PAVED WITH GOOD 'INTENTIONS': THE LATENT AMBIGUITIES IN NEW JERSEY'S SLAYER STATUTE

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I. INTRODUCTION

In February 2007, Tess Damm's boyfriend, Bryan Grove, choked and stabbed Damm's fifty-two-year-old mother, Linda, to death.[1] After Grove committed the crime, Tess and her boyfriend lived in the house for three weeks.[2] After several failed attempts to hide the body, they recruited a friend to help stuff it in the back of Linda's own Subaru.[3] Linda's body was not discovered for nearly a month.[4] Now, over two years after the slaying, Tess Damm is demanding her inheritance.[5]

Like most states, Colorado employs a "slayer" rule that prevents a killer from inheriting from the person he has slain.[6] Though these statutory and common law slayer rules vary in detail, they are consistently challenged in court.[7] In Tess Damm's case, though the Colorado statute specifies that a felonious killing bars an individual's

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1. Bill Scanlon et al., *Murder Plot Hatched at IHOP*, ROCKY MOUNTAIN NEWS, Mar. 8, 2007, http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN_15_5402691,00.html.

2. *Id.*

3. *Id.*

4. *See id.*

5. John Aguilar, *Tess Damm's Lawyer Fights Slayer Statute*, Daily Camera (Boulder County), Sept. 4, 2008, *reprinted at* http://s2.excoboard.com/excoarchive.php?ac=t&forumid=124655&date=11-03-2009&t=1584795-1.

6. *See* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 129-31 (7th ed. 2005); COLO. REV. STAT. ANN. § 15-11-803(2) (West 2009).

7. DUKEMINIER ET AL., *supra* note 6, at 129-31.

right to intestate succession,[8] her lawyers argue that, as a minor, she was unable to form the requisite intent for a felonious murder.[9]

Under New Jersey's slayer statute,[10] it may be even easier to make an argument on behalf of the murderess. The New Jersey statute bars succession when the killing is "intentional"[11] but does not provide a technical definition that would enable courts to properly determine when a killing is sufficient to trigger the statute. This Note examines how this ambiguity, latent in the construction of the statute, creates confusion, risks inconsistent application of justice, and undermines the very laws of equity in which the statute is based.

Part II traces the roots of the slayer statute to common law principles of equity, examining the moral basis upon which it is predicated. Part III includes a close reading of the New Jersey slayer statute, with a focus on defining its most important part: an intentional killing.[12] Part IV explores various legal applications of the word "intentional," to demonstrate how differences in interpretation may affect the outcome. Part V presents a discussion of other state slayer statutes to demonstrate how these states have grappled with some (but not all) of the problems posed by triggering the rule through an intentional killing. Lastly, Part VI highlights the risks that New Jersey takes in relying on the word "intentional" without definition, and proposes a more comprehensive construction for New Jersey's slayer statute.

II. TRACING THE SLAYER STATUTE TO ITS EQUITABLE COMMON LAW ROOTS

Courts and kings have, for ages, grappled with the problem of what to do with a slayer and his windfall.[13] The consensus has

8. The Colorado statute reads:

> An individual who feloniously kills the decedent forfeits all benefits with respect to the decedent's estate, including an intestate share, an elective-share, an omitted spouse's or child's share . . . and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his or her intestate share.

COLO. REV. STAT. ANN. § 15-11-803(2) (West 2009). In Colorado, a felonious killing is "the killing of the decedent by an individual who, as a result thereof, is convicted of, pleads guilty to, or enters a plea of nolo contendere to the crime of murder in the first or second degree or manslaughter," all of which are defined elsewhere in the Colorado statutes. *Id*. § 15-11-803(1)(b).

9. Aguilar, *supra* note 5.

10. N.J. STAT. ANN. § 3B:7-1.1 (West 2007).

11. *Id.*

12. *See id.*

13. *See* Tara L. Pehush, *Maryland is Dying for a Slayer Statute: The Ineffectiveness of the Common Law Slayer Rule in Maryland*, 35 U. BALT. L. REV. 271,

always been against allowing a slayer to collect bounty from his victim.[14] This section examines the common law roots of the statute and its modern incarnations to demonstrate that its application has always stemmed from principles of moral equity.

A. At Common Law

The rule that a slayer may not inherit from his victim is based in the common law principle that "*nullus commondum capere potest de injuria sua propria*" or "[n]o man can take advantage of his wrongdoing."[15] Though the manner and means of enforcing this principle have changed over time, the sentiment has not.[16]

The doctrines of attainder,[17] forfeiture of estate,[18] and corruption of the blood[19] interacted at common law to support this principle.[20] When a slayer was convicted or sentenced to death, he was attained and forced as punishment to forfeit his land or chattels,[21] including any property that he inherited from his victim.[22] The burden of these forfeits, collectively called incidents of attainder, fell on those who would have been his heirs.[23] Under corruption of the blood, these would-be heirs were considered tainted, and they were denied the right to inherit.[24] In fact, this doctrine applied not only to the felon's children, but also to "the felon's heirs unto the remotest

273-75 (2005) (tracing the evolution of the slayer rule from its early English roots); *see also* Gregory C. Blackwell, Comment, *Property: Creating a Slayer Statute Oklahomans Can Live With*, 57 OKLA. L. REV. 143, 145 (2004) ("The problem of what to do with a slayer and his bounty is, of course, not new.").

