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# Caramadre's Loophole: Exploiting the Fine Print, Financial Institutions & Terminally-Ill

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## CARAMADRE'S LOOPHOLE: EXPLOITING THE FINE PRINT, FINANCIAL INSTITUTIONS & TERMINALLY-ILL

Joseph Caramdre is an estate planner and lawyer with a penchant for taking advantage of a good deal. He came up with what he called “creations”<sup>1</sup> that allowed him to exploit loopholes.<sup>2</sup> He claims that he has a compulsion toward finding mistakes in offers, then exploiting the better end of the bargain.<sup>3</sup> But Caramadre is much more than an extreme couponer.<sup>4</sup> He dabbled in something much more dubious that has landed him at the center of a number of civil suits and a federal criminal indictment.

Caramadre bet on terminally ill persons to die, then profited off of their death.<sup>5</sup> In the mid-1990s, Caramadre attended an insurance seminar<sup>6</sup> about variable annuities.<sup>7</sup> This is where he got the idea for this, his most infamous, “creation.” In its simplest terms, this type of variable annuity was very much like a life insurance policy. One party took out a plan that paid out to a beneficiary if and when the insured died. The major distinction between life insurance and a variable annuity, something that allowed this “creation” to function, is that annuities were not considered “insurance” under Rhode Island law.<sup>8</sup> This allowed Caramadre to take out variable

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<sup>1</sup> Caramadre has made 19 such “creations” in his lifetime...Number three was a short-lived, sure-fire way to win at the racetrack. Jake Bernstein, *Joseph Caramadre is a Robin Hood or Con Artist Depending on Who You Ask*, HUFFINGTON POST, available at [http://www.huffingtonpost.com/2012/08/25/joseph-carmadre-robin-hood\\_n\\_1829990.html](http://www.huffingtonpost.com/2012/08/25/joseph-carmadre-robin-hood_n_1829990.html). Creation number four was awarded Caramadre \$1200 of office furniture at a significant discount. *Id.o* (Find out about the other creations if possible and put them in this footnote).

<sup>2</sup> *This American Life: Loopholes*, Chicago Public Radio (August 23, 2012) (Downloaded using iTunes) (Transcript available at, <http://www.thisamericanlife.org/radio-archives/episode/473/transcript>); Bernstein, *supra*, note 1; *See, infra*, PART II for further discussion of Caramadre and his creations. One of which allowed him to purchase \$1200 of office furniture at an extremely discounted rate. Caramadre had to buy calendars that contained the coupons. But he bought so many calendars that the seller cut him a deal for buying in bulk.

<sup>3</sup> *This American Life*, *supra*, note 2.

<sup>4</sup> There is a television show called “Extreme Couponers” about people who find and use as many coupons as possible to get as much savings as possible. *See* EXTREME COUPONING, <http://tlc.howstuffworks.com/tv/extreme-couponing> (last visited Dec. 5, 2012).

<sup>5</sup> *This American Life*, *supra*, note 2; Bernstein, *supra*, note 1.

<sup>6</sup> Caramadre is also a licensed insurance broker. *This American Life*, *supra*, note 2.

<sup>7</sup> *See infra* Part II for an explanation about how this type of variable annuity works.

<sup>8</sup> *W. Reserve Life Assur. Co. of Ohio v. Conreal LLC*, 715 F. Supp. 2d 270, 276 (D.R.I. 2010)

annuity plans on terminally ill people because, even though the law does not allow someone to take out a *life insurance* plan on a third party, he could put up the money for a *variable annuity* with the third party as the measuring life. This subtle distinction in the law, this loophole, allowed Caramadre and a number of investors to make millions of dollars off of the death of the terminally ill.<sup>9</sup> But, he did this with their consent and even compensated them for each plan that they were used as a measuring life.<sup>10</sup>

This article discusses the ethical implications of such a “creation” and concludes that Caramadre’s scheme,<sup>11</sup> even though it may have been well-intentioned, financially coerced the annuitants to enter into the scheme,<sup>12</sup> was wrong in and of itself,<sup>13</sup> violated economic moral theory,<sup>14</sup> and created a market for death and dying that runs counter to long standing ethical principles.<sup>15</sup> While certain ethical theories are discussed, this piece is largely undergirded in the philosophy of narrative ethics. Generally, this seeks to answer fundamental questions about the commodification of life and death, exploitation of the terminally-ill and dying, and the interplay between bioethics and economic morality. Part I seeks to explain Joseph Caramadre, his career, and how he has been viewed by the media since his indictment. Part II focuses on the structure of this “creation” and how it came to be that one could legally profit off of another’s death, knowing that he could die at any minute. Part III focuses on the terminally ill people that he selected for this scheme. It explains how they benefited and/or how they felt slighted by the transaction. Part IV discusses the legal implications for Caramadre and his associate. His

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<sup>9</sup> Indictment United States v. Caramadre, available at <http://www.propublica.org/documents/item/413342-indictment-against-joseph-caramadre>.

<sup>10</sup> He gave each person a sum of \$2,000 per signature on each annuity. *See infra* Part III.

<sup>11</sup> It should be noted that this type of transaction would not be possible without the implicit consent of the financial institutions that sold these annuities. *See infra* PARTS IV & V for further discussion.

<sup>12</sup> *See infra* PART III for a discussion about the annuitants and financial coercion

<sup>13</sup> *See infra* PART IV for a discussion of Caramadre’s scheme as *mala in se*.

<sup>14</sup> *See infra* PART V. B. for a discussion of economic theories surrounding moral transactions.

<sup>15</sup> *See infra* PART V. A. for a discussion of the various ethical schools of thought that would oppose the commoditization of death. This section primarily draws from legal realism, natural law, and utilitarianism.

criminal charges will be of particular import here since much of the criminal allegations are grounded in a deep history of ethics. It is my contention that Caramadre's scheme should be classified as a crime that is *mala in se*, or wrong in and of itself. Part V discusses the larger ethical implications behind such a deal. A discussion of Justice Oliver Wendell Holmes' the Path of the Law will be used to inform the discussion.<sup>16</sup> Of primary focus will be the practical ramifications of commoditizing life and death in such a way and the harmful effects of an unregulated securities market that deals in such speculation.

#### PART I—JOSEPH CARAMADRE

Joseph Caramadre is a polarizing figure.<sup>17</sup> Caramandre was born and raised in Rhode Island.<sup>18</sup> He became a certified financial planner, life insurance agent, estate planner, and lawyer.<sup>19</sup> He put himself through Suffolk Law School at night.<sup>20</sup> He is a devout catholic, philanthropist, and has received high commendations from local charities.<sup>21</sup> He has also been called a con artist, a thief, and much, much worse.<sup>22</sup> What is true, despite the accolades or derisions, is that Caramadre is obsessed with getting a good deal.<sup>23</sup>

Caramadre has delved into contracts, investments, and even coupons just to get more than the other party intended him to get.<sup>24</sup> He unabashedly searched for loopholes in every offer, an unintended benefit that he could exploit. Throughout his life, Caramadre prided himself in

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<sup>16</sup>Oliver Wendell Holmes, *The Path of the Law*, 10 HARVARD L. REV. 457 (1897)..

<sup>17</sup> See Bernstein, *supra*, note 1.

<sup>18</sup> This American Life, *supra*, note 2

<sup>19</sup> *Id.*; Bernstein, *supra*, note 1.

<sup>20</sup> This American Life, *supra*, note 2

<sup>21</sup> Caramadre won the Tocqueville Society Philanthropy Award through his local chapter of the United Way for his work with over 40 different charities. *Id.*

<sup>22</sup> Bernstein, *supra*, note 1.

<sup>23</sup> By his own account, Caramadre is “hardwired” to spot mistakes in offers and exploit them, This American Life, *supra*, note 2.

