2008

A Gift Worth Dying For?: Debating the Volitional Nature of Suicide in the Law of Personal Property

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A GIFT WORTH DYING FOR?: DEBATING THE VOLITIONAL NATURE OF SUICIDE IN THE LAW OF PERSONAL PROPERTY

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* Associate Professor of Law, Faulkner University, Jones School of Law ("JSL"). This paper was made possible in part by a grant from JSL. It was presented in outline form to the JSL faculty and later in draft form at the Southeastern Association of Law Schools 2008 conference. Special thanks are owed to the Honorable Neil Gorsuch and to my colleagues in the academy, Karen Sneddon and Thurston Reynolds, for their helpful comments. Thanks also to Ned Swanner for his expert research assistance.

I. INTRODUCTION

The debate over the nature, history, legality, and culpability of suicide has, for some years, roiled in the center of civic and legal discourse. It occupies a central place in the current legal and cultural fracas over end-of-life decisions and serves as a proxy battle for other cultural disputes. As Washington State recently became the second state to adopt legalized assisted suicide,[1] as "Dr. Death," Jack Kevorkian, enjoys his recently-earned freedom from incarceration for euthanizing patients, and as studies begin to shed light on the assisted suicide experiment in Oregon, now fourteen years old, insecurity persists in American law on what to do with the suicide problem.

Suicide poses difficult and foundational problems for the law. Those who most highly value personal autonomy, those who believe in the inviolability of human life, and those who remain uncommitted on end-of-life issues, all must settle challenging questions about suicide before advancing upon the more complex terrain of physician-assisted suicide, euthanasia, and infanticide. And the way in which a society fashions legal responses to suicidal choices reveals much about the society's cultural commitments and legal assumptions.

The problems that suicide presents to the law are not merely controversial, they are also difficult. How the law should treat suicide causes great difficulties and occupies unique lines of legal reasoning. Criminal law, for example, has long struggled with how best to regard acts of self-destruction. Though suicide remains a common law crime, it is no longer punished as a criminal act, as it was for centuries in the Anglo legal tradition. Meanwhile, assistance of suicide is permissible in Oregon and, as of November 4, 2008, in Washington State. The bodies of insurance law, tort, and health care law are also among those areas of the law in which lawmakers reserve special exceptions for the consequences of suicidal acts.

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1. *See* Washington Death With Dignity Act, Initiative Measure 1000 (2008), http://www.secstate.wa.gov/elections/initiatives/text/i1000.pdf.

One area that has received insufficient attention is the intersection of personal property law and suicide. In particular, suicide implicates a special exception to the enforceability of gifts made in contemplation of impending death. The issue is whether a gift of personal property causa mortis is valid when made in contemplation of and conditional upon the donor's suicide. This question, like so many others that implicate suicide, is not easily resolved.

Scholars have missed substantial doctrinal changes in the law of gifts causa mortis during the last thirty-three years. Citing then-extant authorities, the last edition of Ray Andrews Brown on The Law of Personal Property,[2] published in 1975, asserted, "Some cases hold that a gift in contemplation of suicide is void as contrary to public policy."[3] Within two years after publication of this edition, the Supreme Court of New Jersey became the first court to enforce a gift made conditional upon an act of suicide. Since then, courts have consistently enforced such gifts.

This article addresses the enforceability of gifts of personal property made conditional upon acts of suicide and the attendant debate that has surfaced in the last three decades over the volitional nature of suicide. Section two discusses the law of gifts causa mortis generally and places the doctrine within its context in personal property law. Section three examines the traditional rule that these gifts are not enforceable, the justifications for the rule, and some criticisms.

Section four tests the more recent, modern rule that all gifts made in contemplation of suicide are enforceable and the assumption on which the new rule is predicated, namely that all suicides are wholly non-volitional acts and are products of mental or emotional infirmities. This article tests the assumption against human experience, other bodies of law, and the best contemporary learning of psychology and sociology.

Section five offers a new understanding of the traditional rule (voiding gifts conditioned upon suicide), answers a strong doctrinal criticism, and attempts to fashion a more advanced version of the traditional rule, which avoids the shortcomings of both the traditional rule and the modern rule. That section posits a stronger doctrinal basis for the traditional rule: strict adherence to the Statute of Wills best protects the donor's intentions. Section five also examines a stronger policy basis for the traditional rule, namely that the traditional rule, like parallel doctrines in tort law, criminal law, and insurance law, affirms the intrinsic value of each human person. This

2. This text is arguably the leading treatise on personal property law.

3. RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY 139 n.12 (Walter B. Raushenbush ed., Callaghan & Co. 3d ed. 1975).

teaching helps promote a cultural commitment to the dignity of all human persons and informs contemporary debates on more complex problems, such as the question whether our nation recognizes a fundamental right to assisted suicide. This article concludes with a proposed revision of the traditional rule that is intended to reflect and advance contemporary learning about suicide.

II. GIFTS CAUSA MORTIS GENERALLY

To understand the special problem that suicide poses in the context of personal property law, it is helpful to understand the law of gifts causa mortis generally. The donor makes the gift while faced with the imminent threat of impending death from some illness or external peril. Not having time or energy to execute and have witnessed a will, the donor makes a gift to the donee, conditional upon the donor's actual death. The deathbed donor says something like, "If I don't survive this surgery, I want you to have my life savings." The deathbed donor then delivers either the actual life savings or a symbol of it, such as a bank account passbook.

Enforcement of gifts causa mortis constitutes an exception to the Statute of Wills, which requires revocable bequests and devises to be made in writing. Allowing unwritten deathbed gifts creates a temptation to commit fraud, the mischief that the Statute of Wills was designed to prevent. For this reason, gifts causa mortis are disfavored.[4] A claim that personal property was donated before the donor's death is generally viewed with skepticism and enforced only when clearly proven.[5] The historic refusal of courts to enforce gifts causa mortis made in contemplation of suicide is thus in keeping with the disfavored status of gifts causa mortis generally.

A. Distinguished from Gifts Inter Vivos

Gifts causa mortis (on the occasion of death) must be distinguished at the outset from gifts inter vivos (during life) because suicide has very different implications in each context. Gifts of personal property inter vivos are enforceable even when made in contemplation of suicide because they are not made conditional upon death. Demonstration of a valid gift inter vivos requires proof of three elements: (1) donative intent, (2) delivery, and (3) acceptance.[6] Once offered, deliv-

4. FRANK HALL CHILDS, PRINCIPLES OF THE LAW OF PERSONAL PROPERTY 306 (Callaghan & Co. 1914); BROWN, *supra* note 3, at 144.

5. Jones v. Selby, [1710] 24 Eng. Rep. 143 (Ch.); BROWN, *supra* note 3, at 144–45 (noting the risk of fraud, Justinian required these gifts to be proven by the testimony of five witnesses); CHILDS, *supra* note 4, at 306; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 359 (New York, O. Halsted 1827).

6. BROWN, *supra* note 3, at 77–78.

ered, and accepted, a gift inter vivos, unlike a gift causa mortis, becomes irrevocable.[7] The gift can be made with or without an expectation of imminent death;[8] because the gift is irrevocable, it does not matter what fate the donor meets after making the gift.[9]

By contrast, gifts of personal property causa mortis must be made in expectation of imminent death, and such gifts are revocable.[10] A valid gift causa mortis, thus, has four elements: (1) donative intent, (2) delivery, (3) acceptance, and (4) contemplation of imminent death from illness or external peril. If the donor survives the illness or peril, the gift is revoked ipso facto.[11] Additionally, the donor may affirmatively revoke the gift at any time before death.[12]

Anticipation of death is an essential element of the gift causa mortis. It is necessary, but not sufficient, that the donor actually be in peril of imminent, approaching death.[13] The donor must not merely be in danger of dying; he must know that he is in danger of dying.[14] Sufficient perils include fatal illnesses or afflictions;[15] serious, impending surgical operations;[16] and, according to some authorities, enlistment in the military for active service during time of war.[17]

The strict requirement of known, imminent peril of death guards against the increased risk of fraud where the donor has not had time to execute a will.[18] Brown contrasted the risks of fraud and perjury in claims of gifts causa mortis with the risks in claims of gifts inter vivos.

> There is undoubtedly danger of fraud and perjury in gifts causa mortis. In the inter vivos gift the donor is usually able to testify as to his view of the transaction, and to meet the claim of the donee that a gift has taken place. In the gift causa mortis the lips of the donor are sealed by death. In the gift inter vivos the continuous possession of the property by the do-

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7. 2 KENT, *supra* note 5, at 359.

8. BROWN, *supra* note 3, at 136–37.

9. *Id.* at 137.

10. 2 KENT, *supra* note 5, at 359. In their revocability and conditionality, these gifts resemble bequests by will. *Id.* at 359–60.

11. *See* BROWN, *supra* note 3, at 133, 137, 141.

12. *Id.* at 133, 137.

13. *Id.* at 138. *But see* CHILDS, *supra* note 4, at 307 ("A groundless apprehension is sufficient.").

14. BROWN, *supra* note 3, at 138.

15. *Id.* at 137.

16. *Id.*

17. JOHN R. ROOD, A TREATISE ON THE LAW OF WILLS 18 (Callaghan & Co. 1904). There is some dispute on this point. Note, *Apprehension of Death in Gifts Mortis Causa*, 32 COLUM. L. REV. 702, 709–10 (1932); BROWN, *supra* note 3, at 138.

18. Note, *Gifts—Elements of Gifts Causa Mortis*, 7 TENN. L. REV. 46, 47 (1929).

> nee with acquiescence of the donor furnishes some objective guaranty that the donee's claim of gift is in accordance with the intentions of the alleged donor. In gifts made when death is threatening the donor this guaranty is again lacking. It is not surprising therefore that judicial opinions teem with expressions of hostility to the causa mortis gift.[19]

For these and other reasons, claims of gifts causa mortis generally, and gifts conditioned upon subsequent suicide in particular, are met with skepticism when pressed against the interests of the decedent's heirs or estate.[20]

In sum, contemplation of suicide and a subsequent act of suicide are irrelevant to the validity of a gift inter vivos, which is complete and irrevocable at the time of donation and therefore, enforceable regardless of what occurs afterward. By contrast, the completion of a gift causa mortis occurs only upon death, when the gift can no longer be revoked.

B. Compared to and Contrasted with Nuncupative Wills

The special problem that suicide poses to the law of gifts can be seen more clearly by comparing the gift causa mortis with the nuncupative (oral) will. Both are fundamentally testamentary; both avoid the formalities required by the Statute of Wills; both are effective for the disposition of personal, but not real property; both operate to the detriment of heirs and legatees; and both are revocable any time before death.[21] The significant difference between them is that the gift, unlike the nuncupative will, is conditioned upon the donor's death from the contemplated peril;[22] if the donor recovers and avoids the imminent, dreaded fatality, the gift is revoked automatically.[23] For this reason, a gift causa mortis made in contemplation of suicide is

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19. BROWN, *supra* note 3, at 144.

20. One commentator explained,

> That secret coercion and fraud which the curtain of death so often invites by its concealment; those hopes, wishes and jealousies which they who smooth the dying man's pillow are so careful to mask from one another; that sudden and unexpected opportunity by which a bystander of callous conscience is so sorely tempted; that degeneration of mind in the sick man which so often accompanies bodily disease at the approach of death; and the liability, moreover, to misinterpretation to which every one must needs expose himself when disposing of his goods informally, while *in extremis*:—all these incidents of oral disposition at life's last stage impressed English judges and legislators more than two centuries ago.

James Schouler, *Oral Wills and Death-Bed Gifts*, 2 L.Q. REV. 444, 444 (1886).

21. *Id.*

22. *Id.* at 446.

23. BROWN, *supra* note 3, at 133, 137, 141.

conditioned upon the subsequent suicide; without a suicide, title to the gifted item does not vest in the donee.

C. English Rule vs. American Rule

This last observation raises one final difficulty: does title not pass at all until the donor's suicide, or is title in the donee merely contingent until the act of suicide? Title to the donated item passes at different moments under the English and American versions of the rule. Under the English rule, a gift causa mortis is inchoate until death of donor, which completes delivery.[24] Death is a condition precedent to the validity of the gift, and title does not pass until the moment of the donor's death.

Under the American rule, by contrast, delivery is complete at the moment of donation, but the gift is revoked if the donor avoids the contemplated death. Under this rule, title vests in the donee at the moment of donation subject to the condition subsequent that the failure of the donor to die revokes the donation. For this reason, the gift is not valid unless dominion over and control of the item pass to the donee at the time of donation.[25]

For reasons explained below, the distinction between the English and American rules presents a conceptual challenge in understanding the operation of gifts made conditional upon acts of suicide. However, as shall also be seen, this challenge is easily addressed.

III. TRADITIONAL RULE: VOID IF CONDITIONED UPON SUICIDE

Historically, the common law has maintained that a gift causa mortis made in contemplation of the donor's suicide is void. This traditional rule is grounded both in a formal, doctrinal justification and in the public policy against suicide. The reasons for the traditional rule have come under attack from courts and scholars. Some of these

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24. Jones v. Selby, [1710] 24 Eng. Rep. 143, 144 (Ch.).

25. BROWN, *supra* note 3, at 133–34. The American rule has presented some difficulties for donees where gifts were made in the wrong form. A gift of a certificate of deposit payable "not till my death" was unenforceable under the American rule because the death of the donor was made a condition precedent, rather than a condition subsequent. Basket v. Hassell, 107 U.S. 602, 616 (1883). Furthermore, delivery of the property to a third party, to be held until the death of the donor, defeats enforcement under the American rule. In that instance, the donor has not demonstrated an intention to confer on the donee a present right to obtain the property, and the donor's death thus constitutes an impermissible condition precedent. BROWN, *supra* note 3, at 134; Hart v. Ketchum, 53 P. 931, 932 (Cal. 1898).

criticisms are easily dismissed, while others prompt closer attention to the imperfections of the traditional rule.

A. Statements of the Traditional Rule

A survey of the treatises reveals unanimity on the proposition that gifts conditioned upon suicide are unenforceable. Blackstone, who expressly recognized the enforceability of gifts causa mortis,[26] disqualified one who committed suicide (a *"felo de se"* or felon against himself) from disposing of personal property prior to the act of suicide.[27] Another author explained that one who takes his own life is divested of his personal property from the moment he commits the act, the moment before his death, because he then commits a felonious act upon himself.[28]

Abolition of criminal punishments of suicide rendered suicides competent to dispose of their personal property before death. Their final act was no longer punished as a crime at common law, and so it no longer defeated their dispositions of property.[29] However, though bequests by suicides generally became enforceable, gifts causa mortis remained unenforceable. A twentieth century treatise affirmed, "A gift made in anticipation of suicide has been held not made in peril of death."[30] Brown agreed with this statement.[31] Courts in Ireland,[32] Kentucky,[33] Maine,[34] New Brunswick,[35] New Hampshire,[36] New York,[37] Ontario,[38] Tennessee,[39] and the United Kingdom[40] have re-

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26. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 514 (Oxford, Clarendon Press 1766). Blackstone speculated that the gift causa mortis might have subsisted in a state of nature and pointed out that it goes back at least as far as the Greeks. *Id.* He cited examples of such gifts in Homer's Odyssey and the Alcestes of Euripides. *Id.* at 514 n.m. These gifts certainly have a long history. Justinian discoursed upon them in his institutes. JUSTINIAN, THE INSTITUTES 147–49 (Thomas Collett Sandars trans., Callaghan & Co. 1876). And the consensus appears to be that the English common law derived the transaction from the Roman law. Note, *supra* note 17, at 704 (discussing the origin of gifts mortis causa).

