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THE LEGAL STATUS OF SUICIDE IN EARLY AMERICA: A COMPARISON WITH THE ENGLISH EXPERIENCE

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The Laws of a country are necessarily connected with every thing belonging to the people of it; so that a thorough knowledge of them, and of their progress would inform us of every thing that was most useful to be known about them; and one of the greatest imperfections of historians in general, is owing to their ignorance of law.¹

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In the past decade, historians have focused an increasing amount of attention on the development of substantive law and legal institu-

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1. P. PRIESTLEY, LECTURES ON HISTORY 149, quoted in 1 W. HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at i (1809), reprinted in 1 COLONY LAWS OF VIRGINIA, 1619-1660, at i (J. Cushing ed. 1978) (emphasis in original). Priestley takes a much more expansive view of the historical utility of legal rules than does the author. While I admit that, to varying degrees, laws are helpful in understanding the people who created them, I would not go so far as to say that they tell us
tions in early America. Perhaps the most surprising discovery of this group has been that there was no unified legal or political development among the original thirteen colonies. Quite to the contrary, scholars have demonstrated that several factors, including geography, religion, and occupation, "tended to create markedly different kinds of society." With respect to the colonial American legal culture, the most important differentiating factor appears to have been the source of the rules and practices that were ultimately adopted.

Several of the American colonies drew heavily upon the English experience for their laws and institutions, while others looked primarily to the Scriptures for guidance. A good many of them borrowed liberally from the collected legislation and doctrine of their neighbors. Throughout the colonial period, in addition, laws and practices were tailored to fit local conditions and needs. As a result of this multiplicity of sources, colonial law was a veritable mishmash of rules, policies, sanctions, and institutions.

Because there was no comprehensive reception or uniform development of law in early America, it is impossible for the historian to generalize broadly about "the colonial legal culture." There is no such animal. Instead, the scholar seeking an understanding of a particular

"every thing that was most useful to be known about them." Laws are essentially "registers of social values," and only imperfect descriptions of social conditions. See S. Foster, Their Solitary Way: The Puritan Social Ethic in the First Century of Settlement in New England, at xiii (1971). And yet, though "[m]en may not always act according to the rules, . . . the existence of accepted rules can influence their style of action . . . ." Id. at xvii. There is thus both a descriptive and a prescriptive component to legal rules; laws simultaneously define and shape social reality. In this article, emphasis is placed primarily on the prescriptive component of legal rules, and it is therefore best viewed as an intellectual, rather than as a social, history.


3. George L. Haskins said that there were "thirteen separate legal systems" in the American colonies. G. Haskins, Law and Authority in Early Massachusetts 6 (1960), quoted in L. Friedman, supra note 2, at 31 (footnote omitted).


6. L. Friedman, supra note 2, at 79.
area of colonial law must study the colonies individually, and only then suggest certain patterns, similarities, and differences. As in so many other areas of colonial law, the legal status of suicide varied widely among the several colonies, depending, in large part, upon whether the English common law was followed closely, roughly, or not at all.

Suicide is as old as humankind. It existed in the societies of ancient Greece and Rome, and the Hebrew Bible recorded five acts of self-destruction, including that of the first Israeli king. Suicide is also ubiquitous, as it is observed in every human society. To date, anthropologists have studied it in African, Eskimo, Trobriand Islander, Oriental, and American Indian cultures, as well as in all of the industrialized societies of the West. Despite its universality, however, suicide has never been looked upon with approbation in any human society. Orthodox Christians condemned suicide as a sin because, among other things, it deprived the actor's family of a means of livelihood. They also believed that suicide indicated the presence of evil spirits within the body. Medieval clerics insisted that the souls of "those who wantonly destroyed their lives" would spend an eternity in Hell. The Romans, less concerned with metaphysics and theology than economics, punished suicide among their soldiers and slaves in the hope that others would be deterred from acting in a similar fashion.

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7. See L. Friedman, supra note 2, at 32 ("Colonial legal experience was richly diverse from the outset, because conditions were different in the various colonies."); R. Morris, supra note 2, at 12 ("The extent to which the common law was adopted in the colonies must be actually determined in each specific situation.").

8. The legal definition of the word "suicide" is "the deliberate [i.e., intentional] termination of one's existence." Black's Law Dictionary 1286 (5th ed. 1979). This definition also captures the conventional sense of the word.


10. See La Fontaine, Anthropology, in id. 77-91.

11. There is a marked difference in the suicide rates of industrialized nations. The following rates per 100,000 population were recorded in 1976: Greece, 3.6; Northern Ireland, 6.2; England, 10.0; U.S.A., 12.5; Japan, 23.1; Austria, 29.2; and Denmark, 30.7. U.S. Bureau of the Census, Statistical Abstract of the United States: 1979, at 182 (100th ed. 1979). Between 1900 and 1978 (inclusive), there were approximately 1.25 million suicides in the United States alone. 1 U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, at 414 (Bicentennial ed. 1975); U.S. Bureau of the Census, Statistical Abstract of the United States: 1980, at 186 (101st ed. 1980).

12. It has been tolerated in some cultures, most notably the Japanese and the Trobriand Islander. These cultures practice what is called "altruistic suicide." La Fontaine, supra note 10, at 78-79.

13. See generally Rosen, supra note 9, at 12-15.

14. Id. at 15.

15. Id. at 11.
not until relatively recently—the nineteenth century—that suicide came to be viewed as a symptom of mental infirmity rather than as a form of sinful or culpable behavior. Still, the stigma of having attempted or committed suicide, for both the actor (in the case of an attempt) and the actor's family, remained strong.

I. THE CHARACTERIZATION OF SUICIDE AS A CRIME

The colonial American treatment of suicide was rooted deep in the English past. As early as the year 673, suicide was condemned by the canon law of the Catholic Church in what is now England, and in 967 this policy was formalized by King Edgar. King Edgar's canon provided that the goods of a suicide were to be forfeited to his or her lord. Henry de Bracton, the first English legal writer to speak upon the subject of suicide, wrote in the middle of the thirteenth century that self-destruction was analogous to murder, and that, like murder, it should be classified as a crime. "Just as a man may commit felony by slaying another," wrote Bracton, "so may he do so by slaying himself...." Placing suicide into an established niche of the criminal law, Bracton went about his task of describing English custom. Others would be left to grapple with the consequences of his characterization.

As has been suggested, there was no wholesale adoption of English law in the American colonies. Although the colonies were initially assumed to be mere extensions of the parent country, and thus governed by the same set of legal rules, they did not hesitate to modify or even reject the common law where it was deemed to conflict

16. Id. at 21.
21. In the criminal law, much depends upon the way acts are characterized. Suicide has been variously characterized as "murder," "self-murder," and "felonious homicide." See Mikell, Is Suicide Murder? 5 COLUM. L. REV. 379 (1905); cf. Barry, supra note 17. William Blackstone's typology of homicide is set out in the Appendix. See infra Appendix.
22. See supra notes 5-7 & accompanying text.
23. N. ST. JOHN-STEVAS, supra note 17, at 241.
24. "This was the governing assumption in seventeenth-century American legal history." FOR THE COLONY IN VIRGINIA BRITANNIA, LAWES DIVINE, MORALL AND MARTIALL, ETC., at x (D. Flaherty ed. 1969).
with local conditions. For reasons only dimly understood at this point, the American colonies differed radically in the legal status that they accorded suicide. Four discrete patterns of treatment are identifiable.

The first pattern is illustrated by the experiences of Virginia, North Carolina, South Carolina, Georgia, New York, and New Hampshire, all of which received the English common law without essential alteration. As in England, these colonies characterized suicide as a crime, and thus prescribed punishments for those who committed it. Virginia is representative. As "one of the American colonies that most closely adhered to the full-fledged common law system of the mother country," Virginia punished suicide by exacting a forfeiture of the goods and chattels of the deceased and by denying him or her a Christian burial. This tandem of punishments had long existed in England. Arthur Scott reported that on August 27, 1661, a coroner's jury in Virginia ordered the burial of a suicide at a "cross path," and in 1706, the estate of another suicide was sold at public auction. These cases show not only that the enforcement of laws forbidding suicide was taken seriously by colonial authorities, but that the English background was vitally important in shaping those laws.