14. Blackwell, *supra* note 13, at 145.

15. Pehush, *supra* note 13, at 273.

16. *See generally* Alison Reppy, *The Slayer's Bounty—History of Problem in Anglo-American Law*, 19 N.Y.U. L.Q. REV. 229 (1942). *But see* Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 490 (1986) (arguing that the slayer rule "does not rest solely on equity principles").

17. Attainder is "the act of extinguishing a person's civil rights when that person is sentenced to death or declared an outlaw for committing a felony or treason." BLACK'S LAW DICTIONARY 137 (8th ed. 2004).

18. Forfeiture of estate is "an incident of the old attainder whereby, as a form of punishment for crime, the estate of a convicted felon was extinguished, the property going to the king." BALLENTINE'S LAW DICTIONARY 489 (3d ed. 1969).

19. Corruption of the blood is "[a] doctrine, arising in feudal times but generally abrogated expressly by state constitutions, whereunder one was disqualified to inherit by conviction of a felony." BALLENTINE'S LAW DICTIONARY 276 (3d ed. 1969).

20. Julie L. Olenn, *'Til Death Do Us Part': New York's Slayer Rule and In re* Estates of Covert, 49 BUFF. L. REV. 1341, 1343 (2001)

21. *Id.* at 1343 n.9.

22. Pehush, *supra* note 13, at 273.

23. Blackwell, *supra* note 13, at 146.

24. Pehush, *supra* note 13, at 273-74.

generation."[25] After attainment, along with loss of possession, the felon also lost any chance of benefiting from his wrongdoing.[26]

B. The Slayer Rule Across the Ocean and in the Courts

English Parliament began its abolition of the common law doctrines that prohibited a slayer from profiting in 1814, and completed this process with the Forfeiture Act of 1870.[27] As a result, English courts either had to "allow slayers to recover," or come up with new reasons to prevent them from doing so.[28] To accomplish the latter, they looked to public policy rationale that would prevent enrichment through wrongdoing.[29]

Because English courts did not finish this process until the nineteenth century, the doctrines of attainder, forfeiture of estate, and corruption of the blood became part of colonial law in America.[30] They did not last long; the Constitution forbid their use.[31] Under this prohibition, slayers who had benefited from their misdeeds attempted to challenge the constitutionality of being denied what was "rightfully" theirs.[32]

Riggs v. Palmer[33] and *Weaver v. Hollis*[34] are perhaps the most well-known cases in which a slayer argued for his right to inherit.[35] In *Riggs*, a grandson murdered his grandfather, who had made a bequest to him in his will but had manifested the intention to revoke it.[36] The grandson claimed that because the testator's will was admitted to probate, it must "have effect according to the letter of the

25. Reppy, *supra* note 16, at 233.

26. Pehush, *supra* note 13, at 273-74.

27. Blackwell, *supra* note 13, at 146; *see also* Reppy, *supra* note 16, at 234-38. The Forfeiture Act abolished the forfeiture of goods and land as a punishment for treason and felony. *See* Reppy, *supra* note 16, at 234.

28. Blackwell, *supra* note 13, at 146.

29. In a seminal case concerning the distribution of property to a felon in England, Judge Fry applied public policy to conclude that "no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanor." Reppy, *supra* note 16, at 242 (quoting Cleaver v. Mutual Reserve Fund L. Assoc., 1 Q.B. 147, 156 (A.C. 1892)).

30. *See* Fellows, *supra* note 16, at 538-39.

31. U.S. CONST. art. III, § 3, cl. 2 ("[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

32. Fellows, *supra* note 16, at 538-39.

33. 22 N.E. 1888 (N.Y. 1889).

34. 22 So.2d 525 (Ala. 1945).

35. *Riggs*, 22 N.E. at 189.

36. *Id.* at 188-89.

law."[37] The court disagreed, holding that the purpose of these statutes were "to enable testators to dispose of their estates to the objects of their bounty at death."[38] Relying on Aristotle[39] for the position that "all laws . . . may be controlled in their operation and effect by general, fundamental maxims of the common law,"[40] and on moral equity,[41] the court entered judgment against the defendant.[42]

Similarly, in *Weaver,* a husband who was convicted of the second-degree murder of his wife argued that "to deny him the right to participate in the distribution of his wife's estate . . . is to disregard the plain, unambiguous language of the statute,[43] and would violate [Article I], sections 7[44] and 19[45] . . . of the Constitution of Alabama."[46] Again, the court disagreed and affirmed the trial court's decision.[47] It upheld principles of equity by stating that barring a murderer from inheriting "does not inflict upon him any greater or other punishment for his crime . . . and takes no property from him, but simply bars him from acquiring property by his crime, and so obtaining a reward for its commission."[48]

37. *Id.*

38. *Id.* at 189.