<sup>24</sup> *Id.*; Bernstein, *supra*, note 1.

outwitting people and getting more than they intended him to receive.<sup>25</sup> He devised several schemes throughout his lifetime to accomplish this goal of exploiting loopholes. He calls each of these loopholes his “creations.”<sup>26</sup>

His schemes were typically innocuous. For example, Caramadre once bought a calendar from a local office super store that came with coupons. He noticed that one such coupon was missing a key clause. Instead of saying “\$25 off any piece of furniture over \$200,” it merely stated, “\$25 off any piece of furniture.”<sup>27</sup> Caramadre was naturally drawn to this mistake. “I noticed that mistake there. It was normal for me to notice it. I’m kind of hard-wired for this stuff.”<sup>28</sup>

He could not help himself from exploiting this mistake. Caramadre bought as many of these calendars as he could, so many that the company selling the calendars gave him a discount on the calendars. Finally, once the coupons came due, he bought every piece of furniture under \$25 that he could find.<sup>29</sup> He got to the register with \$1,200 in furniture, handed the cashier a stack of coupons, and walked out the door with more furniture than he literally knew what to do with.<sup>30</sup> He had so much that he gave some away to charity.<sup>31</sup>

Caramadre wasted time on procuring things that he was going to give away. As Ira Glass of *This American Life* commented,

Who does this? Think of the effort involved. He had to read through twelve months of fine print, buy all of these calendars, remember the scheme, and come back several months later to claim his prize. And for what? \$1,200 of cheap office furniture that he didn’t even need. He actually had to borrow a truck from a

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<sup>25</sup> *This American Life*, *supra*, note 2; Bernstein, *supra*, note 1.

<sup>26</sup> *This American Life*, *supra*, note 2.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

friend to take it all home where, he says, he stored it in a garage, and gave some to friends, family and charity.<sup>32</sup>

This office furniture scheme was “Creation 4.”<sup>33</sup> “Creation 3” was a surefire way to win at the racetrack.<sup>34</sup> “Creation 18” is what landed Caramadre and his associate in serious legal trouble.

Caramadre was inspired to create “Creation 18” during the normal course of his business life. As an estate planner and life insurance agent, Caramadre attended many seminars that about various estate planning devices.<sup>35</sup> The particular seminar that inspired “Creation 18” was about variable annuities with a death benefit guarantee.<sup>36</sup> What drew Caramadre to variable annuities was the extremely low risk involved in the investment.<sup>37</sup> In short, this particular type of variable annuity functioned a bit like a life insurance policy in that a financial payout was triggered at the death of the insured.<sup>38</sup> The death benefit guarantee meant that investors would not lose any of the money that they invested in the annuity.<sup>39</sup> After listening to the seminar, Caramadre poured through hundreds of pages of prospectuses and fine print, searching for a way to exploit variable annuities.

Caramadre found the loophole and exploited it.<sup>40</sup> Allegedly, he and other investors associated with him made millions of dollars from investing in variable annuities.<sup>41</sup> They accomplished this feat by using terminally ill and dying people as the “measuring lives” over the

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Bernstein, *supra*, note 1.

<sup>35</sup> This American Life, *supra*, note 2.

<sup>36</sup> *Id.*; *see infra* PART II for a discussion about variable annuities and the details of Creation 18.

<sup>37</sup> This American Life, *supra*, note 2

<sup>38</sup> *Id.*; *see infra* PART II for a more detailed analysis.

<sup>39</sup> This American Life, *supra*, note 2

<sup>40</sup> *See infra* PART II.

<sup>41</sup> Indictment, *supra*, note 9.

course of a decade.<sup>42</sup> This required Caramadre to ask dying people if he could profit off of their death.<sup>43</sup> This was something that Caramadre felt comfortable with, however. He noted,

“I think a lot of my success in the life insurance industry has been because I always treat death as a part of life and it’s very easy for me to talk about it. I’m around death all of the time. Estate planning is all about death planning. So... I guess I might have been the first one to ever ask anyone, can we use their name and their health status for the benefit of others? Yes, I was a little nervous, but, on the other hand, if the person didn’t want to do it, they didn’t have to do it.”<sup>44</sup>

Caramadre’s unique perspective on life and death allowed “Creation 18” to flourish, but it ultimately led to Caramadre’s demise.

Caramadre is currently embroiled in very significant legal battles.<sup>45</sup> He still faces civil liability even though his criminal trial has ended.<sup>46</sup> Caramadre and his associate, Raymour Radhakrishnan, stood trial in Rhode Island based on a 66 count grand jury indictment.<sup>47</sup> The trial began in the second week of November and was expected to last three to four months with hundreds of witnesses. However, after only a few days, Caramadre and Radhakrishnan pled guilty to two of the 66 counts: identity fraud and conspiracy to commit the same.<sup>48</sup> Each man faces ten years in jail.<sup>49</sup>

## PART II—VARIABLE ANNUITIES

The scheme presented Caramadre with these significant legal problems is simple. In a way, variable annuities are like life insurance policies. When a person purchases a life insurance

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<sup>42</sup> *Id.* This American Life, *supra*, note 2; Bernstein, *supra*, note 1

<sup>43</sup> This American Life, *supra*, note 2.

<sup>44</sup> *Id.*

<sup>45</sup> *See, infra*, PART III for a discussion of Caramadre’s potential civil and criminal liability.

<sup>46</sup> *W. Reserve Life Assur. Co. of Ohio v. Conreal LLC*, 715 F. Supp. 2d 270, 276 (D.R.I. 2010)

<sup>47</sup> *Indictment*, *supra*, note 9.

<sup>48</sup> Erika Niedowski, *Philanthropist Pleads Guilty to Cheating the Terminally Ill*, ASSOCIATED PRESS, available at <http://www2.turnto10.com/news/2012/nov/19/10/philanthropist-pleads-guilty-scheme-involving-term-ar-1246024/>.

<sup>49</sup> *Id.*

policy, he makes periodic payments to the insurance company and, if he dies,<sup>50</sup> his beneficiary gets a lump sum.<sup>51</sup> A variable annuity is more like an investment than a safety net.<sup>52</sup> With a variable annuity, an individual contracts with an insurance company to make a lump-sum payment or a series of payments.<sup>53</sup> The insurance company agrees to make periodic payments at some future date.<sup>54</sup> Typically, the individual can choose to invest his money in a certain mutual fund or funds.<sup>55</sup>

The incentive to invest in a variable annuity is the “Death Benefit Guarantee.” This guarantees that the money that the investor initially invested will be available upon the triggering event, *i.e.* the death of the annuitant.<sup>56</sup> For example, if a person invested \$10,000 in a variable annuity, he would still get the original \$10,000 back at the death of the annuitant even if the mutual fund in which he invested plummeted.<sup>57</sup> It is a safe bet: no risk<sup>58</sup> and possibly very high reward.<sup>59</sup> The catch is that, as the annuities were intended to function, the investor has to die in order to get any reward.<sup>60</sup>

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<sup>50</sup> A term life insurance policy only covers the insured for a period of time. If he or she lives past the term, then the insurance expires. Whole life insurance has an investment component as well. Even if the insured lives past a specific term, he or she still has some money invested. *Whole Life Insurance or Term?* SMART MONEY (April 5, 2012 4:29 PM), <http://www.smartmoney.com/plan/insurance/term-or-whole-life-8011/>.

<sup>51</sup> Jake Bernstein, *Death Takes a Policy: How a Lawyer Exploited the Fine Print and Found Himself Facing Federal Charges*, PROPUBLICA, (Aug. 24, 2012 10:02 AM), <http://www.propublica.org/article/death-takes-a-policy-how-a-lawyer-exploited-the-fine-print>.

<sup>51</sup> *Id.*

<sup>52</sup> *Variable Annuities*, SEC, (May 3, 2012), <http://www.sec.gov/answers/varann.htm>; This American Life, *supra*, note 2; Bernstein, *supra*, note 1.

<sup>53</sup> *Variable Annuities*, *supra*, note 52.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> An annuitant is the person upon whom a life-insurance contract is based. *Annuitant*, INVESTOPEDIA, <http://www.investopedia.com/terms/a/annuitant.asp#axzz2Em7i2jbS> (last visited Dec. 11, 2012).

<sup>57</sup> This American Life, *supra*, note 1.

<sup>58</sup> Technically, very low risk. The only risk is that the investment won't keep up with the rate of inflation.

<sup>59</sup> Having the money guaranteed encourages riskier, more profitable investment. Mark Gibbs, *Making a Business Out of Death*, FORBES, available at <http://www.forbes.com/sites/markgibbs/2012/08/25/making-a-business-out-of-death/>.

