AVOIDING PRISON BARS, BUT GAINING A BAR TO INHERITANCE: A STATUTORY SOLUTION FOR THE INSANE SLAYER THROUGH A COMPARATIVE APPROACH

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INTRODUCTION

Motivational speaker and lawyer Iyanla Vanzant once said: "Family is supposed to be our safe haven. Very often, it's the place where we find the deepest heartache."[1] While this quote is certainly not applicable to every family, for many, it rings true. Family violence goes back arguably to the beginning of civilization,[2] and it takes many forms: from the husband who beats his wife,[3] to the mother who murders her children,[4] to the children who murder their parents.[5] In 2013, there were 16,121 homicides in the United States.[6] Of these, an estimated 4,000 of

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[1] Zainab Shabbir, *Family: A Safe Haven?*, TASKEEN SEHATMAND PAKISTAN: TASKEEN BLOG, http://taskeen.org/en/family-a-safe-haven/ [https://perma.cc/KF52-BMHM] (last visited Mar. 29, 2020).

[2] *Genesis* 4:8-9 (English Standard Version) ("Cain spoke to Abel his brother. And when they were in the field, Cain rose up against his brother Abel and killed him.").

[3] *See* CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING INTIMATE PARTNER VIOLENCE, https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html [https://perma.cc/77F9-H7NZ] (last visited Mar. 29, 2020) (reporting that nearly 1 in 5 women and 1 in 7 men report having experienced severe physical violence from an intimate partner in their lifetime).

[4] *See* Melissa Chan, *Revisiting Andrea Yates 15 Years After She Drowned Her Children*, TIME (June 20, 2016), https://time.com/4375398/andrea-yates-15-years-drown-children/ [https://perma.cc/9E7A-QFA4].

[5] *See* Steve Helling, *30 Years After the Menendez Brothers Murders, Read PEOPLE's 1990 Cover Story*, PEOPLE (Aug. 20, 2019), https://people.com/crime/menendez-brothers-murders-30-years-later/ [https://perma.cc/KVQ7-D23C].

[6] *See* E. FULLER TORREY ET. AL., TREATMENT ADVOC. CEN., OFF. RES. & PUB. AFF., RAISING CAIN, THE ROLE OF SERIOUS MENTAL ILLNESS IN FAMILY HOMICIDES 1 (2016)

the homicides were between family members.[7] Of these, an estimated 1,149 of the homicides were between family members in which the wrongdoer had a mental illness.[8] From these statistics, one might assume that homicides carried out by a mentally ill family member are rare.

However, the analysis of family homicide does not stop there. Within the family dynamic exist property, assets, and money. In other words, family coexists with inheritance. Often, individuals create a will expressing their intent to distribute their property after their death, unless of course, they die intestate.[9] Carla Spivack illustrated this concept best when she stated, "[w]here murder and inheritance overlap, we often find family."[10] The mixture of family, inheritance, and murder is already a complex concoction. Now, let's add the mentally ill perpetrator back into the equation.

Consider the following hypothetical: After the perfect night out on the town, Jane murdered John, her husband. She stabbed him multiple times with a knife, incapacitated him (making him unable to call the police), and relayed to the police that she killed him because she feared that he intended to kill her and the children. Jane has a history of mental illness, particularly paranoid delusions. Jane was found not guilty by reason of insanity by the court. Upon seeking to recover her deceased husband's pension benefits, however, it was concluded that the state's slayer statute barred Jane from recovering John's benefits. This hypothetical mirrors that of *Laborers' Pension Fund v. Miscevic*.[11]

This case is just one of many in a state split regarding whether the insanity defense to criminal liability applies as a

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[hereinafter RAISING CAIN] (providing substantial, in-depth analysis of family homicides, including statistics, studies, and cases from different states).

[7] *Id*.

[8] *Id*. at 2.

[9] *See* Morgan Kirkland Wood, *It Takes a Village: Considering the Other Interests at Stake when Extending Inheritance Rights to Posthumously Conceived Children*, 44 GA. L. REV. 873, 879 n.25 (2010) (stating that studies have shown that over fifty percent of Americans die without a will).

[10] Carla Spivack, *Killers Shouldn't Inherit From Their Victims—Or Should They?*, 48 GA. L. REV. 145, 147 (2013).

[11] Laborers' Pension Fund v. Miscevic, 880 F.3d 927, 930-31 (7th Cir. 2018).

defense to the application of the slayer statute. At the heart of the split is inconsistent decision-making amongst the states, which results in unpredictability of outcomes based on the state where the insane slayer is found. Once this situation arises, states go one of two ways: either by letting the insane slayer inherit or, alternatively, by not letting them inherit. For instance, if the insane slayer commits the crime in Mississippi, the outcome may be distinctly different than if the slayer committed the crime in Virginia. This level of inconsistency presents a serious issue for the insane slayer, and thinking outside the United States, specifically towards New South Wales, Australia, best solves the issue.

This state split runs deeper than murder, inheritance, and family. It affects a huge portion of the population that is stigmatized, dramatized, and discriminated against: the mentally ill.[12] Mental illness affects nearly one in five adults.[13] However, most mentally ill individuals are not dangerous.[14] The select few that do kill a family member, presumably, may look towards the insanity defense as their safety net. The individuals that choose this legal route are usually found not guilty by reason of insanity, to which we have our conflict under most slayer statutes. Discussed more in-depth in a later section, slayer statutes strive to prohibit the murderer from unjustly enriching and inheriting from a person that he kills.

Despite most states having a slayer statute, most differ in language, the fashion in which the killing must have been carried out, and the effect on the insane slayer. This Comment proposes a statutory solution that would rectify the split and unify states under one statute that looks at the bigger picture. This solution required a journey outside the borders of the United States, specifically to New South Wales, Australia. Borrowing language

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[12] The terms "mental illness," "mental disorder," and "insanity" are used interchangeably throughout this Comment.

[13] *Mental Health Information: Statistics: Mental Illness*, NAT'L INST. OF MENTAL HEALTH, https://www.nimh.nih.gov/health/statistics/mental-illness.shtml [https://perma.cc/WMY2-R7F2] (last updated Feb. 2019).

[14] RAISING CAIN, *supra* note 6, at 1 ("Most individuals with serious mental illness are not dangerous. However, a small number of them, most of whom are not being treated, may become dangerous to themselves or to others. Some of these individuals may assault or even kill family members.").

from New South Wales's Forfeiture Act of 1995 No. 65 and implementing it into current statutory language of American slayer statutes brings into fruition a more subjective, discretionary solution for the insane slayer.

While other scholars have participated in the conversation surrounding slayer statutes in different contexts,[15] this Comment strictly looks at the slayer rule through the lens of insanity. Part I of this Comment dives into the history, justifications, and implications of both slayer statutes and the insanity defense. Moreover, to see the bigger picture of the state split, Part I provides example cases from each side of the split to show the rationales and holdings of those states.[16]

Part II of this Comment argues that the insane slayer should be able to inherit and proposes the comparative solution.[17] Part II posits that because insane slayers do not possess the requisite intent, they do not fall under the "manners" required in most slayer statutes and, therefore, should not be barred from inheritance. Further, Part II contends, based on the field of genetics, that the genetic inheritance of mental illness should not bar inheritance for the insane slayer, as it is uncontrollable and unsolicited.

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[15] *Compare* Carla Spivack, *Let's Get Serious: Spousal Abuse Should Bar Inheritance*, 90 OR. L. REV. 247, 248-49 (2011) (proposing that spousal abuse should be regarded as duress, and unless rebutted, should effectively bar the abuser from inheritance), *with* Michelle E. Loakes, *Till Death Do Us Par. . . . But What About Our Property? Giving Abused Spouses Their Inheritance Rights Back*, 52 REAL PROP. TR. & EST. L.J. 291, 300 (2017) (arguing that legislatures should codify the temporary insanity exception to the slayer rule to allow abused spouses to inherit from their abusers' estates). *See also* Jeffery G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 858 (1993) (proposing that an exception should be added to the slayer rule when the slaying was an assisted suicide); Lisa C. Dumond, *The Undeserving Heir: Domestic Elder Abuser's Right To Inherit*, 23 QUINNIPIAC PROB. L.J. 214, 215 (2010) (arguing that in order to discourage elder abuse, it is imperative to eliminate the abuser's right to inherit); Rebecca Blasco, *Slayers and Soldiers: The Validity and Scope of the Slayer's Rule Under the Family Servicemembers' Group Life Insurance Act*, 82 WASH. L. REV. 967, 970 (2007) (arguing where the servicemember does the killing and the Act covers his spouse's life insurance policy, courts should preserve the slayer rule); Paige Foster, *Exonerated But Still Confined: Slayer Rules Present Extra Obstacles to Criminally Exonerated Individuals*, 10 EST. PLAN. & COMMUNITY PROP. L.J. 351, 352 (2018) (discussing the legal consequences between exonerated criminals and slayer statutes).

[16] *See infra* Part I.

[17] *See infra* Part II.

The proposed solution is applied to two distinct hypotheticals to exhibit the utilization, hindrances, and recommended applications of the solution. Then, limitations, exceptions, and unanswered questions are posed to show that this solution is neither perfect nor able to remedy all scenarios involving slayers. Lastly, this Comment provides suggested implementation for state courts, whether probate or chancery, for the sake of uniform application amongst the states.[18] Finally, this Comment concludes by offering final words in support of the insane slayer inheriting.

I. BACKGROUND

A. Brief History of the Slayer Statute

As with much of American law, slayer statutes stem from English common law. Conceptualized from "the common law doctrines of attainder, forfeiture, corruption of blood and escheat,"[19] slayer statutes are present in almost all fifty states.[20] An example of language from a slayer statute is: An individual who feloniously and intentionally kills another individual forfeits the right to take an interest from the decedent's estate.[21] The

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[18] *See infra* Part II(*C*)(6).