39. *Id.* The court quoted Aristotle as following: "*Aequitas est correctio legis generaliter latoe qua parti deficit*." This roughly translates to "[t]he equitable construction which restrains the letter of a statute.**"** *Id.*

40. *Id*. at 190.

41. "No one shall be permitted to profit by his own fraud . . . or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes." *Id.* at 189-90. Judge Earl, commenting on the grandson's decision to murder the testator in order to ensure himself an estate, asked the court "what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime?" *Id.*

42. *Id.* at 191.

43. "If a married woman having a separate estate dies intestate, leaving a husband living, he is entitled to one-half of the personalty of such separate estate absolutely; and to the use of the realty during his life." ALA. CODE tit. 16 § 12 (LexisNexis 1940) (repealed).

44. "That no person shall be accused or arrested, or detained, except in cases ascertained by law, and according to the form which the same has prescribed; and no person shall be punished but by virtue of a law established and promulgated prior to the offense and legally applied." ALA. CONST. art. 1, § 7 (2009).

45. "That no person shall be attainted of treason by the legislature; and no conviction shall work corruption of blood or forfeiture of estate." *Id.* § 19.

46. Weaver v. Hollis, 22 So. 2d 525, 527 (Ala. 1945).

47. *Id.* at 529.

48. *Id.* at 527. The court further explained that a beneficiary in the plaintiff's position "commits a crime against society . . . [t]o permit him to recover is to reward him for his evil deed, in that the death benefit is matured aforetime, and his claim thereto made absolute. But for his criminal act he may not have the survived the insured." *Id.*

Both decisions rely on the same fundamental principle, expressed by Blackstone: "If there arise out of [the statutes] any absurd consequences manifestly contradictory to common reason, they are with regard to those collateral consequences void."[49] Where a slayer murders an individual with the express intention of gaining a benefit from the decedent, the result that he should profit from his crime is indeed absurd.[50] Therefore, though the of slayer statutes may vary, the underlying purpose is the same.

III. READING INTO THE NEW JERSEY SLAYER STATUTE

At first glance, New Jersey's slayer statute[51] is similar to many other state statutes regulating when – and if – a slayer may take from his victim.[52] It even resolves one issue that has been the subject of litigation in the past: whether the rule operates on joint tenants the way it does on tenants in common.[53] However, in spite of these attempts to create a comprehensive statute, there is a single – but crucial – element missing in its construction: the definition of what exactly triggers the statute.

A. Text of the Statute

Though the statute seems to read clearly and concisely, its ambiguity is revealed through interpretation. The text reads:

> An individual who is responsible for the *intentional* killing of the decedent forfeits all benefits under this title with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's, domestic partner's or child's share, exempt

49. Riggs v. Palmer, 22 N.E. 188, 189 (N.Y. 1889) (citing Blackstone).

50. *See* Helwinkel v. Helwinkel, 18 Cal. Rptr. 473, 476 (Cal. Ct. App. 1962) (holding that an appellant whose crime gave rise to a family allowance would have had no allowance without her crime; therefore, "[g]ood conscience and good sense" do not allow her to profit from her wrong); Bradley v. Fox, 129 N.E.2d 699, 705 (Ill. 1955) (holding that where a joint tenant husband murdered his wife to gain control of the entire estate, it is "legal fiction" to disregard the benefits to the murderer under traditional notions that "a joint tenant holds the entire property at the date of the original conveyance"); *Riggs,* 22 N.E. at 190-91 (holding that a slayer who causes a death, and in doing so, triggers the operation of a will, should not have the will speak in his favor).

51. N.J. STAT. ANN. § 3B:7-1.1 (West 2007).

52. *See, e.g.,* ALA. CODE § 43-8-253(a) (2008) ("A surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under articles 3 through 10 of this chapter, and the estate of decedent passes as if the killer had predeceased the decedent.").

53. A killing by an individual of a decedent with whom he held property in joint tenancy "severs the interests of the decedent and the killer in property . . . [and] transform[s] the interests of the decedent and killer into tenancies in common." N.J. STAT. ANN. § 3B:7-1.1(b)(2) (West 2007). For an example of litigation concerning the rights of joint tenants, see Bradley v. Fox, 129 N.E.2d 699 (Ill. 1955).

