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What Is So Morbid about Viaticals? An Examination of the Ethics of Economic Ideas and Economic Reality

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Abstract: A viatical settlement (or viatical) is a transaction in which an investor purchases the life insurance policy from a terminally ill person for a lump sum so that the investor can receive those benefits at the time of death. While there is an ongoing debate in the insurance and financial planning industry about viaticals, including the ethics of this practice, the focus has been predominantly on abuses (i.e., the practice of buying and selling viaticals) and less on the fundamental ethicality of the economic idea behind viaticals. This paper offers a systematic ethical analysis of viaticals that leverages the distinction between the ethicality of an economic idea and the ethicality of economic reality to isolate and discuss the fundamental ethical problems of viaticals. By unpacking the evaluative content of our negative emotional reactions to viaticals, we show that, even under ideal circumstances, the economic idea of viaticals is, at its core, unethical.

Key Words: ethical analysis, moral intuition, life insurance, life settlements, viaticals

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Introduction

A viatical settlement (or viatical) is a transaction in which an investor purchases the life insurance policy from a terminally ill person for a lump sum so that the investor can receive those benefits at the time of death. Viatical transactions have provoked a variety of responses. On the one hand, Quinn,[1] in her important study, describes the changing moral perceptions in the viatical market, and reveals that many of those perceptions point to the inherent immorality associated with benefiting economically from the suffering of others. Trinkhaus and Giacalone[2] also speak of "entrepreneurial 'mining' of the dying" and highlight several ethical issues that might arise in the economic transactions surrounding the final stages of life. On the other hand, the moral perceptions of many participating in this industry are more positive and focus on the benefits to the dying or changing attitudes toward death among the public.[3]

The development of the viatical industry has been quite rapid and the forecasts indicate that viaticals are becoming less of a fringe product. As of 2002, there were already forty-five viatical settlement companies purchasing policies.[4] Sanford C. Bernstein & Company estimated that in 2005 the market for "used" policies topped $13 billion and could hit $160 billion by 2030.[5] Despite the increased use of viaticals and the ongoing debate in the insurance and financial planning industry about such transactions, most articles that discuss the ethical concerns surrounding viaticals are mainly concerned about the potential, and on occasion documented, abuses that occur in connection with viaticals rather than on the fundamental ethicality of viaticals themselves.[6]

This focus on what can be called the ethicality of economic *reality* is intriguing because it implicitly assumes that the ethical concerns associated with viaticals can be overcome if those aspects of viaticals that have caused or can cause harm are improved (for example by regulation, improvements in the marketplace, more education of insurance professionals, etc.). However, a few researchers have explicitly called attention to problems associated with the ethicality of the economic *idea* behind viaticals.[7] Duska for example points out that the negative reactions that individuals have toward such products might be because "life insurance policies owned by strangers, and in some cases speculators, are fundamentally in conflict with the very nature and primary purpose of a life insurance policy [which is] a purely altruistic product."[8] He goes on to point out that while viaticals and other insurance schemes might be innovative financial tools, they might also contribute to a commodification of an individual's life and thus might not be socially desirable.[9]

Another interesting characteristic of the debate surrounding viaticals, which Duska[10] also points to is the tension between the negative moral responses by those unfamiliar with the industry (such as the general public) and the positive moral evaluations by industry insiders.[11] From this, it seems as if the negative responses of the public and the ethical evaluations of the industry are not in alignment. This misalignment could be explained in terms of cognitive biases on both sides. On the one hand, the negative reactions of the general public might be due to the frequent reporting of abuses (availability bias). On the other hand, the positive evaluations by industry insiders might be a psychological mechanism to reduce discomfort from working in an industry that is perceived to be unsavory.[12] Even though cognitive biases probably do play an important role here, we believe that this misalignment in ethical evaluation has more to do with conflating concerns regarding the *practice* of viaticals and concerns regarding the viatical *idea* itself.

Given these interesting characteristics of the viaticals debate, this paper will offer a systematic ethical analysis of viaticals that leverages the distinction between the ethicality of an economic *idea* and the ethicality of its *reality* (or *practice*) to isolate and discuss the fundamental ethical problems of viaticals. We believe that in order to determine whether an economic practice or product is ethical, there are essentially two questions that need to be answered. The first is whether under ideal circumstances the product or practice is or can be used ethically. The second is whether it is possible that one can achieve that ideal circumstance in practice. With few exceptions, discussions on the ethicality of viaticals usually focus on the second question and either do not see or ignore the first question. That is, they focus on the problems of the implementation and practice of viaticals rather than the moral nature of the practice itself. However, we believe that the first question has priority, and if it is answered in the negative, then, naturally, a positive answer to the second question is not possible. By unpacking the evaluative content of our negative emotiional reactions to viaticals, we show that, even under ideal circumstances, the economic idea of viaticals is, at its core, unethical. However, recognizing that the viaticals industry is a legal and an economic reality that is growing rapidly, we also explore the second question and attempt to delineate, and discuss, the practical problems of the industry. We believe that the general structure of this case study can be used to discuss the ethical viability of other economic practices as well.