[19] Alison Reppy, *The Slayer's Bounty—History of Problem in Anglo-American Law*, 19 N.Y.U. L.Q. REV. 229, 244 (1942). *See also* Estate of Foleno v. Estate of Foleno, 772 N.E.2d 490, 493-94 (Ind. Ct. App. 2002) (noting that these common law doctrines gave the property to the Crown upon a killer's conviction, but after the abolishment of the doctrines of attainer, forfeiture, corruption of blood, and escheat, "[n]o longer would the sovereign emerge to confiscate a killer's property, even when the killer acquired the property by means of his crime").

[20] *See infra* notes 80-82. The following states developed their slayer rules from case law: Maryland developed its slayer rule from *Price v. Hitaffer*, 165 A. 470, 473 (Md. 1933); New York was first state to adopt the slayer rule under *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889); Missouri first confronted the slayer issue in *Perry v. Strawbridge*, 108 S.W. 641, 644-45 (Mo. 1908); New Hampshire adopted its approach from *Kelley v. State*, 196 A.2d 68, 69-70 (N.H. 1963) ("[A] court applying common law techniques can reach a sensible solution by charging the spouse, heir or legatee as a constructive trustee of the property where equity and justice demand it."); Texas adopted its approach from *Bounds v. Caudle*, 560 S.W.2d 925, 928 (Tex. 1977) ("[T]he law will impose a constructive trust upon the property of a deceased which passed either by inheritance or by will if the beneficiary wilfully and wrongfully caused the death of the deceased.").

[21] This language is loosely based on GA. CODE ANN. § 53-1-5(a) (West 2020) ("An individual who feloniously and intentionally kills or conspires to kill or procures the killing of another individual forfeits the right to take an interest from the decedent's

rudimentary meaning of the language is mainly that a killer cannot benefit from his wrongdoing or profit from his crime.[22]

Decided in the late 19th century, one of the earliest cases evincing this concept is *Riggs v. Palmer*. In *Riggs*, the defendant, Elmer E. Palmer, willfully poisoned and murdered the testator, Francis B. Palmer, in efforts to obtain "enjoyment and immediate possession" of the property.[23] The New York Court of Appeals was left to decide whether Elmer was entitled to the property. In its decision, the court alluded to public policy as the determining factor of whether Elmer should inherit.[24] In its holding, the New York Court of Appeals stated that Elmer was not allowed to inherit under the rationale that no individual can profit from his wrongdoing or obtain property by his crime.[25] Courts across the country since have grappled with this topic, especially in the case of the insane slayer.[26]

While courts come to differing conclusions, the underlying justifications for the slayer rule are grounded in property, equity, and morality.[27] All three of these justifications are based on real

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estate and to serve as a personal representative or trustee of the decedent's estate or any trust created by the decedent.").

[22] Estate of Armstrong v. Armstrong, 170 So.3d 510, 514 (Miss. 2015).

[23] Riggs, 22 N.E. at 189.

[24] *Id.* at 190. ("Under such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime? The will spoke and became operative at the death of the testator. He caused that death, and thus by his crime made it speak and have operation. Shall it speak and operate in his favor? If he had met the testator, and taken his property by force, he would have had no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house, and by force compelled him, or by fraud or undue influence had induced him, to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative it seems to me would be a reproach to the jurisprudence of our state, and an offense against public policy.").

[25] *Id.*

[26] *See, e.g.*, Boyd v. Boyd, 149 F. Supp. 3d 1331, 1332-36 (N.D. Ala. 2016). After an argument, Cormella Boyd died from multiple gunshot wounds. Her husband, Frederick Boyd, was charged with her murder. *Id.* at 1333. Upon being evaluated for mental capacity, Frederick was found to be extremely paranoid and psychotic. *Id.* After determining that the evidence fell short of showing that Frederick's mind was "so diseased" that he could not "distinguish between right and wrong," the court determined that Frederick Boyd could not benefit from Cormella Boyd's life insurance policy. *Id.* at 1336.

[27] *See* Callie Kramer, *Guilty by Association: Inadequacies in the Uniform Probate Code Slayer Statute*, 19 N.Y.L SCH. J. HUM. RTS. 697, 700 (2003).

concerns of public policy. For example, by allowing an individual to inherit from someone he murdered, a morality issue is presented. Individuals who kill should be penalized, not rewarded with an inheritance. Further, by receiving the inheritance, it may undercut the equity for other outstanding beneficiaries who feel they deserve the inheritance more than the slayer. Lastly, allowing the slayer to inherit could be regarded as an interruption in the chain of property, particularly by "interfering with ownership rights, donative freedom, and transfers conditioned on survivorship."[28] However, despite these concerns surrounding the underlying justifications of slayer statutes, the idea of the slayer statute continues to emerge in modern society.[29]

Although almost all states have a slayer statute, when it comes to the issue of the insane slayer, they customarily take one of two approaches in implementing their statute. Some states apply it literally, using the language of the statute against the situation. For example, the court may consider whether the individual feloniously or willfully killed the testator as required by the statute.[30] Often, these states look at the circumstance from a public policy position to warrant their decision not to let the insane slayer inherit. For example, the court would consider the property, equity, and morality justifications.[31] On the other hand, other states realize that the slayer's mental illnesses pose a problem for his ability to understand his actions and, therefore,

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[28] Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 494 (1986).

[29] *See* Christy Gutowski, *Lawsuit accuses child welfare workers of conducting 'sham investigations' in months before 5-year-old A.J. Freund was killed*, CHI. TRIB. (Oct. 16, 2019), https://www.chicagotribune.com/news/breaking/ct-aj-freund-crystal-lake-dcfs-lawsuit-20191016-t7c46xo4qrfibgeendsjdimt2q-story.html (finding that because Freund's parents were the legal heirs, they could not take under the Illinois slayer statute, which "bars a person who is guilty of intentionally and unjustifiably causing the death of another from profiting from that crime"). *See also* Jordan Schrader, *Killer found insane can't have slain wife's pension, judge rules*, OLYMPIAN (Feb. 5, 2016), https://www.theolympian.com/news/politics-government/article58795398.html.

[30] *See, e.g.*, Clark v. State, 381 So.2d 1046, 1048 (Miss. 1980) ("Where the statute is plain and unambiguous there is no room for construction . . . .").

[31] *See* Kramer, *supra* note 27, at 700.

the slayer does not fit within the statute.[32] This section analyzes this split in decision-making and offers two cases as examples of the rationales and reasoning behind the opposing viewpoints.

1. *In re Estate of Kissinger*

In 2009, the Supreme Court of Washington faced the issue of the insane slayer in *In re Estate of Kissinger*.[33] Joshua Hoge, the appellant, had a long history of mental illness, including but not limited to, paranoid schizophrenia, Capgras syndrome,[34] and hearing voices since the age of nine.[35] Throughout his childhood, his mental illnesses led him to threaten to kill his mother on multiple occasions.[36] On June 23, 1999, Hoge entered his mother's residence and stabbed her and his stepbrother to death.[37] In addition, he tried to kill his mother's boyfriend with an axe.[38] Despite finding that Hoge was legally insane at the time of the killings, the trial court found that he "willfully and unlawfully" killed his mother and therefore was a slayer under Revised Code of Washington, Section 11.84.010.[39]

The central issue before the Supreme Court of Washington was whether a finding of not guilty by reason of insanity is a complete defense to the slayer statute. To resolve this issue, the court grappled with the definitions of "unlawful" and "willful" in its determination of whether the slayer falls under these definitions.[40] The court concluded that "a finding of not guilty by

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[32] *See* Estate of Armstrong v. Armstrong, 170 So.3d 510, 515 (Miss. 2015) (providing multiple cases that have refused to preclude the insane slayer from inheriting under their state's slayer statute).

[33] 206 P.3d 665 (Wash. 2009) (en banc).

[34] Kamil Atta et al., *Delusional Misidentification Syndromes: Separate Disorders or Unusual Presentations of Existing DSM-IV Categories?*, PSYCHIATRY, Sept. 2006, at 56, 59 (2006) ("Capgras syndrome is the delusion that an impostor has replaced a close friend or relative.").

[35] *In re* Estate of Kissinger, 206 P.3d at 666.

[36] *Id.*

[37] *Id.* at 667.

[38] *Id.*

[39] *Id.* The Revised Code of Washington defines a "Slayer" as "any person who participates, either as a principal or an accessory before the fact, in the willful and unlawful killing of any other person as determined under RCW 11.84.140." WASH. REV. CODE. ANN. § 11.84.010(5) (West 2020).

[40] *In re* Estate of Kissinger, 206 P.3d 665, 669-71 (Wash. 2009) (en banc).

reason of insanity does not make an otherwise unlawful act lawful," and ultimately that Hoge's actions were willful and unlawful.[41] He was thereby barred from recovery under RCW 11.84.010.[42]

2. *Estate of Armstrong v. Armstrong*

In contrast to *Kissinger*, in 2015, the Supreme Court of Mississippi landed on the opposite side of the split in *Estate of Armstrong v. Armstrong*.[43] In 2010, multiple neighbors told Joan Armstrong that they were worried about their children's safety because they had seen her son, John, acting erratically.[44] John had a long history of mental illness and, one day, after bringing John back to her condominium, Joan invited some friends to the swimming pool.[45] At that point, John went upstairs and grabbed a "crochet-covered brick," and he proceeded to bludgeon Joan to death.[46] In this case of first impression, the Supreme Court of Mississippi dealt with the issue of whether an individual charged with murder but not tried because of mental incapacity is precluded from inheriting under the Mississippi slayer statute.[47]

The Supreme Court of Mississippi construed the state slayer statute according to its plain meaning.[48] Interpreting the word

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[41] *Id.* at 671.