27. 2 BLACKSTONE, *supra* note 26, at 535.

28. 3 JOHN B. MINOR, INSTITUTES OF COMMON AND STATUTE LAW 63 (Anderson Bros. 2d ed., 1895).

29. JOHN C.H. FLOOD, AN ELEMENTARY TREATISE ON THE LAW RELATING TO WILLS OF PERSONAL PROPERTY 394–95 (London, William Maxwell & Son 1877).

30. ROOD, *supra* note 17, at 19.

31. BROWN, *supra* note 3, at 139 n.12. *See also* Note, *supra* note 17, at 710–11.

32. *See* Agnew v. Belfast Banking Co., [1892] 2 I.R. 204, 211 (Ir.).

33. *See* Pikeville Nat'l Bank & Trust Co. v. Shirley, 135 S.W.2d 426, 429 (Ky. 1940).

34. *See* Nw. Mut. Life Ins. Co. v. Collamore, 62 A. 652, 655 (Me. 1905).

35. *See* Earle v. Botsford, [1883] 23 N.B.R. 407 (Can.).

36. *See* Blazo v. Cochrane, 53 A. 1026, 1028 (N.H. 1902).

37. *See* Bainbridge v. Hoes, 149 N.Y.S. 20, 23 (App. Div. 1914); McGuire v. John Wanamaker N.Y., 79 N.Y.S.2d 594, 595 (App. Div. 1948).

38. *See In re* Fanning, [1922] 3 D.L.R. 925, 926 (Can.).

fused to enforce gifts made conditional upon the occurrence of the donor's suicide. The usual reasoning is that such gifts cannot be upheld as gifts causa mortis because death by suicide does not satisfy the elemental requirement that the gift be made "in expectation of imminent death from a disease or peril then impending."[41]

Many courts have avoided the issue in various ways. Some gifts made prior to the donor's suicide are considered as potential gifts inter vivos by express or implied findings of irrevocability.[42] Other gifts that were clearly intended to be revocable are not enforced, not because they were made conditional upon an act of suicide, but because evidence of donative intent or delivery is lacking.[43] Finally, in a recent decision, the Supreme Court of Wyoming held that there appeared in the record no evidence that the donor contemplated suicide at the time of donation; therefore, contemplation of death was not established.[44]

Those courts that face the issue head-on still must grapple with the question of the donor's mental capacity to make the gift. The traditional rule admits of an exception for the donor who is sane at the time of statement of intent and insane at the time of the suicide. A court that early refused enforcement of a gift made conditional upon suicide reserved judgment on the speculative case "of a donation made in sane apprehension of an impending attack of suicidal mania, regarded as an imminent cause of impending death, which in such a case might be treated as a natural death by disease."[45]

Thus, at least in theory, the traditional rule admits the possibility that the donor's mental condition might deteriorate or improve from moment to moment.[46] A donor might make a gift while lucid and

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39. *See* Ray v. Leader Fed. Sav. & Loan Ass'n, 292 S.W.2d 458, 467 (Tenn. Ct. App. 1953).

40. *See In re* Dudman, [1925] Ch. 553, 555 (Eng.).

41. Pikeville Nat'l Bank & Trust Co. v. Shirley, 135 S.W.2d 426, 429 (Ky. 1940).

42. *See, e.g.*, *In re* Stockham's Estate, 186 N.W. 650, 652 (Iowa 1922); Waller v. Capper, 53 P.2d 836, 839 (Kan. 1936); Schwalbert v. Konert, 76 S.W.2d 445, 449 (Mo. Ct. App. 1934); *Ray*, 292 S.W.2d at 468.

43. *See, e.g.*, Wittman v. Pickens, 81 P. 299, 299 (Colo. 1905); Matulevitch v. Am. Ry. Express, 6 Pelt. 106 (La. Ct. App. 1923); Duryea v. Harvey, 67 N.E. 351, 353 (Mass. 1903); Nw. Mut. Life Ins. Co. v. Collamore, 62 A. 652, 655 (Me. 1905); Allen v. Allen, 77 N.W. 567, 568 (Minn. 1898); Coppock v. Kuhn, 2 Ohio Cir. Dec. 347 (Cir. Ct. 1889); Liebe v. Battmann, 54 P. 179, 180 (Or. 1898).

44. Stang v. McVaney, 44 P.3d 41, 45 (Wyo. 2002).

45. Agnew v. Belfast Banking Co., [1892] 2 I.R. 204, 223 (Ir.).

46. In the context of wills, testamentary capacity is adjudged at the moment the will is made; a person may possess testamentary capacity at any given time though he lacks it at all other times. Maimonides Sch. v. Coles, 881 N.E.2d 778, 788 (Mass. App. Ct. 2008). In that case, the court found sufficient evidence of testamentary capacity despite the facts that the testator during the last months of his fight with esophageal cancer be-

then take his own life while deranged. If the donor anticipated the derangement and expected a resulting suicidal impulse, this gift would be enforceable under the traditional rule.

B. Justifications for the Traditional Rule

Because gifts causa mortis are conditioned upon death and voided if the donor either revokes before death or survives the peril, gifts causa mortis made in contemplation of suicide are definitionally conditioned upon the donor committing suicide before revoking the gift.[47] This creates two problems for the jurist. The first problem is a policy problem. To predicate the vesting of the gift on an act of suicide offends the public policy against suicide. The second problem is doctrinal. To condition a gift on the donor's suicide (an event that is thought to be within the donor's control) contradicts both the donor's expression of donative intent and the contingent nature of the condition. For both of these reasons, courts have refused to enforce these gifts.

1. Policy Ground

The policy ground for refusing enforcement appeared earliest in a nineteenth century decision in Ireland, which has significantly influenced both subsequent decisions and the treatise authors. The decedent-donor had been married for just a few days when she became concerned about shielding her pre-marital assets from her profligate husband.[48] This she attempted to do by giving her sister a deposit receipt with the verbal instruction, "[I]f anything should happen to me, that is yours in God's Name."[49] Four days later, she poisoned herself and died.[50]

The court held that the gift was unenforceable.[51] The gift was "utterly void as against public policy" because it was "to take effect on and not until the commission of a felony by the giver, and that felony [is] of the highest form."[52]

> A *donatio mortis causa* is incomplete till death, and depends upon it. If the sick man recovers it is of no avail. No property

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came depressed, felt helpless, and expressed thoughts of suicide as a function of his clinical depression. *Id.* at 782. Throughout, the testator remained "'alert, oriented, lucid, coherent,' and 'independent, . . . with no evidence of psychotic thinking.'" *Id.* (alterations omitted). "[D]epression does not per se negate the testator's mental capacity." *Id.* at 789.

47. *See* Note, *supra* note 17, at 703 (explaining that transactions mortis causa are "based on death as a consideration").

48. *Agnew*, 2 I.R. at 205–06.

49. *Id.* at 206.

50. *Id.*

51. *Id.* at 223–24.

52. *Id.* at 213.

> passes until death. In the case of felonious suicide, therefore, the accrual of the right depends upon the committal of a felony; and the intent to commit that felony is a necessary constituent of the gift. In my opinion it is fundamentally opposed to the first principles of our law, or any law which treats suicide as a crime, that legal rights should be created by the intention to commit suicide to be followed by the actual commission of it.[53]

This reasoning prevailed for nearly a century. Following *Agnew*, a New York court refused to enforce a pre-suicide gift[54] on the ground that the suicide "and its contemplated means become an essential part of the transaction; and such a death is declared by [New York law] to be a 'grave public wrong.'"[55] Other courts have similarly followed the *Agnew* rule and reasoning.[56]

2. Doctrinal Ground

The doctrinal impediment to enforcement of gifts made in contemplation of suicide is the requirement that any peril of death not be within the control of the donor. Suicide, assumed for centuries to be a volitional act of the donor, did not qualify as a peril of death sufficient to sustain the gift.[57] "[T]he [suicidal] donor is not in peril of death within the meaning of the law, for he voluntarily places himself in a dangerous position, and his subsequent dissolution comes by his own hand."[58] The doctrine of gifts causa mortis "is inconsistent with the idea that a person in health, contemplating his death at a future pe-

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53. *Id.* at 216.

54. The court first considered whether to enforce the gift of a negotiable instrument as one inter vivos, but decided that mere receipt of the check, without cashing or depositing it, did not constitute dominion by the donee over the funds. Bainbridge v. Hoes, 149 N.Y.S. 20, 22 (App. Div. 1914).

55. *Id.* at 23 (referring to N.Y. PENAL LAW § 2301 (McKinney 1909) (repealed 1967)).

56. *See, e.g.*, *In re* Fanning, [1922] 3 D.L.R. 925, 926 (Can.); *In re* Dudman, (1925) Ch. 553–54 (Eng.).

57. "The conceived approach of death (so far as it might arise from what was contemplated) was entirely within his own control and he escaped from the peril (and so the condition of the gift failed) every moment that he refrained from the act of destruction." Earle v. Botsford, [1883] 23 N.B.R. 407, 410 (Can.). *See also*, Note, *supra* note 17, at 710; Recent Important Decision, *Gifts Causa Mortis—Contemplation of Suicide*, 24 MICH. L. REV. 197 (1925).

58. Recent Decisions, *Gifts Causa Mortis—Contemplation of Suicide*, 30 MICH. L. REV. 626, 627 (1932).

riod from a cause depending on his own volition, could make a valid" gift.[59]

The requirement that the peril contemplated be outside the donor's control seems to rest upon two grounds. First, it increases confidence that the donor intended to make a gift. Because the gift causa mortis is revoked in the event of survival, and because the condition of the gift made in contemplation of suicide is entirely within the donor's control, the gift does not look like a gift at all.[60] The putative donor is saying, "I intend to give you this item, but only if I later kill myself, signaling that I no longer want it."[61] In this case, donative intent, the first element of a valid gift, is questionable. For this reason, "[a]ny reserve of control [over the chattel] defeats the gift."[62]

Second, the requirement of illness or external peril grounds the contingent nature of the gift. The revocability of a gift causa mortis is predicated upon the assumption that the donor would not part with the object if not separated from it involuntarily by death. The law presumes that people generally want to live. It further presumes that they care most about the disposition of their personal property and, thus, have the greatest incentive to dispose efficaciously of it while they retain that desire. Justinian explained, "In short, it is a donation *mortis causa*, when the donor wishes that the thing given should belong to himself rather than to the person to whom he gives it, and to that person rather than to his own heir."[63]

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59. *Agnew*, 2 I.R. at 220. Some courts have married, or even conflated, the policy and doctrinal justifications for the traditional rule. In *Agnew* the court held "that a donation cannot be supported on a danger which is so purely voluntary as to be criminal in its origin." *Id.* at 221. In *Pikeville*, the court stated, "A gift made in contemplation of death to be effected by suicide is not valid as a gift causa mortis, not only because the intent to commit suicide may be abandoned, but also a gift so made is against public policy." Pikeville Nat'l Bank & Trust Co. v. Shirley, 135 S.W.2d 426, 429 (Ky. Ct. App. 1940).

60. The doctrine seems "inapplicable to one who does not apprehend death, but voluntarily seeks it . . . ." *Agnew*, 2 I.R. at 213.

61. This is precisely the point that the California Court of Appeals failed to recognize in *Berl v. Rosenberg*, 336 P.2d 975 (Cal. Ct. App. 1959). *See* discussion *infra* Part III.C.1. The court acknowledged the essential difference between a gift inter vivos and a gift causa mortis, namely that the latter is "revocable if the donor lives." *Id.* at 977. And it grasped the vague outlines of the parties' argument that the requirements of the two gifts "are fundamentally different." *Id.* However, it did not acknowledge, much less address, the implications of this fundamental distinction.

62. ROOD, *supra* note 17, at 16. Another way of saying the same thing is to hold that the delivery element is not established because delivery is fully revocable, and the donor, therefore, failed to demonstrate an intention to relinquish full control over the item. This is the approach taken by the Maine Supreme Judicial Court in *Northwestern Mutual. Life Ins.. Co. v. Collamore*, 62 A. 652, 655 (Me. 1905), where the court held the gift unenforceable because the suicidal donor "could have repented of his design," and any delivery was therefore equivocal.

63. JUSTINIAN, *supra* note 26, at 148. Justinian, like Blackstone, in demonstrating the historic roots of the doctrine, invoked Homer's account of Telemachus' gift causa mortis to Piraeus. *Id.*

To whom Telemachus, discrete, replied.

But this desire to retain the thing in the event of survival does not pertain where the donor intends suicide. As the court in *Agnew* observed, the prioritization of self over donee is inconsistent "with the intention of self-destruction."[64]

> [T]he motive of a *donatio mortis causa* is to let it take effect only when self-interest is at an end, and the desire to retain the object through the love of life, is still stronger than the desire to give it to the donee. Could words be used more graphically inapplicable to the state of mind of a person intending to commit suicide?[65]

Thus, the suicidal donor leaves the jurist in doubt concerning both his donative intent and the revocability of the gift. The first is an essential element of the gift, and the second is the purpose for which the doctrine is maintained; no separate category is needed for gifts made on the occasion of death unless those gifts are contingent upon death.

C. Criticisms of the Policy Defense of the Traditional Rule

Both justifications for the traditional rule have encountered criticism in recent years. The policy justification is criticized on numerous grounds, which follow here.

1. California Criticism and Reply

The traditional rule has come under attack for its frustration of the donor's attempt to dispose of his own personal property. A California court has summed up the critique:

> [T]here is a strong public policy against suicide, but this does not mean that public policy prevents an owner from giving away his property before committing suicide. Carried to its

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Piraeus! wait; for I not yet forsee
The upshot. Should these haughty ones effect
My death, clandestine, under my own roof,
And parcel my inheritance by lot,
I rather wish those treasures thine, than theirs.
But should I with success plan for them all
A bloody death, then, wing'd with joy, thyself
Bring home those presents to thy joyful friend.

HOMER II, THE ODYSSEY 252, Book XVII, ll. 92–100 (William Cowper trans., London, J.M. Dent & Sons, New York, E.P. Dutton & Co. 1913).

64. *Agnew*, 2 I.R. at 222.