The situation in the Carolinas was similar to that in Virginia. In 1712, the South Carolina Assembly formally received the English common law:

25. See S. WALKER, supra note 5, at 11 ("[S]ettlers adapted their inherited institutions to the circumstances of the new environment, often out of necessity."). Classical theory posits that American culture and institutions differed from those found in Europe because of the radically different conditions under which Americans had to live. The "frontier" environment supposedly required an abandonment of old ways of doing things and generated a host of new character traits, including individualism, practicality, and ingenuity. See F. TURNER, THE SIGNIFICANCE OF THE FRONTIER IN AMERICAN HISTORY (1963). For a critique of Turner's thesis as it relates to Michigan Territory, see Burgess-Jackson, Violence on the Michigan Frontier: The Incidence of Sporadic Assault in Michigan Territory, 1817-1830 (to be published in DET. PERSP.: J. REG. HIST.). For a discussion of the influence of wilderness conditions on patterns of thought and attitudes, see R. NASH, WILDERNESS AND THE AMERICAN MIND (rev. ed. 1973).

26. FOR THE COLONY IN VIRGINIA BRITANNIA, LAWES Divine, MORALL AND MARTIALL, ETC., supra note 24, at xxxvii.

27. A. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 198 (1930); see discussion infra note 147 & accompanying text.

28. A. SCOTT, supra note 27, at 198; see infra note 152 & accompanying text.


30. A. SCOTT, supra note 27 at 198 n.15. Both instances illustrate the societal condemnation of suicide. However, Scott reported that suicide "was not uncommon, particularly among servants and slaves." Id. at 198 (footnote omitted).
And be it further Enacted by the Authority aforesaid, That all
and every part of the Common Law of England, where the
same is not altered by . . . the particular Constitutions,
Customs and Laws of this Province, . . . is hereby made and
declared to be in as full Force and Virtue within this Province,
as the same is or ought to be within the said Kingdom of
England . . . .

North Carolina followed suit in 1715, with the following flourish:
"[T]he Laws of England are the Laws of this Government, so far as
they are compatible [sic] with our Way of Living and Trade . . . ." 52
Presumably, the criminalization of suicide was compatible with
Carolinian life, for no statute was enacted abrogating that aspect of
English law during the Colonial period. In fact, there is evidence that
suicide was treated as a crime in South Carolina even before formal
reception of the common law.

On April 9, 1706, the South Carolina Assembly enacted a statute
which charged coroners' juries with investigating and declaring the
circumstances under which people died. In each case presented to a
jury, the panelists were required to determine whether the deceased
had died as a result of "Felony or by Mischance and Accident, and if
by Felony, whether of his own or another." 53 If the deceased had "died
of his own Felony, then [the jurors were required] to enquire of the
Manner, Means and Instrument, and Circumstances concurring." 54
Perhaps the best evidence of the criminal character of suicide in South
Carolina is found in the oath that coroners' jurors were obliged to
take:

If it appear to be Self-Murder, the Inquisition must conclude
after this Manner, viz.

And so the Jurors aforesaid say upon their Oaths, that the
said A.B. in Manner and Form aforesaid, then and there
voluntarily and feloniously as a Felon, of himself did kill
and murder himself, against the Peace of our Sovereign
Lady the Queen, [sic] her Crown and Dignity. 55

91. 1 THE EARLIEST PRINTED LAWS OF SOUTH CAROLINA, 1692-1734, at 322
(J. Cushing ed. 1978) (emphasis in original).
92. 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, 1669-1751, at 59 (J.
Cushing ed. 1977).
93. 1 THE EARLIEST PRINTED LAWS OF SOUTH CAROLINA, 1692-1734, supra
note 31, at 190 (emphasis added).
94. Id.
95. Id. at 192 (emphasis omitted).
Not only was suicide characterized as a crime in colonial South Carolina, but it was categorized with that species of felonious homicide known as murder.36 This classification would persist throughout most of the eighteenth century.37

The second pattern in the colonial legal treatment of suicide is illustrated by the New England colonies of Rhode Island and Massachusetts, both of which made suicide a crime by legislative enactment early in their histories. The first American statute to address the subject of suicide was enacted in 1647 by the General Assembly of Providence Plantations, a "commonwealth" of towns which later38 became the colony of Rhode Island. Ratified by freemen,40 the statute read:

_ Touching Murder, and first of Self-murder._

Self-murder is by all agreed to be the most unnatural, and it is by this present Assembly declared, to be that, wherein he that doth it, kills himself out of a premeditated hatred against his own life or other humor: his death being presented and thus found upon record by the coroner, his goods and chattels are the king's custom, but not his debts nor lands; but in case he be an infant, a lunatic, mad or distracted man, he forfeits nothing.41

36. For the distinction between felonious homicide and murder, see, _e.g._, Blackstone's typology of homicide set out in the Appendix; _see also supra_ note 21.

37. The American Revolution in the late 1700's may have caused a change in colonial treatment of suicide as part of wide-range, general changes. _See infra_ notes 61-65 & accompanying text. Although the precise status of the English common law in many of the colonies was unclear, it appears that Georgia had received the common law on a de facto basis by the middle of the eighteenth century. _See J. Goodenow, HISTORICAL SKETCHES OF THE PRINCIPLES AND MAXIMS OF AMERICAN JURISPRUDENCE, IN CONTRAST WITH THE DOCTRINES OF THE ENGLISH COMMON LAW ON THE SUBJECT OF CRIMES AND PUNISHMENTS_ 228 (1972). New York received the common law in 1691, _THE EARLIEST PRINTED LAWS OF NEW YORK, 1665-1693_, at 19 (J. Cushing ed. 1978), while New Hampshire judges were applying English law in 1679. _J. Goodenow, supra_, at 219.


39. The religious dissident Roger Williams founded a settlement at Providence in 1636. Seven years later he received a "charter of civil incorporation" from Parliament. The resulting "commonwealth" eventually became Rhode Island. _See F. Bremer, supra_ note 38, at 85-86; _see also THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, 1647-1719_, at vii (J. Cushing ed. 1977).

40. _F. Bremer, supra_ note 38, at 85.

Massachusetts, authorized as early as 1629 to make "all Manner of Wholesome and reasonable Orders, Lawes, Statutes and Ordinnces, . . . not contrairie to the Lawes of this our Realme of England,"42 criminalized suicide in 1660. Its statute betrayed both a religious purpose and a secular justification:

SELF-MURTHER.

This Court considering how far Satan doth prevail upon several persons within this Jurisdiction, to make away themselves, judgeth that God calls them to bear testimony against such wicked and unnatural practices, that others may be deterred therefrom;

Do therefore Order, That from henceforth, if any person Inhabitant or Stranger, shall at any time be found by any Jury to lay violent hands on themselves, or be wilfully guilty of their own Death, every person shall be denied the privilege of being Buried in the Common Burying place of Christians, but shall be Buried in some Common High-way where the Select-men of the Town where such person did inhabit shall appoint, and a Cart-load of Stones laid upon the Grave as a Brand of Infamy, and as a warning to others to beware of the like Damnable practices.43

Rhode Island followed the examples of its predecessor (Providence Plantations) and its neighbor (Massachusetts) in enacting suicide legislation in 1663.44 This legislation was a virtual mirror of the 1647 Providence Plantations statute. Not until 1700 did Rhode Island receive the common law from England.45

The third pattern of treatment of suicide in the colonies differed markedly from the others. Instead of mimicking the English experience, these colonies rejected the notion that suicide is—or rather should be—a crime. William Penn is particularly responsible for the divergence. In 1681, Penn received a proprietary charter from King Charles II of England,46 a charter which, among other things, granted Penn exclusive law-making power over his subjects.47 On April 25,
1682, Penn exercised this power by issuing a "Frame of Government for Pennsylvania" and a body of laws known as the "Great Law of 1682." The "Great Law," reflecting both Penn's idealism and his belief in the fallibility of human institutions, "made a spectacular departure from English criminal law," particularly in the area of capital punishment. Daniel Boorstin wrote that: "Instead of the numerous capital crimes in the England of that day, only treason and murder were punishable by death in Pennsylvania." Penn's influence was also strong in the area of suicide.