To develop the above argument the paper proceeds as follows. First, we give a description of viaticals and the regulatory environment. Second, we discuss the practical problems that arise in connection with viaticals and whether they can be remedied. And third, by unpacking the evaluative content of our negative emotional reactions to viaticals, we show that the economic idea itself is unethical.

The Economic and Legal Environment of Viaticals

In a viatical settlement the seller (called a "viator") sells his or her life insurance policy to a viatical settlement company (called a "provider") for a lump sum payment that is a percentage of the policy's face value.[13] The viatical provider then becomes the beneficiary of the policy, and is responsible for making any ongoing premium payments. When the viator dies, the viatical provider collects the full face value of the policy. When one buys a viatical, it represents the purchase of an insurance policy of a terminally ill person at a discounted price. The viatical provider can either hold the investment for themselves or they may act as a broker on behalf of some other investor. Either way, in theory, the ill person gets needed money to help pay expenses before his death and the investor gets the full face value of the policy when the person dies.

Viatical settlements are a type of life settlements.[14] The main difference between a viatical and a life settlement is that the former usually involves policyholders with medical conditions that are likely to result in two years or less of life expectancy, whereas life settlements typically involve people over sixty-five who are not currently ill. However, the legal foundation for both instruments is the same. It was the Supreme Court decision of Grigsby v. Russell, 222 U.S. 149 (1911) which provided the legal basis for viatical and life settlements. Dr. A. H. Grigsby treated a patient who wished to pay for his surgery by selling his life insurance policy to Dr. Grigsby. When the doctor tried to collect after the patient's death, the executor of the estate issued a legal challenge. Eventually the case was appealed to the Supreme Court where the fundamental principle was established that a life insurance policy is private property and therefore can be assigned or disposed of at will by the owner like any of his other property.[15]

Despite this very early legal precedent, viaticals really didn't start to become common until the 1980s when the AIDS crisis occurred. Many of the early victims of AIDS were young gay men who did not always have traditional dependents compared to the more typical policy holder. In addition, several members of this group were very willing to participate in experimental medical treatments that frequently were not covered by their traditional healthcare insurance. Therefore, the ability of viaticals to allow patients to access funds for treatment or living expenses while still alive increased demand on the patient side. In addition, the medical developments that existed at that point in history typically did not result in major extensions of life expectancy after formal diagnosis. This in turn meant the investor side had some predictability when forecasting payoff and return on investment.

Since the start of the AIDS crisis, the public awareness over time of the concept of selling one's life insurance benefit to a third party increased to the general public. Eventually, inquires among older individuals who were not terminally ill started to become much more common. This was especially so for individuals who held whole life policies and wanted more funds to enjoy retirement. Typically, the negotiated price to collect on a whole-life policy death benefit is something less than the full death benefit but it is always greater than the existing cash value of the policy. The buyer pays less than the full death benefit in order to represent a) a time value of money discount, b) the risk associated with the uncertainty of the life expectancy of the original policyholder, c) possible assumption of ongoing premium payments and d) the potential for lawsuits by dependents after the fact.[16]

Even though viatical settlements are not legally considered securities, they are nevertheless subject to legal regulation. In the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Congress officially defined the terms "viatical settlement provider" and "terminally and chronically ill insured's." Under this Act, a viatical settlement provider is defined as any person or entity who regularly engaged in the trade or business of viatical settlements.[17] Additionally the act created an incentive for viatical settlements by granting them preferential tax treatment in the sense of excluding viaticals from gross income as of January 1, 1996. This was done by treating viatical settlements as equivalent to the proceeds of a life insurance contract payable by reason of death, which thus excludes it (for now) from gross income if the contract meets certain IRS compliances.[18]

In the area of tax law and entitlements, it is possible that the payments from viatical settlements could affect the viator's eligibility for benefits because a large enough cash payment can trigger the loss of disability income. To have viatical income be excluded in calculating eligibility for benefits, specific criteria must be met under 26 U.S.C. Section 101. Therefore it is not automatic that all viaticals receive preferential tax treatment on all cases.[19]

Ethical Concerns and Arguments Associated with the Practice of Viaticals

Since the emergence of viaticals as a form of life settlement, a variety of ethical concerns have been raised. Most of these concerns, which we examine in this section, relate to the empirical reality of *how* the buying and selling of viaticals is conducted. Particularly in the early days of viaticals, the terminally ill were often taken advantage of and the harms to individuals outweighed the benefits for sellers as well as buyers. Below we examine the potential benefits and harms/risks to the viatical parties.