65. *Id.*

> logical conclusion the argument . . . would mean that one contemplating suicide . . . could not will his property away . . . .[66]

On this view, however strong is the public policy against suicide, the policy in favor of honoring donative intent is stronger. The purpose and function of property law, on this reasoning, is to enable owners of personal property to dispose of their assets before death and not to inquire by what circumstances those owners subsequently met their demise.

To be sure, carrying out the donor's intent is the "basic policy underlying the law of gifts causa mortis . . . ."[67] However, to argue that enforcement of gifts made conditional upon suicide is to honor the donor's intent is to raise the question what the donor's intent was in the first instance. If the donor intended to make a gift that was conditional only upon the occurrence of his own suicide, an event entirely within his control, which he was resolved to bring about, then one of two possibilities attains. Either the gift was not conditional at all, and was instead a fully enforceable gift inter vivos, or the donor lacked the intention that the donee should receive title to the gift. The donor cannot condition the vesting of title on an event within his control without undermining his own expressions of donative intent.

Furthermore, the California Court of Appeals was simply wrong in its assertion that the traditional rule jeopardizes the validity of bequests by will and gifts inter vivos. Disposition of personal property by inter vivos gift or will prior to suicide, unlike disposition by gift causa mortis, does not involve the creation of rights by the act of suicide. Therefore, neither gifts inter vivos nor wills implicate the policy against suicide. Consequently, the supposed conflict between the policy against suicide and the policy favoring free disposition of personal property is false.

In the case of a gift inter vivos, the gift is irrevocable from the moment of donation, and any subsequent suicide is irrelevant to the validity of the gift. Wills require a slightly different analysis. Though wills are revocable during life, they need not be made in contemplation of any particular illness or external peril. To be sure, an act of suicide renders the bequest irrevocable because the death prevents the testator from thereafter changing his or her mind about the bequest. However, unlike a gift causa mortis, a bequest may be made in apprehension only of the general certainty that death will occur eventually. Because it is written, and thus not subject to a risk of fraud, a bequest is not subject to the strict requirement that the testator contemplate impending doom at the moment of decision. Thus, refusing

66. *Berl*, 336 P.2d at 978.
67. BROWN, *supra* note 3, at 141.

to enforce gifts causa mortis made in contemplation of suicide does not jeopardize the enforcement of bequests made before suicide.

2. Scholarly Criticism

A stronger and more common attack upon the policy underpinnings for the traditional rule is that it does not further the ostensible policy objective, and that the policy argument is therefore a non sequitur.[68]

> [T]he purpose of the doctrine of public policy is to prevent injury to public welfare. It is a dubious proposition that knowledge of the rule [invalidating gifts made in contemplation of suicide] would dissuade a person . . . from committing the unlawful act, for he could effect the transfer in another way.[69]

Another author asserted, "There seems no social end to be achieved by [refusing enforcement], since it can hardly be argued that suicides will be thereby diminished."[70]

This criticism enjoys intuitive appeal. The despondent soul contemplating suicide seems, at first glance, particularly apathetic about the legal consequences of the act. However, the criticism does not well withstand close scrutiny.

The criticism starts by characterizing the policy as prevention of suicide. It then rejects the proposition that invalidation of gifts made conditional upon suicide furthers that goal. The syllogism runs as follows:

Major premise: The goal of the law is to deter suicide.

Minor premise: The rule is ineffectual at deterring suicide.

Conclusion: Therefore, the rule does not serve its policy goal.

The major premise of this criticism is questionable. The *Agnew* decision supports the proposition that deterrence is in fact a policy goal.[71] The court was concerned that by enforcing the gift it might "take away one of those restraints operating on the minds of men against the commission of crimes[.]"[72] The restraint, the court

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68. Recent Cases, *Gifts—Gift* Causa Mortis *Invalid When Made in Contemplation of Suicide*, 36 HARV. L. REV. 483, 483 (1923).

69. Recent Decisions, *supra* note 58, at 627 (citation omitted).

70. Note, *supra* note 17, at 710–11. *See also* Recent Important Decision, *supra* note 57, at 197–98. Another author suggested that the policy objective might be one of three—reformation, retribution, or prevention—but asserted that refusal to enforce can "neither reform nor wreak vengeance on the wrong-doer for he no longer exists." Comment, *Validity of a Gift Mortis Causa Made in Contemplation of Suicide*, 24 YALE L.J. 164, 164 (1914).

71. Agnew v. Belfast Banking Co., [1892] 2 I.R. 204, 218 (Ir.).

72. *Id.*

thought, was "the interest we have in the welfare and prosperity of our connexions."[73]

However, prevention of suicide is not the only policy objective of the law. Another objective, one more directly attainable by legal expressions of disapprobation of suicide, is the promotion of respect for the intrinsic value of all human lives. Even if the law cannot deter the suicidal person from destroying herself, it may still teach others that the life of the suicidal person has intrinsic, inalienable value. This article will return to this theme in section five.

In addition, none of the critics of the traditional rule have identified any evidence in support of the minor premise of their criticism. And nothing in logic compels one to conclude that the law of property lacks all power to deter suicide. One cannot assume that suicidal persons do not care about the disposition of their property. There is nothing inherently inconsistent between a determination to kill oneself and a continuing concern for the financial well-being of those one loves. And requiring the suicidal donor to arrange her affairs more securely than by a last-minute, contingent gift at least has the virtue of burdening her haste to destroy herself.

The law can promote respect for human life, and nothing suggests that it lacks all deterrent power over suicidal persons. For these reasons, this scholarly criticism of the traditional rule is not as strong as its immediate intuitive appeal.

3. Two Additional Criticisms and Replies

One might draw a distinction between American and English law and criticize the traditional American rule on two grounds. First, under the American rule, the gift is not completed by the act of suicide.[74] On this line, one might argue that, regardless of the wrongness or illegality of suicide, the act is not a condition precedent to the gift. Instead, the failure of the donor to die constitutes a condition subsequent rendering the previous gift void.

This criticism promotes form over substance. Under both the American and English rules, some rights would be created by the act of suicide if the gift were enforceable. Under the English rule, suicide would complete delivery of the gift. Under the American rule, suicide would make the gift irrevocable by removing the condition subsequent. Thus, the distinction between gifts that vest at the moment of donation, subject to revocation, and gifts that vest only upon the

73. *Id.*

74. *See* Recent Case Note, *Personal Property—Gifts Causa Mortis Made in Contemplation of Suicide*, 35 YALE L.J. 379, 379 (1926).

death of the donor sheds no light on the question.[75] "The practical substantive rights of the donor are the same in both cases."[76]

Second, one might observe that suicide is not a crime in some jurisdictions in the United States,[77] so rights created by the act of suicide are not created by a criminal act. Thus, one commentator writing in 1932 posited that an American court might uphold a gift conditioned upon an act of suicide because "suicide is not a crime in [that jurisdiction] as it is in England and Ireland."[78] And, after England and Northern Ireland decriminalized suicide, an author suggested that the *Agnew* decision, from which the traditional rule originated, might have been rendered obsolete.[79]

However, forfeiture and dishonor were abolished in the United States, and later in England and Ireland, not because of approbation for suicide, but rather because of the impossibility of punishing a dead person and the injustice of punishing the suicide's survivors.[80] Both English law and American law continue to treat suicide as an act unlawful, criminal, and *malum in se*.[81] As the United States Supreme Court observed in its landmark *Glucksberg* decision, abolition of criminal penalties for suicide "did not represent an acceptance of suicide; rather, as [Connecticut] Chief Justice Swift observed, this change reflected the growing consensus that it was unfair to punish the suicide's family for his wrongdoing."[82]

Thus, suicide remains a common law crime (albeit one that is never punished), and the law continues to express disapprobation for suicide. The policy ground for refusing enforcement persists. As the New York court observed in *Bainbridge*, after abolition in New York but before abolition in England, "It is true . . . from the impossibility of reaching the successful perpetrator, no forfeiture is imposed [upon

75. Brown calls this distinction "unfortunate" and "highly artificial." BROWN, *supra* note 3, at 135.

76. *Id.*

77. *See* 40A AM. JUR. 2D *Homicide* § 603 (2008).

78. Note, *supra* note 17, at 711.

79. Nial Osborough, *The Suicide Act, 1961*, 15 N. IR. LEGAL Q. 311, 314 (1964).

80. *See* Washington v. Glucksberg, 521 U.S. 702, 713 (1997); NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 31 (Robert P. George ed., Princeton University Press 2006). *But see* Osborough, *supra* note 79, at 313 (asserting that regard for survivors is "hardly the whole story" and suggesting that the impetus for the United Kingdom's abolition might have been the belief that suicide causes no "tangible social harm"). Osborough cites no authority for this assertion, which is contrary to the weight of authority summarized in Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 63–100 (1985).

81. *See* Clift v. Narragansett Television L.P., 688 A.2d 805, 808 (R.I. 1996) ("Rhode Island, a common law state, also considers suicide a felony.") (citation omitted); GORSUCH, *supra* note 80, at 31; Marzen et al., *supra* note 80, at 63–100.

82. *Glucksberg*, 521 U.S. at 713.

the suicide]."[83] But the court went on to affirm that the gift fails at the moment of death because it is contrary to the policy behind the law.[84]

As a wrongful act, the act of suicide cannot predicate the creation of legal rights in a donee.[85] Enforcement of gifts causa mortis under either the American or English rule would entail an impermissible endorsement of a wrongful act, and this basis for refusing enforcement overcomes the criticisms outlined here.

D. Criticism of the Doctrinal Justification—The *Scherer* Rule

The doctrinal justification for the traditional rule has come under attack in the last three decades for resting upon an outdated and discredited view of suicide. Some claim that suicide is a wholly nonvolitional act and therefore not within the control of the suicidal donor, as the authorities had always before supposed. If suicide is never a volitional act, then the doctrinal impediments to enforcement of gifts made conditional upon suicide dissolve because the apprehended death would not be within the control of the donor.

1. Early Departure from the Rule

The Michigan Supreme Court made an early departure from the then-universally accepted wisdom and enforced a gift made prior to a suicide in *In re Van Wormer's Estate*.[86] The gift in that case preceded the donor's move from Michigan to California, a temporary recovery from his depression, and the passing of nearly two and a half months before he took his own life.[87] Nevertheless, the court enforced the gift as a valid gift causa mortis made in contemplation of suicide, reasoning, "The melancholia which evidently resulted in suicide had fastened itself upon deceased before the date of the gift, and he obviously was convinced at that time that he could not continue on indefinitely in his depressed mental state."[88] Implicit in this reasoning, but not apparently examined, was the presupposition that the donor's depression, not his own volitional choice, was the cause of his suicide.

The decision provoked immediate criticism. Commentators noted that a gift causa mortis cannot be upheld absent both "(1) a subjective belief in the near approach of death, and (2) an objective illness which motivates such belief."[89] The *Van Wormer* holding was thought defi-

83. Bainbridge v. Hoes, 149 N.Y.S. 20, 23 (App. Div. 1914) (internal quotations omitted).
84. *Id.*
85. *Id.*
86. 238 N.W. 210, 212 (Mich. 1931).
87. *Id.* at 211.
88. *Id.* at 212.
89. Note, *supra* note 17, at 706.

cient because the court used only a subjective test, not requiring an actual illness causing peril of death.[90] Furthermore, the evidence did not show a "serious psychopathic state, such as melancholia, or mania . . . ."[91]

Another author simply demonstrated that the decision contravened all available authority.[92] A third critic attempted to reconcile the decision with prior authority.

> [I]t might be said that here the donor was seized with an irresistible impulse to commit suicide and therefore was in peril of death in the legal sense. . . . But assuming that the law will recognize this psychopathic impulse, the argument is dissipated by the fact that the suicide did not occur until more than two months after the gift had been made. Furthermore, during that time, deceased stated in a letter that he was "gradually getting a desire to want to live." He could hardly have been suffering from an irresistible impulse to destroy himself.[93]

The *Van Wormer* decision and the criticism that followed it adumbrated a debate that would resurface forty-six years later. The presupposition that the *Van Wormer* court left unexamined—whether the donor's mental infirmity or his own volitional choice was the cause of his suicide—waited to be resolved.

2. *Scherer*'s Criticism: Suicide Is Wholly Non-Volitional

In 1977, the New Jersey Supreme Court became the first court expressly to reject the traditional rule in the case *Scherer v. Hyland.*[94] On January 23, 1974, Catherine Wagner received a check for $17,400.[95] At 11:30 the same morning, Ms. Wagner spoke by telephone with the man with whom she lived, Robert Scherer, and informed him of the arrival of the check.[96] At 3:20 that afternoon, Ms. Wagner left her apartment and jumped to her death.[97] When police later entered the apartment, they found the check, endorsed by Ms.

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90. *Id.* at 706–07.
91. *Id.* at 708.
92. Late Leading Cases Annotated, *Gifts Causa Mortis—Validity of Gift of Personalty Made in Contemplation of Suicide*, 66 U.S. L. REV. 223, 225 (1932).
93. Recent Decisions, *supra* note 58, at 627.
94. 380 A.2d 698 (N.J. 1977) [hereinafter *Scherer II*].
95. *Id.* at 699.
96. *Id.*
97. *Id.*

Wagner, and a note presumably written by Ms. Wagner stating that she "bequeathed" the check to Mr. Scherer.[98]

Over the protestations of Ms. Wagner's administrator, the New Jersey court enforced the donation of the check to Mr. Scherer as a gift causa mortis.[99] The court recognized but rejected the administrator's argument that there was no delivery because Ms. Wagner did not unequivocally relinquish control of the check before her death.[100] The court noted, "[c]entral to this argument is the contention that suicide, the perceived peril, was one which decedent herself created and one which was completely within her control."[101] In the administrator's view, Ms. Wagner was free at any time before she jumped to change her mind, and thus, she never relinquished possession of the check.[102] Her maintenance of control over the money defeated the element of delivery.

The court dismissed the administrator's argument, reasoning, "[w]hile it is true that a gift causa mortis is made by the donor with a view to impending death, death is no less impending because of a resolve to commit suicide."[103] The court rejected "the notion that one in a state of mental depression serious enough to lead to suicide is somehow 'freer' to renounce the depression and thus the danger than one suffering from a physical illness . . . ."[104] Although the conception of volitional suicide "has a certain augustinian appeal," the court asserted that it had "long since been replaced by more enlightened views of human psychology."[105] A majority of the New Jersey Supreme Court thus committed itself to the proposition that suicide is a wholly non-volitional act.

If the *Scherer* court's view of suicide is correct, then two doctrinal impediments to enforcement dissolve. First, donative intent may be established if one may assume that the donor has no control over the time and manner of her death. No subsequent volitional choice is necessary to demonstrate donative intent because her intentions are unequivocal. On this view, the donor is, both at the moment of donation and at the moment of suicide, a passive object of fate who has no say in her destruction and is compelled by mental or emotional infirmity to destroy herself.

