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THE AGE OF FRAUD

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Abstract

We think of scams primarily as a problem for older adults. Indeed, in the past few years, states and the federal government have undertaken a range of legal actions designed to prevent seniors, as a distinct class, from scams—from more harshly punishing scams directed towards older adults to authorizing financial institutions to closely monitor and rapidly freeze the accounts of only their older clients. But this successful, popular, and bipartisan law reform movement has taken place without a thorough empirical understanding of whether in fact seniors fall victim to scams more frequently than other age groups.

This study analyzed whether older adults were victimized by scams more frequently than younger adults during the 2020 COVID-19 pandemic. A group of Americans older than 65 (n=364) and a group age 25–35 (n=388) were recruited online and asked to complete a short survey about their experiences with frauds and scams during the pandemic. The results were statistically analyzed to assess whether the two groups expressed that they were solicited by, engaged with, and were aware of consequences from four specific common scams of the pandemic, and additional scams not specifically described.

The results unsettle conventional wisdom on the shape of scam victimization. The younger *group engaged with scams three times more frequently than the older group, and this disparity was statistically significant (12% to 4%; $\chi^2 = 16.41$; $p = .000051$). Moreover, more younger adults engaged with scams than older adults as a percentage of those who had been solicited—that is, younger adults were more susceptible to scams. Although further research is required, in designing legal and policy solutions to the challenge of frauds and scams we must acknowledge the problem may not be limited to—nor even be most prevalent among—seniors.*

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INTRODUCTION

In the early days of the 2020 coronavirus pandemic, one California woman was very worried about contracting the virus.[1] At some point during that difficult time, she was approached by a scammer who promised that he could get her access to a vaccine in exchange for money.[2] The woman—very worried about meeting her financial needs and with only a part-time job—took out a personal loan and paid the scammer.[3] There was no vaccine. But this mistake had lasting consequences for the woman, who has struggled to repay the loan and suffered long-term financial and mental health challenges.[4]

The woman in this story was 32 years old.[5] That may be surprising. We tend to think of scams and frauds as primarily a problem for older adults—lonely, trusting, and possibly experiencing cognitive decline.[6] Indeed, widespread conventional and legal wisdom has it that older adults are more vulnerable to scams because of cognitive changes that take place with aging, because they are more trusting, and because they may be wealthier.[7] An enormous amount of ink and legal energy has been spilled in recent years on addressing the perceived social problem of seniors falling victim to scams.[8]

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[1] Survey Response Younger Group 74 (on file with author).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *See, e.g.*, Jesse R. Morton & Scott Rosenbaum, *An Analysis of Elder Financial Exploitation: Financial Institutions Shirking Their Legal Obligations to Prevent, Detect, and Report This "Hidden" Crime*, 27 ELDER L. J. 261, 262–263 (2020) ("Elder financial exploitation is a major, and growing, issue in the U.S.—to the tune of up to $36 billion per year—with some estimating that as many as one in five Americans over the age of sixty-five has been victimized by financial exploitation."); *see also* Johnny Parker, *Company Liability for a Life Insurance Agent's Financial Abuse of an Elderly Client*, 2007 MICH. ST. L. REV. 683, 686 (2007) ("In summary, the elderly are prime targets of scam artists because they are perceived as more trusting, less aware of their surroundings, and easier to handle.").

[7] *See, e.g.*, Mary F. Radford, *What if Granny Wants to Gamble? Balancing Autonomy and Vulnerability in the Golden Years*, 45 ACTEC L. J. 221, 235 (2020) (noting a recent survey found that "98% of respondents believed that seniors are susceptible to scams, only one in ten of the older Americans surveyed believed this could actually happen to them"). Shana Siegel, *How Isolation and COVID Make Seniors More Vulnerable to Fraud and Exploitation*, 11 NAT. L. REV. (2021) ("We have long known that seniors are more vulnerable to financial abuse. The COVID pandemic has only amplified this problem due to the increased social isolation and stress it has wrought.").

[8] *See, e.g.*, Taylor Lemick, *Society's Response to the 'Invisible' Abuse of Elders: Understanding and Addressing the Financial Abuse of Society's Most Vulnerable Citizens*, 23 ELDER L. J. 152, 153 (2015) ("To properly protect elders, Illinois must amend its laws to

This prevailing assumption about the shape of fraud victimization has propelled an enormously successful movement in law reform.[9] Indeed, over just the past five years, there has been widespread legislative, prosecutorial, and regulatory action at both the state and federal level to combat a purported epidemic of seniors falling victim to fraud.[10] These measures, almost invariably, have treated *senior* frauds and scams as a distinct social problem that calls for a distinct legal solution, and treat seniors—and those that defraud them—differently in the law than other groups.[11] For instance, in 2018, the SEC authorized financial institutions to report certain suspicious transactions to law enforcement free of liability—but only on the accounts of their clients over 65.[12] In the meantime, states have introduced a broad spectrum of legal measures to protect seniors from falling victim to scams—from authorizing banks to freeze and review certain transactions made by seniors[13] to creating entirely new crimes for defrauding an older adult.[14]

The bipartisan, national, and broadly popular push for law reform has taken place without a clear empirical understanding of whether in fact older adults are more frequently victimized by scams than other age groups.[15] Indeed, while hypotheses abound in the scholarly literature and popular

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include financial institutions as mandatory reporters."); Camilla O. McRory, *Protecting Senior Citizens*, 35 MD. B. J. 26, 27 (2002) ("Scams against seniors and other consumer protection issues relating to seniors is an issue of concern to every attorney . . ."); *see also See* Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174 sec. 303 (2018), *see also* FINRA, SENIOR SAFE ACT FACT SHEET (2019)..

[9] *See infra* Part I.A.

[10] *Id.*

[11] *See, e.g.*, Nina A. Kohn, *Elder (In)justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1, 1 (2012) (discussing the legal trend towards criminalizing conduct directed towards older adults differently than the same conduct directed towards others).

[12] FINRA, RULE 2165 (Financial Exploitation of Specified Adults) (effective Feb. 5, 2018). This measure also extends to adults with "a mental or physical impairment that renders the individual unable to protect his or her own interests." *Id.*

[13] *See, e.g.*, HF 3064, 89th Leg. Reg. Sess. (Minn. 2016).

[14] *See, e.g.*, H.B. 1499, 64th Leg. Reg. Sess. (Wash. 2015).

[15] *See, e.g.*, Peter A. Lichtenberg, Daniel Paulson & S. Duke Han, *Examining Health and Wealth Correlates of Perceived Financial Vulnerability: A Normative Study*, 4 INNOVATION IN AGING 1, 2 (2020) (acknowledging "considerable debate about whether older adults are more susceptible to fraud than other age groups"); Jingjin Shao, Qianhan Zhang, Yining Ren, Ziying Li & Tian Lin, *Why are older adults victims of fraud? Current knowledge and prospects regarding older adults' vulnerability to fraud,* 31 J. ELDER ABUSE & NEGLECT 225, 237 (2019) ("There is strong debate about whether older adults experience higher levels of fraud victimization than other age groups . . . ." (citing Michael Ross, Igor Grossman & Emily Schryer, *Contrary to Psychological and Popular Opinion, There is No Compelling Evidence That Older Adults Are Disproportionately Victimized by Consumer Fraud*, 9 PERSP. ON PSYCH. SCI. 427 (2014)).

press for *why* seniors are more vulnerable to scams, there is almost no good evidence either way as to whether they *in fact* fall victim to scams more than other groups.[16] Instead, the data we have are scant and contradictory.[17] In 2017, the most comprehensive empirical analysis of the incidence of elder financial frauds and scams to date summarized the state of play by acknowledging that "it is unclear whether older adults experience higher rates of fraud-scam victimization than other age groups."[18]

The study presented in this Article is the first that sought to shed light on whether seniors are in fact more frequently victimized by scams than other age groups by asking about participants' experiences with common scams of the COVID-19 pandemic, a salient, discrete time-period notable for the opportunity it offered scammers.[19] Two groups—one of adults age 65 or older (n = 364, the "Older Group") and one of adults aged 25–35 (n = 388, the "Younger Group")—were recruited on the online crowdsourcing platforms Amazon Mechanical Turk and Prolific and asked to take a short survey. The survey asked participants whether they had been approached by someone making any of four common, fraudulent promises of the pandemic: (1) early access to a vaccine; (2) claims that additional information or money was required for access to a federal stimulus check; (3) fraudulent offers for treatments for COVID-19; and (4) generic claims that an individual's bank or other financial account had been locked. Participants were then asked to report whether they had engaged with the scam by clicking a link, paying money, or disclosing personal information. The survey also included a residual final question prompting participants to discuss any other experiences with frauds or scams during the pandemic.

The results unsettle our conventional wisdom about the shape of the problem of fraud in the United States. The Younger Group reported having engaged with any scam during the pandemic three times more frequently than the Older Group (12% to 4%), and these results were statistically significant ($\chi^2 = 16.41$; $p = .000051$). This finding—that younger adults

[16] *See id.*; *see also* Jeffrey L. Bratkiewicz, *"Here's a Quarter, Call Someone Who Cares"; Who is Answering the Elderly's Call for Protection from Telemarketing Fraud?*, 45 S.D. L. REV. 586, 588 (2000) ("Telemarketers are though to prey upon the elderly because of (1) their availability, (2) their frailty, and (3) their financial resources.").

[17] *See infra* Part II.A.

[18] David Burnes, et al., *Prevalence of Financial Fraud and Scams Among Older Adults in the United States: A Systematic Review and Meta-Analysis*, 107 AM. J. PUBLIC HEALTH e13 (2015).

[19] *See, e.g.*, Chad G. Marzen, *COVID-19 Vaccine Distribution: A Brief Proposal for Future Pandemics*, 21 WAKE FOREST J. BUS. & INTELL. PROP. L. 377, 382 (2021) (discussing how the pandemic offered opportunities for scammers to promise "false cures" "fake COVID-19 tests" and "fraudulent charges for COVID-19 vaccines and fake vaccine appointments" that "often target seniors").

were more likely to report engaging with and falling victim to scams—persisted however the data were sliced, whether looking at any particular subset of the scams asked about or all of them together, and whether looking at scam engagement *simpliciter* or negative consequences following therefrom. Moreover, although there was no statistically significant difference in the overall rate at which the Older Group and Younger Group reported being solicited for scams, younger adults who were solicited were more likely to engage with scams than older adults who were solicited, to a statistically significant degree (19% to 7%, $\chi^2 = 13.51$; $p = .00024$)—that is, younger adults who were approached by scammers were more likely to engage with them than older adults who were approached by scammers.

This study suggests that our assumptions about the problem of scams and how to respond to them may be misguided. Although further, nationally-representative research across different time periods will be required, this study suggests that the problem may not be, as we have assumed, a relatively bounded issue for older adults. This empirical fact does not *necessitate* the conclusion that we ought to abandon the legal approach of treating senior scams as a discrete problem worthy of a discrete legal solution. It might be that taking advantage of older adults is *qualitatively* worse as an ethical matter.[20] But to the extent the justification for treating scams targeting seniors differently in the law is the *quantitative* claim that they are more frequently victimized (and this, in fact, appears to be the primary justification in popular, legal, political, and academic discourse),[21] this study suggests that we may have to rethink that approach. At a minimum, we may no longer be able to justify treating senior scams differently in the law with easy recourse to the assumption that they are more frequently victimized.

Empirical findings so divergent from widespread popular and academic assumptions demand some explanation, and indeed, this study's results must be squared with the robust literature in psychology and gerontology demonstrating that individuals undergo various cognitive changes that may make them more vulnerable to scams as they age.[22] Preliminarily, I suggest three ways in which it might be that seniors could be victimized by scams less frequently than (or at comparable levels to) other age groups, notwithstanding the widespread public and scholarly assumption to the contrary. First, it might be that efforts to combat senior scams are *working*, and that seniors are *no longer* the group most frequently victimized, even if they may abstractly be the most vulnerable (a possibility with some

[20] *See infra* Part I.B.
[21] *See infra* Part I.C.
[22] *See infra* Part III.A.

anecdotal support in the data).[23] Second, it could be that the cognitive changes coincident with aging revealed in lab studies do not have the hypothesized relationship to fraud victimization in the real world.[24] Finally, and most invidiously, it might be that our assumptions about the unique fraud vulnerability of older adults are driven to some extent by ageist stereotypes.[25]

This Article has four Parts. First, I offer a brief overview of the novel, unique, and rapidly evolving legal status of senior frauds and scams, emphasizing the extent to which the public impetus for law reform appears to be primarily driven by the empirical assumption that seniors are scammed more frequently than other adults. Part II offers a literature review of efforts to ascertain senior scam victimization incidence to date and discusses this study's methodology. In Part III, the results are presented, demonstrating that in the study population, younger adults were more likely to report engaging with scams (and suffering consequences from doing so) than older adults no matter how the data were parsed. Finally, in Part IV, I discuss the implications of these findings both for academia and discussions of the problem of fraud in the public sphere.

I. THE LEGAL CONTEXT OF SENIOR FRAUDS AND SCAMS

The legal system treats—increasingly so—frauds and scams targeting older adults differently than those that target others. We punish senior scams more harshly, authorize financial institutions to take more proactive measures to prevent them, and devote more funding and prosecutorial wherewithal to tackling the problem—considered to be bounded—of seniors falling victim to scams. In short, we've devoted tremendous academic and practical resources to the problem of senior financial scams on the apparent assumption that it is a uniquely common problem that merits unique explanations and legal responses.

In this Part, I offer background on the law and scholarship of senior financial frauds and scams. First, I summarize the broad trend in recent years towards treating *senior* scams as a distinct social problem worthy of a distinct legal solution. Next, I discuss the potential justifications for this trend, and argue that the primary justification—although there are others—is the quantitative empirical claim that seniors are more commonly victimized by scams than other groups. Finally, I explain that although this claim has never been strongly supported, it has been assumed by a large body of academic research seeking to explain *why* seniors are more

[23] *See infra* Part III.A.1.
[24] *See infra* Part III.A.2.
[25] *See infra* Part III.A.3.

commonly victimized, as well as in popular discourse and calls for law reform.

But before diving in, a brief word on terminology. Financial frauds and scams targeting "seniors," "elders," or "older adults" are a species of "senior financial exploitation"—where a person improperly obtains money or other things of value from an older person.[26] Senior exploitation can be divided into two basic categories—(1) "elder financial abuse," "when an older adult's resources are improperly or illegally used by a person in a relationship involving an expectation of trust," and (2) "elder financial frauds and scams," "perpetrated by a stranger or someone else outside of a conventional or legally-defined trust relationship."[27] There is evidence that the former is more common,[28] and such intimate financial abuse has been studied extensively as a challenge of institutional design in monitoring fiduciary and intimate relationships.[29] But there has been a recent explosion of interest in the latter—third-party frauds or scams targeting seniors—both

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[26] *See, e.g.*, NINA A. KOHN, ELDER LAW: PRACTICE, POLICY, AND PROBLEMS 492 (2d ed. 2020) (defining elder financial exploitation).

[27] Burnes, et al., *supra* note 18, at e14; *see also* JEFFREY HALL, DEBRA L. KARCH & ALEX CROSBY, ELDER ABUSE SURVEILLANCE: UNIFORM DEFINITION AND RECOMMENDED CORE DATA ELEMENTS 35 (2016) (defining elder financial frauds and scams as "Deception carried out for the purpose of achieving personal gain while causing injury to another party. An intentional distortion of truth initiated to convince another to part with something of value or to surrender a legal right.").

[28] *See, e.g.*, KOHN, *supra* note 26, at 494 ("Elder abuse victims who are not living in institutional settings are most likely to have been victimized by family members (primarily adult children and spouses of the victims. Female victims are especially likely to have been victimized by a family member."); *see also Senior Fraud*, NEV. CONSUMER AFFS. DEP'T BUS. & INDUS., https://consumeraffairs.nv.gov/Alerts/Senior/Senior_Fraud/ (last visited June 3, 2021) ("Over 90% of all reported elder fraud is committed by an older person's own family members, most often their adult children, followed by grandchildren, nieces and nephews, and others."); Morton & Rosenbaum, *supra* note 6, at 265 ("[T]he most common abuser is someone who is entrusted to care for the elder, and of those abusers, 60% of abusers are family members.").

