to sexual abuse²⁰⁹ and producing additional barriers to reporting sexual abuse and to acknowledging it. Older women may be dependent on their abusers (their partners, children, other family members, or caregivers) because of health issues, physical impairments, mobility problems, and cognitive disabilities.²¹⁰

207. *Nursing Home Care*, CDC/NATIONAL CENTER FOR HEALTH STATISTICS (Mar. 11, 2016), <https://www.cdc.gov/nchs/fastats/nursing-home-care.htm>; *Residential Care Communities*, CDC/NATIONAL CENTER FOR HEALTH STATISTICS (Mar. 11, 2016), <https://www.cdc.gov/nchs/fastats/residential--ccareommunities.htm>.

208. *See supra* Part II.

209. Grant & Benedet, *supra* note 18, at 58.

210. Arthur Meirson, *Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State*, 60 HASTINGS L.J. 431, 434 (2008).

Disability combines with other categories of identity, like gender, race, and poverty, in an attempt to justify discrimination, social exclusion, and the violation of human rights.²¹¹ Feminist critical disability theories perceive disability as (another) social category of analysis, framing it as a reflection of power relations, similar to gender.²¹² These theories examine the way disability intersects with gender to perpetuate hegemonic constructions of beauty, sexuality, femininity, and “normalcy,” while fostering certain female bodily images as inferior.²¹³ Integrating the categories of gender and disability allows us to understand the societal and cultural construction of femininity, sexuality, and women’s bodies. It clarifies the way various societal and cultural systems intertwine to perpetuate power relations²¹⁴ between women and men, poor and rich, healthy and “unhealthy.”

Much like the stereotypical assumptions regarding older women’s sexuality, disability is socially contrasted to sex and sexuality. Women with disabilities are perceived as nonsexual: either physically or mentally incapable of engaging in sexual relations or unattractive because of their disability.²¹⁵ They do not fit the conventional category of femininity associated with sexual attractiveness and fertility.²¹⁶ Although it is well documented that disability increases vulnerability to abuse,²¹⁷ the socie-

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211. In his seminal essay, Douglas Baynton described how disability was used in American history to perpetuate the slavery of Black people, to resist the suffragist struggle, and to deny citizenship to immigrants. See Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in *THE DISABILITY STUDIES READER* 33–57 (Lennard J. Davis ed., 5th ed. 2017).
212. Anita Silvers, *Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights*, 13 *BERKELEY WOMEN’S L.J.* 85–89 (1998) (discussing the way feminist theories should cultivate a disability perspective).
213. *Id.* at 92–100.
214. Rosemarie Garland-Thomson, *Integrating Disability, Transforming Feminist Theory*, *NWSA JOURNAL*, Fall 2002, at 16.
215. See, e.g., Amy Swango-Wilson, *Systems Theory and the Development of Sexual Identity for Individuals with Intellectual/Developmental Disability*, 28 *SEXUALITY & DISABILITY* 157 (2010).
216. Women with disabilities need to fight for their right to give birth and are required to prove they can be “good” mothers. Dympna Walsh-Gallagher, et al., *The Ambiguity of Disabled Women’s Experiences of Pregnancy, Childbirth and Motherhood: A Phenomenological Understanding*, 28 *MIDWIFERY* 156 (2012).
217. Dick Sobsey, *Violence and Disability*, in *HEALTH PROMOTION FOR PERSONS WITH INTELLECTUAL/DEVELOPMENTAL DISABILITIES: THE STATE OF SCIENTIFIC EVIDENCE* 205 (W. M. Nehring, ed., American Association on Mental Retardation 2006); Douglas A. Brownridge, *Partner Violence Against Women with Disabilities: Prevalence, Risk, and Explanations*, 12 *VIOLENCE AGAINST WOMEN* 805, 817 (2006); Robert S. Dembo, *The Psychological Consequences of Violence Against People with Disabilities*, 11 *DISABILITY & HEALTH J.* 390, 390 (2018).

tal and cultural sexual images of women with disabilities, combined with sexual images of older women, makes recognition of sexual abuse of older women with disabilities more difficult.

Additionally, physiological and mental disabilities create other obstacles for naming the abuse and reporting it. Complexities arise when the woman is unable to verbalize what has happened to her, when she is unable to fully comprehend the event or to interpret it correctly, or when the perpetrator is another resident with dementia.²¹⁸

Dementia and other mental disabilities are particularly relevant to the way the criminal justice system approaches and treats the problem of recognizing, naming, and prosecuting sexual abuse of older women. Research shows that one out of eight elders with dementia report the abuse.²¹⁹ American studies have shown a disproportionately low rate of prosecutions and convictions for cases of sexual abuse of older women, particularly for cases of institutional sexual violence,²²⁰ which is consistent with the legal analysis presented in this Article.