> property and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his share.[54]

The text specifies the consequences of an intentional killing, including revocation of any revocable dispositions or appointments in governing instruments,[55] provisions in governing instruments that confer "a general or special power of appointment,"[56] or "nomination[s] in a governing instrument of the killer or a relative of the killer" to fiduciary or representative positions.[57] Additionally, as noted earlier, it addresses concerns of joint tenancies,[58] and defines a limited number of terms in the statute.[59] There is no further elucidation of any terms within the statute – neither through legislative direction within the text nor via official comments.

This lack of definition is not initially concerning, given that the statute clearly explains that the revocation of property rights hinges on the killing having been done intentionally.[60] However, the practical interpretation of this language proves problematic: the lack of legislative direction combined with conflicting and controversial definitions of "intent" as a legal state of mind[61] make uniform application of the statute difficult, if not impossible.[62]

B. Defining 'Intention'

In determining whether a killer's mental state is sufficient to trigger the statute, a standard definition of the word "intentional" is necessary to ensure equitable application of justice. Unfortunately,

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54. N.J. STAT. ANN. § 3B:7-1.1(a) (West 2007) (emphasis added).

55. *Id.* § 3B:7-1.1(b)(1)(a).

56. *Id.* § 3B:7-1.1(b)(1)(b).

57. *Id.* § 3B:7-1.1(b)(1)(c).

58. *Id.* § 3B:7-1.1(b)(2).

59. *Id.* § 3B:7-1.1(c) (defining a "governing instrument" as "a governing instrument executed by the decedent" and a "relative of the killer" as "an individual who is related to the killer by blood, adoption or affinity and who is not related to the decedent by blood or adoption or affinity").

60. *Id.* § 3B:7-1.1(a) ("An individual who is responsible for the intentional killing of the decedent forfeits . . . .").

61. The question of intention is "by no means free from ambiguity." Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645, 646 (1917). When using the term, "[o]ne writer or judge will use [it] in one sense, another in a different sense; indeed, the same writer will not always be consistent in his usage." *Id.*

62. *See id.* at 645-46. In discussing the fictional account of the attempted murder of Sherlock Holmes, Cook claims that, though it would surprise a layman that there would be doubt as to whether the criminal would be guilty of attempted murder, "if we apply tests which have occasionally been suggested it would seem that in the first case the accused was guilty, but that in the second case he was not guilty, of a criminal attempt to murder." *Id.*

when such a definition is not provided in the context of the statute, it falls to the judiciary "to distinguish intended results from accidental happenings."[63] To do so, judges must consider the varied meanings that the word "intent" may have in different contexts. With a wide spectrum of meanings available, it is clear that the outcome is heavily reliant on the individual interpreting the situation.[64] This result is hardly compatible with a wholly objective system of justice.

1. Departure from the Uniform Probate Code

It is critical to note, at the outset of examining this issue, the departure that New Jersey has made from the optional "slayer statute" provision in the Uniform Probate Code.[65] The Uniform Probate Code ("UPC") provides that one who "feloniously and intentionally kills the decedent" is not entitled to any benefits under the will or under this article, and the decedent's estate passes as if the killer had predeceased the decedent.[66] Although there is no definition of the term "intentional" in the UPC, the official comment to this section "confines the section to intentional and felonious homicide," thus excluding "accidental" killings.[67] New Jersey has adopted no such comment; therefore, the ambiguity must be resolved elsewhere.

2. Common-Law Conceptions: The Theory of Intention

Since much of the slayer statute's strength derives from its common-law principles, it is logical to first consider the statute's scope in theoretical terms consistent with early interpretations of law. Walter Wheeler Cook proposes one such theoretical construction of intention.[68] Wheeler claims that, when considering the actor's state of mind in relation to his physical action, "[t]he most important problem in criminal law in this connection is whether the actor did or did not *intend* certain consequences to follow from his act or acts."[69]

Cook elaborates on the ambiguities in this problem: some writers

63. Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 905 (1939).

64. *See* Cook, *supra* note 61, at 646. The confusion about intent "exists to some extent in the actual decisions but to a greater extent, it is believed, in the opinions of judges and the writings of legal authors." *Id.*

65. *See* UNIF. PROB. CODE § 2-803(b) (2006).

66. *Id.* The Uniform Probate Code further provides that "[a] judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section." *Id.* § 2-803(e).

67. Michael G. Walsh, *Annotation, Homicide as Precluding Taking Under Will or by Intestacy*, 25 A.L.R. 4th 787, § 2(a) (1983).

68. *See, e.g.,* Cook, *supra* note 61, at 646-47.