[29] *See, e.g.*, Burnes, et al., *supra* note 18, at e14 ("[O]ur knowledge about the prevalence of elder financial exploitation is mostly limited to the category of elder financial abuse."); Catherine A. Seal, *Remedies*, 26 VOICE OF EXPERIENCE (2014) ("If a case involves the improper transfer and potential recovery of an asset or a defendant against whom there is a strong likelihood of recovery, pursuit of civil remedies may be appropriate. If the suspicious activity or fraud was done under authority of a power of attorney, a request for accounting by the agent should be made if such accountings are authorized under state law."); Susan J. Aziz, *Los Angeles County Fiduciary Abuse Specialist Team: A Model for Collaboration*, 12 J. ELDER ABUSE & NEGLECT 79 (2000) (discussing techniques to deter elder financial abuse committed by fiduciaries); *see also generally* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621 (2004) (discussing the agency cost challenges and risks of bifurcating beneficial interest and legal title).

in the academic literature and in legal and financial practice.[30] This Article is focused on "elder financial frauds and scams"—the extent to which older adults are more frequently victimized by third-party scams as compared to younger adults, and sets aside exploitation by fiduciaries, caretakers, or family members.

A. Law Reform on Senior Financial Frauds and Scams

In the past several years, protecting seniors from scams has become an extremely active area of law reform at the federal, regulatory, and state levels. These efforts are directed towards protecting seniors *specifically*; that is, they are not equally extended across the age-range. For instance, the Office of the Investor Advocate of the U.S. Securities and Exchange Commission (SEC) has referred to senior financial frauds as the "crime of the 21st century" and has committed to undertake a variety of affirmative measures to combat them.[31] More recently, the SEC has approved a series of regulations proposed by the Financial Industry Regulatory Authority (FINRA)—the self-regulatory organization of financial services industry—that were designed to empower financial institutions to protect older adults from financial exploitation and scams.[32] Rule 2165, for example, permits financial institutions to report suspicious transactions made by "specified

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[30] *See, e.g.*, Burnes, et al., *supra* note 18, at e14; Morton & Rosenbaum, *supra* note 6, at 263–64; *see also generally* Rebecca C. Morgan, Pamela B. Teaster & Randolph W. Thomas, *A View from the Bridge: A Brief Look at the Progression of Cases of Elder Financial Exploitation Prosecutions*, 25 ELDER L. J. 272 (2017) (summarizing developments in state prosecution of elder financial frauds and scams); *see also* Kate Fazzini, *Here's how online scammers prey on older Americans, and what they should know to fight back*, CNBC (Nov. 23, 2019, 10:31 AM), https://www.cnbc.com/2019/11/23/new-research-pinpoints-how-elderly-people-are-targeted-in-online-scams.html ("Older adults also lose large sums to online frauds like email compromise and wire fraud . . . ."); *Elder Fraud*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/elder-fraud (last visited July 14, 2021) ("Each year, millions of elderly Americans fall victim to some type of financial fraud or confidence scheme, including romance, lottery, and sweepstakes scams, to name a few.").

[31] *See* STEPHEN DEANE, SEC. EXCHANGE COMM'N, ELDER FINANCIAL EXPLOITATION: WHY IT IS A CONCERN, WHAT REGULATORS ARE DOING ABOUT IT, AND LOOKING AHEAD 7 (2018), available at https://www.sec.gov/files/elder-financial-exploitation.pdf (citing METLIFE MATURE MARKET INST. ET AL., THE METLIFE STUDY OF ELDER FINANCIAL ABUSE: CRIMES OF OCCASION, DESPERATION, AND PREDATION AGAINST AMERICA'S ELDERS 5 (2011)).

[32] *See* Morton & Rosenbaum, *supra* note 6, at 263–64 ("To address and attempt to mitigate the growing issue of elder financial exploitation, the Financial Industry Regulatory Authority ('FINRA'), the Security Exchange Commission ('SEC') and other agencies have recently enacted various guidance and rules specifically designed to better protect seniors and other at-risk adults, such as those who are disabled.").

adults" considered to be at highest risk for financial exploitation—those over 65 or with mental disabilities—to state Adult Protective Services authorities without triggering liability under banking privacy rules.[33] Similarly, the Senior $afe Act, which went into effect in 2018, permits financial institutions to report suspicious transactions on the accounts of customers 65 years or older without liability.[34] This followed the 2017 Elder Abuse Prevention and Prosecution Act, which increased funding for prosecution and victim compensation in elder abuse cases generally.[35]

A similar flurry of activity has also taken place at the state level.[36] Several states have gone further than the Senior $afe Act and authorized financial institutions not just to report the suspicious transactions of seniors but *freeze* them pending review by internal procedures or state authorities.[37] Other states have created a new, distinct crime—with stiffer penalties than ordinary fraud—for theft from an older or otherwise vulnerable adult.[38] This move towards specialized criminal penalties for scamming or defrauding older adults reflects a broader trend towards criminalization in elder law—a "rapid proliferation of laws and policies that facilitate a criminal justice response to elder abuse."[39] Many states, including major states such as California, have introduced new crimes triggered by the old age of the victim that blanketly punish causing "unjustifiable pain or mental suffering" to an older adult.[40] Much of the conduct penalized by these statutes—for instance, theft—would already be criminal and these state statutes simply enhance the penalty where the victim is an older adult.[41] But increasingly these statutes have even extended to conduct that would not be criminal if not directed towards an older adult.[42]

Despite this broad move toward protecting seniors as a class from fraud

[33] FINRA, RULE 2165 (Financial Exploitation of Specified Adults) (effective Feb. 5, 2018).

[34] *See* Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174 sec. 303 (2018), *see also* FINRA, SENIOR SAFE ACT FACT SHEET (2019).

[35] Elder Abuse Prevention and Prosecution Act, Pub. L. No. 115-70 (2017).

[36] *See* Heather Morton, *Financial Crimes Against the Elderly 2016 Legislation*, NAT'L CONF. STATE LEGIS., (Sept. 20, 2016), http://www.ncsl.org/research/financial-services-and-commerce/financial-crimes-against-the-elderly-2016-legislation.aspx.

[37] *See, e.g.*, HF 3064, 89th Leg. Reg. Sess. (Minn. 2016).

[38] *See, e.g.*, H.B. 1499, 64th Leg. Reg. Sess. (Wash. 2015).

[39] Kohn, *supra* note 11, at 1.

[40] *See, e.g.*, Cal. Penal Code §§ 368(b)(1)(2); (g).

[41] *See*, *e.g.*, H.B. 1499, 64th Leg. Reg. Sess. (Wash. 2015).

[42] *See* Kohn, *supra* note 11, at 10 ("A notable feature of many of the statutes that criminalize behavior that previously would not be the basis for criminal sanction is that they outlaw 'abusive' behavior even in situations in which the victim may not see the behavior as abusive or may have consented to it.").

and scams (and despite the occasional dissenting voice)[43] most commentators in the legal academy argue that these reforms have not gone far enough and advocate further measures such as making financial professionals mandatory reporters of suspicious transactions involving older adults.[44] Perhaps significantly to explaining how this reform movement has achieved such legislative success in the absence of a clear empirical basis, these legal developments have been broadly collaborative—bipartisan[45] and supported by regulators[46] as well as interest groups representing the financial services industry[47] and older adults.[48] In short, over the past decade, lawmakers—supported by interest groups, academics, and public commentary—have devoted increasing legal resources to protecting older adults as a class and as distinct from the general population from scams and fraud.

This trend has carried through the 2020 COVID-19 pandemic. At the onset of the pandemic, many commentators anticipated that financial scams targeting seniors would increase.[49] They cited fear and social isolation as

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[43] *See* Kohn, *supra* note 11, at 2 (criticizing the trend toward criminalizing elder abuse differently than pre-existing crimes).

[44] *See, e.g.*, Lemick, *supra* note 8, at 153 ("To properly protect elders, Illinois must amend its laws to include financial institutions as mandatory reporters."); *see also* Morgan, Teaster & Thomas, *supra* 30, at 272 ("For years now, or so it seems, when referencing the current state of elder abuse, the comment made was that the response to elder abuse is where responses to domestic violence and child abuse were twenty years ago. We continue to make this statement, but the time gap never seems to lessen. It always seems to be twenty years behind."); Morton & Rosenbaum, *supra* note 6, at 264 ("[S]tatistics plainly show that financial institutions are failing, in many instances, miserably, at upholding their legal obligations under the Bank Secrecy Act ('BSA') and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ('Patriot Act') to monitor for and report suspicious activity that may indicate elder financial exploitation."); Neal Reynolds, *Elder Financial Exploitation. Are We Doing Enough?* BANKING MARKETING CENTER (Feb. 14, 2020), https://www.bankmarketingcenter.com/blog/post/2020/02/14/financial-exploitation.

[45] The Senior $afe Act, for instance, was co-authored by Susan Collins (R-ME) and Clair McCaskell (D-Mo) and was signed into law by President Trump. *See The Senior Safe Act Becomes Law*, BRESSLER AMERY & ROSS (June 11, 2018), https://www.bressler.com/publication-237.

[46] *See, e.g.*, STEPHEN DEANE, SEC. EXCHANGE COMM'N, HOW THE SEC WORKS TO PROTECT SENIOR INVESTORS (2019).

[47] *See, e.g.*, *Senior Investor Protection Toolkit*, SIFMA, https://www.sifma.org/resources/general/senior-investor-protection-toolkit/ (last visited June 3, 2021).

[48] *See, e.g.*, Victoria Sackett, *New Law Targets Elder Financial Abuse*, AARP (May 24, 2018), https://www.aarp.org/politics-society/government-elections/info-2018/congress-passes-safe-act.html.

[49] *See, e.g.*, Maggie Miller, *Scammers step up efforts to target older Americans during pandemic*, THE HILL (Dec. 2, 2020, 6:00 AM),

increasing seniors' vulnerability to fraud.[50] And lawmakers have responded to the perception that the pandemic enhanced the opportunity for scammers to take advantage of seniors and introduced legislation, including the federal Protecting Seniors From Emergency Scams Act, designed to prevent scammers from defrauding seniors during the pandemic.[51]

B. Justifying Treating Senior Scams Differently

But why *have* we apparently agreed to treat scams that target seniors as a distinct legal problem? After all, we don't typically design laws that only apply to adults of certain ages.[52]

The growing legal trend towards treating financial crimes differently when the victims are older could be justified in one of two ways. First, it might be that seniors are *quantitatively* scammed *more frequently* than other age groups. If this were true, senior scams might represent a discrete social problem that would call for a discrete legal solution—if seniors are uniquely the people getting scammed, we might be justified in uniquely protecting them from scams. In this way, we could think of these laws protecting seniors as analogous to the law reform movement in the 1980s to raise the drinking age in the United States—a move that treated differently younger adult citizens from those older than 21 in the law.[53] The public justification

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https://thehill.com/policy/cybersecurity/528259-scammers-step-up-efforts-to-target-older-americans-during-pandemic ("Older adults have faced a barrage of online scams during the COVID-19 pandemic, with the upcoming holiday season and increased consumer spending likely to intensify the problem."); Will Maddox, *Elder Financial Abuse Is a 'Virtual Pandemic,' and on the Rise*, D MAG. (Sept. 30, 2020, 11:00 AM), https://www.dmagazine.com/healthcare-business/2020/09/elder-financial-abuse-is-a-virtual-pandemic-and-is-on-the-rise/ ("The COVID-19 pandemic is exacerbating a growing problem for seniors in the United States: elder financial abuse.").

[50] *See, e.g.*, Julie Jargon, *How to Protect Seniors From Online Fraud and Phone Scams*, WALL ST. J. (Jan. 23, 2021, 11:37 PM), https://www.wsj.com/articles/how-to-protect-seniors-from-online-fraud-and-phone-scams-11611410401 ("The isolation many older adults are experiencing during the pandemic has exacerbated the problem [of senior financial scams]."); Colleen Long, Michael Balsamo & Rodney Muhumuza, *Coronavirus-related crimes capitalize on global fear, panic*, AP NEWS (Mar. 24, 2020), https://apnews.com/article/public-health-united-nations-health-us-news-ap-top-news-ec678534da3d8a6817c285650414ccf4 ("As the coronavirus pandemic spreads, so too do the crimes related to it—transgressions that capitalize on fear, panic and the urge to lay blame, and add to the burden on law enforcement trying to protect vulnerable citizens.").

[51] H.R. 7699—116th Congress (2020).

[52] *Cf.* Nina A. Kohn, *A Framework for Theoretical Inquiry into Law and Aging*, 21 THEORETICAL INQUIRIES L. 187, 194 (2020) (noting that "whether the law *should* treat older adults differently" is a "core theoretical concern" of elder law).

[53] *See* 23 U.S.C. § 158 (limiting federal highway funding to states that did not raise their drinking age to 21).

for raising the drinking age was the empirical claim that it was primarily adults aged 18–20 responsible for causing drunk driving fatalities[54] (coupled with empirical claims about the vulnerability of the young brain).[55] If these assumptions turned out to be wrong—and in fact 18–20 year olds were *not* more likely to drive drunk or were *not* more vulnerable to long-term brain damage[56]—there would be no justification for treating the class of adults 18–20 differently than other adults with respect to access to alcohol.[57] Similarly, it might be that the justification for treating frauds directed at seniors is that they are empirically more likely to be victimized; and similarly, this justification would not survive the finding that they are not.

In the public sphere, this first justification—the quantitative claim that seniors are defrauded more frequently than other age groups—seems to do most of the work in justifying differential treatment of financial crimes targeting the elderly.[58] Indeed, it is mainstream conventional wisdom

[54] *See, e.g.*, MOTHERS AGAINST DRUNK DRIVING, THE 21 LAW COMES OF AGE (2005) (describing the National Minimum Drinking Age Act, which cut off highway funds for states that did not raise their drinking age to 21, as "one of the most effective anti-drunk driving laws ever passed" and "one of [Mother's Against Drunk Driving's] most successful legislative achievements").

[55] *See, e.g.*, Patricia K. Kokotailo, *Alcohol use by youth and adolescents: a pediatric concern*, 125 PEDIATRICS 1078, 1078 (2010) ("Results of recent neuroscience research have substantiated the deleterious effects of alcohol on adolescent brain development and added even more evidence to support the call to prevent and reduce underaged drinking.").

[56] For those interested, there *is* substantial evidence that raising the drinking age has lowered traffic fatalities. *See, e.g.,* William DeJong & Jason Blanchette, *Case Closed: Research Evidence on the Positive Public Health Impact of the Age 21 Minimum Legal Drinking Age in the United States*, 17 J. STU. ALCOHOL & DRUGS SUPPLEMENT 108, 108 (2014) ("Recent research on the age 21 MLDA has reinforced the position that the current law has served the nation well by reducing alcohol-related traffic crashes and alcohol consumption among youths, while also protecting drinkers from long-term negative outcomes they might experience in adulthood, including alcohol and other drug dependence, adverse birth outcomes, and suicide and homicide."). But the differential treatment of adults under 21 may still be objectionable on other grounds. *See, e.g.*, James Toomey, *The Drinking Age and Law Enforcement on College Campuses*, BILL OF HEALTH (Oct. 22, 2018), https://blog.petrieflom.law.harvard.edu/2018/10/22/the-drinking-age-and-law-enforcement-on-college-campuses/ ("My argument is that the MLDA of 21, rather than the more traditional and globally accepted younger alternatives, inhibits campus law enforcement by making it more difficult for the police to build and maintain the community relationships that make good law enforcement possible.").

[57] *Cf., e.g.*, German Lopez, *Sorry, college students, but the drinking age should stay at 21*, VOX (Jan. 19, 2016, 3:50 PM), https://www.vox.com/2016/1/19/10761802/drinking-age.

[58] *See, e.g.*, Jim Gold, *10 Common Ways Seniors Get Scammed*, MONEYTALKSNEWS (Nov. 4, 2019), https://www.moneytalksnews.com/major-scams-that-can-wreck-your-retirement/ ("It's a sad fact that scammers often target the people with the most to lose, and the least chance to catch on or fix things.").

(within the legal academy and the broader public sphere) that older adults *are* more frequently the victim of scams,[59] and this conventional wisdom is frequently invoked in arguments for law reform tailored to protect seniors from fraud and scams.[60] For instance, the Consumer Financial Protection Bureau calls for increased action against senior scams on the grounds that the problem is "widespread and damaging,"[61] the SEC notes that "[o]lder Americans are often targets of investment fraud,"[62] and articles in the media often describe senior scams as a problem "that happens all too often"[63] in advocating awareness and reform. In short, it seems that at least the primary public justification for this law-reform movement rises and falls with the validity of the empirical assumption that seniors are more frequently victimized by frauds and scams.