In 1701, William Penn issued a "Charter of Privileges to the Province & Counties" of Pennsylvania and Delaware. This document, which set forth the rights and duties of Penn's subjects, contained the following provision: "EIGHTHLY: If any person, through Temptation or melancholy, shall Destroy himself, his Estate, Real & Personal, shall, notwithstanding, Descend to his wife and Children or Relations as if he had Died a natural death . . . ." The effect of this provision was to decriminalize suicide, for forfeiture had been the primary means of punishing self-destruction in England and in those colonies which had followed the English practice. Penn's "Charter of Privileges" has been called "remarkably liberal for the times," and indeed it was; it was not until after the Declaration of Independence, some seventy-five years later, that states began, as a general matter, to incorporate into their constitutions broad provisions for the abolition of forfeiture sanctions. These states illustrate the fourth pattern in the early American treatment of suicide.

Maryland and New Jersey received the English common law upon

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48. D. Boorstin, supra note 5, at 54, 42, 47.  
49. See id. at 42-43; The Earliest Printed Laws of Pennsylvania, 1681-1713, supra note 48, at vii.  
50. D. Boorstin, supra note 5, at 47.  
51. Id.  
54. See infra notes 136-47 & accompanying text.  
56. See Wright, Criminal Aspects of Suicide in the United States, 7 N.C. Cent. L.J. 156, 157 (1975); see also infra notes 58-60 & accompanying text.
their establishment as proprietary colonies by the Crown." Both, therefore, initially characterized suicide as a crime. By 1776, however, a revolutionary wind had commenced to blow in America, and many vestiges of the English past were conveniently swept away, including the characterization of suicide as a crime. Section XVII of the 1776 New Jersey Constitution addressed itself to precisely this issue: "That the estates of such persons as shall destroy their own lives, shall not, for that offence, be forfeited; but shall descend in the same manner, as they would have done, had such persons died in the natural way . . . ." Maryland's Constitution of 1776 contained a similar provision, as did that of Pennsylvania in 1790.

Increasingly, the American Revolution is being viewed as a vehicle for social and legal, rather than just political, change. Samuel Walker, for instance, asserted that during and after the Revolution, Americans were "particularly receptive to emerging ideas and practices." William Nelson believed that political separation from Great Britain "set loose new intellectual and social currents which ultimately transformed the legal and social structure." With respect to the legal status of suicide, there occurred a fundamental change in at least two colonies immediately following the Declaration of Independence.

57. Initially, in Maryland, English law was applied only in select areas, such as homicide, robbery, burglary, and rape. N. Mereness, Maryland As a Proprietary Province 258-59 (reprint ed. 1968). By 1662, however, English law applied to all areas. See generally id. at 258-70; The Laws of the Province of Maryland, at v (J. Cushing ed. 1978). In East and West Jersey, merged into the province of "New Jersey" in 1702, The Earliest Printed Laws of New Jersey, 1703-1722, at vii (J. Cushing ed. 1978), the "Duke of York's Laws" applied after 1664. This body of law was "generally English in its derivation, tempered by local needs and customs." Id.
58. 5 Federal and State Constitutions, supra note 52, at 2597.
59. 3 id. at 1688.
60. 5 id. at 3101. The 1776 Pennsylvania Constitution made no reference to either forfeiture or suicide. See id. at 3081.
61. See, e.g., Jameson, The Revolution As a Social Movement, in The American Revolution: How Revolutionary Was It? 104 (G. Billias 3d ed. 1980); Jensen, The Revolution As a Democratic Movement, in The American Revolution: How Revolutionary Was It? id., at 110. Contra R. Brown, Middle-Class Democracy and the Revolution in Massachusetts, 1691-1780 (1955). Although he declined to define the Revolution as the cause of change, Morton Horwitz wrote that "[d]uring the eighty years after the American Revolution, a major transformation of the legal system took place, which reflected a variety of aspects of social struggle." M. Horwitz, supra note 2, at xvi.
62. S. Walker, supra note 5, at 54.
63. W. Nelson, supra note 2, at 5. Nelson's immediate focus was upon Massachusetts.
Whereas before 1776 suicide had been characterized as a crime subject to an array of punishments, after 1776 it was a legally unobjectionable—and hence, unpunishable—act. It remains to be seen just what intellectual and social forces produced this shift in policy. For present purposes, it is enough to explore some of the reasons that were advanced for characterizing suicide as a crime in the first place.

II. RATIONALE: THE FUNCTION OF LAW IN SOCIETY

Early legal scholars adduced at least three distinct arguments for characterizing suicide as a crime. Because these arguments tend to be esoteric, some background on the English conception of law is necessary. To Henry de Bracton, law was more than just an instrument of punishment. To be sure, it had its corrective component: "Law is a general command, and the decision of judicious men, the restraint of offences knowingly or unwittingly committed, the general agreement of the res publica." But Bracton also believed that law had a pedagogical function; it existed, in part, to instruct people in correct modes of behavior. "[Law's] special meaning is a just sanction, ordering virtue and prohibiting its opposite." In this view, law was expected to step in and "nudge" people toward rectitude whenever they failed to live up to their potential as rational, moral actors.

When the American colonies began to enact legal codes, they accepted this dual capacity of the law both to punish and to guide. A 1647 statute of Providence Plantations expresses both goals: "The law is made or brought to light, not for a righteous man, who is a law unto himself, but for the lawless and disobedient . . . . [W]e do agree to make or rather to bring such laws to light for the direction or correction of such lawless persons . . . ." William Penn, writing some thirty-five years later, insisted: "They weakly err, that think there is no other use of government, than correction, which is the coarsest part of it: daily experience tells us, that the care and regulation of many other affairs, more soft, and daily necessary, make up much of the greatest part of government . . . ." The ancient notion that law was a
teacher, as well as a disciplinarian, helps to explain why suicide was characterized as a crime in both England and several American colonies. To the modern mind, suicide may appear to be an act without social ramifications because it involves an act of inward violence. It was not so conceived by English jurists and certain colonial American legislators. William Blackstone, for instance, firmly believed that suicide, like other crimes which “affect and injure individuals or private subjects,” had social ramifications:

Were these injuries indeed confined to individuals only, and did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs, for which a satisfaction would be due only to the party injured . . . . But the wrongs which we are now to treat are of a much more extensive consequence . . . .

Blackstone’s typology of homicide is evidence that he regarded suicide as a crime not “confined to individuals only.” In this typology, he placed suicide under the heading of “homicide,” which he defined as “destroying the life of man.” In explanation, Blackstone wrote that: “[T]he law sets so high a value upon the life of a man that it always intends some misbehavior in the person who takes it away, unless by the command or express permission of the law.” It did not matter to Blackstone, apparently, that in the case of suicide, the person whose life was “taken” and the person who “took” that life were one and the same.

Colonial Americans, especially in New England, had little difficulty conceiving of suicide as an offense against society, and thus in characterizing it as a crime. Their social ethic emphasized order, courage of virtue, and prevention of vice and immorality, shall be made and constantly kept in force . . . .” Id. at 3091 (emphasis added).

70. See supra notes 17-45 & accompanying text. Aristotle must be credited with the conception of law as a teacher. In his view, the purpose of law was “a moral purpose; they are ‘intended to make men good and righteous.’” THE POLITICS OF ARISTOTLE 367 (E. Barker ed. 1971). “[I]ntellectual virtue,” wrote Aristotle, “in the main owes both its birth and its growth to teaching . . . .” ARISTOTLE, THE NICOMACHEAN ETHICS 28 (D. Ross trans. reprint ed. 1980).