Since the buyer provides the previous policy owner with an amount less than the full face value of the insurance policy, typically 30–80 percent, the potential return to the investor can be quite high.[20] In addition, the payout of a life insurance policy is many times counted as tax free income just as if it were paid to the original holder of the policy. On the other hand, a viatical settlement company that chooses to purchase a viatical as a potential investment faces a number of potential risks. One risk of both viaticals and life settlements is that with improving medical care, the ill or older person may actually live longer than expected. If the new owner of the policy has to pay the premiums to keep the policy in force, this would tie up additional capital and thus reduce the net return on the investment. Another concern is the possibility that the viator's heirs may challenge the changes made to the policy, and thus the payoff is tied up in litigation for some period before collection. Information asymmetry can also lead to a higher probability of fraud. For example, the insured person might fake an illness simply to collect cash by selling the policy. Alternatively, viatical companies might recruit ill but uninsured individuals and encourage them to obtain policies that could then be cancelled by the insurance company if the fraud is discovered, thus harming investors who purchased the viaticals.[21]

While concerns about viaticals have often focused on possible downsides to the sellers of the policies there are numerous benefits that sellers can realize. Most of these benefits stem from the ability to get income now rather than after one's death. For instance, a viatical can provide for the relief of monthly premium expenses. This would be especially important if the viator was in a cash flow bind that would have caused the missing of premiums and therefore the cancelling of the policy altogether. Selling the policy now would totally eliminate that risk. A companion benefit is the ability to receive an immediate infusion of cash that would allow the viator to deal with financial burdens that are in excess of the premium payments themselves. Such burdens could include offsetting the loss of current income caused by being unable to work or paying for treatments that are not covered by health insurance. In addition, some viators simply benefit from having the ability to control the use of the insurance money while they are still alive. By selling the settlement now, the viator guarantees that the funds will be used for the intended use and therefore the potential ability of heirs to use the funds for purposes that are not desired is eliminated. Another benefit of viaticals comes from the current state of tax law. For the time being, lawsuit and insurance settlements are generally tax free because they are not considered ordinary income in most circumstances. Therefore the government generally does not tax the payouts of viaticals because they are merely the rearrangement of a pre-existing, tax-free cash flow.

However, despite these benefits there are some potential downsides of viaticals for the sellers as well. Initially it would seem that receiving a lump sum, cash distribution would totally eliminate all financial risk for the seller of the viatical. However this might not necessarily be true. Various clauses and conditions embedded in the policy as well as some external issues may complicate the situation. For instance, if the policy was designed not just to insure one person but also the lives of a spouse or other family member, then these individuals' coverage is potentially lost when the policy sold. Similarly, there is also the potential loss of other rights or benefits, including conversion rights and waivers of premium benefits that may exist under the current terms of the policy. Another potential risk is that if the level of sophistication of the advice given to the viator is not sufficient, the amount of premiums one had paid may exceed the relative size of the cash settlement received depending upon how the deal is structured. This is especially true given that the policy cash values or dividends that the insured was originally counting on for income purposes are now forfeited to the investor.

Even if the above risks do not materialize, there still is the possibility that the viator may get blindsided by things that are not related to the terms of the policy. One such risk is that there is the possibility of tax consequences to the viator depending upon which state regulations apply. Or alternatively, the viator may find at risk his ability to receive services and benefits such as supplemental social security income, public assistance, and public medical services such as Medicaid.

A central concern surrounding the realization of the potential benefits of viaticals, particularly those of the seller, is the ability of the seller to make an autonomous and informed decision in an environment that is usually characterized by information asymmetry, a restricted set of choices, and emotional stress.[22] On one hand the buyer of viaticals (or the investor) is more sophisticated and more knowledgeable than the viator is about the financial and legal aspects of the transaction. On the other hand, the seller has significantly more information concerning the state of health of the insured because the viator lives with the supposed medical condition on a daily basis.