<sup>60</sup> *Id.*



However, Caramadre poured through the investment prospectus and the fine print and found that there was a loophole. In a variable annuity there are three parties to the transaction: the investor, the beneficiary, and the annuitant.<sup>61</sup> Typically, the investor and the annuitant are the same person. That is, “I, Joe Smith, take out this annuity with myself as the annuitant. In the event of my death, my wife can still live comfortably off the proceeds of this annuity.” What Caramadre figured out with variable annuities was that the annuitant and the investor did not have to be the same person.<sup>62</sup> They did not even have to be related.<sup>63</sup>

So instead of the traditional model above, Caramadre’s variable annuity scheme looked fundamentally different. There were three distinct parties in each transaction.<sup>64</sup> The investor put the money up for the annuity; the annuitant allowed the investor to use his life as a measuring life, at the annuitant’s death the beneficiary would be paid out; and the beneficiary who received the annuity payments. There are laws in virtually every state that prohibit an individual from taking out a life insurance policy on another person.<sup>65</sup> The reason for these laws is simple: the state does not want people to murder people upon whom they took out policies, and insurance companies do not want people doing what Caramadre did.<sup>66</sup> However, in Rhode Island, where Caramadre practiced, there was a federal district court decision that held that annuities are different from life insurance.<sup>67</sup> Therefore, annuities were not subject to the same laws as life insurance policies.

Caramadre’s scheme was legal by the letter of the law. Since the Rhode Island law against taking out insurance policies on unrelated third parties did not apply to variable annuities,

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<sup>61</sup> *Id.*

<sup>62</sup> This American Life, *supra*, note 2.

<sup>63</sup> *Id.*

<sup>64</sup> Bernstein, *supra*, note 51.

<sup>65</sup> *See, e.g.*, R.I. Gen. Laws §27-4-27(a)(West 2010).

<sup>66</sup> This American Life, *supra*, note 2.

<sup>67</sup> Bernstein, *supra*, note 51; Gibbs, *supra*, note 59.

Caramadre could legally purchase them with unrelated third parties as the measuring life.<sup>68</sup> With variable annuities he could invest money in a mutual fund with full knowledge that the annuitant would die within a short period of time. Most importantly, at least for Caramadre and his investors, his bet was guaranteed. “It’s like going to the horses. When you leave the horse track, if you won, you keep the winnings. If you lose, they give you your money back.”<sup>69</sup>

The only catch for Caramadre, at this point, was that he needed people to agree to be the annuitant, and he needed them to die soon.<sup>70</sup> To test this scheme, he asked a dying member of his church if he could use her as the annuitant. He offered her compensation for her signature.<sup>71</sup> The annuity form asked for the relationship between the investor and the annuitant. Caramadre responded, “N-O-N-E. None. No relationship.”<sup>72</sup> This was the only probing question that the annuity form asked.<sup>73</sup> Unlike most life insurance policies, which request extensive information about the measuring life’s health status, the financial institutions selling the variable annuities did not ask a single question about the annuitant’s health.<sup>74</sup> Thus, Caramadre had the test case for “Creation 18.”

Within a few months, the first annuitant died.<sup>75</sup> The account lost money.<sup>76</sup> His initial investment was down \$1,000.<sup>77</sup> Caramadre paid his respects to his fellow church member’s

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<sup>68</sup> Reserve Life Assur. Co. of Ohio v. Conreal LLC, 715 F. Supp. 2d 270, 276 (D.R.I. 2010) on reconsideration in part sub nom. W. Reserve Life Assur. Co. of Ohio v. Caramadre, 847 F. Supp. 2d 329 (D.R.I. 2012).

<sup>69</sup> This American Life, *supra*, note 1; Bernstein, *supra*, note 51

<sup>70</sup> The annuitant needed to provide the name, date of birth, and social security number on the annuity form. In order for this investment to be at all profitable within Caramadre’s lifetime, the annuitant needed to die before Caramadre did. Bernstein, *supra*, note 51; This American Life, *supra*, note 2.

<sup>71</sup> \$500 for this attempt. The sum later increased to \$2,000. This American Life, *supra*, note 2.

<sup>72</sup> This quote is Caramadre’s spoken word, not what was actually written on the document. This American Life, *supra*, note 2.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

family then processed the annuity that he had taken out.<sup>78</sup> The insurance company paid out Caramadre's request, the entirety of his initial investment plus interest.<sup>79</sup> The test case worked exactly as Caramadre had planned, and "Creation 18" was off and running.<sup>80</sup>

Shortly after the first attempt, Caramadre and some investors submitted four different variable annuities to the same company, all using the same annuitant—another dying person—and no relationship to him.<sup>81</sup> Caramadre submitted one piece of paper to the company stating, essentially, "this person died; pay these four owners."<sup>82</sup> When this annuitant died, Caramadre and his investors were paid with no questions asked. To be clear, Caramadre and three other people each took out a variable annuity with the same company on a dying person to whom they had no relationship. Then, when the person died within a very short period of time, the company paid them all out without a single question asked. This cycle repeated for several years.<sup>83</sup>

Carl Ferrera, a dentist from Massachusetts, put the pension plan for his dentistry business into this variable annuity.<sup>84</sup> "For me, it was an ideal position to put some of my pension money in, where there would be growth and guaranteed principal protection, and I would protect both myself and my employees from the fluctuations from the market," he said.<sup>85</sup> It made perfect sense from an investment standpoint, even for the companies who sold these annuities. Usually, an investor put his money in the annuity and then the company could collect upwards of four

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> According to the indictment, the scheme began in 1995 and did not end until 2010. Indictment at 9 United States v. Caramadre, available at <http://www.propublica.org/documents/item/413342-indictment-against-joseph-caramadre>.

<sup>84</sup> This American Life, *supra*, note 2.

<sup>85</sup> *Id.* Ferrera saw a retributive bonus in this creation. "Isn't this something? How many times had we dealt with insurance companies and been denied claims, whether it's on your homeowners', or your medical insurance, or your dental insurance and they refer you to some policy in fine print, and you say to yourself, 'you need a lawyer to read this'? Isn't this great!/? Finally, there is a lawyer who read this and is going to hoist them on their own petard."

percent in fees from that money for years.<sup>86</sup> When people purchased these plans for the purpose that the company intended, variable annuities were money-making plans for the company.<sup>87</sup> But, of course, Caramadre was not purchasing these plans for the purpose that the insurance company intended. He used terminally ill and dying people as the annuitants.

### PART III—THE ANNUITANTS

Caramadre needed a special type of annuitant—one that would die in a relatively short period of time—in order for his scheme to work.<sup>88</sup> He took out ads in local catholic newspapers soliciting terminally-ill people to become annuitants.<sup>89</sup> He offered them a financial incentive for participating.<sup>90</sup> This unique relationship, however, created several problems when attempting to parse out the ethical dilemmas involved. Each annuitant suffered his own condition, which may have impaired his ability to consent to the deal. Additionally, the financial incentive that Caramadre offered coupled with medical bills and a desire to care for his loved ones after the annuitant passed made them susceptible to being financially coerced into acting in a way that they might otherwise find morally reprehensible.

#### A. *How the Annuitants Felt About the Deal*

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<sup>86</sup> *Id.*; Gibbs, *supra*, note 59.

<sup>87</sup> Assume that a 45 year old, healthy investor puts \$100,000 in a variable annuity. Assume he lives until he is 70. Assume the company collects 5% in fees each year. Under these facts, the company has made \$125,000 off of the investor's initial \$100,000 investment at the time of his death. Gibbs, *supra*, note 59. "As competition intensified in the mid-2000s, many life insurance companies launched an unprecedented war for customers, offering benefits they now acknowledge were far, far too favorable. The insurance companies' contracts provided little defense against Caramadre's approach. For policies under a million dollars, they didn't check the health status of people receiving variable annuities. Instead, they limited the ages of annuitants or the amount that could be invested. All that the companies required for persons to serve as a measuring life was their signature, birthdate and Social Security number. Some didn't even require the signature." *Id.*

<sup>88</sup> *See infra* PART II.