69. *Id.* at 654 (emphasis added).

believe that an actor intends a consequence when he wishes or desires such consequences to follow his behavior.[70] However, where an actor intends to shoots A, but realizes that it is likely he will hit B, the question emerges: does he *intend* to hit B where he did not necessarily *desire* to do so?[71] A third formation of intention emerges where it is unavoidable, not merely likely, that B dies in the above scenario, and finally, a fourth formation, in which B *must* die in order for A to die as well.[72]

To resolve the tension between these four different interpretations, Cook relies on John Salmond's theory.[73] Salmond explains that one who intends a certain end also intends any means by which the end must be obtained.[74] Combining Salmond's work with his own line of reasoning, Cook comes to a conclusion: an actor intends a particular consequence when he "wishes or desires it to happen as the result of the act which he does," or when, at the time of committing the act, "he adverts to the consequence in question as one which will necessarily result from the act . . . even if he would be glad to have this particular consequence not happen."[75]

70. *Id.* at 655. Justice Markby, one such thinker, says: "Intention, then, is the attitude of mind in which the doer of an act adverts to a consequence of the act and desires it to follow. But the doer of an act may advert to a consequence and yet not desire it: and therefore not intend it." *Id.* (citing WILLIAM MARKBY, ELEMENTS OF LAW (6th ed. 1905)).

71. Cook, *supra* note 61, at 655. Though Justice Markby would respond that this action was not intentional, other writers would disagree. For instance, Jeremy Bentham draws a distinction between consequences that are directly or obliquely intentional. Consequences, he explains, are directly lineal when producing the result caused the person to perform the act in the first place. Alternately, a consequence is only obliquely lineal when it was in contemplation or appeared likely at the time of the action, yet was not a deciding factor in the decision to act. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Oxford 1907).

72. Cook, *supra* note 61, at 656. In the fourth scenario, Cook admits that the actor only *intended* the harm to B as a means to an end, yet contends that this does not detract from the actor's intention to harm B. *See id.*

73. *See generally id.* at 649; JOHN SALMOND, JURISPRUDENCE OR THE THEORY OF THE LAW 84 (2d ed. 1907).

74. SALMOND, *supra* note 73, at 341. For instance, one who desires to kill an emperor by throwing a bomb into his carriage also desires the death of any other person riding in that carriage. *Id.* Conversely, however, "[a]ny genuine belief ... that an event may not happen, coupled with a genuine desire that it shall not, is sufficient to prevent it from being intended." *Id.* In this way, the actor who fires at A, while knowing that he may very probably hit B yet genuinely desires not to do so, does not intend to hit B as well as A. *Id.* at 342. Cook interprets this explanation to form an interpretation that is narrower than the second, third, and fourth scenarios (where an actor may intend a consequence if it is collaterally related to the action, or is possible, likely, or sure to follow from it) but not quite so broad as the first (in which an actor must desire a consequence to intend it). Cook, *supra* note 61, at 656.

75. Cook, *supra* note 61, at 657-58.

In theory, this conclusion would seem to solve New Jersey's slayer statute's problem: where a slayer wished for the decedent to die as a result of his action, or was aware that he would die, the statute will be triggered. However, this conclusion may prove difficult to apply in a practical sense. As Cook admits, the "discussion of the various meanings of intend and intention deals only with the simpler aspects of the problem."[76] In practice, a judge or jury may *never* know what a person wished, desired, or knew at the time he acted. And without this knowledge, a judge acting on Cook's theory runs the risk of expanding or reducing the original scope of the statute.[77]

3. Statutory Definitions: New Jersey and Model Penal Code

With the evolution of legal theory, textual analysis has become the cornerstone for resolving ambiguities. However, in the case of the slayer statute, even an exercise in close reading does not yield results because the statute does not clarify exactly what an intentional killing is. Consulting the definitions governing the administration of estates of decedents in New Jersey reveals little more guidance.[78]

Furthermore, though the slayer statute is meant to govern when a criminal killing revokes inheritance, the New Jersey Criminal Code also reveals no explanation or answers.[79] The section addressing criminal homicide[80] explains that "[a] person is guilty of criminal homicide [when] he purposely, knowingly, [or] recklessly . . . causes the death of another human being."[81] Criminal homicide constitutes

76. *Id.* at 662. Cook's article was intended to be a foundation for a discussion of criminal attempt in a subsequent article. *Id.*

77. *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 703-04 (1983). Robinson and Grall argue that element analysis – or the precise definitions of each element of a crime – provides a system of comprehensiveness and precision that decreases the possibility of arbitrary governmental action. *Id.* at 703. They frame their argument in the legality principle, which requires the imposition of penal sanctions only when there is sufficient warning. *See id.* at 703 n.95. Precisely defining the elements of an offense has many positive results, including reducing litigation by eliminating ambiguities in offenses, shifting the burden of defining criminal liability requirements back to the legislature, and increasing simplicity and effectiveness of the judicial system. *Id.* at 704. *But see* Robert Batey, *Judicial Exploitation of Mens Rea Confusion, At Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 342 (2001-2002) (arguing that the judiciary is unwilling to relinquish control of defining crimes to the legislature, as evidenced by its tendency to flout definitions for purposes of policy considerations).