[42] *Id.* at 670. Other courts have concluded similarly. *See* Osman v. Osman, 737 S.E.2d 876, 880-81 (Va. 2013) (finding that although Osman avoided criminal penalties because of his mental illness, under the civil burden by a preponderance of the evidence, the evidence was sufficient to prove the murder, thereby restricting Osman from benefiting from his wrong); Dougherty v. Cole, 934 N.E.2d 16, 21 (Ill. App. Ct. 2010) (finding that in considering only "whether the murderous act was intentional and unjustified, regardless of the institution or outcome of any criminal proceedings," in addition to there being "no exception for mental illness," the slayer's "conduct excluded him from inheriting").

[43] 170 So.3d 510 (Miss. 2015). *See generally* Zachary B. Roberson, *Oh the Insanity: After 124 Years, It's Time to Amend Mississippi's Slayer Statute to Account for the Insane Slayer*, 87 MISS. L.J. 441 (2018) (providing an in-depth analysis of *Armstrong* and the Mississippi slayer statute).

[44] *Armstrong*, 170 So.3d at 511.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 513.

[48] *Id.* The Mississippi slayer statute provides in part that "[i]f any person shall willfully cause or procure the death of another in any manner, he shall not take the property." MISS. CODE ANN. § 91-5-33 (West 2020).

"willful" in the statute, the court relied on precedent that states "willful" is similar to "intentionally, knowingly, deliberately, and purposely."[49] From this, the court determined that, for the slayer statute to apply, John had to have acted willfully in committing the killing.[50] The court concluded that the slayer statute:

> requires a finding of *willful* conduct to preclude a person from inheriting from his or her victim. Because an insane person lacks the requisite ability willfully to kill another person, the [s]layer [s]tatute is not applicable in cases where the killer is determined to be insane at the time of the killing.[51]

Following in *Armstrong*'s footsteps, as well as other cases in the "Yes" category,[52] the arguments that follow in this Comment follow the same thought process and reasoning.

B. A Brief History of the Insanity Defense

The common method in the sentencing of criminal offenders involves "punishment, prevention, restraint, rehabilitation, deterrence, education, and retribution."[53] In this section, the punishment of the offender is closely considered. In general, the American criminal justice system is grounded on swift, certain, and severe punishment.[54] Further, the three main theories of

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[49] Estate of Armstrong v. Armstrong, 170 So.3d 510, 516 (Miss. 2015).

[50] *Id.*

[51] *Id. But see* Ford v. Ford, 512 A.2d 389, 406-07 (Md. 1986) (Cole, J., dissenting) ("I realize that the insane killer committed the crime either because she could not appreciate the criminality of her conduct or because she could not conform her conduct to the requirements of the law. But this reason for the killer's volition has no bearing upon the equitable principle embodied in the slayer's rule. If the insane killer has intentionally killed her victim, if she has acted with the required *mens rea* for the crime, she is personally and morally responsible for her wrong, and equity demands that she shall not benefit from the deed. It is repugnant to decency to say that an insane murderer can finance her rehabilitation with new found wealth from her victim's estate.").

[52] *See generally In re* Estates of Ladd, 153 Cal. Rptr. 888 (Ct. App. 1979); Turner v. Estate of Turner, 454 N.E.2d 1247 (Ind. Ct. App. 1983); Campbell v. Ray, 245 A.2d 761 (N.J. Super. Ct. Ch. Div. 1968); *In re* Fitzsimmon's Estate, 315 N.Y.S.2d 590 (N.Y. Sur. Ct. 1970).

[53] United States v. Giraldo, 822 F.2d 205, 210 (2d Cir. 1987).

[54] *See* William C. Bailey & Ronald W. Smith, *Punishment: Its Severity and Certainty*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 530, 531-32 (1972) (discussing the severity and certainty of punishment as it relates to homicide). *See*

punishment seek to provide justifications for why punishment is necessary.[55] But in a system in which the punishment should fit the offender, rather than the crime, the insanity defense presents itself as an exception. Justified on its refusal to penalize the deranged, the insanity defense is an affirmative defense whereby the individual alleges that his mental disorder or disease caused him to commit the act.[56]

However, despite the insanity defense's underlying philosophy in fairness, it is not an easy defense to bring.[57] In fact, the insanity defense is brought in only 1% of cases and is successful no more than 25% of the time.[58] Notwithstanding its rarity, this defense has roots that extend deep into history. In fact, the first acquittal of a defendant for reasons of insanity dates to the early 16th century.[59] Not long after, English common law fully adopted the insanity defense in 1581.[60] In the 18th century, Britain established the "wild beast test."[61] In the years that followed, other tests for insanity surfaced, many of which are utilized today: the Appreciation Test,[62] *McNaghten*,[63] Irresistible-

generally Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BRIT. J. AM. LEGAL STUD. 263 (2013).

[55] *See* Beatrice R. Maidman, *The Legal Insanity Defense: Transforming the Legal Theory into a Medical Standard*, 96 B.U. L. REV. 1831, 1841-45 (2016) (providing an in-depth discussion about the retribution, deterrence, and rehabilitation theories of punishment as they relate to the insanity defense).

[56] *Insanity Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[57] *See* J. Amy Dillard, *Madness Alone Punishes the Madman: The Search for Moral Dignity in the Court's Competency Doctrine as Applied in Capital Cases*, 79 TENN. L. REV. 461, 492 (2012) ("Proving insanity is very difficult, even in cases with overwhelming evidence of long-term, untreated mental illness.").

[58] Ronald Schouten, *The Insanity Defense: An Intersection of Morality, Public Policy, and Science*, PSYCHOL. TODAY (Aug. 16, 2012), https://www.psychologytoday.com/us/blog/almost-psychopath/201208/the-insanity-defense [https://perma.cc/X276-PK4V].

[59] Jessica Harrison, *Idaho's Abolition of the Insanity Defense—An Ineffective, Costly, and Unconstitutional Eradication*, 51 IDAHO L. REV. 575, 580 (2015).

[60] *Id.*

[61] *From Daniel M'Naughten to John Hinckley: A Brief History of the Insanity Defense*, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html [https://perma.cc/3F4V-2ZZK] (last visited Mar. 29, 2020) (The wild beast test stated that, "[i]f a defendant was so bereft of sanity that he understood the ramifications of his behavior no more than in an infant, a brute, or a wild beast, he would not be held responsible for his crimes." (internal quotations marks omitted)).

[62] *Appreciation Test*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the Appreciation Test as "[a] test for the insanity defense requiring proof by clear and

Impulse,[64] Substantial-Capacity,[65] and *Durham*.[66] Today, most states follow one of these insanity defense tests,[67] with exception to Idaho, Montana, Utah, and Kansas.[68] However, despite its extensive, historical development, this defense has remained heavily debated and questioned.[69]

II. ARGUMENT

In American society today, one of the most unprotected, neglected, and victimized groups of individuals is the mentally

convincing evidence that at the time of the crime, the defendant suffered from a severe mental disease or defect preventing him or her from appreciating the wrongfulness of the conduct"). *See also* 18 U.S.C. § 17.

[63] McNaghten *Rules*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *McNaghten* as "[t]he doctrine that a person is not criminally responsible for an act when a mental disability prevented the person from knowing either (1) the nature and quality of the act or (2) whether the act was right or wrong").

[64] *Irresistible-Impulse Test*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the Irresistible-Impulse test as "[a] test for insanity, holding that a person is not criminally responsible for an act if mental disease prevented that person from controlling potentially criminal conduct").

[65] *Substantial Capacity*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the Substantial-Capacity test as "[t]he Model Penal Code's test for the insanity defense, stating that a person is not criminally responsible for an act if, as a result of a mental disease or defect, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the law"). *See also* MODEL PENAL CODE § 4.01 (AM. LAW INST., 2018).

[66] Durham *Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the *Durham* Rule as "[a] test for the insanity defense, holding that a defendant is not criminally responsible for an act that was the product of mental disease or defect").

[67] *See The Insanity Defense Among the States*, FINDLAW, https://criminal.findlaw.com/criminal-procedure/the-insanity-defense-among-the-states.html [https://perma.cc/H4WB-5UPS] (last visited Mar. 29, 2020) (providing a chart of the utilization of the different insanity defense tests in each of the fifty states and the District of Columbia).

[68] *See* Harrison, *supra* note 59, at 585 n.128.

[69] *See*, *e.g.*, Hinckley v. United States, 140 F.3d 277 (D.C. Cir. 1998). In 1981, John Hinckley attempted to assassinate President Ronald Reagan. *Id*. at 279. "At his criminal trial, Hinckley presented evidence that he was suffering from a mental disease and that his criminal actions were a result of that disease." *Id*. He was found not guilty by reason of insanity. *Id*. The result of his verdict produced much debate and heated discussion. *See*, *e.g.*, Jonathan B. Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 YALE L.J. 1545, 1553 n.28 (1985) (stating that based on an ABC poll, "83% of the nation thought justice was not done in the Hinckley trial" (internal quotation marks omitted)); Lisa Callahan, Connie Mayer & Henry J. Steadman, *Insanity Defense Reform in the United States — Post-Hinckley*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54 (Jan.-Feb. 1987) (providing research on the impact of insanity defense reform after *Hinckley v. United States*).

ill.[70] Further, there currently is no standard of scrutiny review for this class of individuals.[71] Though there are many areas in the legal sector that neglect the mentally-ill, this Comment focuses on gaps in the probate system. Pursuant to the state split set forth in *Laborers' Pension Fund v. Miscevic*,[72] at issue is whether the insanity defense also applies as a defense to the slayer statute. States fall on either side of the split, either having rationales underlain in public policy justifications, or reasoning related to the lack of intent on the part of the insane slayer.

In response, this Comment argues that once slayers are found not guilty by reason of insanity, they should not be barred from inheriting from their victim's estate due to their uncontrolled genetic predisposition to the mental illness and their lack of requisite intent to commit the act. To reconcile this ongoing state split, this Comment proposes that it may be advantageous to look outside the borders of the United States towards New South Wales, Australia for a solution and, specifically, the "justice requires" approach. As discussed later, the "justice requires" approach is a fairer, discretionary application of forfeiture in New South Wales.