Furthermore the viaticals seller is usually faced with death and is in a weakened physical, mental and financial condition and thus might not be in a position to look for or negotiate for the best available settlement, thus allowing companies to offer excessively small settlements:

> In the absence of standards, it's hard for viators to know whether they got a fair deal, though too often they do not. Joseph Belth, editor of Insurance Forum, a consumer-oriented industry newsletter, studied viatical transactions between 1994 and 1998 arranged by eight companies in Florida. He found that payment ratios varied from as low as 22 percent of a policy's death benefit to as much as 60 percent. Even within the same company, Belth found, similar policies paid out different proportions. Accelerated Benefits, an Orlando firm, for example, paid 25 percent, 33 percent, and 40 percent of death benefits to three HIV patients, each with a life expectancy of 48 months, who owned whole-life policies. The surprisingly wide variation, explains Jess LaMonda, Accelerated's president, is due to differences in premiums, brokers' fees, and loans against the policies.[23]

A variation of the above argument is that potential viators do not have the time or resources to thoroughly research their options and explore the potential for lost state and federal benefits. This argument is supported by the reasonable observation that while viatical companies have to compete against each other to provide a "reasonable" price, they do not have an economic interest to investigate all possible ramifications from the viewpoint of every single viator. And even if such an economic rationale could be created, viatical companies may not be able to do so given privacy laws and the lack of willingness of a viator to share all his personal information during the negotiating process.

Another concern that arises in connection of viaticals is the potential infringement on a persons' right to privacy. In order to determine the level of risk involved in purchasing a policy or an investment based on a pool of policies, there is an interest on the side of the buyer to find out as much personal information from the insured about his/her health condition as possible and then track this information throughout the life of the policy. However, the insured might like such information to remain private or restricted to a limited group of individuals. Since there might not be legal provisions for these circumstances in a given state, it is possible that one's medical condition will be tracked by investors for the rest of a viator's life.[24] The availability of identifying information might expose the viator to a higher risk from foul play as well.[25] For example, a current viatical sales person had been convicted of being a middle man in a murder for hire on a family in exchange for proceeds from life insurance benefits.[26]

In summary, an analysis of the common ethical concerns surrounding viaticals indicates that there are significant benefits to the different parties involved in this practice. However, the positive effects are in tension with concerns about decision autonomy, privacy and potential negative effects on the interests of the parties involved. The initial moral intuition about this practice focuses on the decision autonomy of the viator due to the particularly difficult circumstances viators are usually in. The sick and weak are considered deserving of a heightened level of care and protection and violations of this principle of care are morally problematic. The titles of earlier papers written on the subject of viaticals clearly show the underlying tension between the special moral considerations that attach to death and the economic potentials arising from such situations: "rolling the dice on death,"[27] "betting on death,"[28] or "making a killing."[29]

The main ethical challenge in practice thus becomes to balance the increased duty of care with the economic interest and benefits viaticals can provide if they are offered in a way that minimizes the possible harms. In other words, is it feasible to offer viaticals in a way that would meet ethical expectations? This question is an important one because economic practices are often supported by pointing out their benefits and reducing ethical concerns about harms to practical problems that await a solution. Thus moral emotions are seen as an indication of areas that need improvement rather than an indication that a practice itself might be ethically untenable overall. The following section will examine in more detail what possible improvements to the practice of viaticals have been suggested or implemented to address the ethical challenges mentioned earlier.

Responses to Ethical Challenges of Viatical Practice

There are several possibilities to avoid or limit the harms that both seller and purchaser can experience in the process of a viatical settlement. One possibility is to increase regulation and oversight through federal and state laws in order to curb abuses and/or mandate more information disclosure and additional licensure. Another possibility is to allow the industry to create its own internal regulation mechanisms through the introduction of more stringent professional responsibility requirements. Lastly, viatical sellers can be exposed to more information about the product, implications of various choices and available alternatives, for example through information campaigns sponsored by non-profit, non-governmental or government organizations.

As a general trend, the attempts at the Federal level for additional regulation have been somewhat limited. One example of this concerns the selling of fractional interests in a patient's insurance policy to retail investors called "fractionalizing." In such a process the investors may purchase as little as 3 percent of the benefits of an insurance policy. The purpose for this practice is to increase liquidity and to spread risk among a number of different investors. The SEC had attempted to regulate this process and the resulting market, but the Court of Appeals for the District of Columbia in Pardo III denied the Commission jurisdiction.[30]

At the state level, governments originally had difficulty regulating such contracts and their secondary markets under traditional buyer-seller laws. Later regulations in some states were eventually incorporated in the insurance sections of state codes, thereby giving state insurance commissioners and administrators some authority. These regulations typically would require aspects of full disclosure, voluntary consent, confidentiality guarantees, and protection from unfair competition, recording duties, licensing, and minimum discount rates. For example with regard to minimum benefits the National Association of Insurance Commissioners (NAIC) developed a regulation that would require a minimum payment to viators based on life expectancy. Only nine states have so far adopted this payment scale.[31] Other requirements included in the model act proposed by the NAIC regard licensure (a license would be required to sell viaticals—currently even real estate agents can sell viaticals in twenty-five states). Other restrictions relate to advertising; for example terms like "guaranteed" or "safe" cannot be used (NAIC). However, many states still have not implemented such requirements in their state regulations.[32]