But there are other possible ways in which differential legal treatment of senior scams *could* be justified. Indeed, it might be that scamming an older

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[59] *See, e.g.*, *Senior Fraud*, NEV. CONSUMER AFFS. DEP'T BUS. & INDUS., https://consumeraffairs.nv.gov/Alerts/Senior/Senior_Fraud/ (last visited June 3, 2021) ("Older Americans are targeted for fraud because they are the most likely demographic to have money in savings, own their home, and have excellent credit . . . all of which a fraudster will attempt to take advantage of. Also, seniors are less likely to report fraud."); McMaster Univ., *Older adults increasingly targeted by fraud and scams*, MCMASTER OPTIMAL AGING PORTAL (Mar. 19, 2018), https://www.mcmasteroptimalaging.org/blog/detail/blog/2018/03/19/older-adults-increasingly-targeted-by-fraud-and-scams ("The financial exploitation of older adults has been recognized as a serious problem . . . ."); ACFE, *Elderly Fraud Scams: How They're Being Targeted and How to Prevent It*, THE FRAUD EXAMINER, https://www.acfe.com/fraud-examiner.aspx?id=4294997223 (last visited June 3, 2021) ("Unfortunately, this is not uncommon. . . . [T]hose over the age of 65 are more likely to have lost money due to a financial scam than someone in their 40s.").

[60] *See, e.g.*, Lemick, *supra* note 8, at 152 ("These experts found—in a study released by the White House Symposium in 2012—that 99% of elder Americans were 'very vulnerable' to financial scams because of weakening mental capacity, as well as other mild cognitive impairments, making the elderly particularly susceptible." (citing Elizabeth A. Richards, *Stop the silence of elder abuse*, AM. NURSE TODAY (2011), http://www.americannursetoday.com/article.aspx?id=8122 and Maria Wood, *Study: Elder Financial Abuse on the Rise*, LIFEHEALTHPRO (June 15, 2012), http://www.lifehealthpro.com/2012/06/15study-elder-financial-abuse-on-the-rise.))

[61] OFFICE OF FIN. PROTECTION FOR OLDER AMERICANS, SUSPICIOUS ACTIVITY REPORTS ON ELDER FINANCIAL EXPLOITATION: ISSUES AND TRENDS 4 (2019) ("SARs indicate that elder financial exploitation is widespread and damaging.").

[62] Sec. Exchange Comm'n, *Investor Alert for Seniors: Five Red Flags of Investment Fraud*, INV. ALERTS & BULLETINS (June 15, 2015), https://www.sec.gov/oiea/investor-alerts-bulletins/ia_5redflags.html.

[63] *See, e.g.*, *Top Internet Scams Affecting the Elderly*, AGING IN PLACE (July 2021), https://aginginplace.org/internet-scams-affecting-elderly/; *see also* Veronica Dagher, *When an Elderly Parent Has Been Scammed*, WALL ST. J. (June 12, 2016, 10:08 PM), https://www.wsj.com/articles/when-an-elderly-parent-has-been-scammed-1465783683 (describing "older Americans" as "at risk" for scam victimization).

person is *qualitatively, morally worse* than scamming younger adults, and law ought to treat this behavior differently. In contrast to the justification for the drinking age, we might think of this qualitative kind of justification as analogous to punishing hate crimes more harshly than similar crimes with different motivations. Hate crimes are not more *common* than other crimes; we punish them more harshly because we think they are qualitatively different—and morally more blameworthy—than crimes with other motivations.[64]

This is a normative claim that can't be disproven with empirical findings. Indeed, it might be that it is deontologically worse *in itself* to commit a crime because of racial hate than for money. This could lead us to formally punish hate crimes more harshly even if they almost never occurred. But depending on our moral framework, a qualitative justification might depend on descriptive predicates. For example, if we are consequentialists, we might believe that hate crimes are qualitatively more morally blameworthy because they are more *harmful*.[65] Whether a crime with a particular motivation is in fact more harmful is an empirical question, and if it turned out that the victims of hate crimes (or their communities) did not experience greater psychological distress than other crime victims, we might lose our justification for punishing them more harshly.[66] So too with punishing financial crimes targeting seniors more harshly—it might be that taking advantage of an older adult may simply be despicable in itself; or it could be that seniors are qualitatively harmed more by scam-victimization.

Although it appears that the primary justification for uniquely preventing scams against seniors is the empirical claim that these scams are more common,[67] some commentators also suggest that scamming older adults is qualitatively worse.[68] Sometimes, this claim seems deontological, such as when the financial advisor Michelle Singletary wrote in the *Washington Post* that "[t]here should be a special place in Hades for

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[64] *See, e.g.*, Laura Meli, *Hate Crime and Punishment: Why Typical Punishment Does Not Fit the Crime*, 2014 U. ILL. L. REV. 921, 943–956 (2014) (summarizing arguments that hate crime laws are justifiable because they punish conduct that is morally worse than comparable crimes with other motives).

[65] *See, e.g.*, Komor Cormier, *Increase the Peace Means Increase the Penalty?: The Impact of the James Byrd, Jr. Hate Crimes Act in Texas*, 34 TEX. TECH. L. REV. 343, 348 (2003) ("The justification [for punishing hate crimes more harshly] is based on the principle that hate crimes cause a disproportionately severe impact on the victim and the community at large.").

[66] *Id.*

[67] *See*, *e.g.*, Morton & Rosenbaum, *supra* note 6, at 262–264 (arguing that banks are not fulfilling their legal duty to report suspicious transactions, which is problematic in light of the scope of elder financial exploitation).

[68] *See*, *e.g.*, Michelle Singletary, *The scammers who bilked seniors out of more than half a billion dollars*, WASHINGTON POST (Mar. 5, 2018).

criminals who commit financial fraud against seniors."[69] But more commonly, the normative, qualitative claim appears to be consequentialist and based on the descriptive predicate that seniors who are defrauded are distinctly more harmed than other victims. This descriptive predicate is typically supported in two related ways—either that seniors are more financially vulnerable, and their loss of money more subjectively significant,[70] or that seniors may be less likely to smoothly recover from fraud losses because they are less likely to be working.[71] In short, the basic conventional wisdom behind treating scams and frauds targeted at seniors differently in law and policy is that seniors are more commonly victimized. But some advocates and commentators have suggested that even if that were not true, scams victimizing seniors might be qualitatively worse than those that take advantage of others.

C. The Quantitative Assumption of Senior Fraud and Scam Victimization

The conventional wisdom that seniors are more frequently defrauded than other age groups has never been supported by clear empirical evidence. Indeed, the academic literature widely recognizes that there is no strong evidence that older adults fall victim to scams more often than others.[72]

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[69] *Id.*

[70] *See id.* ("No one deserves to be a victim of a scam, but it's particular[ly] heinous when perpetrated on people who are living on fixed incomes or surviving on savings they can't replenish.").

[71] *See, e.g.*, Caroline Skinner & Samantha Springer, *Imposter scams use new tech and techniques to steal reitrees' life savings*, NBC NEWS (Dec. 15, 2019, 5:17 AM), https://www.nbcnews.com/news/us-news/imposter-scams-employ-new-tech-techniques-steal-retirees-life-savings-n1101716 ("With little or no way to work to earn back their money, victims are often left with few options after having been conned out of their life savings."); Ronnie Cohen, *Financial scams target millions of older Americans annually*, REUTERS (July 14, 2017, 11:02 AM), https://www.reuters.com/article/us-health-seniors-fraud/financial-scams-target-millions-of-older-americans-annually-idUSKBN19Z1P3 ("[V]ictims of elder financial fraud and scams suffer financial losses from which they may never be able to recover.").

[72] *See, e.g.*, Burnes, et al., *supra* note 18, at e14 (noting that "it is unclear whether older adults experience higher rates of fraud-scam victimization than other age groups"); Lichtenberg, Paulson & Han, *supra* note 15, at 2 (acknowledging "considerable debate about whether older adults are more susceptible to fraud than other age groups"); Emily A. Mueller, et al., *Older and wiser: age differences in susceptibility to investment fraud: the protective role of emotional intelligence*, 32 J. ELDER ABUSE & NEGLECT 152, 152 (2020) ("[S]ome empirical evidence (and some anecdotal) suggest that older adults are more likely to fall prey to fraudsters. Whether age is a contributing factor, however, is an open question. . . . To our knowledge . . . there is limited empirical data examining age difference in susceptibility to financial fraud."); Shao, et al., *supra* note 15, at 237 ("There is strong debate about whether older adults experience higher levels of fraud victimization than other age groups . . . ." (citing Burnes, et al., *supra* note 18 and Ross, Grossman &

Instead, the overwhelming majority of studies in this area have focused only on obtaining *absolute* prevalence figures for the fraud-scam victimization of seniors, rather than comparing those prevalence figures to rates of victimization in other age groups.[73] Efforts to ascertain monetary amounts lost to senior fraud have similarly been concerned with absolute figures and have reached wildly divergent conclusions—off by tens of billions.[74] And while there are a few studies purporting to find that seniors are scammed more frequently in certain contexts,[75] other studies have found precisely the opposite—that seniors are *less* likely to fall victim to scams than other age groups.[76]

Nevertheless, the assumption that seniors are more vulnerable to scams pervades both the academic literature and public discourse on the problem of fraud. Indeed, there is a robust academic literature aspiring to explain *why* older adults are defrauded more frequently than other adults. Three reasons are typically offered.[77] The first is cognitive—that older adults undergo cognitive and psychological changes that make them more vulnerable to scams.[78] It is relatively uncontroversial that individuals with

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Schryer, *supra* note 15, at 427).

[73] *See, e.g.*, Burnes, et al., *supra* note 18, at e13 (a meta-analysis of 12 studies on fraud-scam prevalence finding that "5.4% . . . of cognitively intact older adults living in the community are victims of financial fraud or scams each year in the United States").

[74] *Compare*, METLIFE ET AL., THE METLIFE STUDY OF ELDER FINANCIAL ABUSE: CRIMES OF OCCASION, DESPERATION, AND PREDATION AGAINST AMERICA'S ELDERS (2011) (concluding that $2.9 billion is lost to senior financial fraud annually) *with* TRUE LINK FINANCIAL, THE TRUE LINK REPORT ON ELDER FINANCIAL ABUSE 2015 (2015) (concluding that $36.48 billion is lost to senior financial fraud annually).

[75] *See, e.g.*, Ginny Fahs, et al., *Centralizing Older Users In Government Design*, ASPEN TECH POLICY HUB (2019) ("Strong empirical evidence suggests older adults are as vulnerable as young children in their interactions online . . . .").

[76] *See, e.g.*, FED. TRADE COMM'N, PROTECTING OLDER CONSUMERS 2 2018–2019 (2019) ("In 2018, older adults were still the least likely of any age group to report losing money to fraud, but their individual median dollar losses remained higher than for younger adults."); *see also*, Michelle Singletary, *This might surprise you. Seniors are not more susceptible to scams; younger adults are*, WASH. POST (Oct. 28, 2019), https://www.washingtonpost.com/business/2019/10/28/this-might-surprise-you-seniors-are-not-more-susceptible-scams-younger-adults-are/.

[77] *See* Bratkiewicz, *supra* note 16, at 589-590; *see also* Parker, *supra* note 6, at 686 ("The elderly have become the victims of choice for con men because (1) they are most likely to have a 'nest egg,' own their homes, and/or have excellent credit; (2) they are polite and trusting; (3) seniors are less likely to report fraud because they do not know to whom to report it, are too ashamed at having been defrauded, or do not know they have been defrauded; and (4) when they do report fraud, they often make poor witnesses, due to the effect of age on memory.").

[78] *See, e.g.*, Annie Nova, *As you age, your brain becomes less able to detect fraud*, CNBC (Apr. 30, 2018, 8:29 AM), https://www.cnbc.com/2018/04/30/aging-brains-become-less-able-to-detect-fraud.html ("As people grow old, they tend to concentrate on

dementia or substantial age-related cognitive decline are more susceptible to scams as well as wide variety of other forms of abuse.[79] But a growing body of research has shown that older adults without dementia undergo many more modest cognitive changes as they age.[80] Some researchers have hypothesized that these cognitive changes underlie assumed differences in scam victimization between older and younger adults,[81] and have researched physical changes in the brain to explain differences in individual scam susceptibility.[82] Researchers in this field are typically careful to acknowledge that these cognitive changes are heterogeneous and do not

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the positive. As a result, they may be more likely to get ripped off."); *see also* Peter A. Lichtenberg, Rebecca Campbell, LaToya Hall & Evan Z. Gross, *Context matters: Financial, psychological, and relationship insecurity around personal finance is associated with financial exploitation*, 60 THE GERONTOLOGIST 1040, 1042 (2020) ("The studies cited above not only link declines in financial decision making to reduced cognition—even without dementia—but also link brain regions and findings on decision making to scam susceptibility.").

[79] *See, e.g.*, Carole Roan Gresenz, et al., *Effect of early-stage Alzheimer's disease on household financial outcomes*, 29 HEALTH ECON. 18, 18 (2020) ("We find robust evidence that early-stage AD places households at significant risk for large adverse changes in liquid assets."); XinQi Dong, Ruijia Chen & Melissa A. Simon, *Elder Abuse and Dementia: A Review of the Research And Health Policy*, 33 HEALTH AFFAIRS 642, 647 (2014) (conducting a literature on the elder abuse of individuals with dementia and concluding that "[e]lder abuse is common in people with dementia"); *see also* S. Duke Han, et al., *Mild Cognitive Impairment and Susceptibility to Scams in Old Age*, 49 J. ALZHEIMER'S DISEASE 845, 845 (2016) (finding that "the presence of [Mild Cognitive Impairment, a pre-clinical form of dementia] was associated with greater susceptibility to scams").

[80] *See generally, e.g.*, Gregory R. Samanez-Larkin & Brian Knutson, *Decision making in the ageing brain: changes in affective and motivational circuits*, 16 NATURE NEUROSCIENCE 278 (2015) (describing cognitive changes of "ordinary aging").

[81] *See, e.g.*, Shao, *supra* note 15, at 232 ("There is growing evidence that older adults show reduced negative arousal to anticipated loss, thus they may engage in riskier financial decision making, and in turn make more suboptimal decisions during risk-seeking." (citing Gregory R. Samanez-Larkin, et al., *Anticipation of monetary gain but not loss in healthy older adults*, 10 NATURE NEUROSCIENCE 787 (2007) and Natalie L. Denburg, et al., *The orbitofrontal Cortex, Real-World Decision Making, and Normal Aging*, 1121 ANNALS N.Y. ACAD. SCI. 480 (2007)); *see also* Patricia A. Boyle, et al., *Poor Decision Making Is a Consequence of Cognitive Decline Among Older Persons Without Alzheimer's Disease or Mild Cognitive Impairment,* 7 PLOS ONE e43647, e43647–48 (2012) (finding cognitive decline short of dementia is correlated with poor financial decision-making and suggesting that this underlies the contextual claim that "older persons comprise the vast majority of fraud victims").

[82] *See, e.g.*, Melissa Lamar, et al., *White matter correlates of scam susceptibility in community-dwelling older adults,* 14 BRAIN IMAGING & BEHAV. 1521, 1522 (2020) ("[S]tudies in older adults without dementia reveal a portrait of scam susceptibility associated with higher age, lower wellbeing and social support, lower global cognitive functioning, as well as lower levels of health and financial literacy and income. . . . Furthermore, a more rapid global cognitive decline over time increases scam susceptibility even among non-demented older adults.")

necessarily correspond to greater aggregate scam victimization of older adults,[83] but the media is less so, invoking this research in support of measures designed to specifically prevent elder scam victimization.[84]

Second, many commentators and government agencies attribute assumed higher rates of scam victimization among older adults to the fact that they are more trusting.[85] This claim is often ascribed to cognitive changes as well, suggesting that cognitive changes in ordinary aging make older people more trusting than other adults.[86] It is often also hypothesized that the "generation which is now on the wane among us"[87] was raised to be more trusting of strangers than the generations that have followed.[88]

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[83] *See, e.g.*, Shao, et al., *supra* note 15, at 236 ("[R]esearch has failed to consider everyday factors, such as age-related changes in income and purchasing behaviors, which can affect the prevalence of consumer fraud across various age groups."); *see also, e.g.*, Lichtenberg, et al., *supra* note 77, at 1049 (summarizing variables accounting for different levels of susceptibility among different individual older adults).