<sup>89</sup> The ad simply read, "Terminal Illnes? \$2,000 CASH." Bernstein, *supra*, note 1. Mike Pottenger, *Death and the Market: The Peculiar Dealings of Joseph Caramadre*, THE CONVERSATION (Nov. 2, 2012, 2:40 PM AEST), <http://theconversation.edu.au/death-and-the-market-the-peculiar-dealings-of-joseph-caramadre-10063>.

<sup>90</sup> This American Life, *supra*, note 2; Bernstein, *supra*, note 51.

The annuitants, for the most part, were more than happy to sign up for Caramadre's scheme.<sup>91</sup> He offered them \$2,000 just for agreeing to a visit, then an additional sum of money for each annuity form that the annuitant signed.<sup>92</sup> He offered them money and a comfortable end-of-life that they might not have enjoyed otherwise.<sup>93</sup>

What I told Raymour was... I can't thank him enough... I could not thank him enough, him and his boss, for supplying my wife with the best days of her life for the couple of months before she passed away. And to this day I'll be forever grateful no matter what ... I could care less how much they got. I know that my wife had the best days of her life because of what they did for her, and I'll never be thankful enough.<sup>94</sup>

The annuitants stood to make a substantial sum of money off of, essentially, selling their signature and personal information.<sup>95</sup> Thus, even though Caramadre and the beneficiaries were making even more money from signing up each annuitant, the annuitants were also making money.<sup>96</sup> Not only did it provide the annuitants with a more comfortable end of life but, to some, it allowed them to do things for their family members that they would not have otherwise been able to do. A daughter of one of the annuitants explained how her mother was able to pay bills that she otherwise would not have been able to pay and buy gifts for her loved ones.

[A]t the time, she had been sickly, and financially, as most people in her age group, things like prescriptions were becoming a stretch to afford. She couldn't buy Christmas presents for her grandchildren and her great grandchildren. And there were certain things that she needed, whether it be hair color or to go to

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<sup>91</sup> This American Life, *supra*, note 2.

<sup>92</sup> *Id.*

<sup>93</sup> Deposition of Charles Buckman, *Excerpts of Video Depositions in the Case Against Joseph Caramadre*, PROPUBLICA, (Aug. 24, 2012 10:01 AM), <http://www.propublica.org/article/excerpts-of-video-depositions-in-the-case-against-joseph-caramadre>.

<sup>94</sup> *Id.*

<sup>95</sup> Each annuitant was paid \$2,000 for an initial consultation and an additional sum for each annuity taken out on them. The exact amount paid per transaction is not clear, but was typically between \$3,000 and \$10,000. Charles Buckman and his wife were parties to at least 9 such transactions. This American Life, *supra*, note 2.

<sup>96</sup> Whether or not the amount of money being made was proportional to the other is unknown. Caramadre would make money off the transactions in a couple of different ways. Some institutions gave him a flat rate for signing people up while other times he would agree to share a percentage of the profit with the investor/beneficiary. This American Life, *supra*, note 2. The fact that each party benefited financially in the transaction could be classified as a "Pareto improvement" under economic theory. This theory holds that a given transaction is acceptable if both of the parties are at least as well-off as they were prior to the transaction. Pottenger, *supra*, note 89.

Wright's Chicken Farm with the elderly and whatnot. She didn't have her own money for that, so she relied on us for that, and that bothered her... But working with Joe, the compensation he gave her gave her back her dignity. She would go to the mall with my granddaughter and I, and when I said no to a Webkinz, my mom could say, I can do this. And that made her—that's what gave my mom happiness, really.<sup>97</sup>

However, not all of the annuitants were as pleased with the way Caramadre handled everything.

The daughter of one annuitant called the scheme “slimy,”<sup>98</sup> while one annuitant claimed to be deceived by Caramadre and Radhakrishnan. Among other things, one annuitant, Robert Mizzoni, claimed that he never signed any annuity forms and that Caramadre and Radhakrishnan never informed him of what was going on.<sup>99</sup> After talking to investigators, Mizzoni was upset to find out what was going on.

Make me upset? Because my body is going to be sold without my wife getting a dime. How do you feel? How do you feel? How do you feel if I was to bury you, and you got insurance, and your wife don't get nothing. No way is it going to happen to me. I got news for you. They better drop this policy in a hurry. If they don't, I'll sue. How about that one?<sup>100</sup>

The available deposition testimony makes a few things clear. First, the annuitant and their family members had strong feelings one way or the other about “Creation 18.” Second, some annuitants appear to lack an understanding about the nature of the transaction. This lack of understanding may be attributable to one of two possibilities; (1) either Caramadre and his

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<sup>97</sup> This American Life, *supra*, note 2.

<sup>98</sup> Pottenger, *supra*, note 89.

<sup>99</sup> This American Life, *supra*, note 2; Deposition of Robert Mizzoni, *Excerpts of Video Depositions in the Case Against Joseph Caramadre*, PROPUBLICA, (Aug. 24, 2012 10:01 AM), <http://www.propublica.org/article/excerpts-of-video-depositions-in-the-case-against-joseph-caramadre>.

<sup>100</sup> This American Life, *supra*, note 2. Mr. Mizzoni, who was 86 at the time of the deposition, has since passed but it appears as though no formal complaint has been filed on his behalf against Caramadre. Interestingly, Caramadre had known Mizzoni for several years. Mizzoni was a school bus driver that drove Caramadre to school. They attended the same church and Caramadre had done favors for the Mizzonis. Caramadre's wife was the beneficiary on the Mizzoni annuity. Caramadre claims that the source of Mizzoni's rage toward him stemmed from misleading facts provided by the investigator. “He's being informed, or told, or given the understanding that my wife gets \$1 million when he dies, and we only invested \$10,000. So he doesn't know the real facts. I believe if he thought my wife was getting \$10,000 back, and I put up the \$10,000, and he already got his \$2,000, he may not be upset at that at all. Of course, he would need to have been told the truth.” *Id.*; Deposition of Robert Mizzoni, *supra*, note 99.

associate did not properly explain the nature of the transaction, including the possibility that the annuitants were outright defrauded; or (2) the annuitants were physically or mentally incapable of grasping the nature of the transaction.

*B. The Annuitants' Ability to Consent and Financial Coercion*

Several legal doctrines present themselves because of the health status of the annuitants; each doctrine generally prohibits individuals from taking advantage of the less fortunate.<sup>101</sup> The unorthodox nature of these deals between Caramadre and the annuitants presents several problems. The first issue is whether or not the annuitants had the capacity to enter into the contract with Caramadre.<sup>102</sup> The unique structure of the “creation” begs the question of what form of capacity is necessary to enter into this deal.<sup>103</sup> From the annuitant’s perspective, the transaction is twofold.<sup>104</sup> A court, if presented with the issue,<sup>105</sup> might examine whether the

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<sup>101</sup> Each annuitant undoubtedly had his or her own health issues, each of which could possibly raise several issues of fact. The government is seeking to exploit the unique nature of these relationships in order to bring forth criminal charges. For example, there are several counts in the indictment that hinge on material misrepresentations and failures to disclose the nature of the investment to the annuitants. Indictment, *supra*, note 9. While a criminal conviction will largely depend on what Caramadre or Radhakrishnan did or did not do, when one looks at the nature of these relationships in a vacuum, several questions are raised regarding the physical and mental state of the annuitants. Several legal doctrines crop up immediately including whether the annuitant lacked capacity, was under duress or undue influence, and whether Caramadre had obtained something akin to the annuitant’s informed consent to enter into this agreement. Even if none of these doctrines are dispositive and the contract may be upheld under an analysis of each doctrine, a court may still find the contracts to be void as against public policy or that they are unconscionable. Each of these doctrines, at their respective core, are grounded in the premise that the court should not allow one party to unethically take advantage of the other by means of the law. When a court decides one of these issues, it is making normative value judgments based on the subjective states of another. In other words, it is deciding whether or not one of the parties, or both, has acted unethically. *See* Holmes, *supra*, note 18.

<sup>102</sup> Capacity is a critical issue for all contracts. A contract is either void or voidable if one of the parties lacks testamentary capacity. 265-AUG N.J. Law. 14.

<sup>103</sup> Arguably, this type of transaction requires two different types of capacity. The annuitants should have the capacity to enter into the contract with Caramadre and testamentary capacity to dispose of their estate.