78. N.J. STAT. ANN. §§ 3B:1-1, 3B:1-2 (West 2007).

79. N.J. STAT. ANN. tit. 2C.

80. N.J. STAT. ANN. § 2C:11-2.

81. *Id.* A person is also guilty of homicide when it occurs under certain

murder when an actor "purposely" or "knowingly causes death or serious bodily injury resulting in death."[82] Therefore, the essential terms to focus on for this Note include "purposely," "knowingly," and "recklessly."

Unfortunately, exploration of these terms reveals that there is no legislative parallel between these mental states and the requisite "intentional" level required by the statute.[83] This is a significant deficit, and one with a dangerous impact on the court's ability to exercise justice.[84] As a result, courts must constantly revisit and revise these difficult concepts when faced with cases of first impression.[85]

Although the New Jersey legislature has chosen not to explain exactly what an intentional killing is, the Model Penal Code[86] ("MPC") has done just that. The MPC provides that "'intentionally' or 'with intent' means purposely."[87] Furthermore, if the element of a crime involves the nature of an actor's conduct, he "acts purposely with respect to a material element of an offense when . . . it is his conscious object to engage in conduct of that nature or to cause such a result."[88] With respect to attendant circumstances, he acts purposely when "he is aware of the existence of such circumstances or he believes or hopes that they exist."[89] When no culpability is prescribed as a matter of law, the three types (purposely, knowingly, recklessly) will establish such an element.[90] Therefore, the

circumstances, including "when it is caused by driving a vehicle or vessel recklessly." *Id.* § 2C:11-5.

82. *Id.* §§ 2C:11-3(a)(1)-(2).

83. *Id.* §§ 2C:2-2(b)(1)-(3).

84. *See, e.g.*, State v. Coyle, 574 A.2d 951 (N.J. 1990) (holding that the charge to the jury must distinguish between purposely or knowingly causing serious bodily injury that caused death or purposely or knowingly causing death); State v. Gerald, 549 A.2d 792 (N.J. 1988) (deeming a defendant convicted of purposely or knowingly causing bodily injury to not have had the intent to kill necessary to invoke capital punishment); *see also* State v. Yothers, 659 A.2d 514 (N.J. Super. Ct. App. Div. 1995).

85. *See, e.g.*, State v. Darby, 491 A.2d 733 (N.J. Super. Ct. App. Div. 1984). In this case of felony murder, the trial court attempted to define more clearly the second element of the crime: that the defendant "'purposely does an act constituting a substantial step in a course of conduct planned to culminate in his . . . crime.'" *Id.* at 735. To satisfy the purposeful requirement of this element, the trial court said that the defendant must have been "guided by a criminal purpose." *Id.* In overturning the decision, the superior court called this line of reasoning "manifestly unintelligible." *Id.* at 736.

86. MODEL PENAL CODE (1962).

87. *Id.* § 1.13(12).

88. *Id.* § 2.02(2)(a)-(a)(i).

89. *Id.* § 2.02(2)(a)(ii).

90. *Id.* § 2.02(3). The official comment to this section explains that it is an aid to guide the drafting of definitions to specific crimes: "[w]hen it is intended that purpose,

definitions of these levels of culpability draw a "rough correspondence . . . [to] the common law requirement of 'general intent.'"[91]

In equating "intent" with "purpose," and defining the latter, the MPC strikes a resonant chord with the ambiguity in New Jersey's slayer statute. And although New Jersey has, in large part, adopted the culpability scheme proposed by the MPC,[92] it failed to adopt the key provisions that contribute to the MPC's "clarity, consistency, and predictability."[93] Though using "intentional" as a state of culpability would not pose a problem where it is either clearly defined or equated with another defined term, the New Jersey legislature, unfortunately, has fallen far short of this mark.[94]

IV. 'INTENTIONAL' IN LEGAL APPLICATION

Without proper guidance from the New Jersey legislature, many situations pose potential problems for New Jersey's slayer statute. An overriding issue arises in these circumstances: when a judicially-constructed definition of the word "intentional" conflicts with the moral underpinnings of the slayer statute, does application of the statute preserve the integrity of the judicial system or does it erode it?

A. Murder v. Manslaughter

Courts have been divided on the effect of a slayer's conviction of homicide in a lesser degree than first-degree murder.[95] Though many courts seem reluctant to dispossess a slayer whose crime was unintentional, others show no such hesitation.[96] Excusing a killer whose culpability exonerates him from a murder conviction reflects founding principles of the statute;[97] however, where the exemption or inclusion of a slayer depends not on a prescribed definition of culpability but rather on a judicial construct, these principles may still be at risk.

knowledge or recklessness suffice for the establishment of culpability for a particular offense, the draftsmen need make no provision for culpability; it will be supplied by [subsection three]." *Id.*

91. *Id.* § 2.02(3).

92. *See* Robinson & Grall, *supra* note 77, at 705-06.

93. *Id.* at 706. At one time or another, New Jersey has "used terms such as 'carelessly,' 'heedlessly,' 'wanton,' 'willful,' 'intent,' and 'criminal negligence' without defining them." *Id.* at 705-06.