Second, the condition on the gift is truly contingent, not determined in advance by the donor. One cannot say whether or not the donor desires to retain the item by surviving because survival is not a

98. *Id.* at 699–700.
99. *Id.* at 701.
100. *Id.* at 700.
101. *Id.*
102. *Id.*
103. *Id.* at 702.
104. *Id.*
105. *Id.*

matter for the donor to decide. The *Scherer* court has disposed of the traditional view of the suicidal donor as one who despairs of life and all of life's joys, including possession and enjoyment of the donated item. Instead, we are left with a terminally ill patient in the same position as one who suffers from cancer or AIDS. If the patient manages to avoid the pathological compulsion to suicide, which is entirely external to her own will and volition, then she might wish to revoke the gift.

Though the court's reasoning about suicide, apart from its factual accuracy, resolves doctrinal issues of intent and revocability, it creates other problems. First, the court's assumption that the donor is irremediably depressed raises the spectre of fraud. A hopelessly depressed, suicidal donor, peculiarly incapable of mustering sufficient interest in the disposition of her assets to resist manipulation, seems especially susceptible to suggestion.

The *Scherer* court dismissed the risk of fraud, without explanation, with the conclusory assertion, "The circumstances definitely rule out any possibility of fraud."[106] One commentator, attempting to provide an explanation, remarked, "Crucial to the holding was the Court's finding that there was no danger of fraud in this case, as the decedent, without warning to others, took her own life." [107] This contrasts with the case "where a decedent is dying of natural causes . . . ."[108] There, "the danger of fraud exists when third parties can take advantage of the decedent's condition in order to effect a fraudulent transaction."[109]

This defense of the *Scherer* decision is simply wrong. If, as the court assumed, the donor is not master of her own fate, not capable of self-determination, and overcome by depression, then the risk of fraud is actually *greater* than it would be in other terminal cases. Indeed, in the *Scherer* court's view of suicide, the donor is *both* dying of natural causes *and* suffering from a mental or emotional infirmity that casts doubt upon her capacity.

Second, and related to the first problem, there inheres in the court's reasoning an apparent contradiction between the donor's determinative act of disposing of her personal property and her wholly non-volitional act of committing suicide. In the court's view, Ms. Wagner suffered from corruption of her faculties or supervention of her will or both in respect to her compulsion to destroy herself, but not in

106. *Id.* at 701.

107. Neal S. Solomon, *Abusing the Power of Attorney*, 148 N.J. L.J. 777, 781 (1997).

108. *Id.*

109. *Id.*

her choice to donate her money to Mr. Scherer. The court was insufficiently curious to examine whether the supposed mental infirmity that rendered Ms. Wagner incapable of resisting the suicidal impulse also rendered her incapable of forming donative intent.[110] If she was not master of her own faculties, it would seem that she should have been ineligible to make a gift of her assets.[111]

Nearly a century before the *Scherer* decision, the *Agnew* court anticipated this "dilemma."[112]

> Part of [the donor's] condition of mind was that it was not to cease to be her property till her death: if she was insane at her death, she had then no capacity to complete the gift: if she was sane, we must attribute to her the intention of giving effect to the gift by a crime. In either event the gift cannot stand.[113]

This dilemma is not resolved in *Scherer* and seems fatal to the court's reasoning.[114]

The court might have resolved both of these problems with evidence that the donor's depression left her capable of forming donative intent and free of manipulation at the moment she endorsed the check, but incapable of saving herself at the moment she jumped from her apartment building. However, in Ms. Wagner's case, this prospect seems unlikely; her self-destruction occurred within a few hours, if not minutes, after her alleged expression of donative intent. And the court did not cite any evidence bearing upon Ms. Wagner's putative depression or the effect of any depression upon her mental faculties.

One can conceive of a case in which a donor in her right mind anticipates a bout of depression or mental infirmity involving an irresistible suicidal impulse, perhaps similar to an episode she has experienced in the past.[115] In such a case, the donor would enjoy suffi-

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110. In a prior decision in the case, a lower court concluded, without express analysis, "[W]e are satisfied from our own review of the record, including the evidence relating to both the January 9 and January 23, 1974 suicide incidents, that none of the proofs presented raises a factual issue as to [Ms. Wagner's] lack of mental capacity when she made the gift of the check." Scherer v. Hyland, 380 A.2d 704, 708 (N.J. Super. Ct. App. Div. 1976) [hereinafter *Scherer I*].

111. *See* Note, *supra* note 17, at 708 n.47 ("It is demonstrable that certain advanced psychopathic states have as definite prognostic measures of fatality as physical maladies. In a case of one of these mental disturbances, query whether the donor would retain sufficient mental capacity to carry on business or make a gift.").

112. Agnew v. Belfast Banking Co., [1892] 2 I.R. 204, 218 (Ir.).

113. *Id.* at 223.

114. *See* Recent Case Note, *supra* note 74, at 379.

115. "Certainly if it can be proved that the donor made the gift in anticipation of an irresistible impulse toward self-immolation, he may be held to have contemplated death from an existing disease or peril, and subsequent suicide would be a natural result of the illness." Note, *supra* note 17, at 712. Evidence in *Scherer* might have supported this

cient capacity to form donative intent at the moment of donation and, on the *Scherer* court's view of suicidal compulsion, lack at the moment of her death the volitional capacity to save herself. However, this case would fit squarely into the exception to the traditional rule (discussed in section III.A above) of a donor who is sane at the moment of donation and insane at the moment of suicide. Thus, this hypothetical case would not give cause to reject the traditional rule. Furthermore, resolution must rest upon separate factual findings of the donor's capacity (1) at the time of donation and (2) at the time of suicide. The *Scherer* court did not mention any such findings in the case before it.

Notwithstanding the new difficulties that the *Scherer* court created, the court called into serious question the doctrinal foundation for the traditional rule. Indeed, if the *Scherer* court's more enlightened view of suicide is correct, then the issue in claims of gifts conditioned upon acts of suicide is reduced to the single question whether the particular pathology that compelled the suicide also rendered the donor incapable of forming donative intent.

3. Subsequent Decisions Following *Scherer*

Two courts in Pennsylvania have followed the *Scherer* rule but have given no indication that they considered, much less rejected, the traditional rule. In *In re Estate of Smith*, a majority of the Superior Court of Pennsylvania enforced a gift causa mortis of negotiable instruments made before a suicide.[116] The court mentioned neither *Scherer* nor the traditional rule and actually indicated that it thought suicide a *volitional* act. It opined, "We believe that by considering gifts made in contemplation of suicide to be gifts causa mortis, we further the public policy against suicide since the donor may retrieve the gifts if the suicide is not completed."[117] The hypothetical donor in this formulation is one who might have succumbed to the impulse to commit suicide were it not for the revocability of the gift. Motivated by his

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inference in that case, as Ms. Wagner had attempted suicide two weeks before she successfully destroyed herself. *Scherer I*, 380 A.2d at 705.

The Ireland Supreme Court was skeptical of this possibility in *Agnew*:

> [I]t is quite impossible to suppose that the determination to take away her life was a sane determination on the 17th May, and that it was an insane determination on the 21st. Insanity is not a quality of the outward act, but of the mind of the person who commits the act. There is nothing in the case to afford a shadow of foundation for the argument addressed to us that on the 17th Jane Agnew seriously contemplated the possibility of her afterwards becoming insane and then killing herself . . . .

Agnew, 2 I.R. at 215.

116. 694 A.2d 1099, 1102 (Pa. Super. Ct. 1997).

117. *Id.* at 1102 n.2.

desire to retain the item he has conditionally gifted away, the suicidal donor is deterred from self-destruction.

This reasoning presupposes that suicide is a volitional act, which may be freely chosen or not chosen. It also presupposes that the law of personal property possesses some deterrent power and, therefore, has a role to play in promoting the public policy against suicide. These presuppositions are inconsistent with both the *Scherer* court's reasoning and the court's own enforcement of a gift conditioned upon an act of suicide.

In *In re Fleigle's Estate*, the Pennsylvania Court of Common Pleas enforced a gift of negotiable instruments made before the donor's suicide.[118] Curiously, the court enforced the gift not as a gift inter vivos, but rather as a gift causa mortis. However, it did not attempt to ascertain whether the gift was made in contemplation of imminent death.[119] Instead, misstating the elements of a valid gift causa mortis, the court reasoned, "We are satisfied that both elements of a valid gift causa mortis have been satisfied, that is, that the decedent possessed the requisite donative intent and that delivery was completed."[120]

4. The Unsatisfactory Reply

Since the *Scherer* decision, only one judge, writing as the lone voice of dissent in *In re Estate of Smith*, has challenged the *Scherer* court's reasoning. Judge Cirillo "vehemently disagree[d] . . . with the [*In re Estate of Smith*] majority's incomplete analysis and inaccurate conclusion that the decedent made valid *gifts causa mortis* . . . ."[121] He objected to the majority's "cursory reference" to the question whether suicide can constitute the requisite death contemplated.[122] He rejected the notion that suicide is wholly non-volitional, and he invoked the doctrinal impediments to enforcement of the gift, stating, "Because the intention to commit suicide may be readily abandoned at one's own will, courts from other jurisdictions have taken the position that the contemplated or intended suicide of a donor is not a 'peril, ailment or disease' which can serve as the foundation of a *gift causa mortis*."[123] He noted that gifts causa mortis are disfavored in the law because they are made without the safeguards present in a will.[124] For all of these reasons, Judge Cirillo thought it "prudent to adopt the reason-

118. 13 Pa. Fiduciary. Rep. 2d 141, 147 (Ct. Com. Pl. 1993).
119. *See id.*
120. *Id.*
121. 694 A.2d 1099, 1103 (Cirillo, J., dissenting).
122. *Id.* at 1104.
123. *Id.* at 1104–05 (citations omitted).
124. *Id.* at 1105.

ing of other jurisdictions that render alleged *gifts causa mortis* void when they are made in contemplation of suicide."[125]

Judge Cirillo acknowledged the *Scherer* decision (as well as the *Rosenberg* and *In re Van Wormer's Estate* decisions), but thought its reasoning unpersuasive. He rejected the notion that "according to modern human psychological principles, the utter despair attendant upon one contemplating suicide may reasonably be viewed as even more imminent than a person struggling with a fatal physical illness."[126] He thought this reasoning "attenuated, at best, in light of this Commonwealth's consistent views disfavoring suicide."[127] He explained,

> [I refer to] Pennsylvania's general public policy with regard to condoning the commission of suicide. . . . "The policy of the law is to protect human life, even the life of a person who wishes to destroy his own."
>
> . . .
>
> [I]t is just as reasonable to conclude that a donor's intent to commit suicide . . . is as strong as, if not stronger than, his or her intent to retrieve and repossess the gifts upon a change in one's will to commit the act.[128]

Judge Cirillo's reply to *Scherer* is unsatisfactory because it is largely unresponsive. To the *Scherer* court's attack upon the doctrinal foundation for the traditional rule, Judge Cirillo invoked the policy foundation for the traditional rule. But the *Scherer* court did not dispute that the law disfavors suicide.

Perhaps Judge Cirillo was asserting that a view of suicide as volitional inheres in both the public policy against suicide, the goal of which is to protect the life of the suicidal person, and the doctrine of gifts causa mortis, which voids gifts of items over which the putative donor retains control. Both the policy and doctrinal underpinnings of the traditional rule might depend upon the view that the donor has resolved to commit suicide and that resolve exceeds "his or her intent to retrieve and repossess the gifts upon a change in one's will to commit the act."[129] One cannot overcome the doctrinal impediment to enforcement without doing violence to the policy against suicide because both rest upon a common assumption.

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125. *Id.* at 1105–06.
126. *Id.* at 1105 n.4.
127. *Id.*
128. *Id.* at 1105–06 (emphasis and citations omitted).
129. *Id.* at 1106.

On this interpretation of Judge Cirillo's dissent, the policy justification for the traditional rule supports the doctrinal justification by affirming the predicate for both, namely that suicide is, in most cases, a volitional act of the will. However, Judge Cirillo's dissent does not contain any refutation of the *Scherer* court's hypothesis that suicide is wholly non-volitional. It is not enough to point out that law and policy both rest upon the presupposition that suicide is volitional; if that presupposition is wrong, then both the law and policy should change.

For these reasons, Judge Cirillo's reply to *Scherer* leaves the reader with just as many questions as before. In particular, one continues to wonder whether the *Scherer* court's hypothesis withstands scrutiny. We turn now to that question.

IV. TESTING THE *SCHERER* HYPOTHESIS THAT SUICIDE IS A WHOLLY NON-VOLITIONAL ACT

The forcefulness of the *Scherer* court's criticism turns on the question whether suicide is a wholly non-volitional act, as the *Scherer* court supposed. We turn now to testing this presupposition. Three tests are useful here. The assumption may be (1) measured against anecdotes drawn from human experience; (2) contrasted with the treatment given similar questions in tort law; and (3) tested against the best learning in the social sciences, particularly psychology and sociology.

A. *Scherer* and Human Experience

The *Scherer* court's characterization of suicide strikes the thoughtful reader as not fully consistent with human experience. Many perpetrators of suicide at least appear to have intelligible motives for choosing to commit suicide, and those motives appear to correlate to facts and circumstances in the lives of the suicidal persons. Thus, though many people kill themselves only because they are alienated from reality by mental or emotional infirmities, others kill themselves in rational (if not reasonable or morally justified) response to the realities of their life circumstances.[130] Many cases of apparently

130. Controversial suicide expert Thomas Szasz goes further than this. According to Szasz, "[c]ommon sense" suggests "that people kill others and themselves for essentially the same reasons they do anything else . . . ." THOMAS SZASZ, FATAL FREEDOM: THE ETHICS AND POLITICS OF SUICIDE 41 (Praeger 1999). Szasz observes, "The motives for suicide are no more abnormal or arcane than are the motives for other acts. People kill themselves because they find life so unpleasant—so mentally or physically painful, so humiliating and hopeless—that dying seems to them more attractive then living." *Id.* at 58. And Szasz concludes, "Killing oneself is a decision, not a disease." *Id.* at 46. Undoubtedly, Szasz overstates his case. At least some suicides are attributable to mental infirmities that so overcome the wills of the perpetrators that they cannot be said to have chosen

volitional suicide will spring to the mind of the thoughtful reader. Persons who appear to contradict the *Scherer* court's view include the following:

The person who resolves to commit suicide, then later changes her mind. If suicide were always a non-volitional act, we should expect to find that all persons who take steps toward the commission of suicide—arranging their affairs, writing suicide notes, acquiring weapons, walking out on roofs or ledges—actually follow through. However, that is not the case. Some persons are persuaded to refrain from self-destruction. This experience commends the conclusion that suicide is generally, if not always, a volitional act.