While it is questionable whether legal regulation can be successfully implemented, given the questionable jurisdiction of the SEC and the inconsistency of responses on the state level, another possibility is for the industry to self regulate. This self-regulation could take the form of increased responsibilities expected from professionals who deal in viaticals, similar to codes of conduct in the real estate industry[33] or the code of conduct of the certified financial planners board of standards.[34] As with federal or state legislation proposals, these responsibilities would aim at addressing problems of disclosure, protecting decision autonomy, or guaranteeing a set of minimum benefits.

Unfortunately the success of industry self-regulation is questionable[35] and depends on a variety of conditions, such as effective oversight, sanctioning and other reporting systems. Given that the viators are in a significantly weakened state due to illness or age it is not clear whether reporting of code violations for example would be very likely. However, there exist successful models of industry self-regulation and it is conceivable that a successful model could be developed for the viaticals industry as well.

A third option for mitigating negative effects from viaticals is to increase the autonomy of the involved parties by providing more information about the product as well as available alternatives. Public information campaigns can prove effective as vehicles to achieve policy results,[36] such as for example around smoking, family planning, safety, etc. However, it is not clear that the issue of viaticals would first warrant and elicit the involvement of organizations that could mount such campaigns, and second overcome obstacles to effectiveness that lie in message context and interpretation, target group reach, etc.[37] Particularly since the individual circumstances viators find themselves in and the challenges that each of them face are different, it would be difficult to create a unified and effective message that individuals could respond to. Furthermore, as mentioned above, individuals considering life settlements are most likely in a weakened state (mentally and physically) that might reduce their capacity to absorb additional information.[38] While it is conceivable that individuals could see messages about viaticals before they will be in need of them, it is not likely that this information will find fertile ground, given that individuals systematically underestimate that bad things will happen to them and thus discount information associated with such events.[39]

In summary, options and opportunities exist to ameliorate the potential harms associated with viatical settlements. While the success of the options discussed above is questionable, there is nevertheless the possibility to make viaticals, as an economic practice less harmful and subject to abuse than it currently is. This would mean that the public's negative moral evaluation of viaticals as they are currently practiced might change when the economic reality catches up with moral expectations, at least regarding some moral concerns. It seems, however, that such a change in economic reality is quite unlikely. We argue, even if such changes could be implemented, other ethical challenges to the practice, we believe, remain insurmountable. In fact, even the best economic circumstances do not reduce or eliminate the negative emotional reaction that viaticals are in essence morbid.

After examining the ethical underpinnings of viaticals in the next section it should become clear why our negative emotional reaction to viaticals indicates that something is morally wrong with the practice itself, not with its implementation. Moreover, this case study also provides evidence that such emotional reactions, in general, can be used as moral indicators (signals) that some economic transactions (ideas) are not just morally suspect given the state of a particular industry, but that they cross the line between markets and morality (economic value and human value) and that such economic ideas should not be put in practice in the first place. In the end, some things should not be for sale, and viaticals is one of them.

Why Viaticals are Morbid

Our moral intuitions manifest themselves in emotional responses to ethically questionable actions, practices, and institutions. Seeing someone help another person in need usually causes feeling of hope and joy, or reading about human trafficking in the newspaper gives rise to emotions such as anger and compassion. Commonly these emotions are considered blind irrational (or nonrational) bodily reactions to these situations and, at best, indicate that something might be right or wrong in a given situation. However, practitioners from psychology to philosophy have recognized that moral emotions are not irrational bodily movements but, in fact, have moral evaluative content. For example Cushman et al.[40] found that our moral intuitions express certain moral principles that are subconsciously active and Heidt[41] argued that they reflect societal norms that shape a person's value system. Importantly, Martha Nussbaum in her work *Upheavals of Thought*[42] argues that our moral emotions are, in an important sense, cognitive in nature and always involve moral evaluations. Emotions, for Nussbaum, provide us with moral knowledge that can be both cognitive and affective. Hence, moral emotions play a critical role in our moral appraisals and should be leverage when assessing ethical challenges. Given this, unpacking our negative emotional responses to viaticals is vital to assessing its ethical viability.