94. *See id.* at 705 n.110.

95. *See* Walsh, *supra* note 67.

96. *See id.*

97. *See* Callie Kramer, *Guilty by Association: Inadequacies in the Uniform Probate Code Slayer Statute*, 19 N.Y.L. SCH. J. HUM. RTS. 697, 706-07 (2003).

1. Murder and Manslaughter in New Jersey

New Jersey has not yet been confronted with this issue; therefore, it is necessary to understand how the New Jersey legislature has framed – and the courts have viewed – murder and manslaughter. The New Jersey Criminal Code says that "criminal homicide constitutes murder when: (1) the actor purposely causes death or serious bodily injury resulting in death; or (2) the actor knowingly causes death or serious bodily injury resulting in death."[98] A person acts purposely when "it is his conscious object to engage in conduct of that nature or to cause such a result"[99] and he acts knowingly when "he is aware that it is practically certain that his conduct will cause such a result."[100]

Criminal homicide constitutes manslaughter when "[i]t is committed recklessly"[101] or "is committed in the heat of passion resulting from a reasonable provocation."[102] A person in New Jersey acts recklessly "when he consciously disregards a substantial and unjustifiable risk that the material element . . . will result from his conduct."[103] Therefore, a person commits murder when he either intends to cause death or is aware that it is *practically certain* that death will be the result, and he commits manslaughter when he is aware of a *substantial* risk yet consciously disregards it. Unfortunately, as noted earlier, there is no parallel between any of these mental states and the "intentional" trigger utilized in the slayer statute.

2. Murder and Manslaughter Elsewhere

Courts in other jurisdictions have used various rationales to avoid disinheriting a slayer who has been convicted of a lesser crime than murder. Even where the relevant statutory standard did not hinge on an intentional killing, these courts were nevertheless unable to avoid a discussion of intent.[104]

98. N.J. STAT. ANN. §§ 2C:11-3(a)(1)-(2) (West 2007).

99. *Id.* § 2C:2-2(b)(1). The statute differentiates between purposeful conduct with respect to the nature of his conduct and with respect to attendant circumstances. He acts purposely with respect to the latter "if he is aware of the existence of such circumstances or he believes or hopes they exist." *Id.* This latter definition is strikingly similar to Cook's proposed definition of "intentional," *see* Cook, *supra* note 61, at 658, though the New Jersey Statute never uses this term.

100. N.J. STAT. ANN. § 2C:2-2(b)(2).

101. *Id.* § 2C:11-4(b)(1).

102. *Id.* § 2C:11-4(b)(2).

103. *Id.* § 2C:2-2(b)(3).

104. *See*, *e.g.*, Leggette v. Smith, 85 S.E.2d 576 (S.C. 1955) (holding that a man who was shooting at his wife's lover and killed his wife instead was not barred from inheriting merely as a result of the homicide; there must have been actual intent

For example, in *In re Klein*,[105] the court concluded that the "wilful" statutory standard suggested "the presence of intention and at least some power of choice."[106] Utilizing policy as a basis for its decision, [107] it held that involuntary manslaughter in Pennsylvania[108] was not sufficient to trigger the statutory bar.[109] Similarly, in *In re Kramme*,[110] the California slayer statute barred one who "unlawfully and intentionally caus[ed] the death of a decedent."[111] In reversing the probate court's decision,[112] the court considered the definition of the word "intentional" and concluded that with regard to a particular result, "the actor must either desire the result or know, to a substantial certainty, that the result will occur."[113]

In so holding, both the *Klein* and *Kramme* courts followed the consistent pattern of courts "constru[ing] these statutes narrowly, notwithstanding . . . equitable principles."[114] In these cases, and

directed at the victim alone rather than at a third-party in order to bar his intestate succession).

105. 378 A.2d 1182 (Pa. 1977).

106. *Id.* at 1185 (quoting Lucciola v. Commonwealth, 360 A.2d 310, 311 (Pa. Commw. Ct. 1943)). The court also acknowledged that willful has been interpreted as "'intentional,'" Wright v. Hendrick, 312 A.2d 402, 404 (Pa. 1973), and "'deliberate and intentional,'" Rapoport v. Sirott, 209 A.2d 421, 424 (Pa. 1965).

107. *Klein*, 378 A.2d at 1186. *But see* John W. Wade, *Acquisition of Property by Wilfully Killing Another: A Statutory Solution*, 49 HARV. L. REV. 715, 722 (1936) ("If the wrong was not intentional, it is difficult to say as a matter of policy that the perpetrator should be prohibited from acquiring property.").

108. A person is guilty of involuntary murder when death is caused "as a direct result of the doing of an . . . act in a reckless or grossly negligent manner." 18 PA. CONS. STAT. ANN. § 2504 (1973).