71. 4 W. BLACKSTONE, COMMENTARIES *176 (emphasis in original).
72. Id. (emphasis added). See H. HENDIN, SUICIDE IN AMERICA 13 (1982); Silvering, Suicide and Law, in CLUES TO SUICIDE 82 (E. Shneidman & N. Farberow eds. 1957).
73. 4 W. BLACKSTONE, supra note 71, at *177; see infra Appendix.
74. 4 W. BLACKSTONE, supra note 71, at *186.
75. I include Connecticut, Massachusetts, New Hampshire, and Rhode Island within this term. See F. BREMER, supra note 38, at vii-viii, for a similar treatment.
hesion, and uniformity rather than individualism and personal liberty. In 1648, the Puritan theologian Thomas Hooker expressed the dominant view with respect to the individual's role in society:

"[E]very part is subject to the whole, and must be serviceable to the good there of, and must be ordered by the power thereof.... It is the highest law in all Policy Civill or Spirituall to preserve the good of the whole; at this all must ame [sic], and unto this all must be subordinate."76

Among other things, to commit suicide was to abandon one's "calling" from God,77 and thus to abdicate one's responsibility for the "good of the whole."78 Hooker did not address the possibility that suicide could make society as a whole better off.79

The precise legal status of suicide varied depending upon the person doing the characterizing. Blackstone, as we have seen, considered suicide to be a form of homicide, and in particular, a form of felonious homicide.80 This he described as "the highest crime against the law of nature that man is capable of committing."81 As such, it was morally blameworthy and fully deserving of punishment. Other jurists placed suicide into a somewhat different niche. In 1562, the justices of the Commons Bench of England described the suicide of their former colleague Sir James Hales as follows:

"[A]s to the quality of the offense which Sir James has here committed, ... it is in a degree of murder, and not of homicide or manslaughter, for homicide is the killing a man feloniously without malice prepense, (c) but murder is the killing a man with malice prepense. And here the killing of himself was prepensed and resolved in his mind before the act was done."82

77. For a discussion of the Puritan concept of "calling," see F. BREMER, supra note 38, at 91-92; S. FOSTER, supra note 1, at 100.
78. T. HOOKER, quoted in S. FOSTER, supra note 1, at 16. More than anything else, the American Puritans emphasized social order: "'Order' insured that each man performed that function in which he best served the good of all men, not just ... the dictates of his own unstable whims. ... [I]f any man were to follow his individual desires then every man would ultimately suffer for it." S. FOSTER, supra note 1, at 15.
79. See Brandt, The Morality and Rationality of Suicide, in A HANDBOOK FOR THE STUDY OF SUICIDE, supra note 9, at 67 ("[S]urely there have been many suicides whose demise was not a noticeable loss to society . . . ."); M. BATTIN, ETHICAL ISSUES IN SUICIDE 96-106 (1982).
80. See supra notes 73-74 & accompanying text; see also infra Appendix.
81. 4 W. BLACKSTONE, supra note 71, at *178.
A decision from the King's Bench more than a century later confirmed this view of suicide as murder: "[T]his is as hainous [sic] a murder as any, and is done rather to avoid the shame and loss of their posterity." Virginian authorities eventually concurred in this interpretation, for they regarded suicide as "the murder of one's self." However interpreted, as a form of felonious homicide or as murder, suicide retained its status as a criminal offense.

Three reasons were usually advanced for characterizing suicide as a crime. First, it violated one of nature's most fundamental "laws," that of self-preservation. Second, it infringed upon the king's peace, therefore depriving him of one of his subjects. Third, it prevented the actor from realizing his or her potential as a contributing member of the community. Each of these reasons was cited, at one time or another, by judges and legislators concerned with prohibiting suicide.

The argument that suicide violated a "fundamental law" of nature was first advanced by St. Thomas Aquinas. He wrote: "It is altogether unlawful to kill oneself, . . . because everything naturally keeps itself in being, and resists corruptions so far as it can." The Commons Bench of England employed a similar line of reasoning in the case of Hales v. Petit in 1562, where the court submitted that suicide was "contrary to the rules of self-preservation, which is the principle of nature, for every thing living does by instinct of nature defend itself from destruction . . . ; to destroy one's self is contrary to nature, and a thing most horrible." The Massachusetts Code of 1660, as we have seen, described suicide as a "wicked and unnatural practice[.]", thus continuing the reliance upon natural law concepts. However, these judges and legislators consistently failed to justify their predication of legal rules upon the natural "order," which may or may not have been correctly described.

84. A. Scott, supra note 27, at 198.
87. See supra note 43 & accompanying text.
88. The Colonial Laws of Massachusetts, supra note 43, at 157 (emphasis added). The Puritan theologian Increase Mather preached a sermon, in 1682, in which he called suicide "the most unnatural" kind of murder. I. Mather, A Call to the Tempted: A Sermon on the Horrid Crime of Murder (1723-1724).
89. Sociobiologists have begun to attack the assumption that only "self-interested" behavior has evolutionary survival value. If one accepts the gene, rather than the individual, as the fundamental unit of natural selection (as do most sociobiologists), then at least some altruistic acts have survival value. That is to say, on at least some occasions it is in the "best interests" of an individual to sacrifice himself
The argument that suicide "infringes upon the king's peace" has
an even more ancient origin. Aristotle reportedly wrote that a suicide
"treats the state unjustly;"90 Aquinas argued: "Every man is part of the
community, and so, as such, he belongs to the community. Hence by
killing himself he injures the community."91 This reasoning was fol-
lowed by the Commons Bench in Hales v. Petit,92 which stated that
"James [Hales], not having God before his eyes, but seduced by the art
of the devil, . . . voluntarily entered into the . . . river, and himself
therein then feloniously and voluntarily drowned, against the peace of
the . . . late King and Queen."93 In killing himself, Sir James had "killed
one of the King's subjects,"94 and thus deprived the king of an economi-
cally-functioning individual. This rationale was sometimes phrased in
terms of disloyalty to the community: The suicide "had enjoyed the sup-
port and protection of the civil and political body during his infancy
and youth, and, by taking his own life, he shook off the responsibilities
and shirked the duties devolving upon him as a member of the com-
monwealth."95 This statement reinforces the view, at least in New
England, that the individual was subservient to the community.96

The third rationale for the criminalization of suicide is perhaps
the most removed from modern experience, for it draws upon the
sometimes forgotten Christian underpinnings of English law. Ortho-
dox Christian morality holds that in addition to the the duties owed

or herself for the benefit of other individuals, because either the actor's genes
themselves, or genes substantially similar to them, will survive and continue to spread
themselves throughout the population. Examples of this would include assisting those
who are likely to reciprocate in the future (enhancement of the actor's long-run sur-
vival prospects), and taking steps to promote the welfare of one's family members
(preservation of identical genes). In this view, there are most certainly suicides which
have evolutionary survival value—those which result in the preservation of family
members who would otherwise (for one reason or another) die. Suicide can thus be viewed as a "natural" response in certain situations. See generally E. Wilson,
Sociobiology: The New Synthesis (1975); R. Dawkins, The Selfish Gene (1976);
P. Singer, The Expanding Circle: Ethics and Sociobiology (1981). In any event,
it is patently fallacious to argue that because something "is" the case, it "ought" to be
the case. For useful discussions of this "Naturalistic Fallacy," see P. Singer, supra; R.
Hare, The Language of Morals 79-93 (1964); Frankena, The Naturalistic Fallacy,
90. Brandt, supra note 79, at 67 (emphasis and footnote omitted).
91. Id. (emphasis added) (footnote omitted).
93. Id. at 255, 75 Eng. Rep. at 390 (emphasis added).
94. Id. at 262, 75 Eng. Rep. at 402; 4 W. Blackstone, supra note 71, at
*189.
95. Evans, Bugs and Beasts Before the Law, 54 Atl. Monthly 234, 246
(1884).
96. See supra notes 75-78 & accompanying text. The primary motivation for
the subservience of the individual was economic. See infra notes 182-90 & accompany-
ing text.
others in society, an individual has certain duties to himself or herself. Among these are the duty to cultivate one's intellect, to promote moral virtue, to "adopt some coherent plan of life according to which, by morally permissible actions, [the individual's] mental and physical powers may be developed," and to refrain from willful self-mutilation or impairment of one's health. According to this system of morality, suicide is clearly an impermissible act. It is not only an extreme form of bodily mutilation, but also totally negates the development of one's intellect and the pursuit of moral "excellence." Since English law developed from and drew upon this body of Christian morality, it incorporated these concepts of duty into its treatment of suicide.