As we discussed in the last two sections, the main line of discussion about the ethical viability of viaticals has tended to focus on the "reality" or implementation of viaticals. The argument goes, that if we can just fix the problems of information asymmetry, decision autonomy, and common abuses through regulations that our negative emotional reactions to viaticals will be assuaged. As a previous examination of viaticals argues,[43] the negative emotional responses to this practice are the result of the frequent abuses that industry outsiders perceive without recognizing the benefits that industry insiders see in the practice. In other words, our emotional responses are the result of an information deficit; thus indicating that there is room to improve the practice. But after a closer examination of the main theoretical arguments behind viaticals, we will see that just fixing the "reality" of the practice papers over the morbidity of the practice itself.

The two strongest, and most popular, theoretical arguments for viaticals, we believe, are based on the viator's property right to sell his or her policy, and the right of the viator to live out his or her life in dignity, and that viaticals are one way to exercise that right. Let's examine property rights first. As we saw earlier, the legal grounding of viaticals is based on the idea that life insurance policies are considered property and fall under the purview of property rights. The traditional rights associated with ownership "include the claim-rights to possess, use, manage, and receive income; the powers to transfer, waive, exclude, and abandon; the liberties to consume or destroy; immunity from expropriation; the duty not to use harmfully; and liability for execution to satisfy a court judgment."[44] Thus, from a property rights perspective, an insured person should be able to change a beneficiary or sell the policy even to someone who might not have an interest in the insured's continued life and well-being,[45] particularly if the insured is terminally ill and would need the funds to ease the financial burden of the illness.[46]

However, not everything is up for sale such as second kidneys, people, and illegal or prescription drugs. Viaticals, we argue, should be placed in the same category. Of course a person has a right to buy life insurance to protect one's family against the insured's early death. The insurer, in this transaction, is explicitly interested in the insured's survival. But if a terminally ill person tries to sell his or her insurance policy as a viatical, the moral value of the property changes because the buyer is betting on the viator's death. The important change that takes place when a life insurance policy is sold is the removal of the so-called "insurable interest" from the relationship between the beneficiary of the policy and the insured person. Insurable interest can be defined as a substantial interest grounded either in "love and affection" or an economic interest in the continued life and well-being of the insured.[47] Insurable interest is legally required in order to purchase a life insurance policy in the first place. Without it, people could potentially take out life insurance policies on anybody they wanted, opening the door to nefarious activities, such as purchasing policies on terminally ill people. In fact, in eighteenth century England it was a "sport" to take out speculative life insurance on public persons, without their knowledge or consent, once it became known that they were seriously ill. Speculators were basically betting on how long someone would live and "the premiums on new policies on such persons fluctuated from day to day in accordance with the reports or rumors on their condition."[48] To stop this practice parliament enacted a law in 1774 that required purchasers to have an insurable interest in those they wanted to insure.[49] Viaticals essentially remove the insurable interest, leaving only the investor's economic interest in the quick death of the viator. Thus, viaticals changes the moral value of the property.

This shift from betting on one's survival to betting on one's death substantially changes not only the moral value of the property, but more importantly, the moral dynamic between the buyer and seller in such a way that is morally harmful to both parties. This objection is not new. It has an interesting history that illustrates the ethical problems with viaticals. An earlier, and one could argue cruder, form of viaticals can be seen in nineteenth century England. If people could not pay the premiums on their insurance policies they could sell them at public auctions at which time speculators could publicly examine the insured persons—a practice that Elizur Wright, an abolitionist who was visiting England at the time, compared to slave auctions.[50] Though viatical investors today do not publically examine potential viators, they nevertheless do a thorough medical history on the seller.

In modern times, Sandel[51] describes a case from the *The New York Times* where an investor grows increasing upset that he is not harvesting a profit from his viaticals investment because his viator, Kendall Morrison, who was dying of AIDS, did not die, but was returning to health after receiving new drugs. During this time the investor, and presumably the agents working on his behalf, kept calling and sending FedExes to see if Morrison was still alive.[52] While this might appear to be an extreme case, it is nevertheless a logistical challenge for investors to determine when the insured has died so the investment can be harvested. Viatical firms take various approaches to "tracking" their investments. For example, some give a stack of cards to the insured that he or she has to mail monthly and when a card does not arrive on schedule the "incident" is investigated. Yet others pay $250 to family members to notify the firm when the insured dies (a practice that some have compared to paying a bounty hunter).[53] These examples might be either dismissed as sins of the past or borderline cases, but they clearly show that viaticals can undermine a person's moral sense of respect and compassion for other people, essentially treating them as a commodity.