[84] *See, e.g.*, Robert Powell, *How to prevent fraud from ruining your retirement*, MARKETWATCH (Mar. 16, 2021, 10:26 AM), https://www.marketwatch.com/story/how-to-prevent-fraud-from-ruining-your-retirement-11615770540 (quoting a professor at the American College of Financial Services as saying "Cognitive changes in old age can make us more vulnerable to the risk of losing our nest egg through fraud."); David Brancaccio, *Age of fraud: Are seniors more vulnerable to financial scams?* MARKETPLACE (May 16, 2019), https://www.marketplace.org/2019/05/16/brains-losses-aging-fraud-financial-scams-seniors/ ("Not only are older people heavily targeted by scammers, but surprising data suggest that, as we get older we become more vulnerable to fraud in so many of its forms."); Olivia DaDalt, *Why Older Adults Are So Susceptible To Financial Fraud*, FORBES (Dec. 18, 2016, 9:00 AM), https://www.forbes.com/sites/nextavenue/2016/12/18/why-older-adults-are-so-susceptible-to-financial-fraud/?sh=79846a5d2770 ("Higher levels of trust among older adults may have something to do with actual changes in the brain."); Janice Lloyd, *Why are elderly more vulnerable to scams? Brain changes*, USA TODAY (Dec. 8, 2012, 8:00 AM), https://www.usatoday.com/story/news/nation/2012/12/07/elderly-financial-exploitation-holidays/1746911/v.

[85] *See, e.g.*, DaDalt, *supra* note 83 ("Part of the answer may be that they seem more trusting than other age groups, in general.")

[86] *See, e.g.*, Meghan Mott, *Brain Changes as Trust Rises with Age*, NIH RES. MATTERS (Dec. 17, 2012), https://www.nih.gov/news-events/nih-research-matters/brain-changes-trust-rises-age. ("Older adults are more likely than younger ones to perceive dishonest faces as trustworthy, according to a new study of social judgments and brain activity. The findings may help explain why older people are more likely to fall victim to fraud. . . . The functional MRI scans revealed significant differences in brain activity between the age groups.").

[87] JAMES JOYCE, DUBLINERS 43 (Daniel R. Schwarz, ed., 1994).

[88] *See, e.g.*, Sehar Siddiqi, Robert Zdenek & Karen Kali, *Financial Exploitation*, GRANTMAKERS IN AGING (2014), https://www.giaging.org/issues/financial-exploitation/ ("Many older adults are generally more trusting than others; part of it is cultural as they grew up at a time when etiquette required responding to a polite inquiry or plea from a stranger.").

However, the research on age-mediated differences in trust is complicated—a recent meta-analysis found that while older adults were more trusting than young adults in non-financial contexts, they were less trusting in financial contexts.[89]

Finally, commentators frequently suggest that seniors are scammed more because they are targeted more because they have more money.[90] It is true that older adults are, on average, much wealthier than younger adults.[91] And indeed there are many scams that particularly target older adults—such as scams in which a caller pretends to be an individual's grandchild, which simply would not work if targeted to younger adults.[92] But there are similarly many scams—such as scholarship scams—that target younger adults and would only work against them.[93] Moreover, there is little evidence that wealthier individuals—older adults or otherwise—are consistently targeted more frequently for scams than less wealthy

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[89] Phoebe E. Bailey & Tarren Leon, *A Systematic Review and Meta-Analysis of Age-Related Differences in Trust*, 34 PSYCH. & AGING 674, 674 (2019).

[90] *See, e.g.*, *12 Common Senior Scams and How to Avoid Them*, BROOKDALE SENIOR LIVING (May 31, 2020), https://www.brookdale.com/en/brookdale-life/blogs/2018/03/12-common-senior-scams-and-how-to-avoid-them.html ("Fraudsters target seniors because they're more likely to have next eggs . . . ."); McCall Robinson, *These common scams target seniors—how to avoid them*, MARKETWATCH (Nov. 15, 2018, 6:52 AM), https://www.marketwatch.com/story/these-common-scams-target-the-elderlyhow-to-avoid-them-2018-11-15 ("Unfortunately, con artists see the elderly population as an easy and vulnerable target. Mike Rothman, president of the American Securities Administrators Association, told CNVC that scammers take this approach because the current elderly population is one of the wealthiest we've seen with such hefty retirement savings. Where the money goes, the con artists follow."); *Scam Alert: Financial Abuse of Older Adults Expected to Skyrocket During Pandemic*, INST. ON AGING (May 27, 2020), https://blog.ioaging.org/aging/scam-alert-financial-abuse-of-older-adults-expected-to-skyrocket-during-pandemic/ ("Plain and simple, older Americans' wealth is the primary reason they are targeted by scammers.").

[91] *See, e.g.*, OXFORD ECONOMICS, THE LONGEVITY ECONOMY (2016) (finding that 85% of the wealth in the United States is held by people over 50); *The Rising Age Gap in Economic Well-Being*, Pew Res. Cen. (Nov. 7, 2011), https://www.pewresearch.org/social-trends/2011/11/07/the-rising-age-gap-in-economic-well-being/ ("Households headed by older adults have made dramatic gains relative to those headed by younger adults in their economic well-being over the past quarter of a century, according to a new Pew Research Center analysis of a wide array of government data."); *see also* Neil Howe, *The Graying of Wealth*, FORBES (Mar. 16, 2018, 9:19 AM), https://www.forbes.com/sites/neilhowe/2018/03/16/the-graying-of-wealth/?sh=3756a377302d ("According to the Federal Reserve's latest Survey of Consumer Finances, wealth continues to shift to the nation's seniors.").

[92] *See, e.g.*, Christine Sneed, *The Grandparent Scam*, N.Y. TIMES (Apr. 9, 2015, 7:00 AM), https://opinionator.blogs.nytimes.com/2015/04/09/the-grandparent-scam/

[93] *See, e.g.*, April Maguire, *6 Common Scholarship Scams to Avoid*, COLLEGEVINE (Oct. 1, 2020), https://blog.collegevine.com/scholarship-scams-to-avoid/.

individuals.[94]

In short, although the empirical assumption that seniors are more commonly victimized by scams has never been robustly justified, it has been assumed by a broad body of academic literature seeking to explain why it is so. Moreover, it has served as the primary justification for one of the most successful, nation-wide, and bipartisan efforts in legal and regulatory reform in the past decade.

II. LITERATURE REVIEW AND STUDY DESIGN

A. Literature Review

The incidence of fraud and scams is notoriously hard to measure.[95] Cases are rarely reported to government authorities,[96] and there are good reasons to believe that individuals under-report personal experiences with scams on surveys.[97] The most comprehensive effort to measure the incidence of elder financial fraud and scams thus far is a 2017 meta-analysis

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[94] *See, e.g.*, *Top 10 Financial Scams Targeting Seniors*, NAT. COUN. ON AGING (Feb. 19, 2021), https://www.ncoa.org/article/top-10-financial-scams-targeting-seniors ("[I]t's not just wealthy seniors who are targeted. Low-income older adults are also at risk of financial abuse."); Jenny Manrique, *Ethnic and low-Income Communities Easy Target for Scammers*, TRUTHOUT (Mar. 4, 2016), https://truthout.org/articles/ethnic-and-low-income-communities-easy-target-for-scammers/.

[95] *See, e.g.*, Lee-Ann Fenge & Sally Lee, *Understanding the Risks of Financial Scams as Part of Elder Abuse Prevention*, 48 BRITISH J. SOC. WORK 906, 906–907 (2018) ("Those perpetrating mail, telephone and cyber scams may be more elusive, as they normally have no physical contact with the victim. They are therefore difficult to identify, particularly as scams are often perpetrated across international borders. . . . The scale of the issue is difficult to measure, as many victims never report their involvement, or hide their financial loss from family and friends for fear of being blamed for their involvement."); *see also* Cassandra Cross, *'They're very lonely': understanding the fraud victimization of seniors*, 5 INT'L J. CRIME, JUSTICE, AND SOC. DEMOCRACY 60 (2016) (explaining why scams can be difficult to measure because victims hide the fact that they were defrauded); Bill File for HB 583 (Md. 2009) ("[T]he incidence and impact of exploitation are difficult to measure because there is no national reporting mechanism, cases are too frequently unreported, definitions vary and crimes are difficult to detect.");

[96] *See, e.g.*, LIFESPAN OF GREATER ROCHESTER, INC. ET AL., UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY 31 (2011) (finding that only 1 in 44 cases of senior financial exploitation are officially reported); *see also 5 Senior Citizen Scam Statistics You Need to Know in 2021*, CAL. MOBILITY, https://californiamobility.com/senior-citizen-scams-statistics/ (last visited June 3, 2021) ("Seniors are 93% more likely than younger consumers to file fraud reports when they have been scammed but not lost any money.").

[97] *See, e.g.*, Burnes, et al., *supra* note 18, at e19 (noting that victims of financial fraud "tend to underreport their victimization" (citing MARTHA DEEVE & MICHAELA BEALS, THE SCOPE OF THE PROBLEM: AN OVERVIEW OF FRAUD PREVALENCE MEASUREMENT (2013)).

by Professor David Burnes and colleagues.[98] Burnes, et al., compiled 12 studies that included data on elder scam victimization prevalence from 1995 to 2016.[99] The studies varied in geographic reach from single-states to the

[98] Burnes, et al., *supra* note 18.

[99] *Id.* at e15. The studies were: Peter A. Lichtenberg, et al., *Psychological and functional vulnerability predicts fraud cases in older adults: results of a longitudinal study*, 39 CLINICAL GERONTOLOGY 48 (2016) (national sample of adults older than 50, n=7,252, a telephone interview with a single general self-report question, finding a 5-year prevalence of 6.1%); ERIKA HARRELL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VICTIMS OF IDENTITY THEFT 2014, (2015), available at https://bjs.ojp.gov/content/pub/pdf/vit14.pdf (national sample of adults older than 65, n=11,464, computer-assisted interviews in person or by telephone with closed-ended questions describing 3 different identity fraud types, finding a 1-year prevalence of 5.8%); KRISTY HOLTFRETER, ET AL., FINANCIAL EXPLOITATION OF THE ELDERLY IN A CONSUMER CONTEXT (2014), available at https://www.ojp.gov/pdffiles1/nij/grants/245388.pdf (sample of adults older than 60 in Florida and Arizona, n=2,000, computer-assisted telephone interviews with closed-ended questions describing 10 elder scam types, finding a 1-year prevalence of 13.6%); Peter A. Lichtenberg, Laurie Stickney & Daniel Paulson, *Is Psychological Vulnerability Related to the Experience of Fraud in Older Adults*, 36 CLINICAL GERONTOLOGIST 132 (2013) (national sample of adults older than 50, n=4,440, self-administered questionnaire with a single general self-report question, finding a 5-year incidence of 4.5%); KEITH B. ANDERSON, U.S. FED. TRADE COMM'N, CONSUMER FRAUD IN THE UNITED STATES, 2011: THE THIRD FTC SURVEY, (2013), available at https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-2011-third-ftc-survey/130419fraudsurvey_0.pdf; (national sample of adults older than 65, n=992, computer-assisted telephone interviews with closed-ended questions describing 17 specific and general fraud-scam types, finding a 1-year prevalence of 7.0%); ERIKA HARRELL & LYNN LANGTON, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, VICTIMS OF IDENTITY THEFT, 2012, (2013), available at https://bjs.ojp.gov/content/pub/pdf/vit12.pdf; (national sample of adults older than 65, n=12,024, computer-assisted interviews in person or telephone with closed-ended questions describing 3 identity fraud types, finding a 1-year incidence of 5.0%); KEITH B. ANDERSON, FEDERAL TRADE COMM'N, CONSUMER FRAUD IN THE UNITED STATES: THE SECOND FTC SURVEY, (2007), available at https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-second-federal-trade-commission-survey-staff-report-federal-trade/fraud.pdf (national sample of adults older than 65, n=677, computer-assisted telephone interviews with closed-ended questions describing 16 specific or general scam-fraud types, finding a 1-year incidence of 8.3%); Kristy Holtfreter, Micahel D. Reisig & Thomas G. Blomberg, *Consumer fraud victimization in Florida: an empirical study*, 18 ST. THOMAS L. REV. 761 (2006) (sample of adults older than 65 in Florida, n=430, telephone interviews with a single general self-report question, finding a 1-year incidence of 1.8%); KEITH B. ANDERSON, FEDERAL TRADE COMM'N, CONSUMER FRAUD IN THE UNITED STATES: AN FTC SURVEY, (2004) (national sample of adults older than 65, n=505, telephone interviews including closed-ended questions about 12 specific and general fraud types, finding a 1-year prevalence of 4.7%); FED. TRADE COMM'N, IDENTITY THEFT SURVEY REPORT (2003) (national sample of adults older than 55, n=1,258, computer-assisted telephone interviews with closed-ended questions asking about 3 identity fraud types, finding a 5-year prevalence of 9.0%); AARP, CONSUMER BEHAVIOR, EXPERIENCES AND ATTITUDES: A

United States, sample size from 210 to 12,024, included telephone interviews and online surveys, and ranged from a single question prompting participants to explain whether they had been a victim of a scam to lengthier questionnaires describing up to 17 specific scam types.[100] Burnes, et al., used generalized mixed models with a binomial error assumption, logistic link function, unstructured variance and covariance with studies included as levels of a random classification factor, and found a 1-year prevalence of elder financial frauds and scams of 5.4%; "approximately 1 in every 18 cognitively intact older adults living in the community experiences financial fraud or scam each year."[101]

The study did not endeavor to compare this figure to the prevalence rate in other age groups, and conceded that "it is unclear whether older adults experience higher rates of fraud-scam victimization than other age groups."[102] It also did not investigate how often seniors (or other groups) are solicited for scams or how much money seniors typically lose when they are scammed.[103] Moreover, the small sample-size of the meta-analysis limits the "scope of analytical techniques and detection of significant effects."[104] Nevertheless, the striking incidence found in this study has been widely cited.[105] And the authors note that because of methodological limitations in the underlying studies and the under-reporting of victimization, their conclusion likely underestimates the true incidence of elder financial frauds and scams.[106]

In addition to its substantive conclusions, Burnes, et al.'s, analysis of prior studies offered several valuable methodological recommendations for future research in the field.[107] Specifically, they found that studies

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COMPARISON BY AGE GROUPS (1999), available at https://assets.aarp.org/rgcenter/consume/d16907_behavior.pdf (national sample of adults over 65, n=459, computer-assisted telephone interviews including a single general self-report question, finding a 1-year prevalence of 5.7%); Richard M. Titus, Fred Heinzelmann & John M. Boyle, *Victimization of Persons by Fraud*, 41 CRIME & DELINQUENCY 54 (1995) (national sample of adults over 65, n=210, computer-assisted telephone interviews involving closed-ended questions about 21 specific scams and 1 general question, finding a 1-year prevalence of 5.7%).

[100] Burnes, et al., *supra* note 18, at e17.

[101] *Id.* at e19.

[102] *Id.* at e14.

[103] *Id.* at e19.

[104] *Id.* at e20.

[105] According to Google Scholar, the paper has been cited 67 times since 2017. Moreover, its "1 in 18 older adults" figure has been widely cited in media reports. *See, e.g.*, Cohen, *supra* note 71 ("One in 18 older Americans falls victim to financial fraud or scams annually, and that figures excludes seniors who've been financially abused by friends and relatives, a new study finds.").

[106] *See* Burnes, et al., *supra* note 18, at e19.

[107] *Id*.

"characterized by greater overall methodological quality detected higher rates" of victimization, specifically finding higher self-reporting of victimization on surveys that primed participants with specific examples of scams.[108] However, the authors also encourage including open-ended questions as well "to capture fluctuations in specific fraud-scam popularity over time and the emergence of new fraud-scam types."[109] They also suggest forgiving language in questions and priming for honesty early in the survey instrument.[110]

As observed above, there have been fewer comprehensive efforts to compare the incidence of scam victimization among older adults to other age groups. Data from reports made to the Federal Trade Commission are variable, inconsistent, and plagued by methodological inadequacies—but typically show that older adults are *less* likely to report losing money to scams than other age groups, although they file more reports as a percentage of those who are victimized.[111] Similarly, a 2016 report from the British Office of National Statistics found that adults 45–54 were more likely to be victimized by scams than older adults.[112] Perhaps surprisingly, several academic studies have found that younger older adults (approximately 65–75) are more likely to be victimized by scams than older older adults (75+).[113]

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[108] *Id.*

[109] *Id.* at e20.