The suicide-homicide bomber. The nightly news frequently contains accounts of terrorists who employ suicide as a tool of their evil ways. Their ends, generally political in nature, are often distasteful. And their chosen means are certainly immoral and detestable. However, their ends are intelligible, and suicide is comprehensible as a means of accomplishing their ends. Furthermore, far from being intellectually alienated from reality, many suicide bombers accurately perceive that their campaigns are effective in striking fear into the hearts of their neighbors.

The unapologetic suicide-note writer. Suicide perpetrators themselves sometimes contradict the portrayal of them as victims of some overwhelming compulsion. For one class of suicides, self-destruction is an exercise in self-determination. For these persons, suicide is the means to control the time and manner of their deaths so that, even in their departure from this life, they can be said to have been masters of their own fates. In their view, far from being thrust upon them by some uncontrollable hand, suicide is the ultimate expression of personal freedom and autonomy.

Many of these willful souls make clear that their choice of suicide is purely volitional and entirely within their own control through the

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their actions. However, Szasz rightly discerns that some people volitionally choose to destroy themselves.

Szasz thinks that the volitional nature of at least some suicidal choices is a sufficient reason to recognize a legal right in personal autonomy to commit suicide. However, this conclusion does not necessarily follow. As Judge Neil Gorsuch has demonstrated, any autonomy-based right to suicide must belong to all competent adult patients, regardless of motive or physical condition. *See* GORSUCH, *supra* note 80, at 86–101. There is no support in our history or traditions for such a right. *See id.* at 19–47. Furthermore, this putative right to volitional suicide is inconsistent with the inviolability of all human lives. *See id.* at 157–66. Those who perceive that human life is a basic, intrinsic good, even when it ceases to be instrumentally valuable for the enjoyment of other goods, logically oppose a right to volitional suicide on the ground that human life is itself a reason for choice and action. *Id.* at 157–58. On this reasoning, the intentional taking of innocent human life by private persons is always morally wrong. *Id.* at 157.

medium of the suicide note. A specimen is reproduced in a California decision of some years ago. The decedent wrote, inter alia,

> If you are receiving this letter, it means that I am dead—whether by my own hand or that of another makes very little difference. I feel that my time has come . . . . I am inordinately proud of who I have been—what I made of me. I'm so proud of that that I would rather take my own life now than be ground into a mediocre existence by my enemies—who, because of my mistakes and bravado have gained the power to finish me.
>
> . . .
>
> So why am I checking out now? Basically, betrayal, over and over again, has made me tired. . . . I don't want to die as a tired, perhaps defeated and bitter old man. I'd rather end it like I have lived it—on my time, when and where I will, and while my life is still an object of self-sculpture—a personal creation with which I am still proud. In truth, death for me is not the opposite of life; it is a form of life's punctuation.[131]

The person who uses suicide as a form of emotional blackmail. Those who threaten suicide as a form of blackmail have in mind an intelligible end grounded in fact and reality, whether or not they commit the act after threatening to do so. The person threatening suicide in these cases seeks control over the decisions of another person. The person threatened is intended to feel responsible for keeping the person making the threat alive.[132] This goal is intelligibly grounded in reality and can be discerned both by the one making the threat and the one being threatened. This willful, manipulative use of suicide is not merely purposeful, but also morally culpable. We tend to believe that one acts wrongly when he threatens suicide as a means of exercising emotional control over another person. This moral view would make no sense if the threat (and, in some cases, the act) of suicide were not volitional in this context.

The patient who seeks medical assistance to commit suicide. The push for assisted suicide also casts serious doubt upon the proposition that all suicides are non-volitional. Indeed, many of those who advocate for a legal right to assisted suicide do so on the ground that persons ought to be free to choose suicide as a matter of personal autonomy.[133] Others argue for assisted suicide on the ground that suicide,

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131. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 277 (Ct. App. 1993).

132. As Szasz has observed, "Because every attachment to another human being carries with it the potential of loss, it is a source of extortion or blackmail." SZASZ, *supra* note 130, at 25. In this type of case, "it is obvious that a person threatens to kill himself to control the behavior of others . . . ." *Id.*

133. *See* GORSUCH, *supra* note 80, at 86–101.

in some instances, promotes social utility: that the benefits of assisted suicide sometimes outweigh all costs.[134] Both of these approaches rest on the presupposition that the choice of assisted suicide is first and foremost a choice. If the choice of assisted suicide is not volitional, or if it is not intelligible as a means of realizing personal autonomy or of promoting social utility, then these arguments would be irrational. Though these arguments fail to persuade many (including this author), they surely cannot be said to be irrational. One can perceive the logic of arguments for assisted suicide because the motives for choosing assisted suicide, as a free and autonomous exercise of human volition, are intelligible.[135]

Sacrifice of self. The noted suicide expert Emile Durkheim hypothesized that self-sacrificial self-destruction, what he termed "altruistic suicide," would be common in communities that enjoyed high levels of social integration.[136] Where a group of people is tied together by strong bonds of creed and identity, members of the group are more

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134. *Id.* at 102.

135. Despite the intelligibility of this reasoning, there remains doubt that assisted suicide in Oregon is always, or at least often, performed voluntarily, in good mental health, and free of coercion. Judge Gorsuch has noted several causes of this doubt. Though the Oregon statute requires that the consulting and attending physicians certify the patient's mental health, it does not require physicians have any experience, qualifications, or expertise with mental illness. GORSUCH, *supra* note 80, at 117–18. And twenty-eight percent of Oregon physicians polled admit that they do not feel competent to recognize depression. *Id.* at 118. Also, the statute does not require any assessment of the patient's mental condition at the moment of death. *Id.*

At least some of those assisting in suicides in Oregon appear to have an agenda. Twelve of the first fifteen assisted suicide cases in Oregon were handled by groups that advocate for legalized assisted suicide. *Id.* at 119. The very first patient to obtain assisted suicide in Oregon was twice declined assistance by different doctors, one of whom expressed the opinion that the patient was depressed. *Id.* at 124. The patient's husband then contacted a pro-assisted suicide advocacy group, which referred the patient to doctors willing to assist in her suicide. *Id.* After the patient's death, the prescribing physician expressed regret that he had not contacted the patient's regular physician or investigated the disagreement among the physicians concerning the patient's mental state. *Id.* He explained that he had assisted in the suicide for fear of disappointing the patient's family. At least one other case of apparent family coercion has surfaced in Oregon. *Id.* 124–25.

Finally, risk factors for suicide appear in Oregon's assisted suicide population suggesting that patients might be choosing suicide for reasons other than terminal illness. Divorced persons in Oregon are nearly twice as likely to commit suicide than similarly situated married patients. *Id.* at 121. And reasons patients give for seeking assistance in suicide include feeling like a burden on family members and inadequate pain control (palliative care). *Id.* at 123.

136. EMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY 217–40 (George Simpson ed., John A. Spaulding & George Simpson trans., Free Press 1951) (1897); K. D. Breault, *Was Durkheim Right?: A Critical Survey of the Empirical Literature on* Le Suicide, *in* EMILE DURKHEIM, *LE SUICIDE*: ONE HUNDRED YEARS LATER 11 (David Lester ed., Charles Press 1994).

likely to sacrifice themselves for the group than they would be without strong integrating bonds.[137]

What Durkheim called altruistic suicide, we more commonly call self-sacrifice. Whatever it is called, this type of self-destruction is quite clearly volitional. A soldier who throws himself on a hand grenade to save his fellow soldiers from certain death does so with a clear understanding of the facts and for a clear, intelligible reason. He knows that he is very likely, if not certain, to die by throwing himself on the grenade. He also knows that he and his fellow soldiers are likely to be seriously injured if he does not sacrifice himself, and that some might die. He chooses death to save the lives of his comrades. That reason for his self-destruction is not merely intelligible, it is laudable; the soldier wants to live and likely would if he were not faced with this dreadful choice.[138] Upon those who make the voluntary, volitional choice to destroy themselves in order to save others, we rightly bestow medals, awards, and encomia reserved for those who demonstrate the greatest physical courage.[139] We similarly laud civilians who leap in front of oncoming trains to save the lives of strangers and parents who place themselves in harm's way to save their children.

It is instructive to note the implication of the praise heaped upon altruistic self-destroyers. They are praised for their volitional choice. If the soldier was compelled by some mental ailment to destroy himself, even if he happened to save others in the process, he would not be seen as heroic. Imagine the deranged soldier who runs around looking for live grenades upon which to cast himself and eventually succeeds in finding one. That person deserves our pity, but it would be strange, to say the least, to laud him for physical courage.

The self-sacrifice of the soldier is intelligible and laudable only if it is volitional. And it certainly is all of those things. Ours is not the first, nor will it be the last, civilization to honor such selfless acts. Nearly every civilization has praised at least some form of altruistic self-sacrifice. These facts commend the conclusion that self-destruction is, in at least some cases, a volitional act.

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137. DURKHEIM, *supra* note 136, at 217–40.

138. For this reason, we do not today classify this act as a suicide at all; it is definitionally a non-suicide. The solider does not act with a purpose to destroy himself, but rather with the intent to save his fellow soldiers. This can be seen clearly by removing the soldier's comrades from the reach of the hypothetical grenade. In that instance, with no other lives at stake, the same soldier confronted with the same live grenade would undoubtedly take every effort to save himself.

139. Mike Monsoor, a U.S. Navy SEAL, recently and posthumously won the Medal of Honor for this very conduct. *US Navy SEAL Mike Monsoor—Awarded the Medal of Honor*, BLACKFIVE, April 17, 2008, http://www.blackfive.net/main/2008/04/us-navy-seal-mi.html.

B. Analogy to Tort Law

Tort law has long maintained a distinction between volitional and non-volitional suicides in apportioning liability for self-destruction. A tort-feasor is liable for causing an injury that causes a suicide if the suicide is non-volitional, but not liable if the suicide is voluntary. This distinction has merit[140] and commends the analogous distinction upon which is predicated the traditional property rule voiding gifts made conditional upon suicide.

As a general rule, one cannot be held liable for the suicide of another, even where one has committed a negligent act but for which the suicide would not have occurred.[141] The act of suicide is considered a deliberate, intentional, and intervening act, which constitutes a superseding cause and breaks any causal chain between the defendant's conduct and the suicide's death.[142] It is not a matter of whether the tortfeasor should reasonably have foreseen the suicide, but rather an acknowledgement that suicide is so abnormal, such an irregular response to the tortfeasor's conduct, that he should be relieved of liability, and the decedent should bear responsibility for his own choice.[143] If suicide is performed by a lucid person, in full command of his facul-

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140. *See* Victor E. Schwartz, *Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry*, 24 VAND. L. REV. 217, 226–32 (1971).

141. *See* Cleveland v. Rotman, 297 F.3d 569, 572 (7th Cir. 2002); Watters v. TSR, Inc., 904 F.2d 378, 383 (6th Cir. 1990); Brouhard v. Village of Oxford, 990 F. Supp. 839, 842 (E.D. Mich. 1997); Tate v. Canonica, 5 Cal. Rptr. 28, 35 (Ct. App. 1960); Moore v. W. Forge Corp., 192 P.3d 427, 435 (Colo. Ct. App. 2007); District of Columbia v. Peters, 527 A.2d 1269, 1275 (D.C. 1987); Chalhoub v. Dixon, 788 N.E.2d 164, 168 (Ill. App. Ct. 2003); Carney v. Tranfaglia, 785 N.E.2d 421, 425 (Mass. App. Ct. 2003); Eidson v. Reprod. Health Servs., 863 S.W.2d 621, 627 (Mo. Ct. App. 1993); Bruzga v. PMR Architects, 693 A.2d 401, 402 (N.H. 1997); McLaughlin v. Sullivan, 461 A.2d 123, 124 (N.H. 1983); Gioia v. State, 228 N.Y.S.2d 127, 132 (App. Div. 1962); Runyon v. Reid, 510 P.2d 943, 949 (Okla. 1973); Worsham v. Nix, 83 P.3d 879, 884 (Okla. Civ. App. 2003); McPeake v. Cannon, 553 A.2d 439, 440–41 (Pa. Super. Ct. 1989); Clift v. Narragansett Television, 688 A.2d 805, 808 (R.I. 1996); Crolley v. Hutchins, 387 S.E.2d 716, 717–18 (S.C. Ct. App. 1989); Shell Oil Co. v. Humphrey, 880 S.W.2d 170, 174 (Tex. App. 1994); Diggles v. Horwitz, 765 S.W.2d 839, 842 (Tex. App. 1989) (Brookshire, J., concurring); Webstad v. Stortini, 924 P.2d 940, 945 (Wash. Ct. App. 1996); Baxter v. Safeway Stores, Inc., 534 P.2d 585, 589 (Wash. Ct. App. 1975); McMahon v. St. Croix Falls Sch. Dist., 596 N.W.2d 875, 879 (Wis. Ct. App. 1999); Cook v. Shoshone First Bank, 126 P.3d 886, 896 (Wyo. 2006); R.D. v. W.H., 875 P.2d 26, 28 (Wyo. 1994). This rule does not relieve a tortfeasor from liability for a suicide resulting from the tortfeasor's intentional conduct, whether the suicide is voluntary or involuntary. Kimberlin v. DeLong, 637 N.E.2d 121, 126–28 (Ind. 1994); Cauverien v. De Metz, 188 N.Y.S.2d 627, 632 (N.Y. Sup. Ct. 1959); Mayer v. Town of Hampton, 497 A.2d 1206, 1210 (N.H. 1985); Rowe v. Marder, 750 F. Supp. 718, 724 (W.D. Pa. 1990).

142. Edwards v. Tardiff, 692 A.2d 1266, 1269 (Conn. 1997); *Bruzga*, 693 A.2d at 402–03; *Webstad*, 924 P.2d at 945; *Cleveland*, 297 F.3d at 572–74.

143. *See generally*, William L. Prosser, *Proximate Cause in California*, 38 CAL. L. REV. 369, 405–06 (1950); Schwartz, *supra* note 140, at 229.

ties, to whom life is unendurable, "it is agreed that his voluntary choice is an abnormal thing, which supersedes the defendant's liability."[144]

An exception appears in section 455 of the Restatement of Torts, which sets apart the case in which a negligent tortfeasor causes the suicidal person to suffer loss of volitional control from the case in which suicide is volitionally chosen.[145] The tortfeasor is liable for subsequent harmful conduct of the delirious or insane person if the delirium or insanity renders the person either (a) unable to understand the nature of his conduct and risk of harm or (b) unable to resist an impulse caused by his insanity, depriving him of his capacity to govern his conduct according to reason.[146]

Though clause (a), dealing with the capacity to understand, has not been met with universal acclamation, clause (b), dealing with the capacity to govern oneself through the exercise of volitional choice, has been adopted almost universally in the United States.[147] Section 455(b) applies to a suicide performed under an insane impulse, which is irresistible because the suicide's insanity has also prevented his reason from controlling his actions.[148] Thus, the delirium or insanity caused by the defendant must both prompt the impulse to suicide and render the suicidal person unable to resist the impulse.[149]

In short, a negligent tortfeasor may be held liable for causing a mental illness that causes an involuntary suicide, but not for causing a voluntary suicide. Three distinctions inhere in this rule, each of which brings to light a conflation in the *Scherer* court's reasoning. First, the rule distinguishes between mental conditions and mental illnesses.[150] The former include conditions such as depression, dis-

144. *Tate*, 5 Cal Rptr. at 40 (quoting WILLIAM L. PROSSER, LAW OF TORTS, 273–74 (2d ed. 1955)).