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[70] *Compare* Patrick W. Corrigan & Amy C. Watson, *Understanding the impact of stigma on people with mental illness*, 1 WORLD PSYCHIATRY 16 (2002), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1489832/pdf/wpa010016.pdf [https://perma.cc/EF2R-KLP5] ("On one hand, they struggle with the symptoms and disabilities that result from the disease. On the other, they are challenged by the stereotypes and prejudice that result from misconceptions about mental illness. As a result of both, people with mental illness are robbed of the opportunities that define a quality life: good jobs, safe housing, satisfactory health care, and affiliation with a diverse group of people."), *with* Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 886 (2011) (stating that some individuals with severe mental disorders are treated "specially" in criminal law, and further that people with mental disorders should be treated similarly to everyone else).

[71] *See generally* Steven K. Hoge, Cleburne *and the Pursuit of Equal Protection for Individuals with Mental Disorders*, 43 J. AM. ACAD. PSYCHIATRY L. 416, 416 (2015) ("The Equal Protection Clause of the Fourteenth Amendment to the Constitution has been the foundation for judicial rulings against discriminatory laws affecting racial minorities, women, and other groups. However, it has had only limited application in mental health law, even though individuals with mental disorders have been subjected to long-standing discrimination in many contexts.").

[72] 880 F.3d 927, 937 (7th Cir. 2018).

A. Lack of the Requisite Intent in the Commission of the Criminal Act Should Not Bar Inheritance

To reiterate, slayer statutes are premised on the idea that a slayer should be prevented "from benefitting from the death of the victim or profiting from wrongdoing."[73] While the situation under these statutes is a civil matter and must be proven by a preponderance of the evidence, generally, the criminal act imagined in these scenarios is a homicide.[74] It is well-settled that there are two requirements for a criminal act: *mens rea* and *actus rea*.[75] Moreover, the act must have been of the person's own volition.[76] Some individuals, however, are incapable of formulating the requisite *mens rea* due to their mental disease.[77] Across the United States, courts utilize different tests under the insanity defense to determine whether defendants had control over their actions.[78]

Under most American slayer statutes and the Uniform Probate Code,[79] the killing must have been done feloniously,

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[73] Estate of Armstrong v. Armstrong, 170 So.3d 510, 514 (Miss. 2015).

[74] *In re* Kissinger, 206 P.3d 665, 669 (Wash. 2009).

[75] Barbara A. Weiner, *Not Guilty by Reason of Insanity: A Sane Approach*, 56 CHI. KENT. L. REV. 1057, 1058 (1980).

[76] *See* MODEL PENAL CODE § 2.01 (AM. LAW. INST., 2018). Subsection (1) provides: "A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable." *Id.* § 2.01(1). The Model Penal Code, in subsection (2), lists acts that are "not voluntary," including: "a reflex or convulsion;" "a bodily movement during unconsciousness or sleep;" "conduct during hypnosis or resulting from hypnotic suggestion;" and "a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual." *Id.* § 2.01(2). *See also* Kevin W. Saunders, *Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition*, 49 U. PITT. L. REV. 443 (1988) (providing an in-depth analysis of the voluntary act).

[77] *See* Seth Feuerstein et al., *The Insanity Defense*, PSYCHIATRY, Sept. 2005, at 24, 24 (2005). *See also* McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962) ("[A] mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.").

[78] Feuerstein, *supra* note 77, at 25. *See also supra* notes 62-66 (defining all tests of insanity).

[79] UNIF. PROBATE CODE § 2-803(b) (amended 2010) (stating that an "individual who feloniously and intentionally kills the decedent forfeits all benefits under this [article] with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a

willfully, unlawfully, intentionally, or a combination of these.[80] Other statutes use words such as "unjustifiably."[81] Others tie the slayer requirements to offenses in their respective criminal codes, such as murder and voluntary manslaughter.[82] Notwithstanding the requirements set forth in state slayer statutes, the insane slayer does not fall within these statutes based on lack of *mens rea* and inability to form the requisite intent at the time of the killing.

Insane is defined as, "[m]entally deranged; suffering from one or more delusions or false beliefs that (1) have no foundation in reason or reality, (2) are not credible to any reasonable person of sound mind, and (3) cannot be overcome in a sufferer's mind by any amount of evidence or argument."[83] A slayer of unsound mind and with no foundation of reality cannot and does not possess the

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family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his [or her] intestate share.").

[80] *See* ALA. CODE § 43-8-253 (2019); ALASKA STAT. ANN. § 13.12.803 (West 2019); ARIZ. REV. STAT. ANN. § 14-2803 (2020); CAL. PROB. CODE §§ 250-254 (West 2020); COLO. REV. STAT. ANN. § 15-11-803 (West 2020); D.C. CODE ANN. § 19-320 (West 2020); FLA. STAT. ANN. § 732.802 (West 2020); GA. CODE ANN. § 53-1-5 (West 2020); HAW. REV. STAT. ANN. § 560:2-803 (West 2019); IDAHO CODE ANN. § 15-2-803 (West 2020); KAN. STAT. ANN. § 59-513 (West 2020); LA. CIV. CODE ANN. art. 941 (2019); ME. REV. STAT. ANN. tit. 18-C, § 2-802 (2019); MD. CODE. ANN., EST. & TRUSTS § 11-112 (West 2020); MASS. GEN. LAWS ANN. ch. 265, § 46 (West 2020); MICH. COMP. LAWS ANN. § 700.2803 (West 2020); MINN. STAT. ANN. § 524.2-803 (West 2020); MISS. CODE ANN. § 91-1-25 (West 2019); MO. ANN. STAT. § 461.054 (West 2019); MONT. CODE ANN. § 72-2-813 (West 2019); NEB. REV. STAT. ANN. § 30-2354 (West 2020); NEV. REV. STAT. ANN. § 41B.250 (West 2019); N.J. STAT. ANN. § 3B:7-1.1 (West 2019); N.M. STAT. ANN. § 45-2-803 (West 2020); N.C. GEN. STAT. ANN. § 31A-3 (West 2019); N.D. CENT. CODE ANN. § 30.1-10-03 (West 2020); OR. REV. STAT. ANN. § 112.455 (West 2020); 20 PA. STAT. AND CONS. STAT. ANN. § 8801 (West 2020); 33 R.I. GEN. LAWS ANN. § 33-1.1-1 (West 2019); S.C. CODE ANN. § 62-2-803 (2020); S.D. CODIFIED LAWS § 29A-2-803 (2020); TENN. CODE ANN. § 31-1-106 (West 2020); TEX. INS. CODE ANN. art. 1103.151 (West 2019) (for life insurance purposes); UTAH CODE ANN.§ 75-2-803 (Uniform Law Comments) (West 2020); VT. STAT. ANN. tit. 14, § 322 (West 2020); WASH. REV. CODE ANN. § 11.84.010 (West 2020); W. VA. CODE ANN. § 42-4-2 (West 2020); WIS. STAT. ANN. § 854.14 (West 2020); WYO. STAT. ANN. § 2-14-101 (West 2019).

[81] *See* 755 ILL. COMP. STAT. ANN. 5/2-6 (West 1990); IOWA CODE ANN. § 633.535 (West 2020).

[82] For slayer statutes tied to state criminal offenses, see ARK. CODE ANN. § 28-11-204 (West 2019); CONN. GEN. STAT. ANN. § 45a-447 (West 2019) (however, "intentionally" is the manner prescribed for life insurance purposes); DEL. CODE ANN. tit. 12, § 2322 (West 2019); KY. REV. STAT. ANN. § 381.280 (West 2020); OHIO REV. CODE ANN. § 2105.19 (West 2019); OKLA. STAT. ANN. tit. 84, § 231 (West 2019); VA. CODE ANN. § 64.2-2500 (West 2019).

[83] *Insane*, BLACK'S LAW DICTIONARY (11th ed. 2019).

requisite intent, nor can he commit the crime in the manner specified in most slayer statutes, with the exception of "unlawfully." All definitions are discussed below as it applies to the insane slayer.

Felonious means "[o]f, relating to, or involving a felony[;] [c]onstituting or having the character of a felony[;] [p]roceeding from an evil heart or purpose; malicious; villainous[;] [w]rongful; (of an act) done without excuse or color of right."[84] While a homicide may have the character of a felony, the second portion of the definition is not suitable for the insane slayer. While under the influence of mental illness or disorder, the insane slayer has no conscientious inclination to act with an "evil heart" or in a "villainous" or "malicious" manner. Those adjectives require the purpose to act in such a manner. Further, the insane slayer does have an excuse in these instances, because the act results from the mental illness.

Willful means "[v]oluntary and intentional, but not necessarily malicious."[85] Further, "[a] voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong."[86] Due to the lack of intent and volition on the part of the insane slayer under the influence of mental illness, there is no way such a person could kill willfully. Moreover, there would be no conscious wrong or evil purpose on the part of the actor, as he was insane.

The exception to the insane slayer fitting under common manners exhibited in state slayer statutes is the word "unlawfully." Unlawful means "[n]ot authorized by law; illegal."[87] To be clear, the insane slayer did kill someone, whether done under the influence of mental illness, or some other *mens rea* diminishing force. And it is well established that the act of homicide is unlawful, or illegal, as the definition suggests. Therefore, it could be argued that if the state slayer statute *only* requires the manner "unlawfully," then the insane slayer should not be able to inherit for the sheer fact that the act was unlawful.

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[84] *Felonious*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[85] *Willful*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[86] *Id.*

[87] *Unlawful*, BLACK'S LAW DICTIONARY (11th ed. 2019).

However, the biological argument, discussed in the following section, still applies in the instance of "unlawfully." Reason being, the insane slayer neither has control over his predisposition nor over the inheritance of his mental illness. Thus, if strictly considering the state's slayer statute, then the insane slayer probably should not inherit. However, if the underlying predisposition and the unfairness of punishing based on that is considered, the insane slayer should be able to inherit.