[110] *Id.*

[111] *See, e.g.*, FEDERAL TRADE COMMISSION, PROTECTING OLDER CONSUMERS 2018-2019 (2019), available at https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2018-2019-report-federal-trade-commission/p144401_protecting_older_consumers_2019_1.pdf (summarizing reports of scams to the FTC and finding that older adults were the least likely to report losing money to fraud, the most likely to report scams to which they have not lost money, but likely to lose the most if they were scammed); *see also* MARTHA DEEVY, SHOSHANA LUCICH & MICHAELA BEALS, SCAMS, SCHEMES & SWINDLES: A REVIEW OF CONSUMER FINANCIAL FRAUD RESEARCH 13–14 (2012) ("People frequently fail to report incidents of fraud. . . . Since many reports of fraud are now collected online, there is some doubt as to whether rising reports of fraud reflect an actual trend, or simply the increasing ease with which individuals can report incidents as they occur); *see also* Singletary, *supra* note 68 ("[A]ccording to a new report from the Federal Trade Commission, in 2018, people 60 and older were 20 percent less likely than younger adults to report losing money to fraud.").

[112] JOHN FLATLEY, OFFICE FOR NATIONAL STATISTICS, OVERVIEW OF FRAUD STATISTICS: YEAR ENDING MAR. 2016 6 (2016) ("Fraud victimisation was identified as being higher in the middle of the age distribution, where adults aged 45–54 were more likely to be a victim of fraud (7.9%) than 16–24 year olds (5.0%) or those aged 75+ (4.0%).")

[113] *See, e.g.*, Lichtenberg, Paulson & Han, *supra* note 15, at 2 (citing 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 AM. J. PUB. HEALTH 292 (2010); Boyle, et al., *supra* note 80; and Josep Garre-Olmo, *Prevalence*

One industry study found that adults over 65 reported being solicited and falling for certain kinds of investment frauds more frequently than other age groups.[114] But this particular study—widely cited in the media—asked participants whether they had *ever* been solicited for particular fraudulent investment schemes, which is not particularly helpful for determining whether older people are solicited more *frequently* (as opposed to simply having been alive for longer).[115] Moreover, the study focused on an extraordinarily successful subset of investment frauds—finding that half of seniors—and 40% of respondents in their 40s—invested money in the scheme after having been solicited.[116] Finally, more recent industry research has apparently contradicted this finding, observing that people under 35 may have been scammed more in the past few years than any other age group.[117]

Emily Mueller and colleagues recently conducted an experimental study designed to compare scam susceptibility across age groups.[118] Mueller, et al., recruited a population on Amazon Mechanical Turk (n=281) and divided it into older and younger groups.[119] Both groups were presented with investment fraud pitches developed by FINRA, as well as a measure of emotional intelligence.[120] Mueller, et al., found that their older adult group was less susceptible to scams than the younger adults, though both groups scored similarly on other measures of decision-making and cognitive ability.[121] In contrast, the older group scored more highly on emotional intelligence, which was also correlated with lower susceptibility to fraud.[122] Thus, the authors concluded that "adults over 64 may in fact be less vulnerable to some types of investment financial fraud than their younger counterparts" and that "emotional intelligence plays a more crucial role than

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and Risk Factors of Suspected Elder Abuse Subtypes in People Aged 75 and Older, 57 J. AM. GERIATRICS SOC. 815 (2009)).

[114] *See* FINRA, FINANCIAL FRAUD AND FRAUD SUSCEPTIBILITY IN THE UNITED STATES (2012) ("Upon being solicited for fraud, older respondents were 34% more likely to lose money than respondents in their forties.").

[115] *Id.* at 40. After all, older adults would report having been solicited with higher incidence than younger adults even if the frequency with which people across age ranges are solicited is constant—they've simply had more time to be contacted.

[116] *See id.* at 18.

[117] *See Under 35s now most likely to fall victim to financial scams*, MYWALLETHERO (June 10, 2021), https://www.fool.co.uk/mywallethero/your-money/learn/under-35s-now-most-likely-to-fall-victim-to-financial-scams/

[118] *See* Mueller, et al., *supra* note 71, at 152.

[119] *Id.* at 155.

[120] *Id.* at 155–56.

[121] *Id.* at 160–162.

[122] *Id.* at 160.

cognitive (or decision) ability."[123] But they counseled that this experimental data does not necessarily mean that older adults are defrauded less in the real world—they might be solicited more often for scams.[124]

Thus, whether older adults are in fact victimized by scams more often relative to other age groups is an important, largely unanswered question in the literature.[125] The suggestive evidence goes both ways, and the question has too often not been addressed on its own terms. In contrast, this study seeks specifically to analyze whether older adults are in fact more often the victim of scams than other age groups. Moreover, it offers preliminary evidence analyzing the descriptive predicates of a normative justification for treating scams targeting elders differently from other scams.

B. Study Design

This study used a survey about common scams of the COVID-19 pandemic as a salient way to measure whether older adults are more frequently victimized by scams during a bounded time-period. It was approved by the Harvard University Area Committee on the Use of Human Subjects, Protocol Number IRB21-0479. The survey was developed in Qualtrics, and, following Burnes, et al., asked participants to report their experiences with four specific, common scams of the pandemic and included one general, open-ended question about experiences with frauds and scams during the relevant time period.[126] For each scam, participants were asked to report whether they had been contacted by phone, text, or email by scammers making the described promises during the 2020 coronavirus pandemic. If they answered yes, they were asked whether they engaged with the scam by clicking a link, providing personal information, or paying money, and whether they were aware of any financial loss, identity theft, account-freezes, or credit-score impact arising from their engagement with the scam. Further, participants were asked whether and how they knew the solicitation was a scam at the time and given the opportunity to report more about their experience with an open-ended question. The survey also included demographic questions and an attention-

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[123] *Id.* at 165.

[124] *Id.* at 166 (noting that older adults may be targeted more often for two possible reasons. "Scammers might believe that older adults are easier targets due to their age and cognitive changes. Second, and possibly more important, older adults tend to have more assets.").

[125] *See supra* note 72.

[126] *See* Burnes, et al., *supra* note 18, at e19–e20 (encouraging research on fraud incidence to ask about specific instances of fraud as well as open-ended questions to learn about unanticipated scams).

filter,[127] and its full text of the survey is reproduced in Appendix A.

The four specific scam examples were drawn from federal fraud alerts provided by the Federal Trade Commission and the Federal Communications Commission, as well as media reports.[128] Scams were selected to be facially age-agnostic—that is, nothing about them required their being targeted at particular age groups. Although it is well-established that some scams particularly target older adults,[129] including some scams arising from the COVID pandemic,[130] there are also scams that target younger adults specifically, both in the pandemic and generally.[131] Therefore, to meaningfully measure whether seniors fall victim to scams more frequently than other age groups, it is necessary to use scams that we might expect would be solicited of all adults. The four specific scams

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[127] This was a screening question build into the middle of the survey designed to make sure that participants were reading the questions, modelled on the attention filter used by Francis Shen and colleagues. *See* Francis X. Shen, et al., *The limited effect of electroencephalography memory recognition evidence on assessments of defendant credibility*, 4 J. L. & BIOSCIENCES 330 (2017). The question instructed participants who carefully read the paragraph-long prompt to disregard the bold-faced question above and below the paragraph. See Appendix A for the complete text of the attention filter. Attention filters were widely used in online survey research to compensate for the fact that participants cannot be monitored while completing tasks. *Id*.; *see also* Daniel M. Oppenheimer, Tom Meyvis & Nicholas Davidenko, *Instructional manipulation checks: Detecting satisficing to increase statistical power*, 45 J. EXPERIMENTAL SOC. PSYCH. 867 (2009). Otherwise complete responses that failed the attention filter were excluded from analysis.

[128] *See, e.g.*, *Coronavirus Advice for Consumers*, FED. TRADE COMM'N, https://www.ftc.gov/coronavirus/scams-consumer-advice (last visited June 4, 2021); *Coronavirus Scams-Consumer Resources*, FED. COMM. COMM'N, https://www.fcc.gov/covid-scams (last visited June 4, 2021); *A Complete List of Coronavirus (COVID-19) Scams*, SELF., https://www.self.inc/info/coronavirus-scams/ (last visited June 4, 2021).

[129] *See, e.g.*, Galie Weissberger, et al., *Physical and mental health correlates of perceived financial exploitation in older adults: Preliminary findings from the Finance, Cognition, and Health in Elders Study (FINCHES)*, 24 AGING MENTAL HEALTH 740, 741 (2020) ("According to the Federal Trade Commission (FTC), certain types of financial scams are specifically targeted towards older adults . . . .").

[130] *See, e.g.*, Press Release, Office of the Inspector General, Social Security Administration (Mar. 20, 2020), https://oig.ssa.gov/newsroom/news-releases/march20-advisory ("The Inspector General of Social Security . . . is warning the public about fraudulent letters threatening suspension of Social Security benefits due to COVID-19 or coronavirus-related office closures.").

[131] *See, e.g.*, Maguire, *supra* note 92. For instance, the common scam claiming that Netflix was granting a free subscription for a year due to the pandemic seems particularly designed to take advantage of younger adults. *See* Dawson White, *No, Netflix isn't offering free subscriptions due to COVID—don't fall for the scam*, THE KANSAS CITY STAR (Jan. 18, 2021, 3:38 PM), https://www.kansascity.com/news/nation-world/national/article248589415.html.

selected were: (1) an offer for access to a COVID-19 vaccine before one's turn (the "Vaccine Scam");[132] (2) a claim that additional personal information was required to receive a federal stimulus check (the "Stimulus Scam");[133] (3) an offer for a treatment, test, or vaccine for COVID-19 in exchange for money or personal information (the "Fake Treatment Scam");[134] and (4) the claim that a bank or other financial account had been locked (the "Generic Financial Scam").[135]

Participants were recruited with Amazon Mechanical Turk and

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[132] *See, e.g.*, Colleen Tressler, *Help fight COVID vaccine scams: Share these tips with those you know*, FTC CONSUMER INFORMATION (Mar. 2, 2021), https://www.consumer.ftc.gov/blog/2021/03/help-fight-covid-vaccine-scams-share-these-tips-those-you-know ("You can't pay to get early access to the vaccine. That's a scam."). Of the specific scams asked about, the Vaccine Scam was the most likely to show some age-modulated effects. In the United States, priority in the line to access COVID-19 vaccines was largely (but not entirely) dependent on age, with the oldest adults the first in line. *See, e.g.*, Abby Goodnough & Jan Hoffman, *Frontline Workers and People Over 74 Should Get Shots Next, C.D.C. Panel Says*, N.Y. TIMES (Dec. 20, 2020), https://www.nytimes.com/2020/12/20/health/covid-vaccine-first-elderly-workers.html. Because younger adults, on average, had to wait longer for access to vaccines than older adults, we might expect them to have been more vulnerable to pitches for early vaccine access. On the other hand, because older adults were at the highest risk from serious complications of COVID-19, *see, e.g.*, *Older Adults*, *COVID-19*, CTR. DISEASE CONTROL & PREVENTION (June 9, 2021), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html, and vaccine appointments were difficult to get even for older adults for several months, *see, e.g.*, Noah Higgins-Dunn & Will Feuer, *'All I did was cry:' Elderly Americans struggle to set up Covid vaccine appointments*, CNBC (Feb. 3, 2021, 11:50 AM), https://www.cnbc.com/2021/02/03/covid-vaccines-all-i-did-was-cry-elderly-americans-struggle-to-set-up-covid-vaccine-shots-.html ("Older Americans across the country who are now eligible to get vaccinated against Covid-19 have been for weeks waking up before dawn trying to secure an appointment for the lifesaving drug."), seniors were vulnerable to the Vaccine Scam. In any event, because of the possibility of age-modulated effects, statistical analysis including all scams *except* the Vaccine Scam was performed as a check for robustness, and the results are presented *infra* Table 2.

[133] *See, e.g.*, Alvaro Puig, *Coronavirus stimulus payment scams: What you need to know*, FTC CONSUMER INFORMATION (Apr. 20, 2020), https://www.consumer.ftc.gov/blog/2020/04/coronavirus-stimulus-payment-scams-what-you-need-know ("Scammers are using these stimulus payments to try to rip people off.").

[134] *See, e.g.*, *Beware of Fraudulent Coronavirus Tests, Vaccines and Treatments*, U.S. FOOD & DRUG ADMIN. (Mar. 1, 2021), https://www.fda.gov/consumers/consumer-updates/beware-fraudulent-coronavirus-tests-vaccines-and-treatments ("[S]ome people and companies are trying to profit from this pandemic by selling unproven and illegally marketed products that make false claims, such as being effective against the coronavirus.").

[135] *See, e.g.*, John Matarese, *Frightening text claims your bank account has been locked for fraud*, ABC CINCINNATI (May 18, 2021, 10:40 AM), https://www.wcpo.com/money/consumer/dont-waste-your-money/frightening-text-claims-your-bank-account-locked-for-fraud ("Some call it the most dangerous bank scam ever: A text or phone call from your bank stating your account has been locked for fraud.").

Prolific,[136] through which participants were compensated $0.50-$1.00.[137] Research combining Qualtrics and crowdsourcing recruitment platforms such as Mechanical Turk and Prolific has become common in empirical legal research and the social sciences.[138] Many studies have validated the populations on these platforms against convenience samples.[139] However, researchers have recognized limitations with crowdsourced survey populations, particularly at reaching the "oldest-old" over 80 and less technologically-savvy older adults.[140]

Participants were recruited in two groups—one of adults 65 years old or older ("Older Group"), and another of adults age 25–35 ("Younger

[136] Recruitment was initially conducted with Mechanical Turk, from April 26 to June 2, 2021. However, Mechanical Turk recruitment moved extremely slowly, particularly in the older population. On June 2, 2021, recruitment was moved to Prolific. To ensure that no participant had completed the survey through both platforms, I checked for duplicate IP addresses, which are automatically collected by Qualtrics, and eliminated duplicates. Research combining recruitment on Mechanical Turk and Prolific has become common over the past few years, *see, e.g.*, Nichole Sames, et al., *Understanding Psychological Distress and Protective Factors Amongst Older Adults During the COVID-19 Pandemic*, AM. J. GERIATRIC PSYCH. (2021) ("We conducted a national, cross-sectional study of 501 older adults (60+ years old) in the United States using two online crowdsourcing survey platforms: Prolific and Amazon.com, Inc. Mechanical Turk (MTurk)."); Erick Kaufmann, *Ethno-traditional nationalism and the challenge of immigration*, 25 NATIONS & NATIONALISM 435, 443 (2019); *see also* Joris Lammers & Janka I. Stoker, *Power Affects Sexual Assertiveness and Sexual Esteem Equally in Women and Men*, 48 ARCHIVES SEXUAL BEHAVIOR 645, 648 (2019) (reporting using both Mechanical Turk and Prolific "to maximize sample size, given difficulties in recruitment"), and studies have shown that the older adult population reached through both platforms is comparable, *see* Anne M. Turner, et al., *Recruiting older adults participants through crowdsourcing platforms: Mechanical Turk versus Prolific Academic*, AMIA ANNUAL SYMPOSIUM PROCEEDINGS ARCHIVE 1230, 1230 (2020) ("Participants were similar in terms of demographics, technology usage, and motivations for participation (topic interest and payment).").

[137] Initially, participants were compensated $0.50. However, due to lagging recruitment, this was ultimately raised up to $1.00.

[138] *See, e.g.*, Francis X. Shen, et al, *supra* note 126, at 330 (2017); *see also* Mueller, *et al.*, *supra* note 71.

[139] *See, e.g.*, Turner, et al., *supra* note 135, at 1230 ("Both crowdsourcing platforms are useful for rapid and low-cost recruitment of [older adults]."); Joseph K. Goodman & Cynthia E. Cryder, *Data Collection in a Flat World: The Strengths and Weaknesses of Mechanical Turk Samples*, 26 J. BEHAV. DECISION MAKING 213 (2012); Tara S. Behrend, et al., *The viability of crowdsourcing for survey research*, 43 BEHAV. RES. METHODS 800 (2011).

[140] *See, e.g.*, Turner, et al., *supra* note 135, at 1230 ("Crowdsourcing platforms are potential sources of [older adult] research participants; however, the pool is limited to generally healthy, technologically active, and well-educated older adults."); Mueller, *supra* note 71, at 169 ("The oldest old, over age 80, are underrepresented on MTurk and may have unique vulnerabilities not captured by this methodology."); *see also* Adam J. Berinsky, Gregory A. Huber & Gabriel S. Lenz, *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 POL. ANAL. 351 (2017).