145. RESTATEMENT (SECOND) OF TORTS § 455 (1965); *see also Peters*, 527 A.2d at 1276; Exxon Corp. v. Brecheen, 519 S.W.2d 170, 181–82 (Tex. Civ. App. 1975); *Cook*, 126 P.3d at 896.

146. RESTATEMENT (SECOND) OF TORTS § 455. The first clause of this formulation comes from *Koch v. Fox*, 75 N.Y.S. 913 (N.Y. App. Div. 1902) and *Maguire v. Sheehan*, 117 F. 819 (1st Cir. 1902). The second clause, and the rule generally, is taken from *Delinousha v. Nat'l Biscuit Co.*, 161 N.E. 431, 432 (N.Y. 1928). *See* RESTATEMENT OF TORTS § 27 (Preliminary Draft No. 38, 1930); RESTATEMENT OF TORTS § 24 (Preliminary Draft No. 44, 1931).

147. *Tate*, 5 Cal Rptr. at 42; Moore v. W. Forge Corp., 192 P.3d 427, 435 (Colo. Ct. App. 2007); Porter v. Murphy, 792 A.2d 1009, 1011, 1015 (Del. Super. 2001). *See* discussion *infra* note 162 (evidence of volition in different instances of suicide).

148. *Moore*, 192 P.3d at 436.

149. Fuller v. Preis, 350 N.Y.S.2d 659, 663–64 (N.Y. App. Div. 1973), rev'd 322 N.E.2d 263 (N.Y. 1974); Baxter v. Safeway Stores, Inc., 534 P.2d 585, 589–90 (Wash. Ct. App. 1975).

150. Halko v. N.J. Transit Rail Operations, Inc., 677 F. Supp. 135, 142 (S.D.N.Y. 1987); *Tate*, 5 Cal. Rptr. at 40; *Moore*, 192 P.3d at 435; Eidson v Reprod. Heath Servs., 863 S.W.2d 621, 627 (Mo. Ct. App. 1993); Gioia v. State, 228 N.Y.S.2d 127, 131–32 (App. Div. 1962); *Baxter*, 534 P.2d at 589; *cf.* Grant v. F.P. Lathrop Constr. Co., 146 Cal. Rptr. 45, 48

couragement, melancholy, and "other sane conditions,"[151] which might contribute to a suicidal tendency but do not interfere with volition. The latter are mental illnesses, which generate a suicidal impulse and incapacitate the will of the suicidal person to resist that impulse. "[N]o duty exists to avoid acts or omissions that lead another person to commit suicide unless those acts or omissions directly or indirectly deprive that person of the command of his or her faculties or the control of his or her conduct."[152] For this reason,

> [W]here the negligent wrong only causes a mental condition in which the injured person is able to realize the nature of the act of suicide and has the power to control it if he so desires, the act then becomes an independent intervening force and the wrongdoer cannot be held liable for the death.[153]

Second, the defendant's negligent conduct must cause the delirium or insanity, which in turn must cause an irresistible impulse to commit suicide.[154] For example, a head injury sustained at a construction site may predicate liability for the subsequent suicide of the injured person only if the injury caused the person to lose the capacity to refrain from self-destruction. It is not enough to show that a decedent's mental condition is a "powerful contributer" to his "feelings of hopelessness and helplessness."[155] Liability will attach only "when the tort-feasor's wrongful act causes the decedent to become insane and the decedent's insanity prevents him from realizing the nature of his act or from controlling his conduct . . . ."[156]

Third, the delirium or insanity must render the resulting suicide non-volitional. "When the decedent acts under the conditions expounded in § 455, he is not acting with volition, and his suicide, therefore, does not breach the chain of causation."[157] By contrast, in the

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(Cal. Ct. App. 1978) (finding no legally significant distinction between a "mental condition" that results in an uncontrollable impulse to suicide and a "mental illness" that renders the individual incapable of reasoning or exercising the will). "In each such case, it is the uncontrollable impulse for which the tortfeasor should be held responsible." *Id.* at 50.

151. *Delinousha*, 161 N.E. at 432.

152. Webstad v. Stortini, 924 P.2d 940, 945 (Wash. Ct. App. 1996).

153. *Tate*, 5 Cal Rptr. at 40. *See* Daniels v. New York, N.H. & H.R. Ry. Co., 67 N.E. 424, 425 (Mass. 1903) ("[I]f death is the result of volition by one who has a conscious purpose to end his life, and has intelligence to adapt means to ends, it is his own act . . . *even though he is so far insane as not to be morally responsible for his conduct.*") (emphasis added). *Baxter*, 534 P.2d at 590 (finding evidence of "severe depression" insufficient to demonstrate an uncontrollable impulse).

154. Porter v. Murphy, 792 A.2d 1009, 1011, 1015 (Del. Super. Ct. 2001).

155. *Moore*, 192 P.3d at 435.

156. R. D. v. W. H., 875 P.2d 26, 28 (Wyo. 1994).

157. *Id.* at 29.

absence of an irresistible impulse, suicide is generally presumed to be "a voluntary willful choice determined by a moderately intelligent mental power, which knows the purpose and the physical effect of the suicidal act."[158] This is true even if the choice is made by a "disordered mind."[159] The Restatement allows recovery only when the decedent is "unable to completely abandon or overcome the 'uncontrollable impulse'" to commit suicide.[160]

The *Scherer* court missed all three of these distinctions. It failed to distinguish between mere mental conditions (depression, for example), which can be found in many suicidal cases,[161] and mental illnesses. It failed to distinguish between mental illnesses that cause a suicidal impulse and those that do not. And it failed to distinguish between those mentally ill persons who are incapable of governing their conduct according to reason and those who possess some measure of volitional control. All three of these distinctions inhere in the Restatement's considered differentiation between volitional and non-volitional suicide.

The distinction that the Torts Restatement draws between volitional and non-volitional acts of suicide is sensible. It rests upon principles and observations easily grasped by thinking persons. That the distinction makes so much sense, has proved workable in a line of cases, conforms to the evidence available in those cases,[162] and is con-

158. Webstad v. Stortini, 924 P.2d 940, 945 (Wash. Ct. App. 1996) (quoting Hepner v. Dept. of Labor and Indus., 250 P. 461 (Wash. 1926)). The law rejects the contention "that we are all slaves of destiny." *Daniels*, 67 N.E. at 426. This presumption "brings us near to the vexed theological problem as to free will and predestination, [but] [w]ithout attempting to pursue these inquiries too far," assumes in the absence of contrary evidence free, voluntary, and volitional choice; the burden is on the plaintiff to show that the decedent acts without volition. *Id.* at 426. *See Moore*, 192 P.3d at 435; Brown v. Am. Steel & Wire Co., 88 N.E. 80, 85 (Ind. Ct. App. 1909); Johnstone v. City of Albuquerque, 145 P.3d 76, 83 (N.M. Ct. App. 2006).

159. McMahon v. St. Croix Falls Sch. Dist., 596 N.W.2d 875, 880 (Wis. Ct. App. 1999). To establish a causal chain back to the defendant's original negligence "there must appear to be something more than an unsound mind." *Brown*, 88 N.E. at 85. The self destruction must be "accomplished in delirium or frenzy . . . and without conscious volition of a purpose to take life; for then the act would be that of an irresponsible agent." *Id.*

160. Clift v. Narragansett Television, 688 A.2d 805, 809 (R.I. 1996).

161. *Moore*, 192 P.3d at 436.

162. *Compare* the volitional suicides in Watters v. TSR, Inc., 904 F.2d 378, 383 (6th Cir. 1990), Brouhard v. Village of Oxford, 990 F. Supp. 839, 842 (E.D. Mich. 1997), Hill v. Sears Roebuck & Co., 982 F. Supp. 471, 476 (E.D. Mich. 1997), Tucson Rapid Transit Co. v. Tocci, 414 P.2d 179, 180–82, 185 (Ariz. Ct. App. 1966), *Baxter*, 534 P.2d at 589–90, *Tetrault's Case*, 180 N.E. 231, 232–33 (Mass. 1932), Long v. Omaha & C.B. St. Ry. Co., 187 N.W. 930, 933–34 (Neb. 1922), *Johnstone*, 145 P.3d at 84, Runyon v. Reid, 510 P.2d 943, 949 (Okla. 1973), *with* the non-volitional suicides in Stafford v. Neurological Med., Inc., 811 F.2d 470, 473 (8th Cir. 1987), Freyermuth v. Lutfy, 382 N.E.2d 1059, 1064–65 (Mass. 1978), Richardson v. Edgeworth, 214 So.2d 579, 586 (Miss. 1968), Fuller v. Preis, 322 N.E.2d 263, 267–68 (N.Y. App. 1974), *Exxon Corp. v. Brecheen*, 519 S.W.2d 170, 181–82 (Tex. Civ. App. 1975), Orcutt v. Spokane County, 364 P.2d 1102, 1107 (Wash. 1961).

sistent with general human experience, all commend the conclusion that many suicides are volitional.

Furthermore, those suicides that result from insanity, which overcomes the will of the suicide perpetrator and renders him unable to resist an impulse toward self-destruction, are identifiable as a matter of fact. As the Colorado Court of Appeals pointed out, "delirium or insanity can be assessed based on objective factors such as the deceased's ability to attend to daily affairs and orientation as to person, time, and place."[163]

This distinction between volitional suicide (even where accompanied by a mental condition) and non-volitional suicide, resulting from insanity that causes an irresistible impulse, ought to inform the law of personal property, as it does the law of tort. In both bodies of law, the outcome is controlled by whether the decedent has control over the time and manner of his death. This question can be resolved with reference to the decedent's mental condition and his ability to govern his conduct according to reason. It then behooves us to investigate what contemporary learning has to say on this matter. This article now turns to that project.

C. Social Science Findings

The *Scherer* court made the manifest scientific claim that some mental disorder afflicting each suicidal person overcomes the suicide's will, so that the act is not volitional. However, scientific studies, particularly in psychology and sociology, cast significant doubt upon the *Scherer* court's view of human psychology. A review of recent studies paints a much more complex image of the relationship between suicide and volitional choice.

1. Interpreting the Data

That the *Scherer* court's understanding of social science was clouded should not surprise the thoughtful reader. Translating scientific findings into the language of the law poses several difficulties. First and foremost is confusion over scientific and legal concepts of causation. Psychological and sociological studies of suicide identify "risk factors," "stressors," and life circumstances immediately preceding suicide.[164] Unlike lawyers, social scientists largely concern themselves with identifying statistical correlations between life circumstances and incidence of suicides, not but-for or proximate causes of

163. *Moore*, 192 P.3d at 438.

164. *See, e.g.*, Xun Shen et al., *Characteristics of Suicide From 1998–2001 in a Metropolitan Area*, 30 DEATH STUDIES 859, 866–69 (2006).

suicide. Medical and sociological studies do not attempt to explain whether, absent a particular risk factor such as depression or mental illness, the suicide would not have taken place. Nor do the studies address superseding causes of suicide. For these reasons, drawing causal inferences from social science research can lead one to error.

The purpose of medical and sociological studies of suicide is prevention, not assignment of culpability or liability. For this reason, researchers tend to focus on statistical correlations. They observe, for example, that some percentage of a particular population—for example, teenagers, Asians, residents of Indianapolis, Indiana—committed suicide within a particular time period.[165] Researchers then record the numbers of cases in which the perpetrator of the suicide suffered from depression, was afflicted with a mental disorder, abused alcohol or narcotics, had recently experienced a traumatic event, or demonstrated some other common characteristic. From these statistical correlations, researchers attempt to identify those persons who are most at risk to succumb to suicide.

The *Scherer* court presupposed that a direct correlation lies between supervening mental illness and the choice of suicide. Though the exact correlation between suicide and mental and emotional disorders is a matter of some dispute, psychological ill-health plays an undeniable role in suicide. Some experts believe that only one-third of all suicides suffer from some psychosis, neurosis, or personality disorder.[166] Others place the number as high as 100%.[167] Most reports fall somewhere between these numbers. Estimates of suicide perpetrators who suffered from mental or mood disorders range from 47%,[168] to 63%, [169] to 88%,[170] to 97%.[171]

Many suicide perpetrators seek mental health care or counseling within months before their suicide. Approximately 19% of suicides occur within one month after contact with a mental health professional, and 32% of suicides occur within a year of such contact.[172] Approximately 53% of all persons who commit suicide have had some contact with a mental health professional during the course of their lifetimes.[173] However, experts caution against second-guessing those mental health care providers who fail to detect and prevent suicide

165. *Id.*

166. Saxby Pridmore et al., *Suicide for Scrutinizers*, 14 AUSTRALASIAN PSYCHIATRY 359, 360 (2006).

167. *Id.*

168. Shen et al., *supra* note 164, at 864.

169. Lakshmi Vijayakumar, *Suicide and Mental Disorders in Asia*, 17(2) INT'L REV. PSYCHIATRY 109, 110 (2005).

170. *Id.*

171. *Id.* at 109.

172. Jason B. Luoma et al., *Contact With Mental Health and Primary Care Providers Before Suicide: A Review of the Evidence*, 159 AM. J. PSYCHIATRY 909, 912 (2002).

173. *Id.*

ideation. Even among high-risk populations, those people whose lives demonstrate one or more risk factors, the suicide rate is only 0.2% annually.[174] This means that nearly all people who suffer from identifiable mental health risks associated with suicide do not commit suicide in any given year.[175]

Furthermore, mental and emotional illnesses are not the only risk factors. Some studies suggest that the most direct relationship lies between suicide and a recent traumatic event, such as a loss of a job or the termination of a romantic relationship, particularly divorce.[176] Abuse of alcohol or narcotics is also a factor, as is separation from one's community.[177]

One might infer from the high statistical correlation between mental illness and suicide that mental or emotional disorders play at least some role in most or all suicides. However, this inference is far from conclusive. Because data are often obtained only after the suicide occurs, some experts believe that mental and emotional disorders among those attempting or committing suicide might be significantly underreported.[178] However, other experts suggest that bias and the impossibility of consulting the deceased suicide post-mortem lead to *over*-reporting of mental health issues among suicides.[179] Many studies consist of so-called psychological autopsies, in which research groups cull available information about life events immediately preceding a suicide.[180] Based upon second-hand accounts of the lives of the deceased, these groups report a diagnosable mental disorder in nearly 90% of studied cases and speculate that the other ten percent suffered from a disorder that escaped post-mortem detection.[181]

Critics of this method observe, with considerable understatement, that "bias may be a problem, and additionally, retrospective studies are methodologically questionable."[182] In fact, the post-mortem methodology has proven highly suspect. One expert asked seven experienced mental health professionals to review the notes of evaluations of seventy-eight psychiatric patients, thirty-nine of whom had committed suicide. The professionals were asked to identify the

174. Pridmore et al., *supra* note 166, at 361.

175. *Id.*

176. Shirley L. Zimmerman, *States' Spending for Public Welfare and Their Suicide Rates, 1960 to 1995: What Is the Problem?*, 190 J. NERVOUS & MENTAL DISEASE 349, 352 (2002).