Intentional means "[d]one with the aim of carrying out the act."[88] Arguably, if the insane person is under the duress of mental illness, there is no intent. If a person kills while under the influence of mental illness, that person does not know right from wrong and has a warped view of current reality. Therefore, the commission of the criminal act could not have been done with the aim of carrying out the act.[89]

Lastly, unjustifiable means "[l]egally or morally unacceptable; devoid of any good reason that would provide an excuse or defense."[90] Although the act of murder is legally and morally unacceptable, the second part of the definition is where the issue lies. Here, there arguably exists a good reason that provides an excuse or defense: the slayer is insane and a victim of mental illness. As stated before, the insanity defense is geared towards the defendant whose mental illness caused him to commit the act. Therefore, arguably, the insane slayer is unable to carry out the killing in an unjustifiable manner as the statutes propose.

The irony here is that if, at the time of the offense, the mentally ill individual is not in the right state of mind and does not possess the requisite intent for the criminal act, then more likely than not, the crime was not willfully, feloniously, or intentionally done as most slayer statutes require. Christopher Eisold states it this way:

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[88] *Intentional*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[89] *See* Johnson v. Ins. Co. of North America, 350 S.E.2d 616, 621 (Va. 1986) ("[A]n individual may be excused from penalty if he is insane at the time he commits a criminal act. . . . [H]e may do the act with every intention of consummating it, but when it is shown that he was mentally ill, he is excused from imposition of his usual sanctions.")

[90] *Unjustifiable*, BLACK'S LAW DICTIONARY (11th ed. 2019).

> An individual killing out of insanity does not rationally consider the effects his or her action will have and what benefits, if any, will result from the killing. . . . Therefore, not allowing the insane killer to collect on the victim's estate will have no effect on the killer's choice to kill, and ineffective law is pointless law.[91]

If modern society were to punish children, who similarly lack the requisite capacity and neither intentionally nor willfully commit criminal acts, many would regard it as unjust.[92] That is not to say that their wrongdoing is justified; however, from a public policy stance, if individuals were punished for something that they had no control over, society would be led in an inequitable direction. A 19th century Massachusetts case, *Commonwealth v. Rogers*, illustrated this point beautifully:

> In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.[93]

Notwithstanding the arguments above, critics would still argue that individuals have free will to choose their behaviors, regardless of mental illness. However, this viewpoint is flawed, as mental illness disrupts an individual's free will.[94] This considered, it would be unjust to bar insane slayers from inheriting their

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[91] Christopher M. Eisold, *Statute in the Abyss: The Implications of Insanity on Wisconsin's Slayer Statute*, 91 MARQ. L. REV. 875, 889-90 (2008).

[92] *See* Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687, 688 (2006) ([T]he common law . . . 'infancy defense' establish[es] that children under the age of fourteen are generally incapable of forming criminal intent because of their general emotional and cognitive immaturity.").

[93] Commonwealth v. Rogers, 48 Mass. (7 Met.) 500, 501 (Mass. 1844).

[94] *See* Gerben Meynen, *Free will and mental disorder: Exploring the relationship*, 31 THEOR. MED. BIOETH. 429, 434 (2010) (determining that philosophers refer to mental disorders from insanity to less intense forms of mental illness as having a "detrimental effect on free will and responsibility").

shares when they, more likely than not, have no control over their actions and lack capacity to satisfy the *mens rea* requirement.

B. The Insane Slayer's Randomized Genetic Inheritance of the Mental Illness Does Not Justify a Bar to Inheritance

According to David Kopel and Clayton Cramer, around 18% of murders are committed by individuals with a severe mental illness.[95] The most common category of mental disorder conducive to violent crime is personality disorders.[96] Examples of personality disorders include, but are not limited to, antisocial personality disorder, obsessive-compulsive personality disorder, and paranoid personality disorder.[97] Further, prior studies have discovered that "delusional or psychotic symptoms, or substance use" are correlated with violent behavior and individuals with mental illnesses.[98] While various forms of mental illness undoubtedly contribute to an individual's ability to commit crime, genetics play a significant role.

It is common knowledge that genes are made up of DNA. Comprised of guanine, cytosine, adenine, and thymine, the strands of DNA create the genetic code of an individual.[99] This double helix-shaped structure contributes not only to the building blocks of life, but also to our behavior. However, linking genetics to behavior is not an easy feat. While genetic factors absolutely

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[95] David B. Kopel & Clayton E. Cramer, *Reforming Mental Health Law to Protect Public Safety and Help the Severely Mentally Ill*, 58 HOW. L.J. 715, 717 (2015).

[96] *Id.* at 720. *See also* AM. PSYCHIATRIC ASS'N, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS V (2013) (defining personality disorders as "a way of thinking, feeling, and behaving that deviates from the expectations of the culture, causes distress or problems functioning, and lasts over time").

[97] *What are Personality Disorders?*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/personality-disorders/what-are-personality-disorders [https://perma.cc/468Y-9XZ9] (last visited Mar. 29, 2020).

[98] Jason C. Matejkowski et al., *Characteristics of Persons With Severe Mental Illness Who Have Been Incarcerated for Murder*, 36 J. AM. ACAD. PSYCHIATRY L. 74, 74 (2008) (conducting a study of inmates incarcerated for murder in Indiana); *see also* Siân Oram et al., *Mental Illness and Domestic Homicide: A Population-Based Descriptive Study*, 64 PSYCHIATRIC SERV. 1006, 1006 (2013) (conducting a study on adult domestic homicide in England and Wales, finding that "20% of intimate partner homicide perpetrators and 34% of adult family homicide perpetrators had symptoms of mental illness at the time of the offense").

[99] U.S. CONG., OFF. OF TECH. ASSESSMENT, THE BIOLOGY OF MENTAL DISORDERS 101 (1992).

contribute to the predisposition of mental illness, it is not a bright-line rule.[100]

Environment, stressors, and other factors may also play a role in whether an individual has a mental illness. While it is true that a mental illness is a mental illness regardless of how it developed, for purposes of this Comment, the argument hinges on the biological inheritance portion of mental illness, not the environmental factors. Reason being that environmental factors contain many variables that differ from individual to individual.[101] Such variables include toxicants, nutritional deficiencies, injuries, sexual abuse, and a cornucopia of others.[102] Therefore, based upon basic genetic knowledge, this section argues that disallowing insane slayers from inheriting from the decedent's estate essentially penalizes them for a predisposition of which they had no control in inheriting.

However, like every other individual, the insane slayer's random genetic cards are uncontrollable and unsolicited. Analogous to how individuals cannot control the sex they are born with, illnesses they may be predisposed to later in life, or congenital disorders, insane slayers cannot control their genetic predisposition to mental illness. For that reason, mental illness should not influence outside facets, such as inheritance. While it is possible that insane slayers may have developed their ailments from environmental factors, even then it is not warranted to completely disregard their right to inherit. To do so, indirectly penalizing a vulnerable party, would be unjustifiable. If the insane slayer is the rightful lineal descendant, regarded in a will, or the designated beneficiary on the life insurance policy, then he

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[100] It is important to note that while some mental illnesses are inherited through genetics, there is still some uncharted territory and much to be studied. Further, it should be noted that the genetic predisposition does not cause the defendant to commit the crime, but rather contributes to it. *See* Amanda R. Evansburg, *"But Your Honor, It's in His Genes:" The Case for Genetic Impairments as Grounds for a Downward Departure Under the Federal Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1565, 1566 (2001).

[101] *See* Charles W. Schmidt, *Environmental Connections: A Deeper Look into Mental Illness*, 115 ENVTL. HEALTH PERSP. 404, 404 (2007) ("Scientists define 'environment' in the realm of mental illness broadly, some going so far as to suggest it encompasses everything that isn't an inherited gene.")

[102] *Id.* at 404, 406.

should be able to inherit what is rightfully his, irrespective of genetic predisposition.

C. The Solution for the Insane Slayer Should Come Through a Comparative Analysis

Pursuant to this state split, it is beneficial to look outside our borders for a potential solution, specifically towards New South Wales, Australia. New South Wales has similar legislation to the United States; the language follows closely to what we term "slayer statutes."[103] The states should consider adopting the language of the Forfeiture Act of 1995 No. 65 of New South Wales, Australia, to provide more protection and fairness for the mentally insane in the probate system through the "justice requires" approach. New South Wales's justification for providing discretion focuses on public policy and the importance of fairness in the process.[104]

1. Background of New South Wales, Australia

The largest state in Australia, with a population of 7.95 million residents, is New South Wales.[105] Similar to the United States, New South Wales's government consists of three branches:

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[103] For other examples of international slayer rules, see Nili Cohen, *The Slayer Rule*, 92 B.U. L. Rev. 793, 797 n.33 (2012); 15 GUAM CODE ANN. § 819 (2018); Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77 (1998) (examining Chinese approaches to inheritance law).

[104] Re Settree [2018] NSWSC 1413 para 64 (Austl.) (providing an explanation of the Forfeiture Act of 1995 No. 65 from the Attorney General of New South Wales) ("While it is clear as a matter of principle that a killer should not profit from his or her crime, the operation of the rule may be unduly harsh in some cases of unlawful killing, because the rule may operate regardless of the killer's motive or degree of moral guilt. The bill enables the Supreme Court to modify the operation of the rule provided it is satisfied that the justice of the case requires the rule to be modified. The proposed legislation recognises that there are varying degrees of moral culpability in unlawful killings, and legislation is necessary to give judges sufficient discretion to make orders in deserving cases in the interests of justice.") (italics omitted). *See also* Jenny Noyes, *Sister fights to stop brother inheriting parents' money after he killed them*, SYDNEY MORNING HERALD (October 24, 2018), https://www.smh.com.au/national/nsw/sister-fights-to-stop-brother-inheriting-parents-money-after-he-killed-them-20181023-p50bhn.html [https://perma.cc/4MKS-6C4C] (covering the news surrounding the case of *Re Settree*).