Considering the complexities involved in accurately comprehending and verbalizing the event, women with mental disabilities face challenges testifying in court.²²¹ Unless additional evidence is available, such as an eyewitness, the complaint, if reported, is unlikely to proceed to trial. The Canadian study shows that in cases that do make it to court, victims with mental disabilities were not present at the hearings as they could not testify and provide details about the criminal act.²²² Therefore, other evidence was needed to prove the alleged crime.

When the perpetrator is a caregiver, cases are easier to bring because of the clear and visible power disparities between the victim and the offender. For example, in one of the American cases, the defense argued that the act (inserting fingers into the woman's vagina) was a legit-

218. Burgess & Phillips, *supra* note 93, at 195–96.

219. *Id.*

220. Grant & Benedet, *supra* note 18. The authors referred to a study of 82 sexual abuse cases against women residents in nursing homes, in which 95 percent of the perpetrators were identified. Nevertheless, only five percent were prosecuted, and three convictions were obtained. In another study, only six percent of APS cases were prosecuted in court, and in only one of these cases was the offender convicted. *See* Teaster & Roberto, *supra* note 79.

221. *See, e.g.*, Jake v. McDonald, 2012 WL 3862455 (E.D. Cal. 2012) (woman with dementia in care home only gave blank stares and inconclusive answers when police interviewed about her rape); People v. Mclaughlin, 2003 WL 22022024 (Cal. Ct. App. 2003) (woman who was raped recounted two confusingly different versions of the rape, and was deemed incompetent to testify at trial).

222. Grant & Benedet, *supra* note 18, at 57, 62.

imate method of cleaning.²²³ The victim's age and infirmity, together with the status of the assailant as a caregiver, supported the inference of a threat of force, which was required to substantiate the offense. In this example, the power disparity between the victim and the defendant simplified the case for the prosecution. Unless there is additional corroborative evidence, however, sexual abuse of women with mental disabilities is almost impossible to prosecute because mentally incapacitated victims are unable to file complaints and present their narrative. In almost all the Canadian cases committed by caregivers, there was someone who witnessed the sexual violence, which made prosecution possible.²²⁴

In acts of sexual violence perpetrated by another resident with dementia, power relations are almost invisible. Naming the act as sexual violence and prosecuting it is challenging and often impossible. Section II sheds light on the unrecognized phenomenon of resident-to-resident sexual abuse and the limited research on this topic. This type of abuse produces unique challenges in the discussion of sexual abuse of older women, because the perpetrator is also vulnerable, and in a way, both parties may be considered victims.²²⁵

Disability may also limit the capacity of women to express free consent to sexual relations or conversely to resist coerced sexual acts. When rape takes place within institutional settings, many victims who suffer from dementia or other cognitive impairments may have difficulties negotiating consent because of their disability.²²⁶ In a way, this should simplify the cases because the starting point in the analysis is non-consent, so the element of sexual coercion is clear and difficult to challenge. Still, this issue raises theoretical questions as to whether a person with dementia is able to consent to sexual relations and how this consent is determined by the courts.

The sexuality of older people with dementia raises different questions about their autonomy and sexual agency, social paternalism, and the level of intervention in people's sexual needs and practices.²²⁷ It also raises ethical dilemmas regarding the way professionals, law enforcement officials, and society in general should treat the will of older people with

223. *State v. Cook*, 2007 WL 475444 (Ohio Ct. App. 2007).

224. Grant & Benedet, *supra* note 18, at 73.

225. See Rosen et al., *supra* note 101.

226. James Cook, *When One Spouse Has It: Dementia and the Permissibility of Marital Sex under Criminal Statute*, 49 J. MARSHALL L. REV. 1225, 1256 (2016) (in discussing parameters regarding sexual marital relations when one party has dementia, the article studies a case from Iowa in which the husband was acquitted after being charged with raping his wife who had dementia).

227. *Id.* at 1234–37 (discussing sexual consent among people with Alzheimers).

dementia in matters of sexual relations, their capacity of making choices regarding such relations, their perceived sexuality, and their sexual wishes.²²⁸ Disability and gerontological studies indicate that the sexuality of older people with dementia who are sexually victimized becomes public in the way in which it is treated, decided, and negotiated by professionals, staff, and family members.²²⁹ These issues are beyond the scope of this research, but they affect the hidden nature of sexual abuse of older women with disabilities in the criminal justice system.