Group"). In both groups, participation was limited to individuals residing in the United States. The study was only shown to individuals meeting these criteria using the Mechanical Turk and Prolific interfaces,[141] and was available to participants from May to June 2021. The survey collected IP addresses to flag and remove duplicate responses, but this identifying information was deleted before the data were analyzed. Sufficient funds were added to compensate 500 participants in the Older Group and 500 participants in the Younger Group, based on the availability of funds. This sample size is comparable to or larger than several of the studies analyzed by Burnes, et al.[142] With an anticipated overall scam incidence of 5.0% in the Older Group,[143] this sample size would find a statistically significant difference ($p < .05$) in the Younger Group if incidence deviated by approximately 2.5 percentage points in either direction.

Data were analyzed in Microsoft Excel and using basic online statistical analysis software.[144] Responses were manually analyzed to exclude bad actors,[145] and where open-ended responses were inconsistent with closed-ended responses, the closed-ended responses were modified to be consistent with the narrative the respondent related.[146]

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[141] On Mechanical Turk, the oldest age category to which participation can be limited is older than 55. For the Older Group on Mechanical Turk, participation was further limited with an initial screening question requiring participants to state their age. Those under 65 were removed from the survey and their responses were excluded.

Somehow, one participant who completed the survey in the Younger Group reported being 41 years old. Because this response was complete and passed the attention filter, it was included in the analysis in the Younger Group.

[142] *See supra* note 98.

[143] *See* Burnes, et al., *supra* note 18, at e19.

[144] Due to the ongoing coronavirus pandemic, the law school library with STATA and other statistical analysis software was closed when this analysis was conducted.

[145] *See, e.g.*, Sames, et al., *supra* note 135 ("In addition to platform specific quality checks, we employed our own systems, such as attention checks and review of open-ended answers to questions. These methods confirmed that our final sample in this study could be qualified as 'good actors.'").

[146] For example, some responses answered "Yes" to having been solicited for (and falling for) specific schemes such as the Vaccine Scam, but their open-ended narratives about the scams indicated that they had in fact been scammed by an "Other" the survey didn't ask about specifically. For instance, Survey Response Younger Group 124 reported "Yes" to whether she had engaged with a vaccine scam, but elaborated that she was "cheated by [a] tele caller and l[o]st my money" to "credit card fraud." Survey Response Younger Group 124 (on file with author). In these cases, I changed the response to the vaccine scam to "No," but changed the open-ended response to "Yes." In particular, several responses to the final open-ended question indicated "Yes" to whether they had suffered financial impacts from other frauds, but indicated in the open-ended question that they had merely been solicited for such frauds. For instance, Survey Respondent Older Group 154 answered "Yes" to engaging with other frauds, but explained in the comment box "only attempts. I am very skeptical of scam 'warnings'." *See* Survey Response Older Group 154

Responses were counted separately in the Older Group and Younger Group for whether the respondent had been (1) solicited for each individual scam, (2) engaged with each individual scam, (3) aware of financial impact because of each scam, (4) were solicited for *any specific* scam, (5) engaged with *any specific* scam, (6) aware of financial impact from *any specific* scam, (7) solicited for *any* scam, (8) engaged with *any* scam, and (9) aware of financial impact from *any* scam. In addition, because it is possible that the Vaccine Scam in particular would have age-modulated results, results for all scams except the Vaccine Scam were also calculated. For each categorical variable in the two groups, Chi-squared tests were performed to assess the statistical significance of differences in observed frequencies at $p < .05$. For tests where any variable recorded less than 10 responses, Fisher's exact tests (FETs) were performed instead. Similarly, Chi-squared tests were performed to compare scam susceptibility by comparing the proportion of Older Group participants who had been victimized by scams to those who had been solicited to the comparable proportion in the Younger Group.

Next, two tests were performed to assess whether scam victims in the Older Group were more financially vulnerable than scam victims in the Younger Group, which might suggest that, at least under consequentialist moral frameworks, scamming older adults could be morally worse than scamming younger adults. First, a 12-point Financial Stability Score was created for each participant as the scaled average of four variables suggestive of an individual's available funds and ability to absorb a financial loss: (1) self-reported fear of meeting financial needs during the pandemic; (2) amount of emergency expense the individual would be able to handle without taking on additional debt, (3) income, and (4) approximate net worth. Higher scores on the 12-point scale indicated greater financial stability and lower scores greater financial vulnerability. The mean of this score was taken for the scam victims in the Older Group and Younger Group, and these averages were compared with a t-test. Second, a FET was performed to compare the number of Older Group scam victims who were employed to the number of Younger Group scam victims employed.

Finally, to ascertain the influence of other variables on scam victimization and as a robustness check on the age-related findings, a multi-variate logistic regression was performed on the combined results from the Older and Younger Groups together with the binary variable engagement with any scam as the dependent variable and (1) age; (2) self-reported fear of catching coronavirus; (3) self-reported fear of losing money to fraud in

(on file with author). The closed-ended responses were altered to reflect this.

general, (4) Financial Stability Score; (5) social trust; (6) educational attainment; and (7) a binary variable reflecting whether the individual had been diagnosed with any mental illness as explanatory variables.

III. RESULTS

364 adults in the Older Group and 388 adults in the Younger Group completed the survey, passed the attention filter, and passed manual screening between April 26 and June 8, 2021. Basic descriptive statistics for the final population that passed the attention filter are reproduced in Table 1, while complete demographic information for the population appear in Appendix B. In general, the survey population was drawn from a broad geographic area that roughly reflects the distribution of the American population. However, the study population differed from the general population in several ways—notably in that it was more atheistic, more Democratic, more highly educated, and less Hispanic than the American population. Although the lack of true representativeness in the study population is an issue, because the focus of the research question is *comparative*, it is less problematic than in studies seeking to obtain absolute prevalence figures.

Further, there were important demographic differences between the Older Group and the Younger Group. For instance, although the Younger Group's racial composition relatively closely reflected the American population, the Older Group was 93% white, 5% Black, 2% Asian, and included no American Indians or Native Hawaiians. Similarly, while the Older Group was more female than male (56% to 44%), the Younger Group was more male than female (56% to 43%).

Table 1 - Descriptive Statistics

Older Group		
	Total Participants	364
	Age Range	64–92
	Mean Age	69.8
	Std. Dev. Age	4.19
	Median Age	69
Younger Group		
	Total Participants	388
	Age Range	25–41
	Mean Age	30.8
	Std. Dev. Age	2.93
	Median Age	31

This Part presents three categories of results. First, statistical analysis was conducted to determine whether older adults engaged with and were victimized by scams more frequently than other age groups during the 2020 coronavirus pandemic. Taken together, the results reveal that in fact *younger* adults engaged with scams more frequently. Next, the populations of Older and Younger scam victims were compared to one another, and the data offer limited support to the claim that it is qualitatively worse to scam seniors than other age groups. Finally, multi-variate logistic regression was conducted across the whole population on a range of potentially explanatory variables collected in the survey. Age remained inversely correlated with scam engagement when controlling for these other variables. Moreover, fear of fraud in general, social trust, and having been diagnosed with one or more mental illness were found to be significantly correlated with scam engagement.

A. Scam Prevalence by Age

Table 2 indicates results of the overall scam engagement rate by age, analyzed with Chi-squared tests (or Fisher's Exact Test where any of the outcome variables were under 10). The results indicate that the Younger Group, in total, clicked on scam links, paid money, or disclosed personal information to scammers at roughly three times the rate of the Older Group during the pandemic (12% to 4%), and that they were victimized by the specific scams asked about on the survey nearly ten times as often (10% to 1%). These distinctions are statistically significant at $p < .05$. Moreover, because the vaccine scam could have age-modulated results, scam-engagement frequency was calculated for all scams except the vaccine scam. The Younger Group still engaged with the remaining scams substantially more than the older group (8% to 3%; $p = .0045$).

Notably, these distinctions do not seem to be driven by the fact that one group was solicited for scams substantially more frequently than the other. Indeed, the Older Group was actually solicited for any scam more frequently than the Younger Group, albeit not by a statistically significant amount (54% to 53%, $p = .90$). And although the Younger Group was solicited more frequently for the specific scams asked about on the survey (39% to 34%, $p = .17$), this difference was not statistically significant either.

Table 2 – Respondents Self-Reporting Engagement with Scams by Age. df = 1. p* < .05, p < .01.**

	Older Group	**Younger Group**	**χ2/FET value**
Engaged* with *any	14 (4%)	46 (12%)	χ2 = 16.41**

scam			p = .000051
Engaged with any ***specific*** scam	3 (1%)	33 (9%)	p (FET) < .00001**
Engaged with any scam ***other than a vaccine*** scam	11 (3%)	30 (8%)	$\chi2$ = 8.08** p = .0045
Solicited by ***any*** scam	195 (54%)	206 (53%)	$\chi2$ = 0.02 p = .90
Solicited by any ***specific*** scam	125 (34%)	152 (39%)	$\chi2$ = 1.89 p = .17
Total (n)	364	388	

Table 3 presents a closer look at the data for each scam about which the survey asked. The overall pattern generally holds—the Younger Group reported engaging with scams at rates higher than the Older Group and more often reported awareness of financial or other consequences arising from the scam at statistically significant higher frequencies. For instance, and of particular note, while 29% of the Older Group was solicited for the Generic Financial Scam, no member of the Older Group engaged with the scam. In contrast, only 18% of the Younger Group reported being contacted about the Generic Financial Scam, but 6 individuals engaged with the scam and 2 experienced known consequences.

Moreover, the data reveal substantial variation by scam type. For example, the hypothesis that the Vaccine Scam was partially age-mediated seems borne out by the fact that 15% of the Younger Group reported being contacted to be moved up in the vaccine line in exchange for money, information, or clicking a link, while only 4% of the Older Group did. Other scams showed less of an age-effect on solicitation, as for example with the Treatment Scam, where 5% of the Older Group and 9% of the Younger Group reported being contacted. The data further suggest that scams facially unrelated to COVID-19 or its most newsworthy effects—the Generic Financial Scam and Other Scams—were actually the most common scams of the pandemic.

Table 3 – Respondents Reporting Engagement With and Victimization by Specific Scams. df = 1. p* < .05, p < .01.**

	Older Group	Younger Group	$\chi2$/FET value
Solicited for a ***vaccine scam***	16 (4%)	60 (15%)	$\chi2$ = 25.33** p < .00001
Engaged with a ***vaccine scam***	3 (1%)	23 (6%)	p = .00001**
Aware of ***consequences*** of engagement with a	0 (0%)	7 (2%)	p = 0.02*

vaccine scam			
Solicited for a ***stimulus*** scam	15 (4%)	60 (15%)	$\chi2 = 26.91^{**}$ $p < .00001$
Engaged with a ***stimulus*** scam	0 (0%)	8 (2%)	$p = .008^{**}$
Aware of ***consequences*** of engagement with a ***stimulus*** scam	0 (0%)	2 (1%)	$p = .50$
Solicited for a ***treatment*** scam	17 (5%)	36 (9%)	$\chi2 = 6.09$ $p = .014^{*}$
Engaged with a ***treatment*** scam	0 (0%)	6 (2%)	$p = .031^{*}$
Aware of ***consequences*** of engagement with ***treatment*** scam	0 (0%)	1 (0%)	$p = 1$
Solicited for a ***generic financial*** scam	107 (29%)	71 (18%)	$\chi2 = 12.80^{**}$ $p = .0034$
Engaged with a ***generic financial*** scam	0 (0%)	6 (2%)	$p = .031^{*}$
Aware of ***consequences*** of engagement with a ***generic financial*** scam	0 (0%)	2 (1%)	$p = .50$
Solicited for any ***other*** scam	118 (32%)	88 (23%)	$\chi2 = 8.95^{**}$ $p = .003$
Engaged with any ***other*** scam	11 (3%)	15 (4%)	$\chi2 = .40$ $p = .53$
Total (n)	364	388	

Finally, Table 4 presents the data on overall scam susceptibility by age group. That is, it analyzes the numbers of each group that engaged with any scam *after* being solicited, compared to those who were solicited but did not engage. The data show that fewer older adults engaged with scams as a percentage of those solicited for them than did younger adults, and these results were statistically significant at $p < .05$.

Table 4 - Scam Susceptibility by Age. df = 1. $p^{*} < .05$, $p^{**} < .01$.

	Older Group	**Younger Group**	**$\chi2$/FET value**
Engaged with ***any*** scam	14 (7%)	46 (19%)	$\chi2 = 13.51^{**}$ $p = .00024$
Solicited but not scammed for ***any***	181 (93%)	190 (81%)	

scam			
Total	195 (100%)	236 (100%)	

B. Are Seniors Who Are Scammed More Financially Vulnerable?

As discussed above, although it is ultimately a normative question whether it is ethically worse to scam an older adult than a younger adult, the claim that it is most commonly relies on one of two descriptive predicates. The first is that older adults who are the victim of scams are more financially vulnerable and less able to recover. The second is that older adults are less likely to be employed and less likely to compensate for scam losses with ordinary income over time.

To test the first claim, average financial stability, measured on a 12-point scale of Financial Stability Score as the standardized average of (1) self-reported financial fear during the pandemic (2), emergency fund availability, (3) income, and (4) net worth (1 is the least financially stable; 12 the most) was indeed lower for members of the Older Group who engaged with any scam during the pandemic than those from the Younger Group who did. However, as reflected in Table 4, this difference was not statistically significant ($p < .05$). Given the small sample-size of participants who engaged with scams, however, it is possible that further research will show that indeed seniors who are scammed are more financially vulnerable than the scam victims of other age groups.

Table 5 – Financial Vulnerability of Scam Victims

	Mean Financial Stability	*t*-value	*p*-value
Older Scam Victims (n = 14)	5.57 (SD = 2.03)	1.789	.078
Younger Scam Victims (n = 46)	6.53 (SD = 1.69)		

Second, the data indicate that participants in the Older Group who engaged with any scam were indeed less likely to be employed. As demonstrated in Table 6, seniors who engaged with scams were much less likely to be employed, either full or part time, and this difference was statistically significant at $p > .05$.

Table 6 – Employment Status of Scam Victims

	Older Scam Victims	Younger Scam Victims	*p*-value
Employed	3 (21%)	40 (87%)	p < .00001
Not Employed	11 (79%)	6 (13%)	
Total	14	46	

C. Other Correlates of Scam Engagement

In addition to categorical analysis of scam engagement between the older group and younger group, logistic regression analysis with age as an explanatory variable and including a variety of other potential predictors was conducted to determine whether any other variables were closely correlated with engagement with scams, controlling for the negative effect of age. The additional potential predictors included in the model were (1) fear of the virus during the pandemic (3-point scale); (2) fear of fraud generally (3-point scale); (3) Financial Stability Score (12-point scale); (4) social trust (5-point scale); (5) education (7-point scale); and (6) mental health status (binary variable). The results are displayed in Table 7, and show statistically significant positive correlations between fear of fraud, social trust, and mental health status and scam engagement. Moreover, age retains a statistically significant, negative correlation with likelihood of engagement with scams even with these other variables included in the model.

Table 7 – Correlates of Scam Engagement (Logistic Regression); df = 7. p* < .05, p < .01.**

Variable	Coef.	Std. Err.	Odds Ratio	95% Confidence Interval	*p*-value
Fear of Virus	0.2435	0.2381	1.2757	(0.8001, 2.0341)	0.3064
Fear of Fraud	1.1817**	0.2342	3.2598	(2.0599, 5.1588)	0.0000
Financial Stability	-0.0350	0.0819	0.9656	(0.8223, 1.1337)	0.9656
Social Trust	0.3390*	0.1399	1.4036	(1.0370, 1.8463)	0.0154
Education	0.1447	0.1279	1.1557	(0.8994, 1.4851)	0.2579
Mental Health Status	0.7535*	0.3067	2.1243	(1.1645, 3.8752)	0.014
Age	-0.242**	0.0084	0.9761	(0.9600, 0.9923)	0.0041
Constant	-6.1994**	1.0903			0.0000

IV. Discussion

This study has suggests that, contrary to the expectations of conventional wisdom in the law and public domain, younger adults were more likely than older adults to have been victimized by frauds and scams during the 2020 coronavirus pandemic. In other words, the challenge of preventing scams may have a different shape—and at a minimum appears to be much more broadly distributed—than we have thus far understood. While further, nationally-representative research will be required to ascertain the precise contours of American fraud, this study has several implications for law reform efforts designed to mitigate the harm caused by scams.

This Part discusses three preliminary implications of the study's findings. First, I try to square this study's findings with the widespread public concern for scams targeting seniors and psychological literature suggesting that seniors are more vulnerable. I suggest—optimistically—that the public concern for senior financial exploitation may be *working* and educating seniors to be more vigilant. Alternatively, it might be that the cognitive changes shown in lab conditions have limited salience in causing real-world victimization. Finally, it could be that public concern for senior financial scam vulnerability is ultimately grounded in unfortunate ageist stereotypes.