[105] *Population*, NSW GOV'T (Sep. 25, 2018), https://www.nsw.gov.au/about-new-south-wales/population/ [https://perma.cc/6DYG-DV9V].

legislative, executive, and judiciary.[106] However, its government is somewhat different than our own. The executive branch consists of the Premier and Cabinet, or ministers, and it is where governmental policy is developed and implemented.[107] The legislature consists of the parliament, which creates the laws.[108] Lastly, the judiciary, consisting of "independent judges," enforces and interprets the laws.[109]

Like anywhere else, New South Wales experiences crime.[110] However, irrespective of its crime rates, another way New South Wales is similar to the United States is that its legal system has a relationship with psychiatry.[111] In fact, New South Wales has utilized aspects of the *McNaghten* insanity defense test.[112] To better deal with insane slayers, forfeiture has also been used to undercut potential benefits following wrongdoing.[113]

2. Background of the Forfeiture Act of 1995 No. 65

In ancient times, family members carried out a fair amount of homicides, and these affected the legal rights of the assailants, whether by will or intestacy, but a clear rule for these situations did not emerge until the modern period.[114] Common law forfeiture, a relatively recent formulation, derives from the notion that a killer should not be unjustly enriched as a result of the wrongdoing.[115] Modern utilization of the forfeiture rule is traced

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[106] *System of Government in NSW*, NSW GOV'T (Sep. 30, 2016), https://www.nsw.gov.au/your-government/system-of-government-in-nsw/.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] NSW BUREAU OF CRIME STAT. & RES., NEW SOUTH WALES RECORDED CRIME 9-13 (June 2019 Update), https://www.bocsar.nsw.gov.au/Documents/RCS-Quarterly/NSW_Recorded_Crime_June_2019.pdf [https://perma.cc/QK5L-FF4H] (providing a tabular chart of recorded criminal incidents for major offenses over a period of 60 months).

[111] *See generally* Stephen Bottomley, *Law and Psychiatry: Aspects of the Relationship in N.S.W.*, 2 AUSTL. J. L. & SOC'Y 30 (1984).

[112] L. Radzinowicz & J.W.C. Turner, *Introductory Note* to John V. Barry, *Insanity in the Criminal Law in Australia,* 21 CAN. B. REV. 427, 429 (1943).

[113] *See* Re Novosadek [2016] NSWSC 554 (Austl.); Pub Tr of New South Wales v Fitter [2005] NSWSC 1188 (Austl.); Jans v Pub Tr [2002] NSWSC 628 (Austl.).

[114] Troja v Troja [1994] 33 NSWLR 269, 277 (Court of Appeal) (Austl.).

[115] Andrew Hemming, *Killing the Goose and Keeping the Golden Nest Egg*, 8 QUEENSLAND U. TECH. L. & JUST. J. 342, 344 (2008).

back to the late 19th century.[116] It was not until the decision in *Troja v Troja* that there was a push to alter legislation from the common law forfeiture rule to England's Forfeiture Act.[117] As originally enacted in 1995, the Forfeiture Act simply allowed the court to modify the operation of the forfeiture rule; but as amended in 2005, it allowed the court to *apply* the forfeiture rule to persons found not guilty of crimes by reason of mental illness.[118] The Sections of the Forfeiture Act of 1995 No. 65 that are relevant to this Comment are Sections 10 and 11 of Part 3.

Section 10 provides definitions that are relevant to Part 3. First, it defines an "interested person" as someone who is not "an offender or a person claiming through an offender."[119] Second, it defines an "offender" as "a person who has killed another person and been found not guilty of murder by reason of mental illness."[120]

Section 11 is titled the "Power of Supreme Court to apply forfeiture rule."[121] Under this Section:

> if a person who has killed another person is not subject to the forfeiture rule because the person has been found not guilty of murder by reason of mental illness, any interested person may make an application to the Supreme Court for an order that the rule apply as if the offender had been found guilty of murder.[122]

Upon the interested person creating an application, "the Court may make an order applying the forfeiture rule to the offender if it is satisfied that justice requires the rule to be applied as if the offender had been found guilty of murder."[123]

Subsection (3) of Section 11 further expounds the phrase "justice requires." It states that, "[i]n determining whether justice

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[116] Troja v. Troja [1994] 33 NSWLR 269, 277 (Court of Appeal) (Austl.) (citing Cleaver v Mut Res Fund Life Ass'n [1892] 1 QB 147 (Eng.)).

[117] Hemming, *supra* note 115, at 350.

[118] Re Settree [2018] NSWSC 1413 paras 61-63, 71-73 (Austl.) (discussing the history of the Forfeiture Act).

[119] *Forfeiture Act 1995 No. 65* (NSW) pt III s 10 (Austl.).

[120] *Id.*

[121] *Id.* s 11.

[122] *Id.* s 11(1).

[123] *Id.* s 11(2).

requires the rule to be applied, the Court is to have regard to the following matters: (a) the conduct of the offender, (b) the conduct of the deceased person, (c) the effect of the application of the rule on the offender or any other person, (d) such other matters as to the Court appear material."[124]

Finally, in Subsection (4) of Section 11, "[i]f a forfeiture application order is made, the forfeiture rule is to apply in respect of the offender for all purposes (including purposes relating to anything done before the order was made) as if the offender had been found guilty of murder."[125]

For purposes of the solution in this Comment,[126] the interested person may be the remainder of the decedent's estate. However, it should not be someone claiming through the offender. Further, the application brought by the interested party does not mean a literal application, but rather it can be in the form of a filed suit against the offender claiming that inheritance should be barred. Lastly, the "forfeiture application order" illustrated in the Act can be in the form of a judgment in chancery court by the judge, and it does not have to be an actual order.

To better illustrate the concept of forfeiture in New South Wales, *Troja v Troja* and *Re Settree* are two examples of how the court varies in its application of the common law forfeiture rule to the modern Forfeiture Act of 1995 No. 65.

a. The Common Law Approach: Troja v Troja

In 1994, the New South Wales Court of Appeal decided the landmark case regarding the insane slayer using the common law rule: *Troja v Troja*.[127] After their marriage began to deteriorate, Jeanna Troja ("appellant") shot and killed her husband Frank Troja, and the appellant was charged with the murder of her husband.[128] The jury found the appellant guilty of manslaughter.[129] The rationale for the verdict was the defense of

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[124] *Id.* s 11(3).
[125] *Id.* s 11(4).
[126] *See infra* Part II(*C*)(3).
[127] Troja v Troja [1994] 33 NSWLR 269, 277 (Austl.).
[128] *Id.* at 271.
[129] *Id.*

diminished capacity.[130] Diminished capacity arises when "the accused demonstrates that he or she is suffering from substantially impaired . . . mental responsibility for the acts or omissions giving rise to the charge."[131] Frank Troja had a will executed prior to his death stating if the appellant survived him for thirty days, she would become the executrix and trustee of this will.[132]

Due to the appellant surviving the decedent, she was entitled to benefit from the estate. A summons was issued to the Equity Division of the Supreme Court asserting that the appellant should be disentitled to benefit from the decedent.[133] The judge determined that although "a discretion did exist in terms of a moral judgment on the degree of criminality . . . the [appellant] does not come within it."[134] As a result, the appellant held an interest in the estate in the form of a constructive trust, which precluded her from taking from the estate.[135] This decision prompted much discussion of changing the common law forfeiture rule into a law more user-friendly, which appeared in the case discussed below.

b. The Modern Approach: Re Settree

Twenty-four years after the *Troja* decision, the Supreme Court of New South Wales decided *Re Settree* using the Forfeiture Act of 1995 No. 65.[136] Following a domestic dispute, the defendant shot his parents at close range.[137] Pursuant to reciprocal wills (a will in favor of the other party), the entire estate passed to the parent's children, the plaintiff and the defendant.[138] Upon evaluating the defendant's mental state, it was determined that he had paranoid schizophrenia.[139] Further, the defendant had a history of drugs and alcohol use, in addition to a history of

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130 *Id.* at 272.
131 *Id.* (internal quotation marks omitted).
132 *Id.* at 272-73.
133 *Id.* at 273.
134 *Id.* at 276 (internal quotation marks omitted).
135 *Id.* at 276.
136 Re Settree [2018] NSWSC 1413 (Austl.).
137 *Id.* para 1.
138 *Id.* para 21.
139 *Id.* para 149.

violence towards his family.[140] The court then applied the "justice requires" approach, while keeping in mind that "the Court can, and should, take into account the defendant's lack of criminal responsibility for the unlawful killings of his parents."[141]

In applying the first prong, the conduct of the offender, the court found that despite having the mental illness and a history of drug and alcohol use, the defendant had intentions and premeditated to kill his parents, and he showed no remorse.[142] When looking at the conduct of the deceased, the court allocated no blame to the decedents, finding that they were "consistently loving, supportive and patient parents."[143] Thirdly, the court looked at the effect of the rule on the defendant and other persons, finding that should the defendant be held in accordance with the rule, he would lose half of the estate from the decedents' wills.[144] Thus, the court determined that the defendant would be reliant on the State for his needs.[145] By applying the forfeiture rule, the estate would pass to the plaintiff, the defendant's sibling.[146] The court considered how the rule would affect her in considering its decision.[147]

Lastly, the court considered other material matters. The court determined that despite the defendant's mental impairment, public policy would not justify the violent, warrantless, and unprovoked murders of the defendant's parents.[148] The court held that justice required that the forfeiture rule must be applied as if the defendant had been found guilty of murder.[149] The United States could use this case as an example of the "justice requires" approach with an insane slayer.

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[140] *Id.* para 173.
[141] *Id.* para 164.
[142] *Id.* para 169.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* para 170.