The seller is not immune from this change in moral sensibilities either. In 1997, an article in *The Advocate*[54] describes how AIDS patients attempted to *lower* their T cell counts to get a bigger viatical pay outs. It describes how one potential viator, in order to have a bad medical profile, stopped taking his protease inhibitors. But as Scott Page, a president of a viaticals company at the time, points out "if you stop taking the drugs then you can build a resistance, and when you start again there are not as effective. It's Russian roulette with an AIDS bullet." The potential viator in this case is willing to die sooner in order to get larger settlement. In other words, viaticals can cause the terminally ill person to views his or her life as a commodity that can be bought and sold, not as a unique life that has intrinsic moral worth. Therefore, viaticals create morally perverse incentives that undercut the value and dignity of human life. Moreover, it cuts away at the moral ties that bind a just society together, namely the principles of mutual dignity and respect, and the virtues, such as compassion, that follow from them. We believe that this is, at bottom, what our negative moral emotional response of morbidity is expressing.

This objection can also be leverage against the claim that viaticals are necessary to help terminally ill people to live out their lives with dignity. It is true that some terminally ill people are under enormous financial pressure to keep up with escalating medical costs and living expenses, and that viaticals industry can help relieve this pressure. However, we believe that they should not be put in this dire position in the first place, where, in many cases, they have no choice but to sell their policies. There are better ways to deal with this issue that does not have the negative consequences of corroding the moral sensibilities of the buyer and seller, and also undermines the basic moral principles that hold a just society together. For example , insurance companies could expand accelerated benefits where the death benefit is paid out to an insured person with confirmed low life expectancy (for example less than 6 months) or they could adjust the cash value of a life insurance policy that an insured can obtain when surrendering their policy to the insurance company based on the insured's health.[55] Alternatively, on a much broader level, one could advocate for universal health care, which would presumably lower the chances that ill persons might face severe financial stress due to medical treatment.

Furthermore, by putting a terminally ill person in a seemingly impossible position of having to sell his policy to make ends meet also undercuts his duty (or obligation) of care to the original beneficiaries of the policy. Life insurance was originally designed to offer financial support for the family of a deceased to help them adjust to the loss of a source of income and new life circumstances. In taking out an insurance policy, the policy holder makes at least an implicit promise to the beneficiaries that they will be supported in case of the policy holder's death. Over the generally long duration of such a policy beneficiaries make life choices that can take this promise into account. For example, the wife of a policyholder might forgo building a career knowing that a life insurance would offer sufficient support for a chosen way of life in case of the death of the primary breadwinner. So the option of selling a policy undermines the policyholder's responsibilities to his beneficiaries and also the beneficiaries' expectations that the policy will be there when needed. In some circumstances the "beneficiary may feel pressured to approve the sale [of the life insurance policy] because opposition to the insured's wishes would appear to be based on the beneficiary's financial interest in retention of the policy."[56] In other circumstances the insured might even sell the policy without the knowledge of the beneficiary who might still rely on it.[57]

Proponents of viaticals could argue that these objections go too far and can be used against other industries as well. If viaticals are inherently unethical because they profit from sickness and death, then so are doctors and funeral directors who also profit from sickness and death. Essentially, viaticals, they argue, are in the same moral category as doctors and funeral directors. In response, we argue that of course doctors and funeral directors profit from sickness and death, but they, unlike the viaticals industry, are working from the moral standpoint of either making sick people better or helping families deal with the loss of a loved one. In essence doctors and funeral directors are not investing in the early demise of terminally ill people, but helping people manage the inevitabilities of life. However, in the case of viaticals, death becomes an impersonal economic event for viatical providers because death initiates the payout of an investment. This event should, from the perspective of the investor, occur as soon as possible because the timing determines the level of return for the investment. There is usually no interaction with the decedents or their grief. Funeral directors also can be said to experience death as the starting point for an economic transaction, but they mainly focus their efforts on providing families with a service in their time of grief. In fact, this focus is a central element in the self-conception of this profession and is expressed throughout the code of professional conduct.[58] This is why we have negative emotional responses to viaticals and not to doctors or funeral directors.

Another way to get at the morbidity of viaticals is to construct a "perfect case" scenario of a viatical transaction and see if the arguments we presented above still hold. Imagine a terminally ill person, without family or beneficiaries, no medical bills, financially stable, lives in a state that has good regulations, and well informed about the nature of viaticals. This person wants to sell his policy so that he can live the last days of his life on a tropical island in the South Pacific. This may alleviate the problems with the realities of the viatical market, but not its moral problems. This scenario does not shake off the problem of undermining the moral sensibilities of the buyer and seller. Again, viaticals, at their core, turn human life into a commodity, thereby undercutting the natural respect and dignity of persons. As we mentioned above, with no insurable interest, the structure of the transaction encourages the viatical investor to see the viator as a commodity, and essentially turns what was originally a bet on life into a bet on death.