177. Breault, *supra* note 136, at 14.

178. Shen et al., *supra* note 164, at 868.

179. Pridmore et al., *supra* note 166, at 360.

180. *Id.*

181. *Id.*

182. *Id.*

suicides based on their knowledge of common risk factors. They performed no better than random chance.[183]

2. Competing Views within the Social Sciences

When social science researchers take up the task of identifying the causes of suicide, their conclusions reflect the difficulties inherent in drawing causal inferences. Experts offer varying responses to the question what factors most directly contribute to incidence of suicide.[184] For the sake of simplicity, this paper will examine the three models that predominate the debate. Suicide expert German Berrios has labeled these models (1) the psychiatric thesis, (2) the standard view, and (3) the social (or sociological) thesis.[185]

Psychiatric Thesis: mental and emotional disorders cause all suicides. The psychiatric thesis is the view to which the *Scherer* court committed itself. This method of explaining suicide originated in the nineteenth century as an attempt to medicalize the phenomenon of suicide, advancing the notion that every person who commits suicide suffers from a mental disorder.[186] One adherent to the psychiatric thesis opined that no person of a sound mind ever commits suicide and that suicides are "no more or less responsible for the act than is a person for having cancer."[187]

Throughout much of the nineteenth century, as scholars attempted to determine what factors lead to suicide, the psychiatric thesis competed with the standard view (set out below). By the end of the century, the standard view had prevailed, largely because of the failure of evidence to support the psychiatric thesis.[188]

Standard View: suicide is often a choice, to which mental illness and other factors contribute. The standard view of suicide, which developed during the eighteenth century, and thus preceded the psychiatric thesis, holds that suicide does not always result from psychiatric or emotional illness.[189] Under this view, suicide does not necessarily reflect alienation of the mind from reality and is not itself a disease.[190] Instead, suicide is often chosen for reasons that bear intelligible connections to the facts and circumstances of the life of the suicidal per-

183. *Id.* at 361.

184. GERMAN E. BERRIOS, THE HISTORY OF MENTAL SYMPTOMS 443–51 (Cambridge Univ. Press 1996).

185. *Id.*

186. *Id.* at 443; Pridmore et al., *supra* note 166, at 360.

187. Edmund Bergler, *Suicide: Psychoanalytic and Medicolegal Aspects*, 8 LA. L. REV. 504, 533 (1948) (emphasis omitted).

188. BERRIOS, *supra* note 184, at 449; Pridmore et al., *supra* note 166, at 360.

189. BERRIOS, *supra* note 184, at 444.

190. *Id.* at 445–46.

son.[191] Under the standard view, suicide is never morally or legally justified, though one can grasp the reasoning of the suicidal person, who is in this sense choosing rationally, though not fully reasonably or morally. Early adherents to the standard view were concerned that the psychiatric thesis might excuse suicide, obscuring the suicide's voluntary choice and moral culpability.[192]

All of the decisions preceding *Scherer*, with the possible exception of *In re Van Wormer's Estate*, articulate the standard view of suicide. The decedent in *Blazo v. Cochrane* was adjudged to be "in his right mind" at the moment when he expressed his intentions both to make a gift and to commit suicide.[193] In *Earle v. Botsford*, the "conceived approach of death" was "entirely within" the control of the suicidal donor, and "he escaped from the peril (and so the condition of the gift failed) every moment that he refrained from the act of destruction."[194] In *Agnew v. Belfast Banking Co.*, the donor, "[t]hinking there was no . . . way of placing [her money] beyond her husband's reach, . . . *determined* to give it to her sister, and then destroy herself."[195] In *Pikeville National Bank & Trust Co. v. Shirley*, the donor "came to his death by self-destruction which the record indicates he had contemplated and determined upon several days before he carried his determined purpose into effect."[196] And the self-destruction of the donor in *Ray v. Leader Federal Savings & Loan Ass'n*, who fully possessed his mental faculties, "was deliberate, just as deliberate as was his gift . . . ."[197]

Prior to *Scherer*, courts generally shared the view that "[n]ormal men are the arbiters of their own fate so far as suicide is concerned, since that is a matter within their own power of control."[198] A casenote commentator in 1923 noted, "If the donor feared self-destruction due to an irresistible impulse, there might be grounds for [enforcement]; but as yet courts are skeptical of any such psycho-physical phenomena."[199]

The twentieth century saw renewed interest in the question what role mental and emotional pathologies play in suicide, as the catalogue of neuroses and personality disorders grew.[200] However, the

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191. *Id.* at 445; SZASZ, *supra* note 130, at 41, 58. *See* DURKHEIM, *supra* note 136, at 66–67; discussion of Durkheim's work *supra* p. 30.

192. BERRIOS, *supra* note 184, at 444, 448.

193. 53 A. 1026, 1027 (N.H. 1902).

194. [1883] 23 N.B.R. 407, 410 (Can.).

195. [1892] 2 I.R. 204, 215 (Ir.) (emphasis added).

196. 135 S.W.2d 426, 429 (Ky. 1939).

197. 292 S.W.2d 458, 467 (Tenn. Ct. App. 1953).

198. *Pikeville*, 135 S.W.2d at 429.

199. Recent case, *Gifts—Gift* Causa Mortis *Invalid When Made in Contemplation of Suicide*, 36 HARV. L. REV. 483, 483 (1923).

200. BERRIOS, *supra* note 184, at 449; Pridmore et al., *supra* note 166, at 360.

psychiatric thesis did not enjoy the benefit of this new learning. Instead, because of the influence and persuasiveness of Emile Durkheim and his social thesis, experts increasingly turned their attention to sociological explanations for suicide, especially the individual's lack of connection to social and cultural institutions.[201] Thus, the psychiatric thesis gave way first to the standard view and then, before the twentieth century began, to the sociological thesis. When the New Jersey Supreme Court extolled the psychiatric thesis as the "enlightened view,"[202] it had been laid aside for three quarters of a century.

Sociological Thesis (Emile Durkheim): suicide is a result of poor social integration. The sociological thesis developed by the French sociologist Emile Durkheim, consists of several components, the most influential of which rests largely upon the concept of social integration.[203] Durkheim thought that the most significant predictor of what he termed "egoistic" self-destruction was the extent to which an individual is loosed from institutional and creedal bonds to the culture or society of which he is a part.[204] Those persons who are not bound to society through social institutions and common beliefs are socially disintegrated and are more likely to take their own lives.[205]

Durkheim expressly rejected what Berrios later termed the psychiatric thesis of suicide. Durkheim observed that insanity is consistent throughout all segments of society.[206] He stated, "Accordingly, if a manifestation of insanity were reasonably to be supposed in every voluntary death, our problem would be solved; suicide would be a purely individual affliction [as opposed to a sociological phenomenon]."[207] Durkheim thought that this psychiatric explanation for suicide could be demonstrated by proving either that suicide is itself a disease or that it is "an event involved in one or several varieties of

201. BERRIOS, *supra* note 184, at 449–50.

202. Scherer v. Hyland, 380 A.2d 698, 702 (N.J. 1977).

203. *See* DURKHEIM, *supra* note 136.

204. *Id.* at 152–216.

205. *Id.* Durkheim posited four types of suicide: altruistic, *id.* at 217–40, fatalistic, *id.* at 241–76, anomic, *id.*, and egoistic, *id.* at 152–216. He hypothesized that two sociological factors correspond to the different types of suicide: social regulation and social integration. High levels of social integration cause high rates of altruistic suicide, such as voluntary death to save another, while low levels of social integration cause high rates of egoistic suicide, self-destruction justified on individualistic grounds. *Id.* at 11. High levels of social regulation result in high rates of fatalistic suicide, while low levels of social integration result in high rates of anomic suicide. *Id.*

By far the most studied and influential of Durkheim's theories is his theory of egoistic suicide. *Id.* at 13. According to this theory, as individuals are loosened from institutional and creedal bonds of attachment to the society in which they live, they become more likely to destroy themselves. *Id.* at 299–300.

206. *Id.* at 57.

207. *Id.* at 57–58.

insanity, and not to be found in sane persons."[208] The second version of the psychiatric thesis cannot be proven, according to Durkheim.

> A complete inventory of all cases of suicide cannot indeed be made, nor the influence of mental alienation shown in each. Only single examples can be cited which, however numerous, cannot support a scientific generalization; even though contrary examples were not affirmed, there would always be possibility of their existence.[209]

In Durkheim's view, the first version of the psychiatric explanation, that suicide is itself a disease, suffers a slightly different but equally fatal flaw. If suicide is a disease, it must necessarily be what Durkheim called a "monomania," that is, it must be an infirmity that bears only on the suicidal tendency and does not afflict the suicidal person in the other areas of his life.[210] By Durkheim's day, the existence of monomanias had been rejected.[211] "Clinical experience has never been able to observe a diseased mental impulse in a state of pure isolation; whenever there is lesion of one faculty the others are also attacked . . . ."[212] Durkheim speculated that any diagnoses of monomania resulted from insufficient clinical observation and a failure of the clinician to observe other defects of the patient's mental faculties.[213] Durkheim concluded that belief in monomanias contradicted the data of science, which tended to show that different conscious activities are really interdependent functions.[214]

Durkheim rejected the psychiatric explanation of suicide for another reason, namely that many suicides are motivated by ends founded in reality. All suicides committed by the mentally ill "are either devoid of any motive or determined by purely imaginary motives."[215] However, many suicides fall into neither category. Durkheim thought that "the majority [of suicides] have motives, and motives not

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208. *Id.* at 58.

209. *Id.* at 59.

210. *Id.* Indeed, this is precisely the view held by those courts that enforce gifts conditioned upon suicide. By enforcing the gifts, the courts are holding, if implicitly, that the donor has sufficient mental capacity to possess informed donative intent, and that this portion of his mental faculties is unaffected by the infirmity that compels him to commit suicide. *See, e.g.*, *In re Schaeffner*, 410 N.Y.S.2d 44, 48 (Surr. Ct. 1978) (enforcing terms contained in suicide note not as gift causa mortis, but rather as a memorandum of an oral contract of sale).

211. DURKHEIM, *supra* note 136, at 60.

212. *Id.*

213. *Id.* at 60–61.

214. *Id.* at 61.

215. *Id.* at 66.

unfounded in reality."[216] Among those motives for suicide that are grounded in reality, Durkheim identified service to country, self-sacrifice to save another, religious faith, political conviction, and "lofty affection."[217] Suicides committed for these ends are "doubly identifiable as being deliberate and as springing from representations involved in this deliberation which are not purely hallucinatory."[218] He concluded, "Not every suicide can therefore be considered insane, without doing violence to language."[219]

Durkheim offered an alternative to the psychiatric explanation of suicide. He posited that disintegration from societal institutions causes individuals to commit suicide.[220] After reviewing and rejecting the ostensible correlations between suicide and mental illnesses,[221] "neurasthenias,"[222] and alcoholism,[223] he concluded that individual factors cannot explain suicide. Instead, the suicide rate "can be explained only sociologically."[224] He stated,

> To explain his detachment from life the individual accuses his most immediately surrounding circumstances; life is sad to him because he is sad. Of course his sadness comes to him from without in one sense, however not from one or another incident of his career but rather from the group to which he belongs. This is why there is nothing which cannot serve as an occasion for suicide. It all depends on the intensity with which suicidogenetic causes have affected the individual.[225]

Durkheim believed that the social institution of marriage, in particular, was valuable in reducing egoistic suicide. Durkheim asserted that non-marriage increases the tendency toward suicide.[226] Durkheim's studies revealed that, between twenty years and old age, the years in which one is most commonly married, married persons are

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216. *Id.*

217. *Id.* at 66–67.

218. *Id.* at 67. Durkheim continued, "This often debated question may therefore be solved without requiring reference to the problem of freedom. To learn whether all suicides are insane, we have not asked whether or not they act freely; we have based ourselves solely on the empirical characteristics observable in the various sorts of voluntary death." *Id.* This claim is true in the sense that Durkheim's approach to the question did not entail inquiry into the question of free choice. However, having ruled out the psychiatric explanation for suicide, Durkheim discredited the foundation for the Psychiatric Thesis and the holding of the *Scherer* court.

219. *Id.* at 66.

220. *Id.* at 299–300.

221. *Id.* at 62–67.

222. *Id.* at 67–77. By this Durkheim meant intermediate stages between sanity and insanity. *Id.*

223. *Id.* at 77–80.

224. *Id.* at 299.

225. *Id.* at 300.

226. *Id.* at 171–75.

less likely to commit suicide than unmarried persons.[227] Based upon his findings, Durkheim ruled out matrimonial selection as the cause of this correlation; the data did not support the conclusion that people who are naturally immune to suicide are simply more likely to be married.[228]

From these data, Durkheim inferred that the immunity from suicide that married persons enjoy is due to participation in "the family society."[229] He postulated that high marriage rates correspond to low suicide rates and that a society with a high divorce rate would suffer from low social integration and a corresponding high suicide rate.[230]

Durkheim's theory of egoistic suicide and social integration has admirably withstood over a century of testing and criticism.[231] Numerous studies have confirmed the strong correlation between divorce and suicide and the parallel correlation between healthy marriages, social integration, and low rates of suicide. [232] One scholar has summarized, "Perhaps the strongest evidence in support of Durkheim's egoistic theory is found in the area of the family. Over a large group of studies, divorce rates or nonmarried status have been shown to be positively correlated with suicide rates."[233]

Social integration through other institutions and relationships also plays an important role in reducing suicide rates, as Durkheim predicted. Moving from one community to another, thereby disrupting friendships and other personal relationships, directly correlates with increases in suicide.[234] Separation from one's employment correlates strongly with suicide; a one percent increase in unemployment correlates with 320 additional suicides per year.[235] And there exists general consensus that membership in a religious community reduces suicide.[236] For all of these reasons, experts have concluded that there exists "good evidence that Durkheim's theory of egoistic suicide is correct . . . ."[237]

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227. *Id.* at 179.

228. *Id.* at 180–81.

229. *Id.* at 189.

230. *Id.* at 171–75; Zimmerman, *supra* note 176, at 352.

231. DURKHEIM, *supra* note 136, at 9.

232. Zimmerman, *supra* note 176, at 352. Divorce is also shown to increase the risk of suicide in children of the broken marriage. Maggie Gallagher, *(How) Does Marriage Protect Child Well-Being?*, *in* THE MEANING OF MARRIAGE 199 (Robert P. George & Jean Bethke Elshtain eds., 2006).