<sup>104</sup> The annuitant is both entering into an agreement with Caramadre and engaging in a highly unorthodox form of estate planning. The annuitant is receiving money from Caramadre in exchange for her signature, but also she is assigning the annuity to a third party upon her death.

<sup>105</sup> Perhaps tellingly, it appears as though none of the annuitants have sued Caramadre or Radhakrishnan. This would likely be the only way that this precise issue would be presented before a court since, in the criminal case, the issue is whether Caramadre committed fraud upon the annuitants. In civil cases between Caramadre and the financial institutions, this issue appears to have not been raised. *W. Reserve Life Assur. Co. of Ohio v. Conreal LLC*, 715 F. Supp. 2d 270, 276 (D.R.I. 2010) on reconsideration in part sub nom. *W. Reserve Life Assur. Co. of Ohio v. Caramadre*, 847 F. Supp. 2d 329 (D.R.I. 2012).

annuitant had both the capacity to make the contract with Caramadre<sup>106</sup> and testamentary capacity.<sup>107</sup> Duress and undue influence would likewise have to be analyzed in a similar manner, but would present more issues of fact since such an analysis would take into account not only the annuitant's state of mind but Caramadre's actions as well.<sup>108</sup>

Assuming that a court could find that the agreement between Caramadre and each of the annuitants met all of the standards above a court still may find that the contract is void as against public policy.<sup>109</sup> If this were the case, then the court might be making a value judgment that the conduct involved runs counter to the morals of the jurisdiction as prescribed by the legislature.<sup>110</sup> Even if Caramadre and Radhakrishnan orchestrated the scheme in a way that would have satisfied a court examining such issues, the ethical issues extend beyond these pseudo-moral legal doctrines.

Primary among these ethical issues is whether or not the annuitants consented to this scheme or whether they were exploited by Caramadre. Over the course of several years,

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<sup>106</sup> Capacity under the law of contracts is fairly straight forward. "To make a valid contract, each party must be of sufficient mental capacity to appreciate the effect of what he or she is doing, and must also be able to exercise his or her will with reference thereto. There must be a meeting of the minds to effect [*sic*] assent, and there can be no meeting of the minds where either party to the agreement is mentally incapable of understanding the consequences of his or her acts." 265-AUG N.J. Law. 14.

<sup>107</sup> Testamentary capacity, in most jurisdictions, is an even lower standard than in the law of contracts. A testator must simply be capable of knowing, not actually know, what she has, who she is giving it to, and the type of disposition that she is making. *Id.*

<sup>108</sup> Undue influence in contract depends on the facts of the case. Generally, age, mental and physical capacity, and whether or not the party had independent advice regarding the transaction are all relevant in determining whether or not undue influence took place. 25 Am. Jur. 2d Duress and Undue Influence § 37. Duress involves compulsion or coercion by the dominant party that overrides the free will of the weaker party. 17A C.J.S. Contracts § 232. In regard to the law of estates, undue influence generally has four elements: "(1) a person who is subject to undue influence; a disposition to exert undue influence; (3) an opportunity to exert undue influence; and (4) a result indicating undue influence." 36 Am. Jur. Proof of Facts 2d 109 (Originally published in 1983). Undue influence is considered a species of duress. 25 Am. Jur. 2d Duress and Undue Influence § 36. Much like the law of contracts, whether or not undue influence occurred depends on the facts of the case. 36 Am. Jur. Proof of Facts 2d 109 (Originally published in 1983).

<sup>109</sup> 5 Williston on Contracts § 12:1 (4th ed.)

<sup>110</sup> This is again where Caramadre's creation is ingenious. It would be hard to find this to be violative of public policy under Rhode Island since annuities are treated differently than life insurance and immune from the law prohibiting such transactions. *W. Reserve Life Assur. Co. of Ohio v. Conreal LLC*, 715 F. Supp. 2d 270, 276 (D.R.I. 2010) on reconsideration in part sub nom. *W. Reserve Life Assur. Co. of Ohio v. Caramadre*, 847 F. Supp. 2d 329 (D.R.I. 2012)



Caramadre and Radhakrishnan signed up over 150 annuitants.<sup>111</sup> Each annuitant presents a unique set of facts to consider when discussing the issue of consent. For instance, one annuitant was so debilitated by her illness that she was unable to physically sign the annuity forms.<sup>112</sup> On the other hand, some claim to have been made completely aware of the transaction and had no qualms with others profiting off of their death.<sup>113</sup> As it is impossible to know exactly what each annuitant knew and what they were capable of thinking or doing at the time of the transaction, it is better to note here a few major issues that undergird the sense of squeamishness that most people feel when listening to Caramadre's scheme as it relates to the annuitants' ability to consent.

First, each annuitant's health status makes consent to this agreement automatically suspect. Every annuitant was dying or close to death at the time that Caramadre entered them into the scheme. This, by itself, should not affect a person's ability to consent since the health industry relies on terminally ill people to make their own end-of-life decisions if they are capable.<sup>114</sup> Therefore, it seems that the annuitant's health status alone is insufficient to render this transaction morally reprehensible.

However, offering to pay each annuitant for their personal information presents an issue of coercion. Caramadre's offer to pay each annuitant, who doubtlessly could use the money either to pay for bills or care for loved ones after their death, begins to encroach on the terminally ill person's autonomy in making their own end of life estate plan. Offering a financial incentive to scam these insurance companies financially coerces a terminally ill person, who is

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<sup>111</sup> This American Life, *supra*, note 2

<sup>112</sup> *Id.*

<sup>113</sup> Deposition of Charles Buckman, *supra*, note 93.

<sup>114</sup> The decision to refuse medical treatment is a much more serious decision than to profit off of the use of one's personal information. *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261 (1990) (holding that a competent person may refuse life sustaining treatment); *In re Quinlan*, 70 N.J. 10 (1976) (allowing the father of a woman in a persistent vegetative state to remove life-sustaining treatment); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127 (Cal. Ct. App. 1986) (holding that a dying patient has the right to refuse life-sustaining treatment).

already vulnerable, to engage in behavior that they may not have without Caramadre's suggestion.

#### PART IV. CRIMINAL CHARGES & CIVIL LIABILITY—

Once the financial institutions figured out what Caramadre was doing, they attempted to recover some of their lost profits in civil court.<sup>115</sup> Unfortunately for them, Caramadre's "creation" worked exactly as he imagined.<sup>116</sup> First, variable annuities were treated differently than insurance contracts under Rhode Island law, which meant that they were not subject to statutory prohibitions against strangers taking them out on strangers.<sup>117</sup> Second, the variable annuities each contained incontestability clauses,<sup>118</sup> which were enforced by the court and prevented the financial institutions from rescinding the policies even on grounds of fraud.<sup>119</sup> The incontestability clauses, which were inserted by the financial institutions, served to negate the financial institutions' claims of fraud, conspiracy, and rescission or voidability of the policies.<sup>120</sup> For these reasons, most of the claims against Caramadre were dismissed.<sup>121</sup>

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<sup>115</sup> *W. Reserve Life Assur. Co. of Ohio v. Conreal LLC*, 715 F. Supp. 2d 270, 276 (D.R.I. 2010) on reconsideration in part sub nom. *W. Reserve Life Assur. Co. of Ohio v. Caramadre*, 847 F. Supp. 2d 329 (D.R.I. 2012).

<sup>116</sup> *Id.*

<sup>117</sup> Section 27-4-27 of Rhode Island's General laws provides "No person shall procure or cause to be procured any insurance contract upon the life or body of another individual unless the benefits under the contract are payable to the individual insured or his or her personal representatives, or to a person having, at the time when the contract was made, an insurable interest in the individual insured." R.I. Gen. Laws §27-4-27(a)(West 2010). Just as Caramadre planned, the court held that the "insurable interest" requirement does not apply to variable annuities because they are not "insurance contract[s] upon the life of another" *Conreal LLC*, *supra*, note 116, at 276.

<sup>118</sup> Incontestability clauses prevent insurance companies from rescinding the insurance policies. *Id.* Generally, incontestability clauses are for the benefit of the insured. *Id.* The variable annuity policies contained incontestability clauses that prohibited the insurers from rescinding even if the policy was fraudulently taken out. *Id.* In the case against Caramadre, the financial institutions asked the court to erase the incontestability clause from the agreements and hold them void against public policy. They asked this of the court even though they were the ones who inserted them into the contracts.