4. Victims of Intimate Rape: The Case of Sexual Abuse by an Intimate Partner

Rape by an intimate partner is one of the most under-reported and unsubstantiated crimes.²³⁰ Many women, of all ages, do not perceive coerced sex in intimate relationships as rape because of the intimate nature of the relationships.²³¹ Some feel that they are obliged by their marital status to submit to their husband's sexual wishes.²³² Cultural beliefs regarding the importance of marital relations and societal idealization of heterosexual marriage, love, and intimate relationships also influence the way women perceive coerced sex in marital and intimate relationships.²³³

Studies show that law enforcement officials show suspicion and mistrust of women who have been raped by their husbands.²³⁴ Women's

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228. Carole Archibald, *Sexuality and Dementia in Residential Care—Whose Responsibility?*, 17 *SEXUAL & RELATIONSHIP THERAPY* 301 (2002); Susan Mary Benbow & Derek Beeston, *Sexuality, Aging, and Dementia*, 24 *INT'L PSYCHOGERIATRICS* 1026 (2012).
229. See Melissa C. White, *The Eternal Flame: Capacity to Consent to Sexual Behavior among Nursing Home Residents with Dementia*, 18 *ELDER L.J.* 133, 145 (2010) (discussing the complexities of free consent in cases of individuals with dementia).
230. A. Durfee & M.D. Fetzer, *Offense Type and the Arrest Decision in Cases of Intimate Partner Violence*, 62(7), *CRIME & DELINQUENCY* 954–77 (2016); Lisa Eskow, *The Ultimate Weapon: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 *STAN. L. REV.* 677 (1996).
231. Patricia Mahoney & Linda M. Williams, *Sexual Assault in Marriage; Prevalence, Consequences, and Treatment of Wife/Partner Rape*, in *PARTNER VIOLENCE: A COMPREHENSIVE REVIEW OF 20 YEARS OF RESEARCH* 113–26 (Jana L. Jasinski & Linda M. Williams eds., 1998). See also Patricia Peacock, *Marital Rape*, in *FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS* 225 (Ida M. Johnson & Robert J. Sigler eds., 1997).
232. *Id.*
233. PATRICIA EASTEAL & LOUISE MCORMOND–PLUMMER, *REAL RAPE REAL PAIN: HELP FOR WOMEN SEXUALLY ASSAULTED BY MALE PARTNERS* (2006); see also DAVID FINKELHOR & KERSTI YLLO, *LICENSE TO RAPE: SEXUAL ABUSE OF WIVES* 5 (1985).
234. Ruthy Lowenstein Lazar, *The Vindictive Wife: The Credibility of Complainants in Cases of Wife Rape*, 25 *S. CAL. REV. L. & SOC. JUST.* 1, 3 (2015).

credibility in these cases is perceived as low, as rape myths continue to shape the prosecution of marital rape.²³⁵ Cases of rape by an intimate partner often involve issues of custody and matrimonial property. These issues are used to depict women as revengeful and manipulative.²³⁶ Furthermore, the issue of consent in cases of rape in intimate relationships constitutes a key hurdle in believing women and recognizing their sexual victimization.²³⁷ Rape by an intimate partner that is not accompanied by physical violence is often associated with elements that the criminal law cannot properly analyze, such as love, intimacy, closeness, and affection.²³⁸

While rape by an intimate partner is one of the most prevalent forms of sexual abuse in late age,²³⁹ it is absent from case law both in Canada and the United States. The above discussion illuminates the complexities in recognizing marital rape, reporting it, and prosecuting it. Old age further contributes to the hidden nature of rape by an intimate partner. The length of intimate relationships is associated with stability and normalcy. The longer the relationship has lasted, the stronger the assumption is that the couple share a stable intimate and personal dynamic into which the state should not intervene.

Older women have been socialized toward conservative values of gender roles, family, and marriage, and they tend to idealize norms of privacy of family life.²⁴⁰ That is, women over the age of 60 were raised in an era characterized by a clear division between the private and public spheres, resulting in the societal belief that the state should not intervene in private life, particularly in the private sex life of the citizens.²⁴¹ Moreover, these women were raised in a society in which marital rape

235. *See id.* at 4.

236. *See id.* at 7.

237. Ruthy Lazar, *Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada*, 22 CAN. J. WOMEN & L. 329, 330 (2010).

238. Ruthy Lazar, *Constructions of Marital Rape in the Canadian Criminal Justice System* (2009) (unpublished Ph.D. dissertation, Osgoode Hall Law School) (on file with author).

239. *See* Section II.B.2.

240. Tova Band-Winterstein & Zvi Eisikovits, *Towards Phenomenological Theorizing About Old Women Abuse*, 35 AGEING INT. 202, 203 (2010).

241. Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78, 88 MARQ. L. REV. 79 (1994) (discussing the dichotomy between the private and the public spheres and its implications for societal and legal approaches to domestic violence and wife rape. Schelong argues that these crimes were deemed to be in the private realm because of their “domesticity”).

was not a criminal offense.²⁴² Only in the 1970s did the marital rape exemption come under social and legal scrutiny and was gradually removed from criminal laws in the United States, Canada, Israel, and other Western countries.²⁴³

5. Older Battered Women and Marital Rape

When sexual violence by an intimate partner is part of a broader cycle of violence, the complexities in reporting the rape and treating it multiply. The dependence of battered women on their abusers is an inherent element of abusive relationships. Domestic violence research has documented the unique psycho-social dynamic of abusive relationships.²⁴⁴ The control exercised by the abuser over the woman is a central element in abusive relationships. The narrative described by abused women of all ages is a continuous feeling of terror due to the abusive partners' sense of control and power. Battered women describe enduring the demands of the abusers to know where the women are, what they eat, whom they see, and overall, what they do.²⁴⁵ The feelings of terror and fear create a powerful negative emotional dependence of women on the abusers, as the women lose their self and perceive themselves as part of the abusers' personality.²⁴⁶ Women in abusive relationships experience ambivalent emotions toward their abusers, which affect their willingness to leave them and report the violence.²⁴⁷

242. See, e.g., *Jake v. McDonald*, No. 2:11-CY-0048, 2012 Lexis *126273 (E.D. Cal., Sept. 5, 2012); *People v. McLaughlin*, No. A092987, A100180, 2003 Lexis *8198 (Cal. Ct. App. Aug. 28, 2003).

243. Many states do not provide full protection to marital rape victims in their sexual assault laws. Twenty states exempt men from sexual offense charges when their wives are mentally incapacitated, i.e., when they are drugged or intoxicated and cannot give valid consent because of their situation, or when they are physically helpless. Laws in several states require that the parties be separated at the time of the rape to prove a marital rape offense. Other states require proof of a prompt complaint to charge a man with marital rape. For a discussion of the legal situation in the United States, see Michelle J. Anderson, *Marital Immunity, Intimate Relationship, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1480 (2002).

244. Kim Bartholomew & Colleen J. Allison, *An Attachment Perspective on Abusive Dynamics in Intimate Relationships*, in DYNAMICS OF ROMANTIC LOVE: ATTACHMENT, CAREGIVING, AND SEX 102 (2006).

245. Kathleen J. Ferraro & John M. Johnson, *How Women Experience Battering: The Process of Victimization*, 30 SOC. PROBS. 325, 332 (1983).

246. *Id.*

247. *Id.*

Lenore Walker's "cycle of violence" model depicts the unique dynamics of a violent relationship.²⁴⁸ The cycle consists of several recurrent stages.²⁴⁹ As the abusive relationship continues, the woman develops a feeling of "learned helplessness," which is explained as a sense of failure to control the violence and to escape the violent relationship.²⁵⁰ The "battered woman syndrome" is an outcome of the "cycle of violence," seeking to explain the effect of cumulative violence on battered women, their unique psychological and mental state, and their difficulties in leaving abusive relationships.²⁵¹

Emotional dependence is exacerbated in late life in view of the length of the abusive relationship, the cumulative effect of abuse, the increasing sense of terror, and the isolation and loneliness that characterize both battered women's lives and many elders' lives.²⁵² Older women report remaining in abusive relationships because of shame, family and social expectations not to leave after so many years with the partner, and the social expectation that they should care for the ageing male partner.²⁵³ Like young battered women, many older battered women feel strong ambivalent feelings toward their abusers and are reluctant to cooperate with the authorities.²⁵⁴

Physical violence serves as yet another barrier for older women who are sexually victimized by their partners to report the rape, but it may also simplify the case if and when it is addressed by law enforcement officials. The physical violence and abuse may assist law enforcement and other, non-legal professionals in identifying the alleged rape because the act of sexual violence is perceived as one form of violence, among various other forms that characterize the relationship. The rape is easier to acknowledge in an abusive context because it fits the nature of the relationship. In the eyes of society, violence and abuse cannot coexist with notions of love, intimacy, and sexual mutuality. Therefore, the frame-

248. LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* 91–105 (2009). The first is the tension or anger building stage, in which the man's anger slowly builds up. The second is the battering stage, which contains violent physical outburst of the anger. The third is the honeymoon stage, in which there is no violence, and the man shows remorse and apologizes for the violence. According to Walker, it is during the honeymoon stage that the victimization of women is completed.

249. *Id.* at 91–125.

250. *Id.* at 91.