233. Breault, *supra* note 136, at 14.

234. Zimmerman, *supra* note 176, at 352.

235. *Id.* at 353.

236. Breault, *supra* note 136, at 15.

237. *Id.* at 24.

3. Synthesis

Berrios, who examined and criticized each of the three competing explanations for suicide, concluded that "one obvious thing to do, when faced with multiple levels of explanation, is blend them."[238] He acknowledged that each theory suffers from various weaknesses.[239] And he asserted that danger lurks in ignoring either pathological factors or sociological explanations for suicide.[240]

In light of the paucity of evidence in support of the psychiatric thesis and the strength of competing theories, perhaps the most that can be said is that numerous factors, including mental disorders, alcohol dependency, unemployment, divorce, and other forms of social disintegration, contribute to incidents of suicide. Many suicides appear to be volitionally chosen for reasons founded in reality. And the law rationally distinguishes between those suicides that are volitional and those that are non-volitional. For these reasons, the *Scherer* court's claim that suicides are wholly non-volitional runs contrary to the best learning on the subject.

V. A REPLY TO *SCHERER*—A NEW UNDERSTANDING OF THE TRADITIONAL RULE

Though the *Scherer* rule fails to comport with the reality of suicide, the traditional rule leaves one with unanswered questions. There remain the questions whether the policy ground for the traditional rule is the prevention of suicides and, if so, whether the rule promotes this goal. The traditional rule appears to frustrate, rather than honor, donative intent. Also, it appears that at least some suicides are non-volitional consequences of mental infirmities. The law must account for these problems.

For all of these reasons, a new understanding of the traditional rule and the grounds for it are necessary. This section criticizes the historical justifications for the traditional rule and offers new ones. It suggests that gifts made in contemplation of and not conditional upon suicide are best considered as unconditional gifts inter vivos, rather than gifts causa mortis. Finally, it clarifies the factual issues that courts must resolve when considering a gift made conditional upon an act of suicide.

A. Teaching Function of the Law

As noted above, many have criticized the traditional rule because it does not further the policy objective of deterrence. Maybe these crit-

238. BERRIOS, *supra* note 184, at 450.
239. *Id.* at 451.
240. *Id.*

icisms are meritorious, and the traditional rule does not advance the stated policy. It is perhaps true, as a factual matter, that refusal to enforce these gifts has little or no deterrent effect upon those who are contemplating suicides. This factual hypothesis seems susceptible to verification, but neither the *Scherer* court nor the academic commentators have attempted to test the claim.

Regardless, another public policy of the law is to teach which choices promote the common good and which do not. Even where a particular rule or doctrine produces no direct, practical benefit—vindicates no wrong, deters no undesirable conduct, and creates no wealth—it can have value as a teacher of the rightness or wrongness of particular choices.[241] The law has long taught that suicide is contrary to the good of humans. Enforcing rights created by an act of suicide would run contrary to this teaching.

An analogy to the criminal law of suicide is helpful. Though the criminal law is unable to inflict upon the suicide perpetrator any meaningful penalty, it nevertheless condemns his choice. Blackstone himself, who articulated the most vehement disapprobation of suicide, acknowledged that the law was powerless to punish one who had withdrawn himself from the law's reach.[242] Nevertheless, for centuries the law continued to declaim the villainy of those who ended their own lives while in their right minds.

And though the penalties of forfeiture and dishonor long ago gave way, the opprobrium persisted and persists in American law today. After abolition, many American states continued to treat suicide as a crime, albeit one for which punishment is impossible.[243] Thus, the New Jersey Superior Court, prior to that state's repeal of the criminal prohibition against attempted suicide, reasoned, "Suicide is none the less criminal because no punishment can be inflicted. It may not be indictable because the dead cannot be indicted."[244] Indeed throughout the twentieth century, courts affirmed the inherent criminality of the act of suicide. In 1933, the Florida Supreme Court stated, "No sophistry is tolerated in consideration of legal problems which seek to justify

241. Francis George has skillfully explained some of the ways in which law shapes moral commitments within a culture. Francis Cardinal George, *Law and Culture*, 1 AVE MARIA L. REV. 1 (2003); Francis George, *Law and Culture in the United States*, 48 AM. J. JURIS. 131 (2003). I have set out a tentative explanation and defense of the teaching function of positive law in Adam J. MacLeod, *The Law as Bard: Extolling a Culture's Virtues, Exposing Its Vices, and Telling Its Story*, 1 J. JURIS. 11 (2008).

242. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 190 (Oxford, Clarendon Press 1769).

243. Marzen et al., *supra* note 80, at 98.

244. State v. Carney, 55 A. 44, 45 (N.J. 1903). *Compare Carney*, 55 A. 44, *with* McMahan v. State, 53 So. 89, 90 (Ala. 1910), *and* State v. Willis, 121 S.E.2d 854, 856 (N.C. 1961).

self-destruction as commendable or even a matter of personal right . . . ."[245] In 1973, the United States Supreme Court acknowledged the existence of constitutionally unchallenged laws against suicide.[246] And in 1996, the Rhode Island Supreme Court affirmed that suicide remains a felony in common law.[247]

Expressions of disapprobation within the law teach that suicide is an immoral and socially undesirable practice. These teachings promote what the philosopher Robert George has called a particular "moral ecology."[248] This ecology is conducive to the protection of human life and antithetical to acts of suicide. The traditional rule, refusing to enforce gifts conditioned upon acts of suicide, helps bolster an anti-suicide moral ecology by affirming society's commitment to the protection of human life. Unlike criminal punishment, the rule voiding a gift made conditional upon suicide might not directly incentivize the preservation of life. (Again, this proposition has in no way been empirically demonstrated.) However, it instructs members of the community governed by the rule that their fellow community members frown upon suicide. If one is to commit suicide, one must do so not with the approval of the community, but in spite of the community's disapproval, which is expressed in torts law, criminal law, and the law of personal property. The state refuses to endorse that choice. And if an individual person is to endorse another's suicide (or assist it), he must do so against the grain of predominant cultural commitments, influences, and social pressures.

Put differently, positive laws that frown upon suicide articulate a cultural commitment to the intrinsic value of human life. Even when one despairs of her own life and desires to end it, the culture in which she and her loved ones live affirms that she has value in and of herself. The law in this way affirms the individual's moral worth regardless of the individual's instrumental value and regardless of her perception of her own value.

Significantly, none of the courts enforcing gifts made in contemplation of suicide have cast doubt upon the policy against suicide, which inheres in the law of personal property. None have questioned the presupposition that suicide is an unacceptable practice. Indeed, the Pennsylvania Superior Court in *In re Estate of Smith* believed it was *advancing* the public policy against suicide by enforcing the gift.[249] Not even the *Scherer* court asserted that the law of property looks upon any suicide with approbation.

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245. Blackwood v. Jones, 149 So. 600, 601 (Fla. 1933).

246. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.15 (1973).

247. Clift v. Narragansett Television, 688 A.2d 805, 808 (R.I. 1996).

248. ROBERT GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 1 (Oxford 1993).

249. 694 A.2d 1099, 1102 n.2 (Pa. Super. Ct. 1997).

Property law's expression of disapprobation of suicide informs other areas of law, particularly the law of assisted suicide. Common law criminal prohibitions of suicide instruct scholars and jurists that our nation recognizes no fundamental right to commit suicide or to receive assistance in the commission of suicide.[250] Expressions of disapprobation of suicide in tort law, insurance law, and property law serve much the same purpose. The law of gifts causa mortis has long taught, and continues to teach (in spite of the *Scherer* court's innovations), that suicide is a socially unacceptable practice. This teaching directly affects the more complicated question whether our culture has adopted a permissible attitude toward assisted suicide.

B. Narrow the Exception to the Statute of Wills

The doctrinal underpinnings for the law's refusal to enforce gifts conditioned upon suicide also demand closer examination. They are susceptible to a strong criticism that focuses the rule considerably.

1. The Problem of Donative Intent

Though the *Scherer* court's rather deterministic view of suicide has proven overstated, the court was right to attempt to discern and honor Ms. Wagner's intent. The "basic policy underlying the law of gifts causa mortis [is] carrying out the donor's intention as far as possible when he has failed to follow the formalities required for a valid will."[251] The traditional rule's apparent frustration of Ms. Wagner's intentions would have been a far more solid ground on which to enforce the gift. In at least some cases, frustration of donative intent is a real weakness of the traditional rule. The *Agnew*[252] case illustrates the problem. The donor there intended to remove her assets from the reach of her irresponsible husband,[253] but the traditional rule against enforcement mandated that her assets go directly to him upon her death.[254] In this way, the law brought about the exact opposite of what the donor intended.

In the typical gift causa mortis, the donor prioritizes her preferences for possession of her asset. If she survives, she would prefer to keep the item. If she does not survive, she would prefer that the donee have the asset rather than her heirs. So the priority of possession is

250. GORSUCH, *supra* note 80, at 46–47; MacLeod, *supra* note 241, at 18.
251. BROWN, *supra* note 3, at 141.
252. Agnew v. Belfast Banking Co., [1892] 2 I.R. 204 (Ir.).
253. *Id.* at 215.
254. *Id.* at 210.

(1) the donor, then (2) the donee, and then, as a last resort, (3) the heirs.

In the case of a gift of personal property made in contemplation of suicide, the fact-finder is left with doubt about the relative positions of preferences (1) and (2). The donor is effectively communicating that she would prefer the donee to have the item only if she chooses to kill herself. However, this confusion about donative intent does not present a practical problem for the fact-finder. Where the issue is litigated, the donor has already died and is out of the picture. Thus, the fact-finder is not concerned with the donor's relative preferences between herself and the donee. The fact-finder need only discern whether the donor preferred the donee over her heirs. This question can be resolved without reference to any condition on the gift or subsequent act of self-destruction.

This observation, not the putative, non-volitional nature of suicidal acts, presents a strong challenge to the doctrinal underpinning for the traditional rule. As long as the evidence removes doubt that the donor preferred the donee over any heirs, the gift may be enforced as between the donee and the heirs as a valid gift inter vivos. As between the donee and the heirs, title was not contingent upon the suicide of the donor. And a donor in contemplation of imminent death may make a gift not subject to revocation (as where the donor has resolved to kill herself), which is the archetypical gift inter vivos.[255]

2. A New Doctrinal Justification

Though the problem of donative priority does not pose a doctrinal impediment to enforcement, the problem of the donor's mental condition does. This ground for the traditional rule persists, and is even bolstered, in light of contemporary learning about the law and suicide.

Concern for donative intent ought to motivate fact-finders to examine with some skepticism claims that a suicide made a gift before her demise. Especially where the suicidal donor suffered from some mental or emotional infirmity, compelling reasons remain to void these gifts. Those persons whose wills are influenced (even overborne) by some mental or emotional disorder—the suicides the *Scherer* court referenced—are among the persons whom the Statute of Wills, to which gifts causa mortis are an exception, was enacted to protect. For this reason, courts ought to examine with considerable skepticism claims by recipients of personal property that donors made gifts in contemplation of suicide.

Furthermore, where the donor contemplates death by volitional suicide, a fundamental justification for enforcement is lacking. A pre-

255. John L. Garvey, *Revocable Gifts of Personal Property: A Possible Will Substitute*, 16 CATH. U. L. REV. 119, 123 (1966).

dicate for enforcement of the gift is that the donor, in peril of imminent death, lacks sufficient time or resources to make out a will. This is not true of the donor who plans to take his own life, who has chosen the time and manner, and who controls the circumstances of his death. To ensure that neither fraud nor coercion has brought the claimant to the bar after the putative donor's death, it is not unreasonable to demand that the claimant has an executed and witnessed will satisfying the Statute of Wills.

Those courts that have recently enforced gifts causa mortis made in contemplation of suicide are likely motivated by a desire to honor the donor's intent, a salutary goal. The courts might have silently reasoned that the donors wanted the donees to have the items and that the courts, by enforcing the gift, are honoring those intentions. However, as demonstrated above, the question with gifts of personal property made in apprehension of death is not whether but *when* the donor intended the donee to have the property. A donor who has resolved to commit suicide has no intention to revoke the gift; the donor does not intend to live long enough to reverse his decision. Nor does the suicidal donor make the gift contingent upon suicide; the donor does not care enough about the asset to retain any interest in it. For these reasons, the means of honoring donors' intentions, in these cases, is to enforce the gifts as irrevocable gifts inter vivos.[256]

Where evidence of irrevocability is either lacking or equivocal, leaving the fact-finder with doubts about donative intent, or perhaps even suspicion of fraud or manipulation, gifts of personal property made in contemplation of suicide should not be enforced. The donor who tells the putative donee, "I want you to have this pocket watch if I should take my own life," has expressly conditioned the gift upon a criminal act and has raised the spectre of manipulation or fraud. The requirements of the Statute of Wills must prevail in this case. Even where no direct evidence of fraud or undue influence appears, adherence to the Statute of Wills increases confidence that the decedent has disposed of her assets as she would have done if she had been free of depression or mental illness.

C. New Statement of the Traditional Rule

Because the donor's mental capacity is a potential issue in every case of suicide, the traditional rule must account for it. The *Agnew* court carved out an exception to non-enforcement in the case of one

256. *See generally* Garvey, *supra* note 255, at 123–24 (arguing that this can be done without doing violence to the donor's intended control over the item until the moment of death).

who is sane at the moment of donation and insane at the moment of self-destruction. However, the terms "sane" and "insane" are imprecise and do not enable courts to resolve the separate issues of testamentary capacity and volitional choice to commit suicide. Mental capacity is not a fixed concept in the law. The standard for insanity excusing otherwise criminal conduct differs from the standard for testamentary capacity, which differs from the standard for capacity to enter into a contract, which differs from the standard for discerning volitional conduct.[257]

The gift causa mortis poses not one, but two factual problems of mental capacity. The trier of fact must first determine whether the donor, at the moment of donation, possessed the capacity to form donative intent. Here, the standard for determining testamentary capacity is appropriately borrowed from the law of wills.

Next, the fact-finder must determine whether the donor-decedent acted volitionally when she took her own life. For the reasons examined above, the standard employed in the Restatement (Second) of Torts § 455 serves that purpose. Where a donor either lacks the capacity to understand the nature of her suicide or acts upon an irresistible impulse, then her death is not within her own control, and the policy and doctrinal impediments to enforcement are dissolved in her case.

This two-stage factual inquiry is undoubtedly burdensome for trial courts, particularly where it attends factual disputes concerning donative intent or delivery. For this reason, courts should be permitted to presume that the donor both possessed capacity to form donative intent and committed suicide volitionally. Only where some evidence appears to contradict these presumptions should parties be permitted to contest the donor's mental health.

257. Delinousha v. Nat'l Biscuit Co., 161 N.E. 431, 432 (N.Y. 1928).