Sometimes the foregoing argument was phrased in theological terms. Instead of asserting that the individual owed duties to himself or herself, it was said that the individual owed duties to God, including the duty to refrain from committing suicide. English jurists and colonial legislators were very much influenced by this argument. In *Hales v. Petit*, after citing the natural law argument and the argument that suicide "infringed upon the king's peace," the judges of the Commons Bench averred that suicide was an offense against God. "It is a breach of His commandment, *thou shalt not kill* . . . ." Blackstone described life as "the immediate gift of the great Creator," and claimed that, as such, it was something of which "no man can be entitled to deprive himself." The person who commit-

97. See, e.g., C. COPPENS, A BRIEF TEXT-BOOK OF MORAL PHILOSOPHY (1895), wherein three categories of "duty" are set forth: "Our Duties to God," "Our Duties to Ourselves," and "Our Duties to Other Men." Id. at 74-101. For a modern treatment, see A. DONAGAN, THE THEORY OF MORALITY 76-81 (1977) ("Duties of Human Beings to Themselves"). For a discussion of two main types of moral theory, "ideal" (wherein individuals owe duties to both themselves and others) and "discretionary" (wherein individuals owe duties only to others), see L. SUMNER, ABORTION AND MORAL THEORY 85, 162-64, 166-74 (1981).
98. C. COPPENS, supra note 97, at 86.
99. Id. at 86-87.
100. A. DONAGAN, supra note 97, at 80 (emphasis omitted).
101. Id. at 79; C. COPPENS, supra note 97, at 87.
102. The influential scholar Norman St. John-Stevas stated that the English legal tradition was "deeply influenced by the Christian attitude to suicide." N. ST. JOHN-STEVAS, supra note 85, at 42.
104. See supra notes 85-89 & accompanying text.
105. See supra notes 90-96 & accompanying text.
107. 4 W. BLACKSTONE, supra note 71, at *177.
108. Id.
ted suicide was “invading the prerogative of the Almighty and rushing into his immediate presence uncalled for.”

It is impossible to overemphasize the extent to which colonial law reflected religious doctrine. It has been said that “the primary objective of criminal law in the prerevolutionary period was to give legal effect to the community’s sense of sin and to punish those who breached the community’s taboos.” This interrelationship between crime and sin was most evident in Puritan New England, where it was believed that “God had rules for civil policy as well as for ecclesiastical . . . .” One of those “rules” was that it was wrong to commit suicide, and the Puritans were quick to transform that “wrong” into a legal proscription. The 1660 Massachusetts statute that criminalized suicide ascribed the self-destructive impulse to “Satan,” and warned the citizenry that “God calls them [suicides] to bear testimony against such wicked . . . practices . . . .” By an imperceptible but powerful process of reasoning, the Puritans derived a duty to others from a duty to God. Crime, in a manner of speaking, had become synonymous with sin.

III. DEFENSES AND EXCEPTIONS

Initially, all homicides were treated alike under English law. It was not until the medieval period that “royal lawyers [began] to distinguish between the guilt of various forms of homicide by reference to the circumstances under which they were committed.” Gradually, exceptions were carved out for misadventure (accident) and self-defense, and ultimately the various shadings of culpability described by Blackstone were used as the basis for criminal punishment. It became an established feature of English criminal law that a particular act could be considered objectively “wrong,” and yet not deserve punishment because the actor was not deemed to be “blameworthy.”

109. Id. at *189.
110. W. NELSON, supra note 2, at 37.
111. S. FOSTER, supra note 1, at 4. The interrelationship can be seen clearly in an early Connecticut criminal code, where biblical citations are given for each criminal offense. See THE EARLIEST LAWS OF THE NEW HAVEN AND CONNECTICUT COLONIES, 1639-1673, at 18-20 (J. Cushing ed. 1977).
112. See supra note 43 & accompanying text.
113. THE COLONIAL LAWS OF MASSACHUSETTS, supra note 43, at 137.
115. See infra Appendix.
116. 3 W. HOLDSWORTH, supra note 114, at 313-14.
117. According to R.B. Brandt, “it is usually thought that an agent is not blameworthy or sinful for an action unless it is a reflection on him.” Brandt, supra note 79, at 62 (emphasis in original).
Thus, the wedge was driven between the concepts of "wrongfulness" and "culpability." 118

That same wedge was used very early on with respect to suicide, where the evil intent of the actor became the sine qua non of legal culpability. According to Bracton, conviction of a crime could not occur without a malicious state of mind: "Remove will and every act will be indifferent. It is your intent that differentiates your acts, nor is a crime committed unless an intention to injure exists; it is will and purpose which distinguish maleficia." 119 This emphasis upon the state of mind of the actor resulted in two major exceptions from, or defenses to, the general rule that suicide was a culpable act.

118. The concept of "culpability" can be viewed as an exception to the general rule of "wrongfulness." Aristotle found exception-carving to be an intrinsic part of the legal process:

"It is impossible for every rule to be written down precisely: rules must be expressed in general terms, but actions are concerned with particulars. [The first form of a law will thus be inexact; and it will need to be changed in the light of further experience of men's actions in detail.]"

The Politics of Aristotle, supra note 70, at 75 (editor's brackets). The philosopher R.M. Hare has traced a similar process in moral reasoning. See R. Hare, supra note 89, at 56-78; Hare, Ethical Theory and Utilitarianism, in Contemporary British Philosophy: Personal Statements 122-23 (H. Lewis ed. 1976). That colonial legislators made the distinction between "wrongfulness" and "culpability" is clear from their enactments. The Massachusetts Body of Liberties of 1641 allowed exceptions from culpability for homicides committed out of necessity, in self-defense, and through accident. E. Powers, Crime and Punishment in Early Massachusetts, 1620-1692, at 545 (1966). The colonies of Connecticut and New Haven did the same. The Earliest Laws of the New Haven and Connecticut Colonies, 1639-1673, supra note 111, at 18, 83. A later Massachusetts statute decreed that if a person killed another "in the just and necessary defence of his life, or the life of any other," while the latter was attempting to rob, murder, or break into a dwelling house, then the actor would be "holden blameless." The Colonial Laws of Massachusetts, supra note 43, at 92.

119. 2 H. Bracton, supra note 20, at 23 (emphasis added). Unfortunately, from the modern perspective, Bracton carried the analysis a bit too far; he conceived evil intent to be a sufficient, rather than merely a necessary, condition of culpability. As such, conviction could occur where the intended act had not yet occurred. "[I]f one lays violent hands upon himself without justification, through anger and ill-will, as where wishing to injure another but unable to accomplish his intention he kills himself, he is to be punished . . . because the felony he intended to commit against the other is proved . . . ." Id. at 424 (emphasis added). But cf. Hales v. Petit, 1 Plowden 253, 259-60, 75 Eng. Rep. 387, 397 (1562), some three centuries later, where the other extreme is taken. There, the Commons Bench divided the suicide act into three parts: the "imagination," the "resolution," and the "perfection." In assigning weights to these parts, the court submitted that "the doing of the act is the greatest in the judgment of our law, and it is in effect the whole, and the only part that the law looks upon to be material. For the imagination of the mind to do wrong, without an act done, is not punishable in our law . . . ." Id. (emphasis added). Today, most crimes require the presence of both of these elements—the subjective mens rea and the objective actus reus—before conviction can occur. See, e.g., Model Penal Code §§ 2.01-.02 (Proposed Official Draft 1962).
The first exception was that suicides committed in an abnormal emotional state were non-culpable. Such an emotional state could be induced by extreme old age, a physical infirmity or disability, or severe and prolonged pain. Bracton wrote that "if a man slays himself in weariness of life or because he is unwilling to endure further bodily pain, he may have a successor [i.e., his property will not be forfeited to the king]." In these cases, the distinction was that the actor's intention was not to harm anyone, but rather to escape a condition of physical debilitation. William Penn's 1701 "Charter of Privileges" decreed that persons who commit suicide "through Temptation or melancholly" would not suffer forfeiture of their property at the hands of the authorities. This provision acknowledged, in effect, that in at least some circumstances, suicide would not be treated with the customary animus by the legal system.