251. *Id.*

252. Bianca Fileborn, *Sexual Assault and Justice for Older Women: A Critical Review of the Literature*, 18 *TRAUMA, VIOLENCE & ABUSE* 496, 499–500 (2017); Altman, *supra* note 15, at 1547–48.

253. Bartholomew & Allison, *supra* note 244, at 202, 205.

254. Ramsey-Klawnsnik et al., *Sexual Predators Who Target Elders*, *supra* note 82, at 354.

work of violence and abuse displaces societal assumptions about matrimonial harmony.²⁵⁵

Notwithstanding the above, and although domestic violence in old age is a recognized phenomenon in research, it is not part of the legal picture of sexual violence against older people. The cultural and societal perceptions of age, family, marriage, and intimacy are intertwined with unequal domestic relationships. This creates multiple barriers for older women and perpetuates the marginalization of sexual violence in late age in research and in the legal system.

6. Consent

Not only are certain victims missing from the judicial picture of sexual abuse of older women, but so is a central legal element. Consent is a key concept in rape and sexual assault cases. In most rape cases, consent is at the center of the legal debate.²⁵⁶ The defense arguments are often based on rape myths and are associated with stereotypical assumptions regarding victims' behavior, personality, sexual history, occupation, clothing, and others.²⁵⁷

Acknowledging the complexities associated with consent in rape cases and the difficulties it presents for victims, legal feminist scholarship on rape and feminist activism have sought to reframe the discourse of consent and to suggest various legal reforms that would improve the experience of rape victims in court. This has resulted in vast scholarship on consent.²⁵⁸ Case law analysis reveals, however, that the dominant ac-

255. Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER 447, 460 (2005) (discussing the failure of law to comprehend complex emotions in the areas of domestic violence and rape); Hadar Dancig-Rosenberg & Dana Pugach, *Pain, Love, and Voice: The Role of Domestic Violence Victims in Sentencing*, 18 MICH. J. GENDER & L. 423, 447–50 (2012) (discussing whether battered women should be heard in the sentencing stage when asking to impose lighter sentencing on the accused). Both pieces highlight the implications of societal dichotomous conceptions of love and abuse, particularly regarding violence against women.

256. See Michal Buchhandler-Raphael, *The Failure of Consent: Re-conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147 (2011).

257. For selected scholarship see *id.*; YES MEANS YES! VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE (Jaclyn Friedman & Jessica Valenti eds., 2008); Robin West, *Sex, Law, and Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE (Franklin Miller & Alan Wertheimer eds., 2009).

258. See, e.g., CAROLE PATEMAN, THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY 1989; CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 238, 245 (2006) (promoting the use of coercion rather than consent); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998); Stephen J. Schulho-

ademic and public discourse on consent is neither relevant nor applicable to cases of rape in late age as consent is a peripheral element and is hardly ever raised by the defense in these cases both in Canada and the United States.²⁵⁹ Why is this common and central element absent in cases of rape in older age, and what differentiates these from other rape cases? In a way, the answers to this question take us back to the description of cases of “real rape.”

The first reason for the absence of consent is the nature of the sexual violence, that is, the circumstances of the case. The grave physical violence that accompanies the sexual acts, the brutality of the sexual offenses, and the additional offenses committed (burglary, battery, kidnapping, and home invasion) inherently negate any societal assumption of free consent. The physical violence makes it less difficult to identify non-consent to sexual relations and to socially acknowledge the occurrence of coerced sex. Physical violence is socially tangible, visible, and easy to believe. It would be difficult to discredit women and use rape myths and stereotypical assumptions about their sexual behavior, claiming that they consented to sexual acts, when their body tells a different story: one of violence, force, and aggression.²⁶⁰

Physical violence offers objective, hard, and external evidence. The victims in cases of sexual violence in late age are severely wounded by the attackers, which results in rape kits, photos of the wounds, medical professionals' records, and other hard evidence that assist in developing the credibility of the women.²⁶¹

In the absence of physical violence, because of societal reluctance to recognize and acknowledge violence that is not visible or measurable, perpetrators can resort to the consent defense. Mental, emotional, economic, and sexual violence are forms of violence that are often not rec-

fer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665 (2016); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988); Michelle J. Anderson, *Negotiating Sex* 78 S. CAL. L. REV. 1401 (2005); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809 (2010); John F. Decker & Peter G. Baroni, “No” Still Means “Yes”: The Failure of the “Non-Consent” Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1084–086 (2011); Peter Western, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333–59 (2004); Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441 (2016).