Conclusion

In this paper we have presented an analysis of the ethical issues surrounding viatical settlements. By distinguishing the ethical challenges that relate to the way viaticals are bought and sold from ethical challenges that relate to the idea of viaticals we have tried to show that viaticals are unethical. They are unethical not because solutions to practical ethical challenges remain elusive but because certain human experiences should be shielded from economic interference. Anderson[59] in her work *Value and Ethics in Economics*, and Sandel[60] in *What Money Can't Buy* address the problem of mixing economic and non-economic spheres in various areas of our lives. Both argue that the injection of economics into practices that are emotional, sacred, and deserving of dignity assumes that these values can be traded off with economic benefits, but they believe that some values are incommensurable with economics.[61] In the case of viaticals, our negative moral responses are telling us something important about the tension between the economic and non-economic spheres of life. Viaticals make death not only an economic transaction for those left behind (during arrangement of funerals, administration of wills, etc.) but also beforehand for the individual who is going to die.

Viaticals industry insiders have tried to separate the personal sphere from the economic sphere in an effort to perhaps increase legitimacy of viaticals by invoking the progress that a rational perspective on death and dying provides for society. They have also pointed out that economic transactions occur in the context of illness and death all the time because undertakers and doctors also make a living because people get sick and die. However, the emotional reaction people tend to have when evaluating viaticals are usually absent when evaluating medical and funeral services, which is an indication that the way the economic sphere touches the personal sphere in viatical transactions is fundamentally different from the way other death and illness-related services do. Thus our moral emotions and intuition can be used to show that the boundaries of moral discourse need to be pushed toward a clearer distinction between theory and practice. They also demonstrate the importance of moving beyond utilitarian concerns toward notions of rights, relationships and values.

Endnotes

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3. Quinn, "Morals in Markets."

4. Sonja Badreshia, Vivek Bansal, Peter S. Houls, and Noel Ballentine, "Viatical Settlements: Effects on Terminally Ill Patient," *Cancer Practice* 10 (2002).

5. Joy D. Kosiewicz, "Death for Sale: A Call to Regulate the Viatical Settlement Industry," *Case Western Reserve Law Review* 48 (1998).

6. Alex Adrianson, "Viatical Mischief," *Consumers' Research Magazine* 85 (2002): 43; Badreshia et al., "Viatical Settlements"; Joseph Belth, "Viatical and Life Settlement Transactions," *Contingencies* March/April (2002): 22–25; Calvin Coolidge, "Death Wish," *Forbes* 167 (2001): 206–207; Consumer Reports, "Betting on Death: Tertiary Betting on Death," *Consumer Reports* 66 (2001): 37; Kosiewicz, "Death for Sale."

7. See for example Ron F. Duska, "Whose Life Insurance Is It, Anyway?" *Journal of Financial Service Professionals* September (2006): 33–35; Jane B. Quinn and Temma Ehrenfeld, "The Lottery on Lives," *Newsweek* 133 (1999): 55; Quinn, "Morals in Markets."

8. Duska, "Whose Life Insurance," 33.

9. While Duska sees these ethical problems as significant, he nevertheless feels that the property rights that individuals have in their insurance provides a very considerable counter-argument and that "not allowing people who are terminally ill to sell [their insurance policies] to make their lives easier" would be unconscionable (Duska, "Whose Life Insurance," 34);

10. Duska, "Whose Life Insurance," 33.

11. Quinn, "Morals in Markets."

12. Max H. Bazerman and Ann E. Tenbrunsel, *Blind Spots* (Princeton: Princeton University Press, 2011)

13. The word "viator" is the Latin term for "traveler" and "viaticum" the term for "supplies for a journey." In that context viatical settlements are most accurately descriptions of transfers of insurance policies for persons who are terminally ill. However, "viaticals" have also increasingly been used to describe policy transfers of the chronically ill or even of elderly persons without illness (Joseph Belth, "Special Viatical Issue," *The Insurance Forum* 23 [1999]: 175). In this paper we use the term "viatical" in the most literal context.

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22. Joseph Belth, "A System for the Exploitation of the Terminally Ill," *The Insurance Forum* 16 (1989): 11–14; Badreshia et al., "Viatical Settlements."

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45. The issue of insurable interest has been at the core of the debate around stranger owned and initiated life insurance for some time and subject in numerous court cases (Steven R. Leimberg, "Stranger-Initiated Life Insurance: Scorpion or Frog?" retrieved September 2010 from www.floir.com/pdf/InsurableInterestSTOLI-Leimberg.pdf). However, the issue of insurable interest in the context of viaticals and life settlements is of a different nature because in the latter cases the insurance is and has been the property of the insured before any change in beneficiary or sale takes place.

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