The second exception to the general rule of culpability derived from the fact that suicide could be a product of mental disorder. As such, it would not be "intentional" behavior. In the year 967, King Edgar decreed that a suicide's goods "shall be forfeited to his lord unless he was [driven to the act] by madness or illness." Bracton concurred in the view that suicide was not a felony where the person committing it was of unsound mind: "But what shall we say of a madman bereft of reason? And of the deranged, the delirious and the mentally retarded? . . . Quaere whether such a one commits felony de se. It is submitted that he does not . . . ." The disordered individual, in this view, was no more culpable than an animal; in fact, wrote Bracton, such individuals were "not far removed from brutes." Nevertheless, the person who committed suicide "under pretense of madness while enjoying lucid intervals" was held fully responsible for his or her act.

William Holdsworth, the great historian of English law, said that the insanity exception was used extensively by English courts during

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120. Brandt, supra note 79, at 68.
121. 2 H. Bracton, supra note 20, at 424 (footnotes omitted). Blackstone made the same exception: "'If anyone, sinking under the pressure of grief, or weariness of life, disease, madness, or shame, shall prefer death, his conduct shall not be considered to the prejudice of his character.' " 4 W. Blackstone, supra note 71, at *189 n.(o) (citation omitted). Compare this statement with Brandt's observation, supra note 117.
122. See supra note 53 & accompanying text.
123. N. St. John-Stevas, supra note 17, at 234 (emphasis added).
124. 2 H. Bracton, supra note 20, at 424 (emphasis in original). Furthermore, Blackstone wrote: "The party must be of years of discretion and in his senses, else it is no crime." 4 W. Blackstone, supra note 71, at *189 (emphasis added).
125. 2 H. Bracton, supra note 20, at 424.
126. Id.; see also 4 W. Blackstone, supra note 71, at *190 ("[If a real lunatic kills himself in a lucid interval, he is a foel de se as much as another man.") (emphasis in original).
the medieval period, and that this "rendered the crime [of suicide] of very infrequent occurrence."127 Available evidence indicates that the same is true of those American colonies that characterized suicide as a crime. In both the 1647 Providence Plantations Code and the 1663 Code of Rhode Island, exceptions were made to the general rule of forfeiture where the suicide was "an infant, a lunatic, mad or distracted."128 In colonial Virginia, it was not uncommon for coroners' juries to give "verdicts of death while temporarily insane, in order to prevent . . . forfeiture."129 These divergences from the "letter of the law" show that legal rules had a hortatory as well as a prescriptive content. Although they expressed standards of conduct which were theoretically applicable to everyone, it was understood that some would not live up to expectations. For these individuals, the doctrine of non-culpability served as a "safety net."130

IV. PUNISHMENT

Because suicide was a crime that entailed the death of the transgressor, some punishment other than corporal chastening had to be devised. The judges of the Commons Bench in Hales v. Petit131 adverted to this difficulty: "[I]nasmuch as the person who did the act is dead, his person cannot be punished."132 Blackstone was also given pause: "What punishment can human laws inflict on one who has withdrawn himself from their reach?"133 Once the purposes of punishment were determined,134 the answer was threefold. First, the suicide's

127. 3 W. HOLDsworth, supra note 114, at 315-16; see also Rosen, supra note 9, at 13.
128. THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, 1647-1719, supra note 39, at 19, 59. The Massachusetts Body of Liberties of 1641 contained a generic exception from standard criminal punishment: "52. Children, Idiots, Distracted persons, and all that are strangers, or new commers [sic] to our plantation, shall have allowances and dispensations in any Cause whether Criminal [sic] or other as religion and reason require." E. POWERS, supra note 118, at 539.
129. A. SCOTT, supra note 28, at 108 n.193. "In some cases, on petition to the Governor the estate was given back to the family." A. SCOTT, supra note 27, at 198 n.15.
130. Puritans, especially, acknowledged a gap between the letter of the law and behavioral expectations. See, e.g., S. FOSTER, supra note 1, at 6 ("[Puritans] demanded good works but they knew that all men were sinful and that some men would commit overt sins . . . ."); Morgan, The Puritans and Sex, in INTERPRETING COLONIAL AMERICA: SELECTED READINGS 77 (J. Martin 2d ed. 1978). Viewed in this light, the Puritan prohibition on suicide does not seem so harsh.
132. Id. at 259, 75 Eng. Rep. at 397.
133. 4 W. BLACKSTONE, supra note 71, at *190; see also Barry, supra note 17, at 5 ("[T]he punishment of death cannot be inflicted on a dead man.").
134. See infra notes 161-90 & accompanying text.
goods were to be forfeited to the state; second, the suicide was denied a traditional Christian burial; and third, the suicide’s bodily remains were mutilated.\footnote{135}

The practice of forfeiting the property of a suicide to the state dates from the reign of King Edgar, in the year 967.\footnote{136} This practice led to the historical accident whereby suicide came to be categorized as a felony. At early common law, all crimes which occasioned the forfeiture of lands and goods were classified as felonies.\footnote{137} Since suicide usually involved forfeiture, it too was thought of as a felony. As English criminal law developed, the early distinction was lost on jurists and lawyers alike. Were it not for this process of “backward reasoning,”\footnote{138} suicide might have been classified as a misdemeanor or even as a less serious offense.

Initially, forfeiture was applied only where the suicide was accused of some other, previously committed crime and the punishment thus applied to the earlier offense. Bracton stated:

\begin{quote}
[A] felony is said to be done . . . where one has been accused of some crime and been arrested [or outlawed as] for homicide or with the proceeds of theft, or apprehended in the course of some evil deed and crime, and kills himself in fear of the crime that hangs over him; [such a person] will have no heir, because the felony previously committed, the theft or the homicide or the like, is thus convicted. But the goods of those who destroy themselves when they are not accused of a crime or taken in the course of a criminal act are not appropriated by the fisc . . . .\footnote{139}
\end{quote}

In modern terminology, the suicide created a “presumption” of guilt with respect to the earlier offense. Bracton’s interpretation, however,
did not control the subsequent development of English law, and forfeiture came to be used as the standard punishment for suicide itself.

English jurists disagreed as to the types of property that a suicide forfeited to the state. Bracton opined that both real and personal property escheated, unless there were exculpating circumstances. In that case, only personal property went to the king: "[I]f a man slay himself in weariness of life or because he is unwilling to endure further bodily pain, he may have a successor, but his movable goods are confiscated." The Commons Bench in *Hales v. Petit* agreed with Bracton: "As to the third point, what [a suicide] shall forfeit. It was agreed by all the justices, that he shall forfeit all his (e) goods, debts, and chattles [sic], real and personal, by reason of the offence aforesaid." However, Blackstone's later writings declared that only personal property escheated to the state; real property could be disposed of by will or by the laws of intestacy: "Neither can a felo de se make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture." The American colonies that characterized suicide as a crime followed Blackstone on this issue. The 1647 Code of Providence Plantations stated that only personal property escheated to the king: "[The suicide's] death being presented and thus found upon record by the

140. 2 H. BRACTON, supra note 20, at 424 (footnotes omitted).
142. Id. at 261, 75 Eng. Rep. at 400. The *Hales* case involved an interesting application of the forfeiture rule. At the time of Sir James's death, he and his wife were joint tenants in certain real property under a 20 year lease. As such, each was entitled to a right of survivorship. Ignoring this right, the court ruled that Hales's widow did not take the property on grounds that Sir James's suicide caused a forfeiture. "[T]he King cannot have a joint property with any person in one entire chattel." Id. Blackstone later explained: "[W]here the titles of the king and a subject concur, the King shall have the whole." 2 W. BLACKSTONE, supra note 71, at *409. "[I]t is not consistent with the dignity of the crown to be partner with a subject." Id. Based on this reasoning, Sir James's widow was deprived of her survivorship interest.
143. Blackstone's *Commentaries* were written between 1765 and 1769, some 200 years after the *Hales* case. S. WALKER, supra note 5, at 44. The first American edition appeared in 1771-1772 and, according to Walker, "was an immediate success." Id.; see also D. BOORSTIN, supra note 5, at 201 ("Blackstone's *Commentaries* . . . was the most ambitious and most successful effort ever made to reduce the disorderly overgrowth of English law to an intelligible and learnable system.") (emphasis in original). By 1775, the *Commentaries* "had sold nearly as many copies in America as in England." Id. at 202.
144. 2 W. BLACKSTONE, supra note 71, at *499 (emphasis added).
145. See supra note 44 & accompanying text.
coroner, his goods and chattels are the king's custom, but not his debts nor lands . . . "146 In Virginia, the common law embodied the same rule. In one case, a suicide had left several negroes as part of his estate. The Attorney General made an initial finding that the negroes were real estate, and ordered that they pass to the widow as dower property. The General Court overruled this opinion, however, and categorized the negroes as chattels. As such, they were forfeited to the Queen.147