259. See *supra* Section III.B.

260. See *supra* Section III.B.

261. See *supra* Section III.B; see also *Yablonsky v. Montgomery*, No. EDCV 14 01877 PA, 2016 WL 807960 (C.D.Cal. Jan. 14, 2016); *Lott v. Workman*, No. CIV-05-891-M, WL 1302286 (W.D. Okla. Mar. 31, 2011); *State v. Forte*, 629 S.E.2d 137 (N.C. 2006); *State v. Leach*, 148 S.W.3d 42 (Tenn. 2006).

ognized as violence.²⁶² In cases of sexual violence against older women, the evidentiary strength that physical violence offers is not merely formal legal strength but symbolizes a deeper societal conceptualization of violence.

The second reason for the marginal role of consent in these cases is the lack of a previous relationship between the offender and the victim.²⁶³ The fact that the offenders and the victims are complete strangers makes it difficult for the defense to argue consent. Based on societal perceptions about women's and men's sexuality and on archaic beliefs that women tend to consent to sexual relations with men with whom they had previous sexual relations, it is difficult to believe that a woman of any age consents and wants sexual relations with a man she does not know.

The third reason for the absence of a consent element is the marginal role of rape myths in the construction of consent. Drinking alcohol, smoking, partying, dating other men, and various other facts raised by the defense to substantiate an argument of consent in rape cases are not relevant in the case of older women. Partly, this is because of the extreme violence in these cases that make it hard to point a blaming finger to women²⁶⁴ and partly because of societal and cultural perceptions that prevent us of from thinking about older victims as sexual beings.²⁶⁵ In the case of older women, it is difficult to make an argument for the sexual history evidence, which is often used to discredit younger victims in sexual violence cases.²⁶⁶ The defense may be aware that it would be socially and culturally unacceptable to point to prior sexual relations of the victims in view of societal beliefs about older people's sexuality. Also, the power disparities between the victims and the offenders negate an assumption of consent.

262. See *supra* Section III.B at 24–25.

263. See *supra* Section III.B; *supra* note 129 for a list of relevant cases.

264. See *supra* Section III.B. See also *Grayson v. King*, 460 F.3d 1328 (11th Cir. 2006); *Lott v. Trammell*, 705 F.3d 1167 (10th Cir. 2013); *McWatters v. Trombley*, No. 06–13870, 2009 WL 1313320 (E.D. Mich. 2009); *Thomas v. State*, NO. AP–77, 052, 2018 WL 739093 (Tex. Ct. Crim. App. 2018); *Buffey v. Ballard*, 782 S.E.2d 204 (W.Va. 2015).

265. See *supra* Section IV.B.2.

266. See Liat Levanon, *Sexual History Evidence in Cases of Sexual Assault: A Critical Re-evaluation*, 62 U. OF TORONTO L. J. 609, 609 (2012); Clare McGlynn, *Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence*, 81 THE J. CRIM. L. 367, 367 (2017); Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854, 1854 (2008).

These cases represent the traditional, classic liberal paradigm of consent.²⁶⁷ Feminist discourse has criticized the liberal discourse of consent, which focused exclusively on visible and clear power differentials as elements that negate free consent²⁶⁸ and did not include women's life experience and values.²⁶⁹ By ignoring subtle power disparities and their effect on free consent, the liberal discourse failed to reflect the reality of coerced sex, ignored the societal context in which sexual interactions take place, and therefore could not acknowledge the victimization of various groups of rape victims. Radical feminist discourse exposed the limitations of the liberal understanding of consent in sexual relations and placed consent in a larger context that considered societal, cultural, economic, and other power disparities between women and men. One of the main changes brought about by radical feminism was the acknowledgement that rape assumes many forms, and is committed by various perpetrators, not only by strangers. Radical feminism also reveals that rape occurs as part of a variety of power relations, most of them not visible or easily recognized, and because of these power inequalities it is often not accompanied by physical violence.²⁷⁰

Cases of rape of older women reflect clear and visible power disparities. As discussed earlier, they enact the stereotypical scenario of real rape. The liberal eye notices only clear pressure, force, and coercion. In these cases, the liberal eye easily recognizes the sexual violence and

267. For an example of a "classical" paradigm of consent, see GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 112 (1996) ("No idea testifies more powerfully to individuals as a source of value than the principle of consent").

268. See, e.g., Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 127–128 (1989); Carole Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (1989);

269. Robin L. West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 65, 70 (1988) (in this seminal piece West criticizes the separation idea of liberal theory and claims that it does not reflect women's life experience and values. ("[L]iberals have confused their male experiences of natural equality, mutual suspicion, fear of annihilation, and pervasive, through-and-through selfishness with "human" experience, and they have done so because women have not made clear that our day-to-day, lived experience—of intimacy, bonding, separation, sexual invasion, nurturance and intrusion—is incommensurable with men's. . . . Unwanted intercourse is "harmful" because it is invasive, not because it is (necessarily) violent. For that reason alone, the harm of intercourse is descriptively incommensurate with liberal concepts of harm. But it is not incommensurate with women's lives.")).