<sup>119</sup> *Conreal LLC*, *supra*, note 115, at 279-80.

<sup>120</sup> *Id.* at 280-81.

<sup>121</sup> *Id.* at 290.

However, this victory was short-lived. In February 2012, the case was reopened after the plaintiffs submitted a motion for reconsideration.<sup>122</sup> This litigation is ongoing at the time of this writing.<sup>123</sup>

A criminal investigation started with Caramadre and his associate, Raymour Radhakrishnan, at the center. The two were indicted for conspiracy and multiple counts of fraud.<sup>124</sup> The indictment alleged that the pair made affirmative misrepresentations of their scheme to the terminally-ill and elderly patients and family members in exchange for their personal information.<sup>125</sup> With this personal information, the indictment alleged that Caramadre and Radhakrishnan obtained over 200 variable annuities and bonds without their consent or knowledge. It is further alleged that some of these annuities and bond forms contained forged signatures. Although Caramadre has never stated how much money he made off the scheme, the indictment alleged that it generated more than \$25 million in “illicit profits.”<sup>126</sup> It

Whether these charges reflect the reality of Caramadre’s “creation,” or whether they were motivated by prosecutors that were outraged by Caramadre’s cavalier conduct is impossible to determine. However, according to Caramadre’s lawyer and former Rhode Island Supreme Court Justice, Robert G. Flanders, the pretext behind these charges is that the government lawyers and investigators were angered by the unethical mechanics of the scheme.<sup>127</sup> Undoubtedly,

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<sup>122</sup> Western Reserve Life Assur. Co. of Ohio v. Caramadre, 847 F. Supp. 2d 329 (D.R.I. 2012).

<sup>123</sup> The District Court Judge dismissed several counts against Caramadre, Radhakrishnan and other defendants but allowed other claims to proceed. “The counts alleging civil conspiracy (all cases except 09–470), unjust enrichment (all cases), civil liability for crimes and offenses grounded in forgery (in cases 09–470, 09–549, and 09–564) will proceed.” *Id.*

<sup>124</sup> The indictment includes 66 separate counts against Caramadre and Radhakrishnan. There are 26 counts of wire fraud, 15 counts of mail fraud, 1 count of conspiracy, 25 counts of identity fraud, 4 counts of aggravated identity fraud, 1 count of money laundering, and 1 count of witness tampering. Indictment, *supra*, note 9; Gibbs, *supra*, note 59.

<sup>125</sup> Indictment, *supra*, note 9; Gibbs, *supra*, note 59.

<sup>126</sup> Indictment, *supra*, note 9.

<sup>127</sup> “That he was a guy who was just throwing a few shekels at some poor, sick people at the end of their lives, and he was reaping the lion's share of it. And they didn't like the stink or the smell of it, and they didn't like what they considered the inequity of it.” This American Life, *supra*, note 2.

Caramdre's lawyers were concerned about jurors having a similar visceral reaction to the charges.<sup>128</sup>

After a highly contested debate about how the trial would be litigated,<sup>129</sup> opening statements were made on November 12, 2012.<sup>130</sup> Caramadre and Radhakrishnan pled guilty to two of the 66 counts: identity theft and conspiracy.<sup>131</sup> Each man faces a maximum of ten years in prison.<sup>132</sup>

Setting aside the criminal charges against them for the time being and focusing purely on “the creation” itself, what Caramadre and Radhakrishnan did in setting up the creation was not

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<sup>128</sup>Caramadre and Radhakrishnan's criminal trial began on November 12, 2012. The trial is expected to last two to three months, including video testimony from the deceased annuitants. *2 RI Men to go to Trial in \$25M Investment Fraud*, ASSOCIATED PRESS, available at <http://www.wsocvtv.com/news/ap/crime/2-ri-men-to-go-to-trial-in-25m-investment-fraud/nS4Yh/> (Nov. 12, 2012). Caramadre filed two motions, both of which were denied, in an attempt to mitigate any further prejudice. Both motions were filed simultaneously. Because Radhakrishnan is appearing *pro se*, Caradre attempted to sever the trial in order to limit the effect of Radhakrishnan's inexperience. Additionally, Caramadre attempted to waive his right to a jury trial, which might also cure any prejudice incurred by Radhakrishnan's inexperience. *United States v. Caramadre*, 2012 WL 4364529, at \*1 (D.R.I., Sept. 21, 2012); *United States v. Caramadre*, CR 11-186 S, 2012 WL 4762189 (D.R.I. Oct. 5, 2012).

<sup>129</sup> On September 21, 2012, District Judge William E. Smith denied Caramadre's motion to sever his trial from his co-defendant, Raymour Radhakrishnan. Caramadre's argument for severance was that because Radhakrishnan is representing himself *pro se*, Caramadre will be irremediably prejudiced *United States v. Caramadre*, 2012 WL 4364529, at \*1 (D.R.I., Sept. 21, 2012). In the First Circuit, a codefendant's *pro se* representation is not grounds for severance by itself. A defendant must also show that “strong prejudice” will result from the representation. *United States v. DeMasi*, 40 F.3d 1306, 1313 (1st Cir. 1994). Additionally, the case law demonstrates that there is a strong preference for joint trials, especially in cases involving conspiracy. *United States v. Celestin*, 512 F.3d 14, 19 (1st Cir. 2010); *United States v. Pena-lora*, 225 F.3d 16, 33 (1st Cir. 2000). Radhakrishnan was admonished by the trial court for representing himself, the joint trial proceeded and Radhakrishnan defended himself. In a hearing that took place on August 7, 2012, the Court warned Radhakrishnan that he would make mistakes at trial and that Caramadre's lawyers may not be there to help him out. *United States v. Caramadre*, 2012 WL 4364529, at \*2 (D.R.I., Sept. 21, 2012). The Court did appoint stand-by counsel for Radhakrishnan to consult with. *Id.* Caramdre also attempted to waive his right to a jury trial and proceed with a bench trial. The government objected. His motion for leave to waive a jury trial was denied *United States v. Caramadre*, CR 11-186 S, 2012 WL 4762189 (D.R.I. Oct. 5, 2012). A defendant may waive his right to a jury trial if (1) the defendant waives it in writing; (2) the government consents; (3) the court approves. *Id.*; Fed. R. Crim. P. 23(a). Effectively, this gives the government, the court, or both the right to veto the defendant's request. *United States v. Caramadre*, *supra*, note 46. There is no constitutional right to a bench trial. *Singer v. United States*, 380 U.S. 24, 34 (1965). *Singer* left open the possibility that a court may allow a defendant to waive his right to a jury trial over the government's objections. *United States v. Caramadre*, *supra*, note 46. As Judge Smith noted, “[a]s *Singer* and its progeny suggest, overruling a governmental objection to a bench trial is a last resort and should only be instituted when an impartial jury is either impossible or extremely unlikely.” *Id.*

<sup>130</sup> *RI Men to go to Trial in \$25M Investment Fraud*, ASSOCIATED PRESS (Nov. 12, 2012), <http://www.wsocvtv.com/news/ap/crime/2-ri-men-to-go-to-trial-in-25m-investment-fraud/nS4Yh/>.

<sup>131</sup> See Jake Bernstein, *Insurance Schemer Cops a Plea*, PROPUBLICA (Nov. 19, 2012 6:01 P.M.), <http://www.propublica.org/article/insurance-schemer-cops-a-plea>

<sup>132</sup> *Id.*

*mala prohibita* since the scheme itself did not violate any federal or civil laws.<sup>133</sup> What they did, if they did anything wrong, was *mala in se*.<sup>134</sup> It was wrong, ethically, in and of itself. It was ethically wrong because it values death over life.

## PART V--ETHICS

Caramadre created a market for death.<sup>135</sup> Being that the United States been steeped in a philosophy of natural law, it is easy to see why a market for death would be taboo.<sup>136</sup> Natural law espouses the sacredness and value of all human life, regardless of the form it takes.<sup>137</sup> To create a market for death is in immediate conflict to this idea. It values death over life, literally.