The second form of punishment—denying a Christian burial to a suicide—dates to the Council of Braga in the year 563.148 Instead of the usual burial rites, the body of the deceased was interred at a convenient crossroad. According to the historian George Rosen, this practice was to "make certain that the spirit of the dead would not return to haunt or harm the living."149 Like other practices and customs that developed gradually in English society, no legal authority was ever given for crossroad burial; it did, nonetheless, become an accepted part of the criminal law.150 Leon Radzinowicz found evidence of crossroad burials in England as early as 1732 and as late as 1823, at which time the practice was formally abolished.151

Crossroad burials also occurred in colonial America. Arthur Scott described the burial of a suicide at a "cross path" in Virginia in 1661.152 The 1660 Massachusetts statute153 decreed that suicides would be "denied the privilege of being Buried in the Common Burying place of Christians, but shall be Buried in some Common Highway where the Select-men of the Town where such person did inhabit shall appoint."154 However, further research is needed to learn whether and to what extent this statute was actually applied.

147. A. SCOTT, supra note 27, at 108 n.193. These events occurred in 1707.
149. Rosen, supra note 9, at 14 (footnote omitted); see also N. ST. JOHN-STEVAS, supra note 17, at 233 ("that the malign influence of the body might be diffused and rendered harmless"). Radzinowicz gave this reason: "[Suicides] were buried at a cross-roads because the latter formed a cross or crucifix and therefore made the place only second in sanctity to a churchyard." 1 L. RADZINOWICZ, supra note 29, at 197 n.9.

150. 1 L. RADZINOWICZ, supra note 29, at 197.
151. Id. at 196-97; 5 W. HOLDSWORTH, supra note 114, at 395. The statute of July 8, 1823, An Act to alter and amend the Law relating to the Interment of the Remains of any Person found Felo de se, 4 Geo. 4, ch. 52 (1823), forbade coroners to inter suicides in public highways. Instead, the coroners were required to direct interment in a private area, but without Christian burial rites. The interment had to be completed within twenty-four hours of the inquisition and could be done only between the hours of nine o'clock and midnight.
152. A. SCOTT, supra note 27, at 198 n.15.
153. See supra note 43 & accompanying text.
154. THE COLONIAL LAWS OF MASSACHUSETTS, supra note 43, at 137.
Bodily mutilation, the third form of punishment for suicide, dates to the time of the Athenians.\textsuperscript{155} In England, mutilation consisted of driving a stake through the felon's body and, in some cases, placing a stone over the corpse's face.\textsuperscript{156} It was believed that such practices would prevent the "ghost" of the felon from returning to earth.\textsuperscript{157} Although practiced only sporadically in England,\textsuperscript{158} the custom seems to have passed to at least one American colony. On August 26, 1661, a coroner's jury in Virginia ordered that the body of a suicide "be buried at the next cross path as the Law Requires [with] a stake driven through the middle of him in his grave."\textsuperscript{159} Though this punishment seems excessive by modern standards, it was thought eminently necessary in order to ward off evil spirits. There were, however, more secular and tangible reasons for punishing suicide.

V. JUSTIFICATION FOR PUNISHMENT

Of the four justifications usually given for criminal punishment—rehabilitation, specific deterrence, retribution, and general deterrence—only two, retribution and general deterrence, were applicable to suicide. The others were ruled out by the very nature of the act.\textsuperscript{160} To understand the use of retribution as a justification for punishment, it is necessary to understand certain fundamentals of English legal thought.

English legal scholars drew heavily upon medieval scholasticism for their rules and practices.\textsuperscript{161} In scholastic thought, the overriding goal of the legal system was to insure order and continuity in the cosmos, which they conceived to be a seamless web. If a "rent" appeared in that web, by whatever means, it had to be repaired.\textsuperscript{162} This

\textsuperscript{155} 4 W. BLACKSTONE, \textit{supra} note 71, at *189; Evans, \textit{supra} note 95, at 246. St. John-Stevas wrote that the English practice of "dishonoring the corpse" of a suicide grew out of custom. N. ST. JOHN-STEVAS, \textit{supra} note 17, at 253. In 1777 in Scotland, where suicide was never characterized as a crime, an Edinburgh mob exhume the body of a suicide and "'tossed it about till they were weary,'" T. SMITH, \textbf{BRITISH JUSTICE: THE SCOTTISH CONTRIBUTION} 110 (1961) (citation omitted).

\textsuperscript{156} Barry, \textit{supra} note 17, at 6; 1 L. RADZINOWICZ, \textit{supra} note 29, at 197.

\textsuperscript{157} 1 L. RADZINOWICZ, \textit{supra} note 29, at 197; N. ST. JOHN-STEVAS, \textit{supra} note 17, at 253.

\textsuperscript{158} See 1 L. RADZINOWICZ, \textit{supra} note 29, at 197. It was abolished in 1823 along with crossroad burial, see \textit{supra} note 151.

\textsuperscript{159} A. SCOTT, \textit{supra} note 27, at 198 n.15.

\textsuperscript{160} Since there was no longer a person to "rehabilitate," or to prevent from engaging in further criminal activity, it was absurd to justify punishment of suicide on those grounds.

\textsuperscript{161} See Evans, \textit{supra} note 95, at 237.

\textsuperscript{162} See id. at 255 passim, for a fascinating analysis of the feudal mind; see also S. FOSTER, \textit{supra} note 1, at 22, for a discussion of Puritan cosmology (The public was "a sum far greater than the simple total of its individual parts[,] and . . . the public's
retributivist attitude was reflected in several medieval legal doctrines, two of which—deodand and lex talionis—shed light on the medieval treatment of suicide.

The doctrine of deodand held that if a reasonable creature, i.e., a human being, was killed by a personal chattel, such as a slave or a domesticated animal, then that chattel was forfeited to the crown. The same rule applied when death was caused by an inanimate object:

‘If a man, in driving a cart, tumbles to the ground and loses his life by the wheel passing over him, if a tree falls on a man and causes his death, or if a horse kicks his keeper and kills him, then the wheel, the tree, and the horse are deodands pro rege, and are to be sold for the benefit of the poor.'

The wheel, the tree, and the horse, having done “wrong,” had to be punished. It was for the same reason that “the property of a suicide was deodand.”

The Puritan worldview, as well as that of the other American colonists, was “predominantly medieval.” Colonial Americans placed the same emphasis upon social order, stability, and punitive justice as had the medieval scholastics. Not unexpectedly, therefore, the colonists embraced the doctrine of deodand. In 1637, a tree which had fallen on and killed a colonist in Maryland was “forfeited to the Lord Proprietor.” In 1673, after convicting a colonist of bestiality with a horse, the General Court tersely ordered that “the mare you abused before your execution in your sight shall be knockt on the head.” A 1719 Rhode Island statute further illustrates the use of this doctrine:

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163. For a discussion of the meaning of deodand, see BLACK'S LAW DICTIONARY, supra note 8, at 392.
164. Evans, supra note 95, at 245-46 (emphasis in original).
165. Id. at 246.
166. F. BREMER, supra note 38, at 90; see also G. CARSON, MEN, BEASTS, AND GODS: A HISTORY OF CRUELTY AND KINDNESS TO ANIMALS 71-72 (1972) (“[O]ne must remember that the Boston Puritans were men of their own time. They had discarded the saints, but not the Devil. They continued to believe in the reality of an invisible world in which witches operated against mankind . . . .”).
167. See supra notes 75-78 & accompanying text.
168. L. FRIEDMAN, supra note 2, at 62 n.69, quoting 4 ARCHIVES OF MARYLAND 10 (1887).
169. Id. at 62 (footnote omitted).
him, or by a Horse's Kicking of him, or by any sort of Neat Cattle's Goring him or Kicking of him, or by any other such like Accident, that then the Coroner of such Town where such casual Death shall happen to be, shall with an Inquest of Twelve Lawful Men, enquire into the Meanes of the death of such Person; and on the Coroners return, that such Person was Killed by any of the aforesaid Accidents, &c. Then the Coroner with his said Inquest upon Oath, shall Apprize the Value of such Cart, Horse or Neat Beast, &c. Which shall be Forfeited as a Deodand, and given to the Overseers of the Poor of such Town where such Casualty shall happen.  