Second, I sketch the possibility that scamming older adults may generally be qualitatively more morally blameworthy than scamming other groups and conclude that this claim is not obviously right, although the study offers some limited support for it.

Third, I outline some paths forward—it might be that want to continue treating the scam victimization of seniors differently, it might be that we want to offer the same protections to all adults, or relieve seniors of special concern by financial institutions—and discuss the study's limitations and the need for further research.

A. Making Sense of the Results

The results of this study fly in the face of the popular wisdom and scholarly assumption that older adults are more vulnerable to scams than other age groups. They therefore demand some explanation. While exploring these possibilities further will require additional research, I offer three preliminary possibilities—taking the results at face value—that could account for why seniors may have been less likely to be victimized by scams during the COVID pandemic than younger adults. First, it might simply be that our efforts to counter senior scams are *working*. And indeed, the data offer suggestions that the senior population may be on guard against scams in a way that the younger population is not, possibly as a result of awareness-raising in the public sphere. Second, it might be that the cognitive changes that occur with aging found by lab studies to impact scam susceptibility are of limited salience in real-world contexts. This could be, for example, because real-world contexts rely more on crystallized intelligence—which is retained into older age—than lab studies suggest, or because seniors implement heuristic safeguards for themselves that rely less on executive judgment. Finally, I point out the troubling possibility that our widespread concern with senior financial frauds may be rooted in invidious ageist stereotypes.

1. Awareness-Raising May Be Working

Senior financial exploitation is a popular topic in the media.[147] And a tremendous amount of messaging on the issue is directly tailored for seniors—including websites directed to seniors,[148] local news articles,[149] nursing home websites,[150] government websites[151] AARP materials[152] and consumer education by financial institutions.[153] In short, everyone—presumably including the elderly—knows that scams targeting seniors are a problem and older adults may be actively on guard against them, as all these

[147] *See, e.g.*, Vern Buchanan, *Passing the Seniors Fraud Prevention Act will help protect elderly from criminals*, THEHILL (Dec. 2, 2020, 8:20 AM), https://thehill.com/blogs/congress-blog/technology/528261-passing-the-seniors-fraud-prevention-act-will-help-protect.

[148] *See, e.g.*, seniorliving.org Team, *Common Scams that Target the Elderly*, SENIORLIVING.COM (Feb. 8, 2021), https://www.seniorliving.org/research/common-elderly-scams/.

[149] *See, e.g.*, Lisa Riley, *6 scams against senior citizens and how to avoid them*, AZ BIG MEDIA (May 13, 2021), https://azbigmedia.com/business/6-scams-against-senior-citizens-and-how-to-avoid-them/.

[150] *See, e.g.*, SALMON Health, *Senior Fraud: Tips to Avoid Scams & Report Crimes*, SALMON HEALTH & RETIREMENT (Sept. 25, 2020), https://www.salmonhealth.com/blog/senior-fraud-tips-to-avoid-scams-and-report-crimes/.

[151] *See, e.g.*, *Scam Tag: Scams Against Older Adults*, F.T.C. CONSUMER INFORMATION, https://www.consumer.ftc.gov/scams/scams-against-older-adults (last visited June 8, 2021); *see also* BUREAU OF CONSUMER CREDIT PROTECTION, STATE OF MAINE, DOWNEASTER GUIDE TO ELDER FINANCIAL PROTECTION (2008).

[152] *See, e.g.*, Katherine Skiba, *10 Red-Hot COVID Scams Vexing Older Americans*, AARP (Feb. 24, 2021), https://www.aarp.org/money/scams-fraud/info-2021/covid-19-scams-vexing-older-americans.html.

[153] *See, e.g.*, *Protecting the elderly from fraud & scams*, WELLS FARGO, https://www.wellsfargo.com/financial-education/basic-finances/build-the-future/protect-money/protecting-elderly/ (last visited July 14, 2021)

media sources urge them to. In short, it may simply be that the public's focus on senior scams is working precisely as it is intended to, and seniors are no longer the most scammed group—whether or not they are more vulnerable in the abstract—because they are taking precautions against fraud.

Some responses to open-ended survey questions indeed offer tantalizing suggestion that this is happening. Several Older Group participants expressed awareness of the problem of elder scams and suggested that their knowledge of the problem helped them avoid being scammed. For instance, one participant wrote "My concern is for other seniors who may not be as aware of scams or be tech-savvy to help themselves. They are the ones most at risk;"[154] another that "[s]ome people tend to think if you are elderly, then you must also be stupid"[155] and a 77-year-old woman reported that she "went along with" a phone scammer "for a while, then . . . let him have it for trying to take advantage of seniors."[156] Moreover, some older adults noted that they take active measures to prevent fraud, such as "Norton/LifeLock as well as other spam blockers on my phone and computers,"[157] and "SpamCop,"[158] and that they learned about particular scams "on the news"[159] and were prepared for them.

In contrast, no such specific awareness of scams was evident in the Younger Group. Indeed, younger adults in the study more often referenced the role of their friends deterring them from falling for scams, suggesting an ad hoc and less systematic approach to scam awareness and prevention among younger adults. For instance, one participant was "excited about the opportunity" to get a vaccine early but "decided to consult with [his] friends first who confirmed to [him] that it was a scam."[160] And two participants reported not engaging with scams because their friends had recently been victimized and warned them.[161]

In short, it may well be that the reason younger adults were scammed more frequently during the pandemic than older adults was that older adults

[154] Survey Response Older Group 59 (on file with author).
[155] Survey Response Older Group 247 (on file with author).
[156] Survey Response Older Group 22 (on file with author).
[157] Survey Response Older Group 59 (on file with author).
[158] Survey Response Older Group 290 (on file with author).
[159] Survey Response Older Group 65 (on file with author); *see also* Survey Response 290 ("Also, I read national newspapers (WA Post, NY Times) daily, and was well aware that such emails were circulating.").
[160] Survey Response Younger Group 103 (on file with author).
[161] Survey Response Younger Group 477 (on file with author) ("I blocked [a scammer] immediately as a friend had been scammed in this same way previously."); Survey Response Younger Group 488 (on file with author) ("A friend who f[e]ll victim of the act informed me days before and warned me.").

were prepared. If further research establishes that this is correct, it would indicate that public awareness-raising campaigns can be an effective way to prevent scam victimization across large populations. On the other hand, further research could reveal a dark side to our contemporary awareness-raising campaigns regarding senior scams—the more we inundate the culture with the proposition that scams are primarily a problem for older adults, perhaps the more vulnerable we make younger adults who are less systematically prepared to respond to a problem they are largely told does not affect them.

2. Changes in Cognition May Not Be Germane to Real-World Scam Susceptibility

As discussed above, most prior academic research on senior scam victimization has largely *assumed* that it is a discrete phenomenon worth describing separately, and sought to *explain why* seniors are more vulnerable to scams.[162] Much of this research has identified individual-level risk factors for victimization that are consistent with the subsidiary findings of this study—for instance, there is a robust literature linking mental health diagnoses and scam victimization.[163] But this study's finding that older adults fell victim to scams less often during the coronavirus pandemic than younger adults is apparently inconsistent with the broader finding of the literature on senior financial exploitation that cognitive changes that occur in normal aging render older adults more vulnerable to scams.[164] It is

[162] *See, e.g.*, Shao, et al., *supra* note 15, at 228–233 (reviewing literature and theories for why seniors are more vulnerable to scams than other groups).

[163] *See, e.g.*, Peter A. Lichtenberg, et al., *Providing Assistance for Older Adult Financial Exploitation Victims: Implications for Clinical Gerontologists*, 42 CLINICAL GERONTOLOGIST 435, 441 (2019) (finding that victims of senior financial exploitation reported statistically significant higher levels of depression and anxiety than control groups); *see also* MERLYN HOKAR & CHRIS LEES, CAUGHT IN THE WEB: ONLINE SCAMS AND MENTAL HEALTH 4 (2020) ("National polling conducted for this report finds that people who have experienced mental health problems are three times more likely than the rest of the population (23% versus 8%) to have been a victim of an online scam.").

[164] *See, e.g.*, Shao, et al., *supra* note 15, at 230 ("Though old age in and of itself does not necessarily predispose an individual to exploitation, certain factors that arise from age-related physical, cognitive, and social circumstances can contribute to greater vulnerability."); Boyle, et al., *supra* note 80 ("These results suggest that poor decision making and increased susceptibility to scams in old age are consequences of cognitive decline among persons without dementia."); *see also* Mariann R. Weirich, *Older and wiser? An affective science perspective on age-related challenges in financial decision making*, 6 SCAN 195, 202 (2011) ("Uncertainty [in retirement] is increased by diminished 'time travel' as people age; they not only are less able to remember the past but also are less able to project themselves into a future that is different from the present."); Keith Jacks Gamble, et al., *Aging and Financial Decision Making*, 61 MGMT. SCI. 2603, 2603 (2015)

certainly possible that this literature is flawed, albeit well-meaning, by the simple fact that it is seeking to explain a phenomenon that does not need explaining.[165] It would hardly be the first time something like this happened in psychology.[166]

On the other hand, it might be that this literature is documenting real changes in cognition but that these changes do not have the hypothesized effects in the real world. This could happen in several ways. First, it might be that the suite of cognitive changes found in studies of older adults are simply not the most saliently relied-upon in responding to third-party scams. The literature on cognitive change in aging has shown that, for example, aging is associated with declines in fluid intelligence—working memory, processing speed, abstract reasoning, etc.—and that older adults instead often rely on simpler heuristics in decision-making as compared to other age groups.[167] But it might be that simple heuristics—categorically refusing to give out personal information to strangers, for instance—are all that is required to avoid scams most of the time in real life. There is suggestive evidence in the qualitative survey data that many seniors relied on such heuristics to avoid engaging with scams—for example, one participant noted that she "*never* click[s] on links from unknown (to me)

("Although participants experiencing decreased cognition also show declines in their financial literacy, these participants may not recognize—or may be reluctant to admit to—this decline in their financial capability.").

[165] And it is worth noting that the effects of age on financial decision-making remain controversial in psychology. *See, e.g.*, Dorien F. Bangma, et al., *The effects of normal aging on multiple aspects of financial decision-making*, 12 PLoS ONE e018260, 12 (2017) (noting that "normal aging appears to have a differential effect on various aspects of [financial decision-making]," finding no effect of age on "relatively basic aspects" and that "impulsive buying tendency" seems to decrease with advancing age, concluding that "[w]hether or not normal aging has an effect on [financial decision-making] with implications for the future and emotional decision-making remains inconclusive"); *see also* Wolfgang Eberhardt, et al., *Aging and Financial Decision Making: Older and Wiser?*, 1 INNOVATION IN AGING 936, 936 (2017) ("We found that performance on each of our financial decision tasks improved with age.").

[166] An example might be the well-documented trend social psychology to pathologize politically conservative viewpoints as the result of various mental biases. *See generally, e.g.*, José L. Duarte, et al., *Political diversity will improve social psychological science*, 38 BEHAVIORAL & BRAIN SCI. e130 (2015) (documenting instances where social psychologists sought to explain conservative views as "denial," "unethical behavior," "rationalization of inequality," etc.).

[167] *See, e.g.*, Rui Mata, Bettina von Helverson & Jörg Rieskamp, *Learning to Choose: Cognitive Aging and Strategy Selection Learning in Decision Making*, 25 PSYCH. & AGING 299 (2010) (showing that older adults rely on simpler heuristics in decision-making than younger adults); Carolyn Yoon, Catherine A. Cole & Michelle P. Lee, *Consumer decision making and aging: Current knowledge and future directions*, 19 J. CONSUMER PSYCH. 2 (2009) (showing declines in fluid intelligence in healthy aging).

sources"[168] and another that she "always assume[s] *everything* is a scam."[169] And indeed, as research by Mueller, et al., and others has shown, it is not necessarily the case that declines in specific aspects of cognition necessitate actually engaging with scams at a higher rate.[170] Mueller, et al.'s, study found that cognitive functioning did not predict scam susceptibility but that emotional intelligence—which *increased* with age—did.[171] It short, it might be that the sorts of cognitive changes that occur as we age are simply not what matters to scam susceptibility in the real world.

Second, it might be that older adults are, as a matter of cognition, more susceptible to scam victimization, but that they are aware of this and compensate by taking active steps to avoid scams. As discussed, several participants ascribed their success in avoiding scams partially to their use of scam-detecting software.[172] Indeed, some prior research has found that conscious scam-avoidance measures such as using only one computer, filtering spam email, and installing antivirus software are correlated with lower rates of scam victimization.[173] Thus, it could be that, cognizant of their cognitive limitations, older adults take active measures to avoid frauds such as relying on heuristics and software that are in fact effective at preventing their engagement with scams. Further research will be required to determine whether the psychological literature on cognitive decline in ordinary aging is compatible with the apparent fact that seniors may fall victim to scams less than other age groups, and if so, how.

3. Ageism

Finally, it is important to note the possibility that the popular view that older adults are more vulnerable to fraud could arise from invidious ageist stereotypes that caricature older adults as less intelligent. A broad literature in social psychology has documented the ubiquity of ageist attitudes and stereotypes in popular discourse.[174] Indeed, one 2019 meta-analysis

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[168] Survey Response Older Group 169 (on file with author) (emphasis added).

[169] Survey Response Older Group 145 (on file with author) (emphasis added).

[170] *See*, *e.g.*, Mueller, et al., *supra* note 71, at 162 ("[D]ecision-making abilities were not a significant mediator for age-related differences in scam susceptibility.").

[171] *Id.*

[172] *See supra* notes 157–158 and accompanying text.

[173] *See, e.g.*, Matthew L. Williams, *Guardians Upon High: An Application of Routine Activities Theory to Online Identity Theft in Europe at the Country and Individual Level*, 56 BRITISH J. CRIMINOLOGY 21 (2016); *but see* Bradford W. Reyns & Billy Henson, *The Thief With a Thousand Faces and the Victim With None: Identifying Determinates for Online Identity Theft Victimization With Routine Activity Theory*, 60 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1119 (2016) (finding that protective online activities were not correlated with identity-theft victimization).

[174] *See generally*, *e.g.*, AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER

concluded that "ageism is experienced almost universally by older people" and that, contrary to many other biases, "younger adults *commonly acknowledge* holding ageist views and/or having done ageist actions."[175] Moreover, research has found ageism to be broadly culturally universal and even internalized by many seniors,[176] and that in some cases such internalization can lead to depression and exacerbate cognitive decline.[177]

The most common forms of the claim that older adults are more vulnerable to scams share obvious features with common stereotypes about older adults. Indeed, this claim in the popular discourse (and psychological literature) is largely premised on the notion that seniors generally are cognitively weak or quasi-senile, falling prey to any obvious con-man willing to give them the time of day. This is essentially the suite of most common stereotypes about the elderly in general—sick, weak, and senile.[178] And, of course, although like many stereotypes there is some truth to this one—of course older adults often do experience cognitive decline and age is the most significant risk-factor for Alzheimer's disease[179]—the reality is far more complicated and ageist stereotypes often do not correspond to reality,

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PERSONS (2d ed., Todd D. Nelson, ed. 2017); Erdman Palmore, *Ageism Comes of Age*, 70 J. GERONTOLOGY: SOC. SCI. 873, 873 ("2015) ("We now know that the virus of ageism infects most people in most countries around the world. Even older people continue to believe the negative stereotype that most old people are weak, sick, or senile. . . . We know that these stereotypes contribute to widespread discrimination against older people in employment, medical care, institutionalization, and even in families." (citing E. PALMORE, F. WHITTINGTON & S. KUNKEL, EDS., INTERNATIONAL HANDBOOK ON AGING (2d 2009)).

[175] Donna M. Wilson, Begoña Errasti-Ibarrondo & Gail Low, *Where are we now in relation to determining the prevalence of ageism in this era of escalating population ageing?*, 51 AGEING RES. REV. 78, 82 (2019); *see also* Liat Ayalon & Clemens Tesch-Römer, *Taking a closer look at ageism: self- and other-directed ageist attitudes and discrimination*, 14 EUROPEAN J. AGEING 1, 1 (2017) ("[E]veryone is susceptible to experience ageism if they live long enough.").

[176] *See, e.g.*, Raudah M. Yunus & Noran N. Hairi, *Ageism*, 32 ASIA-PACIFIC J. PUB. HEALTH 57 (2020) ("Research has shown that this phenomenon, known as ageism, exists across regions and cultures . . . .").