The natural law tradition is not the only school of ethics that would oppose a market for death and dying. For instance, a utilitarian<sup>138</sup> might argue that the social utility of such a market serves only a select few—*i.e.*, Caramadre, his investors, and the annuitants—to the detriment of the greater public in that these types of schemes created market instability and ultimately contributed to the collapse of the stock market.<sup>139</sup> On the other hand, a utilitarian might argue

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<sup>133</sup> Caramadre and Radhakrishnan were not charged with violating a criminal statute that prohibits taking out an insurance policy on a third party. Rather, they were indicted on several charges of various types of fraud and conspiracy. See Indictment, *supra*, note 9.

<sup>134</sup> I use *malum prohibidum* and *mala in se* not to argue that this type of crime should be classified as such legally. Rather, I borrow the terms to flesh out a clearer picture of why Creation 18 was so morally dubious. The terms *malum prohibidum* and *mala in se* further obfuscate the distinction between law and ethics that Holmes sought to draw. Holmes would likely argue that all laws are *malum prohibidum* because the law is ultimately ambivalent to morality. An act cannot be legally wrong in and of itself because humans decide what the law is, and no act is legally wrong until humans decide that it is. See *generally* Holmes, *supra*, note 18 (distinguishing law from morality). Of course the argument can be made that these terms have no actual meaning within the law but rather are ethical rationales for why we humans have written criminal laws, thus, making them ethical rather than legal fictions.

<sup>135</sup> See *infra* PART V for a discussion on the commoditization of death and dying.

<sup>136</sup> The natural law philosophy appears to be waning in popularity. BARRY R. FURROW, ET AL. *BIOETHICS: HEALTH CARE LAW AND ETHICS* 8-9 (6th ed. 2008).

<sup>137</sup> *Id.* Hence, why many natural law theorists oppose abortion and physician assisted suicide.

<sup>138</sup> Stated very generally, utilitarians believe that the correct moral choice is the one that does the greatest good for the greatest number of people. *Id.* at 6.

<sup>139</sup> See *infra* PART V. A. for a discussion on economic theories of morality in transactions as well as a discussion of credit default swaps, which led to the collapse of the housing market and major financial institutions. It is not my contention that Caramadre's scheme brought down the stock market. Rather, it was exploitation of financial devices by sophisticated investors coupled with greed, fervor over driving up profits, and a lack of oversight and regulation

that this type of transaction was beneficial not only to Caramadre and his investors but also to the terminally ill annuitants and would thus be justifiable.<sup>140</sup> This argument may be justifiable on a case-by-case basis where the annuitant was fully informed and did not feel exploited. However, because of the inherent problems of dealing with the terminally ill about complex financial matters, it is unlikely that this argument would have much force across the entire spectrum of annuitants. Annuitants such as Robert Mizzoni obviously would strongly disagree that he benefitted from this transaction.<sup>141</sup> Additionally, the way in which Caramadre knowingly exploited a mistake in an investment contract disrupts the stability of the market place and undermines the public trust in financial institutions, upon which, for better or worse, our economy depends.

Further, Kantian virtue ethics would likely condemn the practice of knowingly exploiting another's mistake for one's own profit, as well as coercing physically and financially vulnerable people to do the same.<sup>142</sup> Kant's second formulation of the categorical imperative implored human beings to "[a]ct in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end."<sup>143</sup> What Caramadre did seems to directly contradict this formulation. He, individually and through Radhakrishnan, treated both the financial institutions and the terminally ill as a means to his own financial success.

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that led to the collapse. Caramadre's scheme and the complicity of the financial institutions speaks to the endemic lack of accountability and responsibility on the part of certain highly sophisticated investors and investments.

<sup>140</sup> This is precisely what Caramadre would argue. See Jake Bernstein, *Insurance Schemer Cops a Plea*, PROPUBLICA (Nov. 19, 2012 6:01 P.M.), <http://www.propublica.org/article/insurance-schemer-cops-a-plea> (noting that "In Caramadre's view, he was offering money to the needy that they had not expected to receive.").

<sup>141</sup> See, *supra*, notes 99 & 100 for quotes by and background of Robert Mizzoni.

<sup>142</sup> The crux of Kantian virtue ethics is Immanuel Kant's categorical imperative, which implores a person to act as though the maxim of their action were to become universal law. Or, as Kant put it in his first formulation, "Act only according to that maxim whereby you can at the same time will that it should become universal law without contradiction." IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 30 (James W. Ellington trans., Hackett 3d. ed.1993)(1785).

<sup>143</sup> *Id.*

For these reasons, I believe that “Creation 18” was morally *mala in se*, wrong in and of itself. Given that much of society draws from these ethical traditions in one way or another, it is likely why the grand jury returned a 66 count indictment against the men. A person who is cynical about the ability of the jury to put aside their personal opinion of the defendant might say that this is the reason that the men pled guilty to two of the counts rather than stand trial on all of them. They might have realized that that in order to acquit, they needed to raise counterarguments that conflict with thousands of years of moral teachings. Even though what these men did was technically legal, they would have had to persuade a jury to disregard these moral principles in order to focus purely on abstract legal doctrines, something that is much more easily done in theory than in practice.

It is important to flesh out the ethical complexities in greater detail. These ethical conundrums ask fundamentally different questions than whether or not the conduct was legal.<sup>144</sup> Further, it is necessary to look to the actions of the financial institutions who created these financial devices to see whether they are at all accountable for allowing Caramadre’s “creation” to continue. Even if it is ethical, one important question is whether or not the financial institutions have a duty to ask questions about the health status of the annuitants.

#### A. *Caramadre is a Bad Man*

Justice Oliver Wendell Holmes would likely consider Caramadre a bad man.<sup>145</sup> Holmes, one of the most respected Supreme Court Justices,<sup>146</sup> believed in a distinction between morality

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<sup>144</sup> See Oliver Wendell Holmes, *The Path of the Law*, 10 HARVARD L. REV. 457 (1897).

<sup>145</sup> *Id.*

<sup>146</sup> Although highly revered, Holmes is not without his judicial blemishes. See *Buck v. Bell*, 274 U.S. 200 (1927) (holding that states may sterilize mentally handicapped individuals against their wishes. “We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those

and law.<sup>147</sup> The law, according to Holmes, is a creation of man, flawed and imperfect. It did not “flow from some mysterious omnipresence in the sky, and ... judges are not independent mouthpieces of the infinite.”<sup>148</sup> Holmes used the “bad man” as an example of why law and morality should be looked at as separate entities.<sup>149</sup> In order to study and fully understand the law, Holmes urged that the law itself must be looked at as a bad man. The bad man cares only about the material consequences of his actions.<sup>150</sup> Although he might engage in entirely unscrupulous behavior if left to his own devices, the bad man still cares about the consequences of his actions because he, like everyone else, does not want to be punished.<sup>151</sup> Although the bad man’s neighbors might follow the law out of an overarching sense of morality or duty, this does not change the fact that the law prohibits and punishes certain behavior regardless of the underlying intention.<sup>152</sup>

Holmes found the law of contract at the epicenter of the confusion between law and morality.<sup>153</sup> If we look at the law as a bad man, the only difference between committing a tort and committing breach of contract is that in the former the tortfeasor has to pay damages; in the latter, one has to pay damages unless an agreed upon event takes place—for example,

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who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes... Three generations of imbeciles are enough.”)

<sup>147</sup> Holmes, *supra*, note 144.

<sup>148</sup> FRANCIS BIDDLE, JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT 49 (1960). While recognizing a distinction between law and morality, Holmes did not think the law entirely devoid of moral teachings. “The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men.” Holmes, *supra*, note 40.

<sup>149</sup> Holmes, *supra*, note 144.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Of course, the law does care about intent in many instances, but Holmes found these to be more legal fictions than moral certitudes. “The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some state of the argument, and so to drop into fallacy.” *Id.*

<sup>153</sup> *Id.*



performance of the contractual obligations.<sup>154</sup> Those who imbue the law with ethics would view this idea as repugnant.<sup>155</sup> However, when stripped down to its fundamental consequences, this is how the law of contracts operates.<sup>156</sup>

The idea that a contract is a meeting of the minds of the parties was pure fallacy to Holmes.<sup>157</sup>

Suppose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs — not on the parties' having meant the same thing but on their having said the same thing.<sup>158</sup>

Holmes' understanding of the law of contracts demonstrates the imperfect reality that the law discards a party's subjective intent in favor of objective proof. The intent of the parties is irrelevant if not contained in the governing document.