3. Proposed Statutory Solution

In creating a solution to better serve the insane slayer, it is important to draft a provision that could be easily inserted into state legislation, or the Uniform Probate Code itself. Having portability is crucial so that inserting the provision into already existing law would not be a crux or hindrance on the state. The following proposal is a mixture of language from the Forfeiture Act of 1995 No. 65's "justice requires" approach with preexisting states' laws.

In a nutshell, the "justice requires" approach is grounded on the notion that every slayer comes with a different moral culpability and creates a different situation in each case. It provides a sense of discretion, subjectivity, and individuality that American slayer statutes alone do not provide.[150] Thus, combining the "justice requires" approach language with the customary language of the American slayer statutes provides more protection and discretion in efforts to provide a viable solution for the insane slayer. Further, based on the lack of intent that insane slayers possess, all "manners" for the killing that most American slayer statutes contain have been removed.

The proposed statutory solution would consist of the following:

> (a) If an interested person files suit based on a claim that the surviving individual should not be able to inherit, the court shall apply provision (b).
>
> (b) Unless the court, in its discretion and if justice requires, applies the slayer rule as if the surviving individual had been found guilty of murder, the surviving individual who is found not guilty by reason of insanity of effectuating the death of

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[150] An exception is Alaska's statute, which states:

> In the case of an unintentional felonious killing, a court may set aside the application of (a), (b), (d), or (e) of this section if the court makes special findings of fact and conclusions of law that the application of the subsection would result in a manifest injustice and that the subsection should not be applied.

ALASKA STAT. ANN. § 13.12.803(k) (West 2019). This section is the closest to the "justice requires" approach in American law.

> the decedent shall be entitled to the benefits of the decedent's estate.
>
> (c) "Justice requires" means an observation of the totality of the circumstances, including but not limited to: the conduct of the offender, the conduct of the deceased person, the effect of the rule on the offender or another person, and any other matters the court finds material.

As stated, this provision could be added to the Uniform Probate Code for states to adopt, or states could adopt it on their own.[151] The Tenth Amendment of the Constitution gives states the autonomy to make their own laws.[152] Therefore, states have the authority to choose whether to adopt this statutory provision into their laws.

It is recommended that states adopt this provision for two reasons. First, due to the generality of the proposed statute, it could apply to all states on either side of the split. Because it looks at the totality of the circumstances, this statutory solution is more subjective to the situation of the insane slayer, and for that reason, it is a better, more effective implementation of equity in the probate system. To understand this provision, it is important to understand how the four factors are defined.

The first factor the court should look at is the conduct of the offender. For this factor, the court should consider how the offender acted before, during, and after the crime. For example, the court should consider whether the offender provoked the attack, the offender's demeanor, and how the mental illness was a contributing factor to the offender's conduct. However, there are two exceptions to this prong that should be noted. First, actions taken by the offender that are immaterial at the time of and before the incident should not be weighed. For example, the fact that the offender may have been in an extramarital affair should not be considered.[153] Second, substance use combined with the mental illness should be considered.

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[151] *See generally* Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599 (1985).

[152] U.S. CONST. amend. X.

[153] *See, e.g.*, Straede v. Eastwood [2003] NSWSC 280 paras 38, 45 (Because husband's extramarital affair had no bearing on how his wife came to die and played

For the second factor, the conduct of the deceased person should be considered. When considering the conduct of the decedent, the court should look at whether the decedent provoked the attack, what the decedent was doing before the attack, and how the decedent was known to act on a normal day.

The third factor is the effect of the rule on the offender or another person. Regarding this factor, the court should approach it from a probate-oriented viewpoint. How expansive is the estate of the testator? Or, if the victim died intestate, what does the estate consist of? If the offender were to inherit, would it completely financially incapacitate the rest of the family? Would the offender receive a windfall? Because these situations usually happen in the context of family, other members should be considered in to applying this provision, as it affects them also.

Last is the catch-all factor: any other matters the court finds material should be considered, using discretion. Material means that the consideration must be regarded as important, relevant, and a concluding factor in determining the case, not a frivolous aspect of the case. Once the court looks at the totality of the circumstances, it should use discretion to determine what other aspects are material. Some examples: What mental illness does the offender have, and for how long has the offender had it? Has there been any prior instance where the offender had a mental outbreak and was violent? Or, as *Re Settree* suggests, it could be helpful to gather opinions from other family members about the offender, as well as whether the public would be dismayed by allowing the offender to benefit from his crime.

Furthermore, the second reason states should adopt this provision is that it has the potential to apply to any situation in which the perpetrator is mentally ill, or otherwise insane; where he murders another human being; and where there is an estate, life insurance policy, or inheritance, at stake. To understand how the proposed statutory provision would work, the following section applies the provision to two hypotheticals to show the hindrances, utilization, and application of the provision.

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no role in her death, the judge did not consider that conduct when regarding the Forfeiture Act, and the husband was entitled to full benefits bestowed upon him by his wife's will.).

4. Proposed Solution Applied to Different Hypotheticals

a. The Schizophrenic and Paranoid Spouse

Picture this: Brandon has a history of mental illness, specifically schizophrenia and paranoid delusions. However, he stopped taking his medication one year ago. On his drive home, a voice told him that his wife, Anna, was cheating on him, and that it would be best to kill her. Brandon automatically became paranoid that his marriage was a lie. When Brandon came home from work, he immediately began yelling at Anna. Surprised by his demeanor, Anna became fearful of him. Brandon grabbed a kitchen knife and stabbed Anna, while the voices in his mind egged him on. Brandon was later arrested and charged with Anna's murder. He was found not guilty by reason of insanity and was committed to an institution. He sought to inherit Anna's million-dollar life insurance policy because he was the beneficiary. However, this was challenged by Anna's estate, asserting that Brandon should not benefit from his wrongdoing despite his mental illness.

In chancery court, after hearing all the testimony and evidence, the judge applies the "justice requires" provision. When looking at the totality of the circumstances, the judge weighs the factors. First, when he looks at the conduct of the offender, he finds that in the moment of the killing, Brandon was paranoid and violent, as well as under the duress of his mental illness. Second, when looking at the conduct of the deceased, he finds that Anna was in a vulnerable state in the home and completely surprised by the attack. Next, regarding the effect of the rule on the offender or another person, the judge finds that because Anna has a million-dollar life insurance policy, should Brandon be allowed to benefit, he would get a windfall. Further, allowing this insurance policy to go to Brandon may financially inconvenience any children they may have together, or any others who depended on Anna, to the point where they would have to depend on the state for assistance.

Lastly, the judge applies the catch-all provision, or any other matters the court finds material. In this case, the judge finds that it is material that the offender stopped taking his medication a year ago. The judge finds this material because the incident could have been prevented if the offender had taken his medication.

Taking all of this into account, the judge determines that under the "justice requires" provision, justice does require that the slayer rule be applied as if Brandon had been found guilty of the killing. Therefore, this jurisdiction's slayer rule applies, and Brandon is not allowed to inherit Anna's life insurance policy.

b. The Post-Traumatically Stressed Young Adult

On July 4, 2018, Oscar returned home from his deployment in Iraq. Upon his arrival to his home in Charleston, South Carolina, his father, sister, and some of his close friends greeted him. The family was already excited for the holiday, and the sight of Oscar lifted their spirits even higher after five years of absence. While his father barbequed outside, his sister started the fireworks. The booming bangs and pops triggered Oscar's memories of explosions, death, and chaos in Iraq. Panicked, he grabbed his rifle and shot his father and friends in a fit of Post-Traumatic Stress Disorder ("PTSD").[154] His sister escaped through a hole in the back fence.

Oscar was arrested for the murders after neighbors reported hearing gun shots and screams. It later was determined that Oscar was insane at the time of the killings, and he was found not guilty by reason of insanity. He was committed for further evaluation. Not long after, Oscar sought to gain his share of $50,000 from the inheritance left by his deceased father. His sister sued claiming that it would be unjust for Oscar to inherit from the decedent.

In chancery court, after hearing all the testimony and evidence, the judge applies the "justice requires" provision. When looking at the totality of the circumstances, the judge weighs the factors. When looking at the conduct of the offender, the judge finds that because the fireworks and loud noises triggered Oscar's memories from the war, his PTSD is understandable. However, Oscar did proceed in a violent manner by shooting his father and

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[154] Posttraumatic Stress Disorder (PTSD) stems from scenarios in which the individual directly experiences the traumatic event, witnesses the traumatic event in person, or experiences first-hand repeated or extreme exposure to adverse details of the traumatic event. *What Is Posttraumatic Stress Disorder?*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/ptsd/what-is-ptsd [https://perma.cc/6PUT-SRS8] (last visited Mar. 29, 2020).

friends with a rifle. Second, when looking at the conduct of the deceased, the judge finds that the father and friends were innocent people, and in no way contributed to the act. The lighting of the fireworks did not count as intentional provocation.

Thirdly, when looking at the effect of the rule on the offender and other individuals, the judge finds that allowing Oscar to receive the inheritance would not be unjust. Since Oscar has a valid mental illness, the $50,000 inheritance could be used for his medication, and anything related to his commitment. Therefore, it would not be a complete windfall. Moreover, the judge determines that because Oscar would be inheriting his share of the inheritance, assuming his sister has her own share, his share would not affect anyone. Lastly, when weighing the catch-all factor, the judge determines that there was nothing else he found material. In his holding, the judge concludes that justice does not require the slayer rule to apply as if the surviving individual had been found guilty.