270. See, e.g., CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY* 72 (1989) ("Consent as ideology cannot be distinguished from habitual acquiescence, assent, silent dissent, submission, or even enforced submission. Unless refusal of consent or withdrawal of consent are real possibilities, we can no longer speak of 'consent' in any genuine sense."). See also CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 439–43 (1989).

acknowledges the coercion of sex. There are no subtleties in the power relations, and there is no need to resort to the broader societal context to explain the negation of consent.

Outdated assumptions about sexuality and age affect the marginal role of consent in these cases. These societal assumptions suggest that it is unlikely that a younger man wants to engage in sexual relations with a much older woman or that an older woman feels desire and attraction for a younger man. The defense may be aware of the fact that in cases of sexual violence against older women, the judicial authorities would have difficulty believing this type of argument.

In light of the above, it is surprising that consent was even argued in these instances.²⁷¹ In the few cases of rape within institutional settings, a large percentage of the victims suffered dementia or other cognitive impairments.²⁷² On one hand, the mental state of the women facilitates the recognition of non-consent because non-consent becomes the starting point of the analysis of the case. This may explain the absence of such arguments in these cases. On the other hand, many women cannot verbalize what had happened to them. At times, they cannot remember the attack, and often cannot comprehend that they have been sexually victimized. The mental impairment can be used by the defense to discredit victim's credibility. For example, in the case of *Maness*,²⁷³ where the defense argued consent, the claim was refuted because the woman was described in court as needing direction, guidance, and reminders to do certain things. In Canada, the women were not present in court because they could not testify and provide details about the crimi-

271. In the case of *Williams*, for example, the defendant broke into the victim's home, vaginally and anally raped her, and severely injured her. She died a year after the attack. Despite these circumstances, the defendant argued that he had consensual sexual relationship with the victim for six months when he was 38 and the victim was 77. Under the circumstances, however, the chances of the argument of consent being accepted by the jury were low. *See* *State v. Williams*, No. C-140199 2015 WL 5772109 *3861 (Ohio App. Sept. 30, 2015); In another of case, the victim was 92 and the offender broke into her home. *See* *State v. Angilda*, No. 106,226, 2013 Kan. App. Lexis *258 (Mar. 22, 2013).

272. *See, e.g.*, *People v. Delgado*, No. B155944, 2003 Lexis 3045 (Cal. Ct. App. Mar. 27, 2003); *W. World Ins. Co. v. Resurrection Catholic Mission of the S., Inc.*, No. 2:05cv327-ID (WO), 2006 LEXIS 51119, 5-7 (M.D. Ala. Jul 25, 2006); *Jake v. McDonald*, No. 2:11-cv-0048, 2012 Lexis 126273 (E.D. Cal, Sep. 5, 2012); *People v. McLaughlin*, No. A092987, A100180, 2003 Lexis 8198 (Cal. Ct. App. Aug. 28, 2013).

273. *Maness v. Allbaugh*, No. CIV-15-1108-D, 2017 WL 6542755 *1 (D. Conn. Dec. 21, 2017).

nal act.²⁷⁴ Their stories were told by health professionals or bystanders who witnessed the sexual attack.

Unlike cases of stranger rape, in cases of acquaintance rape consent was raised at trial and was used by the defense. The familiarity that characterizes these cases assists the defense in arguing consent, but even in acquaintance rape cases, the defense challenged non-consent in only one-third of cases.²⁷⁵ Because of the physical violence that characterizes these cases (in one case the victim was murdered) and the fact that in some of these cases the victim hardly knew the assailant, consent was not a successful defense.²⁷⁶

CONCLUSION

Despite findings indicating that sexual abuse of older women is a significant issue creating serious consequences for victims, legal actors, social workers, health professionals, family members, and society all miss the signs.

Ageist assumptions that older women are at low risk for rape because of their perceived sexuality, combined with outdated and patriarchal assumptions regarding rape and rape victims, produce a subliminal rejection of sexual abuse of older women. These assumptions are the result of limited academic, social, and legal attention to this phenomenon.