This was the loophole that Caramadre intended to exploit. Caramadre knew the law of insurance and annuities very well, and it was his job to exploit its weaknesses. By his own account, he followed the law precisely. Caramadre had faith in the law. He believed that if he abided by the letter of the law, he could exploit a loophole without retribution. Interestingly

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<sup>154</sup> *Id.* “The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it — and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference.”

<sup>155</sup> Lord Coke found that awarding specific performance of a breached contract would subvert the intent of the covenantor to elect to choose between performing the contract or paying damages. *Id.* (citing *Bromage v. Genning*)

<sup>156</sup> *Id.*

<sup>157</sup> “We talk about a contract as a meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent.” *Id.*

<sup>158</sup> *Id.*

enough, he was right to a certain extent. His “creation” did not violate any criminal statute.<sup>159</sup> Caramadre’s “creation” is morally repugnant to most.<sup>160</sup> However, it seems to be within the bounds of what the law accepts.<sup>161</sup> What the government contends in its indictment is that Caramadre executed the scheme in a way that violated the law.<sup>162</sup>

The way Caramadre used the variable annuities created a market for death. He was looking for people with short life expectancies and was willing to pay them, essentially, to die. The market for life was already in place. Caramadre merely found a way to exploit it as a private citizen rather than a life insurance company. In doing so, he created a “legal” market for death. For the same reasons that “Creation 18” was *mala in se*,<sup>163</sup> this market for death is likewise morally reprehensible. In sum, it defies natural law by valuing death over life, runs counter to utilitarian principles by placing the good of a few over the greater good, and exploits both the terminally ill and the financial institutions in a way that flouts Kant’s Categorical Imperative. Additionally, as noted above, Caramadre likely put himself in a position where he financially coerced the annuitants into participating in this scheme.<sup>164</sup> Even though Caramadre is a “bad man” and created a market for death, this would not have been possible without the complicity and tacit consent of the financial institutions that sold and oversaw these transactions.<sup>165</sup>

### B. *Morals of the Marketplace*

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<sup>159</sup> Caramadre allegedly committed multiple counts of fraud and conspiracy. However, the creation as a thing in and of itself is not violative of any criminal statute. Rather, the way in which Caramadre and Radhakrishnan conducted business led to the multiple counts of fraud. See Indictment, *supra*, note 9.

<sup>160</sup> One commentor named “Yeshua” commented on a local news outlet’s webpage, “[p]ut him in a cell with [Jerry] Sandusky.” Katie Mulvaney, *Judge Denies Request by Cranston Man Accused of Defrauding Dying People*, PROVIDENCE JOURNAL (Oct. 9 2102 1:00PM)

<sup>161</sup> Western Reserve Life Assur. Co. of Ohio v. Caramadre, 847 F. Supp. 2d 329 (D.R.I. 2012).

<sup>162</sup> The criminal charges do not allege that the scheme itself is violative of any particular law. Rather, all of the charges against he and Radhakrishnan allege that they fraudulently procured and used personal information about the annuitants. Indictment, *supra*, note 9.

<sup>163</sup> PART IV, *supra*.

<sup>164</sup> PART III, *supra*.

<sup>165</sup> PART II, *supra*.

Life insurance companies make a living off of the life market.<sup>166</sup> These companies provide insurance for a person's loved ones in the event that he should die.<sup>167</sup> However, their standards for issuing a policy are rather strict and each application for insurance is scrutinized carefully by an actuary. For example, term life insurance covers an individual's life for a fixed term of years. If the person dies within that term, then their loved ones will be compensated. If the person lives beyond the term of the insurance plan, then their coverage expires with no financial benefit accrued to their loved ones. Every time a term life insurance plan is issued, the company has determined that the insured is more likely than not to live beyond the term. In order to be profitable, the company needs to make a very well educated bet on life. Caramadre found a way to stack the deck and then make an even better educated bet on death. The difference between Caramadre and the life insurance industry, even if it is a difference in name only, is that life insurance makes wagers on the side of life paying whereas Caramadre always wagered on death.

The commoditization of life has been in place for decades, if not centuries.<sup>168</sup> It serves a beneficial social purpose by providing a safety net for individuals should they meet an untimely demise.<sup>169</sup> The death market, *i.e.*, a forum whereby there is an exchange of money for death, however, has long operated outside of the law.<sup>170</sup> Now, it is wrong to condemn something

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<sup>166</sup> And a handsome living at that! As of 2009, U.S. life insurance companies had capital and surplus in excess of \$300 billion. *Table 1221 Life Insurance Companies—Summary 1990-2009*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2012/tables/12s1221.pdf> (last viewed Dec. 11, 2012).

<sup>167</sup> Assuming that his death is covered under the terms of the insurance policy.

<sup>168</sup> Life insurance, as we know it, is believed to have begun in 16th Century England. James J. Robinson, *The History of Life Insurance*, EZINE ARTICLES, <http://ezinearticles.com/?The-History-of-Life-Insurance&id=1295569> (last visited Dec. 11, 2012).

<sup>169</sup> *Id.*

<sup>170</sup> Only in recent years has assisted suicide become legal in parts of the United States and Europe. *See, e.g.*, The Oregon Death With Dignity Act, Or. Rev. Stat. §§127.800-.897. This is obviously very different than Caramadre's case but it is a situation where one pays to die.

merely because history and tradition has done so as well, so it is important to look at the societal benefits and detriments of commoditizing death in such a way.

Profiting off of the death of another merely for the sake of profit serves no justifiable social purpose.<sup>171</sup> It is merely a reallocation of wealth from one party to another without tangible exchange of ideas, work, or property. That is exactly what Caramadre designed this “creation” to accomplish. He orchestrated a system in which, after an initial investment, he and his investors profited from the death of the annuitant by financial institutions receiving payouts from the financial institutions. He and his investors gave money to the companies and then after a short period of time, they gave it back with interest and profits from the mutual fund investment. There was no other exchange made beside a reallocation of wealth.

This type of investment, investments based on wholly intangible “commodities” without a beneficial social purpose, became far too common on Wall Street for multiple reasons.<sup>172</sup> First, there was a large, profitable market for these investments, which led to a fervor over such investments, blinding the people and companies in charge of managing the investments to the detrimental effect on the market.<sup>173</sup> Second, there was inadequate oversight and regulation over these transactions.<sup>174</sup> The companies issuing the variable annuities did not perform the perfunctory screening that usually occurred in life insurance because they stood to make a profit on such plans.<sup>175</sup>

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<sup>171</sup> Life insurance, as described above, does serve an important social function of providing for the family of a loved one who likely helped provide for them during his or her life. As such, it should not be included in this category, which, of course, does not include “profiting” off of the death of another by receiving an organ donation. The term “profit” here is to be construed in purely monetary terms.

<sup>172</sup> “Matt Dvolatility,” *Basis Trader Says Credit Default Swaps are Fatally Flawed, Replace with Bond Futures*, DISTRESSED VOLATILITY, (April 9, 2012 1:53 AM) <http://www.distressedvolatility.com/2012/04/trader-says-credit-default-swaps-are.html>

<sup>173</sup> *Id.*

<sup>174</sup> This American Life, *supra*, note 2

<sup>175</sup> *Id.*

## CONCLUSION

Joseph Caramadre's creative exploitation of the fine print may have landed in him trouble that he is likely not prone to repeat. Even though it is very possible that the terminally-ill and dying annuitants may have been capable of consenting to such a scheme, Caramadre toed a fine line that could have been easily overstepped depending on the health and financial status of the chosen annuitant. Regardless of what may have occurred during each of the underlying transactions, there are several arguments to be made that what Caramadre did, in and of itself, was wrong. Essentially, he created a market for death and dying, which goes against numerous ethical principles. But the blame is not to be placed entirely on his shoulders. Without the help and complicity of the financial institutions that sold these products, "Creation 18" would have been nothing more than an interesting legal loophole tucked away in the corner of Joseph Caramadre's brain, having never reached fruition.