5. Limitations, Exceptions, and Unanswered Questions

The first hypothetical provides one limitation to this proposed solution: insane slayers voluntarily stopping self-medication, or noncompliance.[155] Potentially, this could mean that the crime could have been avoided and that the insane slayers placed themselves in the predicament. In fact, scholars have found that noncompliance often precedes the criminal act.[156] If this happens, it weighs heavily against the insane slayer. One exception to this would be if the individual stops taking his medication because the individual genuinely cannot afford his medication. Reason being

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[155] *See* Zachary D. Torry & Kenneth J. Weiss, *Medication Noncompliance and Criminal Responsibility: Is the Insanity Defense Legitimate?*, 40 J. PSYCHIATRY & L. 219, 221 (2012) ("A particular challenge is the evaluation of mentally ill offenders who have discontinued their psychotropic medications prior to a criminal offense. In such instances, the offender has brought about the condition underlying the crime. The question for the forensic evaluator is the assessment of mental state at the time in question, not necessarily the factors that brought it about. But there is an elephant in the room: but for the defendant's medication lapse, perhaps there would have been no crime. It is for the legislatures or courts to decide whether or not to permit the use of the insanity defense under these circumstances.").

[156] *Id.* at 232.

that people should not be penalized for the instability of their finances.

The second hypothetical poses potential exceptions. Common to veterans and survivors of various traumatic experiences is PTSD.[157] Individuals with this disorder have been known to bring the insanity defense when they commit a crime.[158] Another potential exception not introduced through a hypothetical is battered woman syndrome. Battered woman syndrome has been recognized as a branch of PTSD.[159] However, because both disorders are not genetically inherited, but rather gained through traumatic experiences, then the genetic argument in Part B fails. Arguably, however, there is still no intent in the heat of both disorders. A lack of intent with the battered slayer may be difficult to comprehend, but it is the abuser's violent tendencies toward the battered slayer that causes the slayer's mindset to be so vulnerable and diminished to the point of murder. Therefore, PTSD and battered woman syndrome are exceptions under the proposed solution.

Despite the effective application of the solution to various hypotheticals, in the interest of transparency, the solution may not apply in all circumstances, as there are some questions left unanswered. Though the solution looks mostly at the insane slayer, it leaves individuals who lack intent and capacity in other scenarios in the dark. For example, an individual under the influence of alcohol, drugs, or legal narcotics causes a fatal accident that kills the testator.[160] The individual did not intend the accident and potentially was not in the right mental state, yet voluntarily took the substance. How would inheritance be affected

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[157] *See* NAT'L CTR. FOR PTSD, UNDERSTANDING PTSD AND PTSD TREATMENT 4 (2019), https://www.ptsd.va.gov/publications/print/understandingptsd_booklet.pdf [https://perma.cc/766N-4A7Q] (stating that of people who have had trauma, about 1 in 10 men and 2 in 10 women will develop PTSD).

[158] *See* Michael J. Davidson, Note, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 422-23 (1988); Daniel Burgess, Nicole Stockey & Kara Coen, *Reviving the "Vietnam Defense": Post-Traumatic Stress Disorder and Criminal Responsibility in a Post-Iraq/Afghanistan World*, 29 DEV. MENTAL HEALTH L. 59, 68 (2010).

[159] Steffani J. Saitow, *Battered Woman Syndrome: Does the "Reasonable Battered Woman" Exist?*, 19 NEW ENG. J. CRIM. & CIV. CONFINEMENT 329, 332 n.27 (1993).

[160] *See generally* Hicks v. Pub. Emps.' Ret. Sys. of Miss., 282 So. 3d 1204 (Miss. Ct. App. 2019).

in this situation? Would the under-the-influence slayer fit under the proposed solution?

Does the fact that the person voluntarily took the substance play a role? What if the slayer was drugged unknowingly and murdered the testator? Further, what about illnesses such as Alzheimer's?[161] When a person with Alzheimer's kills, that person may be in a state of paranoia, fear, and confusion. Does this meet the threshold for a lack of intent sufficient enough to allow for inheritance from the victim? These questions are debatable under the proposed solution and are left for another time.

6. Suggested Implementation in State Courts

Applying the proposed solution to various hypotheticals provides an effective overview of the solution in action. However, hypotheticals are strictly hypotheticals. In the real world, the true test comes when judges start to apply it in the courtroom. A jury should never handle this provision. Reason being that jury members have the potential to view each factor from their subjective points of view, and based on that, the verdict would be based on those collective opinions. For that reason, only the judge should handle this provision. This section provides suggestions for how states should implement the solution in chancery court, probate court, or other courts.[162] Just as in applying *Albright v. Albright,*[163] courts applying this solution should consider factors in their implementation.

The court should consider the age of the slayer, the size of the inheritance or estate, the slayer's lifestyle before the incident, the severity and duration of the slayer's mental illness, the strength of

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[161] *See* Kyle Mooney, *Alzheimer's Patients Who Kill: Uncommon, But Not Impossible*, INQUISITR (Feb. 26, 2015), https://www.inquisitr.com/1875408/alzheimers-patients-who-kill-uncommon-but-not-impossible/ [https://perma.cc/SB73-H2XS] (offering multiple news stories of Alzheimer's patients murdering family members and other individuals).

[162] *See State Probate Courts*, FINDLAW, https://estate.findlaw.com/probate/state-probate-courts.html [https://perma.cc/HQX2-SAJ2] (last visited Mar. 29, 2020) (providing links to the courts in each state that handle probate).

[163] In this Mississippi child custody case, the court set forth multiple factors that should be considered in child custody cases for the best interest and welfare of the child. Some examples include but are not limited to, the age of the child, health and sex of the child, and moral fitness of the parents. *See* Albright v. Albright, 437 So.2d 1003, 1005 (Miss. 1983).

the relationship between the slayer and the decedent, and the mental wellness of the decedent. Considering and weighing these factors would give the judge more clarity when implementing the provision. However, notwithstanding complete application of these factors and a finding that justice is not so required under the statutory solution as if to find the slayer guilty under the slayer rule, there are still potential hurdles and hang-ups that the slayer may have to cross in order to inherit.[164]

First, there is the difference between civil intent and criminal intent. To have criminal intent, there must be a guilty mind, or the requisite *mens rea*. Because the insane slayer would be found not guilty by reason of insanity, there would be no guilty mind, and therefore no criminal intent. Civil intent, however, requires only that the offender intended his actions, without requiring knowledge that the act was wrongful.[165] In other words, there is a lower threshold to meet for *mens rea* than in the criminal context. Therefore, if a civil court found that the insane slayer had civil intent, or that his actions were intentional, then he still may be barred from inheritance.

Second, insane slayers may have trouble in jurisdictions that impose a constructive trust. Despite its name, a constructive trust is not a trust, but actually a remedy.[166] A constructive trust is

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[164] It is important to note that if the insane slayer receives governmental benefits, his inheritance may influence his treatment. Approximately 26% of nonelderly adults with a serious mental illness are on Medicaid. *Facilitating Access to Mental Health Services: A Look at Medicaid, Private Insurance, and the Uninsured*, KAISER FAM. FOUND. (Nov. 27, 2017), https://www.kff.org/medicaid/fact-sheet/facilitating-access-to-mental-health-services-a-look-at-medicaid-private-insurance-and-the-uninsured/ [https://perma.cc/C7XF-84PA]. And "[i]nheriting a sum of money may affect [their] eligibility, depending on how much [they] inherited and what [they] do with the investment." Melinda Hill Sineriz, *How Does Inheritance Affect Medicaid?*, SAPLING, https://www.sapling.com/10014250/inheritance-affect-medicaid (last visited Nov. 23, 2019). *See also* 42 C.F.R. § 409.62 (2020) (stating that under the scope of Medicare, "once an individual receives benefits for 190 days of care in a psychiatric hospital, no further benefits of that type are available to that individual").

[165] Osman v. Osman, 737 S.E.2d 876, 880 (Va. 2013).

[166] *See* Michael Westerberg, *Life, Liberty, and Property–Except If You Kill Your Spouse: A Discussion of the Recent Addition to the Arizona Slayer Statute*, 3 ACCORD, LEGAL J. FOR PRAC. 91, 95-96 (2014) (determining that there is a two-part framework for a constructive trust: "(1) [it] affirms [that] the defendant's title is subject to the plaintiff's superior interest, and (2) [it imposes] a mandatory injunction requiring the defendant to surrender the property to the plaintiff, or other equivalent remedial measures.").

imposed on the property of the decedent to prevent the beneficiary, who wrongfully and willfully inflicted the decedent's death, from benefitting from his wrongdoing.[167] Though the property passes to the offender lawfully, the offender loses any beneficial interest from the unlawful act.[168] In other words, once the property is obtained under circumstances where the holder of legal title is not in good conscience to retain the beneficial interest, he is converted into a trustee under equity.[169] Therefore, if the insane slayer is in a jurisdiction that imposes a constructive trust, he may be susceptible to not gaining any beneficial interest in the property.

CONCLUSION

Family violence is an unfortunate part of our society. It affects most families in one way or another. With the occurrence of family violence comes the struggle of determining inheritance. This determination becomes infinitely more difficult, morally and legally, when the family member who kills is insane. States have differed in their application of their slayer statutes as it pertains to the insane slayer, resulting in a state split. To mend this split, it is fruitful to look outside the United States, specifically to New South Wales, Australia. The language from the Forfeiture Act of 1995 No. 65 combined with existing American slayer statutes provides the best balance of discretion, subjectivity, and fairness that modern law needs in the situation of the insane slayer. Should states adopt this provision, it will enable them to be consistent in their decision-making when dealing with the insane slayer and will protect the insane slayer's right to inherit in the family context. As a result, the "deepest heartache" that Iyanla Vanzant alludes to will stop at violence and not continue into the inheritance process.

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[167] Ragland v. Ragland, 743 S.W.2d 758, 759 (Tex. Ct. App. 1987).

[168] Ford v. Long, 713 S.W.2d 798, 799 (Tex. Ct. App. 1986) ("Here, had Ford predeceased his wife, he would have taken no homestead interest in the land. Since by his willful act Ford made certain his survival, he should be precluded from keeping and enjoying property he takes as a survivor in the community.").

[169] Counihan v. Allstate Ins. Co., 194 F.3d 357, 360 (2d Cir. 1999).