To the colonial legal mind, no wrongdoing could go unpunished, regardless of whether the wrongdoer was human, animal or inanimate.  

A second medieval doctrine supporting the use of retribution as a justification for punishing suicide was *lex talionis*—literally, "the law of retaliation." This doctrine occasionally required that an animal or even a dead person be punished. In the Middle Ages, there were several instances where cattle and hogs were executed as a means of punishment—even at times, being "put to the rack in order to extort confession." In 1266, near Paris, "a pig convicted of having eaten a child was publicly burned by order of the monks of Sainte Geneviève." In 1386, a sow was sentenced to be mangled, maimed and then hanged for having "torn the face and arm of a child and caused its death." The extent to which animals were treated as fully responsible wrongdoers can be seen in the fact that, occasionally, humans and animals were "confined in the same prison."  

Colonial Americans also punished animals as retribution for wrongdoing. In New Haven, before a colonist was executed for sod-
omy, authorities killed the animals that he had abused. In 1692, in Salem, two dogs were hanged along with "nineteen Massachusetts men and women for refusing to make any answer to the indictment charging them with the practice of witchcraft." An early Connecticut statute provided: "If any man or woman, shall lye with any beast, or brute creature by carnall Copulation, he, or she, shall surely be put to death, and the beast shall be slaine, buried, and not eaten." Together, the doctrines of deodand and lex talionis illustrate the colonial emphasis upon retributive justice. "The primal object [of the legal system] was to atone for the taking of life in accordance with certain crude conceptions of retribution." Similarly, those who committed suicide had to be punished. Only then could the "order" of the cosmos be maintained.

Retribution was not the only justification for punishing suicide; it was also punished on grounds that it deterred others from killing themselves. The Commons Bench in Hales v. Petit explained that suicide "ought to be punished for an example to others." Blackstone expressed hope that a person's "care for either his own reputation or the welfare of his family would be some motive to restrain him from so desperate and wicked an act [as suicide]." In Massachusetts, a "Cart-load of Stones" was required to be laid upon the grave of a suicide because authorities believed that the stones would serve as a "Brand of Infamy, and as a warning to others to beware of the like Damnable practices."

The desire of colonial authorities to deter suicide was motivated, at least in part, by the social costs of the act. A common theme running throughout colonial legislation was that the integrity of the public fisc must be maintained at all costs. Examples of measures taken to prevent people from becoming burdens on the community included requiring adulterous men to provide for "illegitimate" 177. G. Carson, supra note 166, at 34.
178. Id. at 72.
180. Evans, supra note 95, at 246.
181. See supra notes 75-78, 166-67 & accompanying text.
183. Id. at 260, 75 Eng. Rep. at 398 (emphasis added).
184. 4 W. Blackstone, supra note 71, at *189-90 (emphasis added).
185. The Colonial Laws of Massachusetts, supra note 48, at 137.
186. See L. Friedman, supra note 2, at 64; W. Nelson, supra note 2, at 37; A. Scott, supra note 27, at 280-81. Poor relief in colonial America, writes Edwin Perkins, was "generally left to the counties and towns." E. Perkins, The Economy of Colonial America 125 (1980). By the late colonial era, it had become a "large item in city budgets." Id. at 128.
children, requiring creditors to reimburse jailers for the costs of incarcerating their debtors, and forbidding people to bring within certain towns any "old Persons, Infants, Maimed, Lunatick, or any vagabond or vagrant Persons"—any persons who were "likely to become chargeable to the County." Since the suicide of an income-producing member of society had the potential to leave people dependent upon the state, it too was condemned and punished by colonial authorities. Suicide was considered to be an anti-social act, and to the colonial mind, anti-social acts were eminently within the scope of legal concern.

VI. CONCLUSION

Suicide had been characterized as a crime in England for nearly a thousand years before the first Europeans settled in North America in the early seventeenth century. As the several American colonies developed, culturally and legally, they adopted widely different stances toward the morality of the suicide act, and ultimately incorporated those stances into their legal rules.

In Virginia, North Carolina, South Carolina, Georgia, New York, and New Hampshire, the English law of suicide was adopted as part of the larger body of the common law. In these colonies, suicide was punishable by the traditional English penalties: forfeiture of property, crossroad burial, and bodily mutilation. Colonial authorities believed, as did their English forbears, that the punishment of suicide would advance important social and economic policies. Two other colonies, Rhode Island and Massachusetts, sought to achieve the same goals by enacting specific legislation which characterized suicide as a crime and prescribed punishment for its commission.

The colonies of Pennsylvanina and Delaware did not adopt the English treatment of suicide; in fact, they affirmatively rejected it. William Penn's "Charter of Privileges" of 1701 decreed that the property of a suicide would not be forfeited to the state, as had been the English practice. Instead, the Charter provided that the in-

187. 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, 1669-1751, supra note 32, at 5. William Nelson wrote that in Massachusetts, "one might . . . think that fornication was punished less because it offended God than because it burdened towns with the support of those children." W. NELSON, supra note 2, at 37.
188. ACTS AND LAWS OF NEW HAMPSHIRE, 1680-1726, at 82 (J. Cushing ed. 1978).
189. THE EARLIEST PRINTED LAWS OF DELAWARE, 1704-1741, at 149 (J. Cushing, ed. 1978). Public officials in Charleston, South Carolina, "complained about the number of indigents who flocked into the city, and . . . badgered the province to assume greater responsibility for poor relief." E. PERKINS, supra note 186, at 128.
190. See supra notes 75-78, 166-67 & accompanying text.
191. See supra notes 52-55 & accompanying text.
dividual's property would pass according to the usual laws of descent and distribution. This policy was followed in 1776 by Maryland and New Jersey, both of which abolished the forfeiture sanction in their new state constitutions.
APPENDIX

BLACKSTONE'S TYPOLOGY OF HOMICIDE

HOMICIDE: "DESTROYING THE LIFE OF MAN"

I. JUSTIFIABLE HOMICIDE: MORALLY BLAMELESS

A. Necessity: Required by Law
B. Advancement of Public Justice
C. Prevention of Crime
D. Defense of Chastity

II. EXCUSABLE HOMICIDE: TRIVIAL BLAME, TRIVIAL PUNISHMENT

A. Misadventure: Per Infortunium
B. Self-Preservation: Se Defendendo

III. FELONIOUS HOMICIDE: MORALLY BLAMeworthy

A. Self-Murder
B. Killing Another
   1. Manslaughter: Unlawful Killing Without Malice
      a. Voluntary: Sudden Heat of Passion
      b. Involuntary: Misadventure by Unlawful Act
   2. Murder: Unlawful Killing with Deliberation and Will
      a. Sound Memory and Discretion

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a 4 W. BLACKSTONE, COMMENTARIES*177.
b Id. at *178.
c Id.
d Id. at *179.
e Id. at *180.
f Id. at *181.
g Id. at *182.
h Id.
i Id. at *185.
j Id. at *188.
k Id. at *189.
l Id. at *190.
m Id. at *191.
n Id.
o Id. at *192.
p Id. at *194.
q Id. at *195.
b. Unlawful Killing"  
c. Reasonable Creature in Being'  
d. Under the King's Peace"  
e. With Malice Aforethought"  
f. Express or Implied'