[177] *See, e.g.*, Deirdre A. Robertson, Bellinda L. King-Kallimanis & Rose Anne Kenny, *Negative Perceptions of Aging Predict Longitudinal Decline in Cognitive Function*, 31 PSYCH. & AGING 71, 71 (2016) ("Experimental studies have found that priming older adults with negative attitudes toward aging results in immediate declines in psychological, physical, and cognitive functions. Longitudinal studies have supported this work illustrating the longer term impact of negative and positive perceptions of ageing on psychological and physical health.").

[178] *See, e.g.*, Palmore, *supra* note 173, at 873 (describing ageism as, at a high level of abstraction, "the negative stereotype that most old people are weak, sick, or senile").

[179] *See, e.g.*, Alison Abbott, *Dementia: A problem for our age*, 475 NATURE S2 (2011) ("Given that the biggest risk factor for dementia is age, a longer-living global population means there will be more people with dementia.").

certainly at an individual level.[180]

One need not look particularly deeply for evidence suggesting that ageism might be doing some work in the public concern for seniors' scam susceptibility. For instance, on the FBI website's section on Elder Fraud, the federal government cavalierly explains that "[s]eniors are often targeted because they *tend to be trusting and polite*."[181] Other publications ascribe the prevalence of senior scams to seniors' "polite and trusting *nature*."[182] This is obviously a stereotype—perhaps a positive stereotype, but a potentially demeaning one nonetheless. And of course the actual research on age-related differences in trust is far more complex, with a 2019 meta-analysis finding that older adults were generally more trusting than younger adults "when trust was expressed non-financially, but not financially."[183] Moreover, the study presented in this Article found that higher social trust was correlated with scam susceptibility even when controlling for age, and vice versa—younger age was correlated with scam susceptibility even when controlling for social trust.[184] In short, it might be that much of the public concern with seniors as a specific risk group for scams in fact plays on ageist stereotypes that may be counterproductive for mitigating the problem of fraud in society.

B. Is Scamming Seniors More Morally Blameworthy?

If the findings of this study are generalizable—and indeed younger adults more than older adults fall victim to scams—the primary justification for crafting age-specific laws designed to protect seniors from scams—that senior scam victimization is particularly prevalent—would be untenable. But it would not necessarily mean that the project of law reform designed to protect seniors specifically from scams must be abandoned. It might be that taking advantage of older adults is more morally culpable than taking advantage of younger adults. Like, for example, racially-motivated murder—which is much less common than other murders but we might

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[180] *See, e.g.*, Becca R. Levy, *Ageism Amplifies Cost & Prevalence of Health Condition*, 60 THE GERONTOLOGIST 174 (2020) (showing that ageism often produces rather than explains generalizations about older adults)

[181] *See Elder Fraud*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/elder-fraud. (last visited June 9, 2021) (emphasis added).

[182] *See, e.g.*, Emma McGowan, *The most common tech scams targeting seniors*, AVAST BLOG (June 1, 2021, 2:00 PM), https://blog.avast.com/most-common-tech-scams-targeting-seniors-avast ("Scammers target the elderly to take advantage of their polite and trusting nature, as well as their typically stable financial situation.").

[183] *See* Bailey & Leon, *supra* note 88, at 674 (2019).

[184] *See supra* Table 7.

think of as more morally blameworthy—we may consider senior financial exploitation to be *qualitatively* different than other scams and worthy of more public resources and more retribution for those who commit the crime.

This claim is normative and cannot be directly proven or disproven with empirical facts.[185] But it is typically based on the descriptive claim that seniors who are scammed are more financially vulnerable than other groups and less able to recover from scams because they are not working.[186] Thus, the normative claim may depend on whether, empirically, scamming seniors causes more harm than scamming other people.

As discussed above, this study offered some weak evidence that seniors who are scammed may face greater harms because they are less likely to be able to make the money back from employment. Indeed, the study found that seniors who are scammed are much less likely to be employed than younger adults who are scammed, and found that senior scam victims were somewhat less financially secure than younger scam victims, although this finding was not statistically significant. Further research comparing groups of scam victims across the age range will be required to determine whether in fact older adults who are scammed suffer more harm than others.

On a qualitative level, this study certainly revealed that seniors can suffer devastating consequences from scams. Indeed, consider one 65-year-old woman from Florida who indicated that she had engaged with a scam other than the specific ones asked about in the survey:

> I saw a bill that said Amazon so I called the number and they told me they needed to do a screen where they open up your computer and then ask me to go to my bank account and I did and I lost $999.00 dollars.[187]

This woman indicated that she is retired, would only be able to cover an emergency expense of $500–$5,000, and that her debts exceed the value of her assets and she does not have a plan for paying them off. No doubt the loss of $1,000 was profoundly challenging for her.

But the survey responses also indicate that the tragic consequences of

[185] *See, e.g.*, STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 150 (2002) (describing the "naturalistic fallacy" that would infer normative claims from descriptive ones).

[186] *See, e.g.*, Singletary, *supra* note 68, ("No one deserves to be a victim of a scam, but it's particular[ly] heinous when perpetrated on people who are living on fixed incomes or surviving on savings they can't replenish.").

[187] Survey Response Older Group 10 (on file with author).

scams are not *limited* to older adults. Recall the 32-year-old woman from the Introduction who reported being "very worried" of contracting COVID who was approached by scammers purporting to offer early access to a vaccine.[188] She took out a personal loan from a bank to cover the ostensible upfront cost of getting vaccine access.[189] This has had negative, lasting effects on her life, from impacting her credit score to leading to a diagnosis of depression.[190] Scams, in other words, can cause deeply tragic consequences across the age range of the victim.

In short, although the fact that seniors may be scammed less frequently than other groups does not entail the conclusion that we ought not continue the project of treating senior scams exceptionally in the public sphere, further empirical research, and normative theorizing, will be required before we do. This study offered weak support for the empirical generalization that seniors who are scammed may suffer more than other age groups, but it is not obvious that that is true on an individual level—and the qualitative responses to the survey complicate the simple view that younger adults as a class may easily bounce back from the loss of money.

C. The Path Forward

This study suggests that an empirical premise of an important recent movement in law reform is misguided—seniors may not in fact be more frequently scammed than other groups. This has implications for the path forward, in research, law reform, and for how we think about the problem of fraud in general. This Section discusses each implication in turn.

1. Future Directions in Research

Although this study found that a population of younger adults more frequently fell victim to scams than one of older adults, it did so under bounded circumstances that may not generalize. Indeed, the study asked only about age-agnostic scams during the 2020 COVID pandemic. The finding that younger adults may have fallen victim to these scams more commonly than older adults, then, might not mean that seniors in general are not, in fact, victimized by scams more frequently than younger adults if they are targeted more by age-*specific* scams than younger adults are or if the scams of the COVID pandemic were particularly effective against younger adults. More research will be required to ascertain whether this study's findings are limited to facially age-agnostic scams and whether

[188] Survey Response Younger Group 74 (on file with author).
[189] *Id.*
[190] *Id.*

some age groups are targeted by scams tailored to their vulnerabilities, and whether frauds and scams of the COVID pandemic differ materially from scams at other times.

Moreover, further research on *why* American seniors were victimized less frequently than other age groups during the pandemic is warranted. As discussed above, this finding is difficult to square with the well-established cognitive changes that occur as people age. But it might be that notwithstanding those changes, public campaigns warning seniors of the danger of scams have been successful at encouraging them to rely on heuristics that prevent them from falling victim to scams, such as not clicking on links in emails from unknown senders.

Finally, if indeed further research shows that awareness-raising about the vulnerability of older adults to fraud has been extraordinarily successful in preventing victimization, research will be required to assess whether this success could be replicated with the general population. Indeed, it might be that part of the success of the movement against senior scams has been its *specificity*, its claim that a specific group of people is *uniquely* vulnerable and *uniquely* to be guarded. If that turns out to be correct, it may be much more difficult to encourage the general population to take measures to limit their personal vulnerability to fraud.

2. Leveling Up or Leveling Down

If indeed seniors are scammed less frequently than other age groups—and we conclude that there are no compelling normative reasons to think of scamming seniors differently from other age groups—there is no reason for the law to treat the scam victimization of older adults differently from everyone else. But this would offer two alternative paths forward for law reform—we might "level-up" the protections for the general population to be comparable to the apparatus protecting seniors, or we might "level down" the protections for older adults and strip back the growing fraud protections that apply to them. Both paths are defensible, and indeed, we might find that the optimal path is some combination of both.

For instance, several important commentators in elder law, including Professor Nina Kohn, have criticized the trend toward criminalizing various aspects of elder abuse that would not be criminal if the victim were not an older adult.[191] From this perspective, the punitive approach to combatting elder abuse can be understood as part of a broader trend in American law towards the use of the retributive apparatus of criminal justice to address a

[191] *See generally* Kohn, *supra* note 11; *see also* KOHN, ELDER LAW, *supra* note 26, at 513–517.

variety of social problems for which it is not appropriate.[192] "Leveling up" the criminal response to scams and frauds by increasing penalties for committing a scam against anyone to the level of punishment for committing a scam against an older adult may be objectionable as an exaggerated case of why increasing the criminal penalties for elder scams is objectionable in the first place—it applies the blunt, violent instrument of criminal justice in increasingly pervasive ways to address social problems that cannot be so solved. We might think, then, that we ought to strip back the heightened penalties for scams based on the age of the victim.

On the other hand, there is good evidence that measures such as authorizing financial institutions to report and freeze suspicious transactions are highly popular among seniors, the group whose transactions are most subject to freezes and reporting.[193] In other words, although such measures could be objected to as paternalistic, it appears that in fact the group subject to the paternalism appreciates the support. It may well be that the same dynamic extends to the general population—people generally may be more comfortable with their financial institutions actively monitoring their accounts and taking measures to prevent their losing money to scams than lawmakers have thus far assumed. In short, if measures such as relieving financial institutions of liability for freezing suspicious transactions are the right move—and a very popular one—with respect to seniors, perhaps we should "level up" similar protections for the general population, or strip back the banking privacy laws that gave rise to liability in the first place.

3. Understanding Fraud

Finally, this study may have broader implications for how we think about fraud and scam crimes and how to prevent them. In brief, it appears that we've been far more willing to treat scams as a serious social problem worthy of legal remedy where we consider the victims uniquely vulnerable

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[192] *See, e.g.*, Kohn, *supra* note 11, at 27 ("The move toward the criminalization of elder abuse parallels similar moves in other social policy domains. The United States is a highly legalistic society in which legal system responses to social problems are increasingly the norm, and in which the criminal justice system serves not only to punish and deter, but also to express social condemnation of acts deemed morally wrong."); *see also* Radford, *supra* note 7, at 259 (noting that the danger of "suffocating an older person's autonomy by our well-meaning attempts to protect her" is a substantial danger of efforts to combat elder financial abuse).

[193] *See, e.g.*, JILENNE GUNTHER, AARP'S BANKSAFE INITIATIVE: A COMPREHENSIVE APPROACH TO BETTER SERVING AND PROTECTING CONSUMERS, AARP PUBLIC POLICY INSTITUTE (2016) (finding that 83% of seniors favored extra monitoring of their accounts to prevent unauthorized withdrawals and 85% wanted to set up an alert that notifies them if more than a specified amount of money is withdrawn from their account).

through no fault of their own—simply because of the inevitable cognitive changes of ordinary aging. But this study has shown, at a minimum, that more of us are vulnerable to scams than anticipated—with 12% of adults ages 25–35 engaging with scams during the COVID pandemic. In other words, notwithstanding our perceptions of fraud as primarily a problem for a subset of particularly vulnerable adults, the data suggest that it is a much broader problem less neatly ascribed to the cognitive idiosyncrasies of a particular group.

Addressing the social problem of fraud may therefore require a rethinking of the nature of the problem. In some ways unlike other crimes, our approach to combatting fraud largely relies on individuals to avoid engaging with scams themselves—an approach of personal responsibility. From this perspective, it makes sense to take a more proactive role to preventing scams targeting groups of people—like older adults—presumed to be less capable of exercising personal responsibility to avoid victimization.

The results of this survey suggest that our understanding of fraud—as essentially a challenge of personal responsibility in most cases and a public problem only with respect to particular groups—may be misguided. Indeed, the older adults in the study sample showed themselves largely capable of exercising personal responsibility to avoid victimization. In contrast, an alarmingly high percentage of younger adults reported engaging with scammers during the 2020 coronavirus pandemic.

There are many ways we could realign the way we think about scams to better fit these empirical facts. We might, for instance, continue to think of scams as primarily a problem of personal responsibility but adopt the view that that personal responsibility is a kind of wisdom that develops over the course of adulthood—that the youngest adults are the least responsible for avoiding scams because they haven't yet learned how. Through this lens, older adults would be fully personally responsible for not engaging with scammers, but we might be more understanding of younger adults' difficulty in distinguishing tricks from genuine opportunities.

But there is another way forward, and one we might ultimately find to be more appealing. We might come to see scams and frauds—like other crimes—as not primarily a matter of personal responsibility at all. We might in the end come to realize that we are all—or at least many of us—vulnerable to the psychological tactics on which scammers rely, and not reserve our sympathy—and legal and social support—for victims of scams to those we think of as less responsible than us.

D. Limitations

As discussed throughout, there are limitations on the generalizability of the data in this study, and further research will be required to determine whether the findings will extend more broadly. In particular, the online recruitment strategy of an older adult population may not be reflective of the general population of older adults. Indeed, studies have found that among Mechanical Turk populations, the "oldest old," or individuals over 80, are underrepresented,[194] and that the pool of older adults available on online crowdsourcing platforms is "limited to generally healthy, technologically active, and well-educated older adults."[195] Thus, further research with mixed recruitment methods, including community interviews with older adults who may not regularly access the internet, would be necessary to establish whether the findings regarding the Older Group in this study generalize to American seniors.

Moreover, although this study used scams of the 2020 coronavirus pandemic as a salient way to assess scam victimization during a discrete period in which commentators expected scam solicitation and victimization to be particularly high, the study's limitation to scams of the pandemic may also limit its findings' generalizability. It might be that scam dynamics during the pandemic were different in meaningful ways than they are in general. It may also be that the specific scams of the pandemic asked about on the survey are less age-agnostic than anticipated, and in fact pandemic-era scams were targeted disproportionately towards younger adults.

The relatively small sample size of the study further ensures that it is not representative of the general American population. As demonstrated in Appendix B, the study population—in both the Older Group and Younger Group—was more atheistic, more Democratic, more highly educated, and less Hispanic than the American population. It is possible that these variables are related to scam victimization dynamics and a more representative sample would offer a better understanding of the comparative scam victimization of the American population generally.

Finally, it is important to note that this study's findings are confined to elder financial frauds and scams, not elder financial abuse generally. There is no reason to believe that they would generalize to fiduciary or familial financial abuse, and this study is not in tension with the robust literature on the prevalence and problem of elder financial abuse in its more common form. Indeed, the assets of far fewer younger adults are subject to fiduciary administration than older adults, so it is unclear that fiduciary financial

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[194] Mueller, *supra* note 71, at 169 ("The oldest old, over age 80, are underrepresented on MTurk and may have unique vulnerabilities not captured by this methodology.")

[195] Turner, et al., *supra* note 135, at 1230.

abuse *could* present the same kind of problem across the age spectrum, in contrast to frauds and scams which can in principle be pitched to anyone. To the extent that many measures designed to prevent elder financials frauds and scams are primarily directed towards elder abuse more generally, then, this study does not implicate their justification.

CONCLUSION

This study is the first to systematically interrogate whether older adults were victimized by scams during a bounded period of time more frequently than the general adult population. The study found that, contrary to prevailing wisdom, older adults were not more frequently victimized, and indeed, younger adults more frequently engaged with scams during the 2020 coronavirus pandemic, a period in which commentators expected scams—and particularly seniors' vulnerability to scams—would be significantly heightened.

These findings unsettle the assumptions of the widespread legal movement to treat scams that victimize seniors differently from other scams. Indeed, that movement appears to be largely (if not exclusively) based on the empirical premise that seniors are more susceptible to scams than other age groups. Although the empirical findings presented in this study do not necessitate the conclusion that these law reform efforts are misguided, and further research and normative theorizing is required, they offer important insights into our response to mitigating the problem of fraud in our society. Whatever path forward we choose, we must keep in mind the shape of the problem of fraud may not be what we thought it was. Fraud may well be, in short, a problem across the age spectrum.