Like younger women, older women tend not to report non-stranger acts of rape. Naming these acts as rape, proving non-consent in these situations and, overall, overcoming archaic beliefs regarding women and sexual violence pose major challenges for women. As discussed, older age brings about additional difficulties and creates further hurdles for women who experience sexual abuse. Ageist assumptions about older

274. Grant & Benedet, *supra* note 18, at 74.

275. *People v. Shelton*, 307 A.D.2d 370 (N.Y. 2003); *Ingersoll v. State*, 2007 Ind. App. Unpub. LEXIS 1371 (Apr. 12, 2007); *State v. Smoot*, No. ED95499, WL 6776068 (Mo. Ct. App. Dec. 27, 2011); *People v. Mclaughlin*, No. A092987, A100180, 2003 Lexis 8198 (Cal. Ct. App. Aug. 28, 2013); *Labon v. Martel*, No. CV 14-6500-DSF(KES), 2016 WL 8470181 (C.D. Cal. July 21, 2016). Report and recommendation adopted: *Labon v. Martel*, No. CV1406500DSFKES, 2017 WL 986358 (C.D. Cal. Mar. 13, 2017).

276. *People v. Shelton*, 307 A.D.2d 370 (N.Y. 2003); *Ingersoll v. State*, 2007 Ind. App. Unpub. LEXIS 1371 (Apr. 12, 2007); *State v. Smoot*, No. ED95499, WL 6776068 (Mo. Ct. App. Dec. 27, 2011); *People v. Mclaughlin*, No. A092987, A100180, 2003 Lexis 8198 (Cal. Ct. App. Aug. 28, 2013); *Labon v. Martel*, No. CV 14-6500-DSF(KES), 2016 WL 8470181 (C.D. Cal. July 21, 2016). Report and recommendation adopted: *Labon v. Martel*, No. CV1406500DSFKES, 2017 WL 986358 (C.D. Cal. Mar. 13, 2017).

women's sexuality; extra vulnerability to sexual abuse because of illness and disabilities; negative perceptions of people with disabilities and of women with disabilities in particular; disbelief and lack of awareness of sexual violence in late age by family members, professionals, and legal actors; and long-term abusive relationships are some of the sources of vulnerability in late age and of the denial of sexual violence against older women. Older women thus experience multiple challenges based on their status as women and as older people.

The Article shows that sexual abuse of older women is being noticed and treated by the criminal justice system almost only when it reflects the "real rape" scenario. Many of the obstacles to effective prosecution and to full access to the criminal justice system are also present in relation to rape of younger women (especially acquaintance and marital rape), rape of LGBT people, and domestic violence. Still, these dimensions are distinctive in the case of older victims because of the effect of age, the way it shapes the experience of older victims of sexual violence, the effects of sexual violence on the victims, and its interplay with gender.

Considering the above, scholars, professionals, and policymakers should consider the interplay between age and gender in framing the phenomenon of sexual abuse of older women and in conceptualizing it. Although sexual violence against older women is a form of elder abuse, it should be distinguished from elder abuse and should be understood as part of a wider context of gender-based violence.

There is a need for a holistic approach to sexual violence of older women, which perceives it as a unique phenomenon, considers the interplay between age and gender, and provides older women with infrastructures and legal and social mechanisms that fit their needs and experiences both as women and older people. One such possibility is developing training programs for prosecutors and police, which promote familiarity with the topic, awareness of the unique needs and characteristics of the problem, and techniques to interview older victims. Another suggestion is strengthening cooperation between aged care services and law enforcement. Other possibilities include community projects with elders that will raise awareness of the phenomenon of sexual violence in late age and will promote access to legal and social services, such as rape crisis centers.

Older women who experience sexual violence face unique challenges and hurdles in naming the abuse, recognizing it, and reporting it to authorities. Law enforcement and other professionals do not acknowledge the phenomenon of sexual violence against older women as a distinct phenomenon and often perceive it as a form of elder abuse

or as a sexual assault issue. Societal and legal responses that account for the interplay between age and gender and the way it shapes older women's experience of sexual violence will assist in conceptualizing sexual abuse of older women as a separate category and will make this issue visible to the public and legal eyes. ♣

APPENDIX

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104. *Corce v. Miller*, No. 1:15-CV-1758, 2017 U.S Dist. Lexis 124245 (Jul. 12, 2017).
105. *People v. Lobdell*, 83 N.E.3d 502 (Ill. App. 2017).
106. *State v. Onyenweaku*, No. C-150482, 2017 Ohio App. LEXIS 2402 (Jun. 16, 2017).
107. *Gracy Woods I Nursing Home v. Mahan*, 520 S.W.3d 171, 2017 Tex. App. LEXIS 4023, 2017 WL 1832487.
108. *Romero v. Nogan*, No. 14-6344-BRM, 2018 WL 2148945 (D.N.G. May 9, 2018).
109. *People v Morrison*, 84 N.Y.S.3d 819 (N.Y. App. 2018).
110. *Hernandez v. Superintendent, Cossackie Corr. Facility*, Civ. 2457 (WHP)(AJP), 2018 WL 502784 (S.D.N.Y. Jan. 22, 2018).