109. *Klein*, 378 A.2d at 1186. In this case, a woman was killed in an automobile accident and her husband, the driver, was subsequently charged and convicted for involuntary manslaughter. *Id.* at 1183. Interestingly, the court noted that "a killing may constitute murder even if it was not committed intentionally." *Id.* at 1186 n.21. Ultimately, the court concluded that "a killing is willful under the Slayer's Act if it is committed intentionally or with malice." *Id.*

110. 573 P.2d 1369 (Cal. 1978). In this case, a man surprised his wife and her lover with a loaded shotgun and, in the struggle between the man and his wife's lover, the gun discharged and killed the wife. *Id.* at 1370. The man entered a negotiated plea to involuntary manslaughter. *Id.*

111. *Id.* at 1371 (quoting CAL. PROB. CODE § 258 (West 1978)) (internal quotations omitted). Note that the current California Probate Code has adjusted its standard to a "felonious and intentional" standard. CAL. PROB. CODE § 250 (West 2008).

112. The probate court found that Charles' intentional act of confronting the couple with the loaded gun, which ultimately resulted in his wife's death, was sufficient to place his conduct within the scope of the slayer statute. *Kramme*, 573 P.2d at 1370-71.

113. *Id.* at 1372. The court corroborated this conclusion with reference to textual clues within the statute, including a list of felonies that would be otherwise superfluous, and a clause providing for the conclusiveness of a conviction or acquittal. *Id.* at 1372-73.

114. *Id.* at 1374.

others,[115] courts have balanced definitions of murder and manslaughter in light of factual circumstances and policy, and ultimately concluded that a conviction of any lesser crime than murder is insufficient to trigger disinheritance.

Other courts, however, have weighed the same questions of intention and come out with the opposite conclusion: that a conviction of less than murder *is* sufficient to disinherit a slayer. For example, in *In re Wells*,[116] the court evaluated a conviction under a statute requiring "proof that a beneficiary intentionally and feloniously took the life of a decedent."[117] After determining that the surviving spouse "was consciously aware of the risks and results that could follow from her actions,"[118] it held that this constituted a wrong sufficient to forfeit benefits[119] under *Riggs v. Palmer*,[120] and refused to allow the slayer to inherit from her victim.[121] Similarly, in *In re Safran*,[122] the court followed the common law rule[123] requiring intent and unlawful killing by the slayer, and held that a conviction of homicide in a degree less than murder might very well disqualify a

115. *See, e.g., In re* Seipel, 329 N.E.2d 419 (Ill. App. Ct. 1975) (holding that a widow's conviction of voluntary manslaughter operated as an acquittal of murder and allowed her to inherit); *see also* Henry v. Toney, 50 So.2d 921 (Miss. 1951) (holding that plaintiff convicted of voluntary manslaughter was allowed to inherit under a 'wilful' statutory standard because manslaughter does not require an intent to kill either in Mississippi or under common law); *In re* Wolf, 150 N.Y.S. 738 (N.Y. Sur. Ct. 1914) (holding that where a widower, intending to kill his wife's paramour killed his wife instead, was convicted of manslaughter based on reasonable provocation, equitable considerations did not bar him from inheriting).

116. 350 N.Y.S.2d 114 (N.Y. Sur. Ct. 1973).

117. *Id.* at 117.

118. *Id.* at 119. In so holding, the court differentiated between one who is criminally negligent, which it called unintentional manslaughter, and one guilty of reckless manslaughter: "in the one instance the action was not a conscious act whereas the other person is aware of what he is doing and consciously disregards a substantial and unjustifiable risk." *Id.*

119. *Id.* At the time, New York law allowed for a hearing to be held to determine whether a wrong committed was intentional. *Id.* at 117. The court in *Wells*, on the other hand, concluded that because the commission of an intentional felony was not a mandatory element for forfeiture, no hearing was necessary where a defendant was convicted of manslaughter. *Id.* at 118.

120. 22 N.E 188 (N.Y. 1889).

121. *Wells*, 350 N.Y.S.2d at 119. The killing at issue fell into the "area of manslaughter . . . in the second degree where one can question whether it is voluntary or involuntary manslaughter." *Id.* at 117.

122. 306 N.W.2d 27 (Wis. 1981).

123. The court adopted the common law rule of whether a slayer can inherit from his victim, explaining that it disqualified "one who intentionally and unlawfully kills a testator." *Id.* at 36. It explained the exact issue facing a probate court, characterizing it as the question of whether "the beneficiary unlawfully kill[ed] the testator, with the intent to kill?" *Id.*

slayer.[124]

Situations in which a conviction of less than murder, typically either voluntary or involuntary manslaughter,[125] is sufficient to bar disinheritance exhibit a recognizable rationale. This rationale follows the logic proposed by Wade: "the decision being one of policy . . . it may be urged that it would be sufficient to require the slaying to be felonious, and thus include manslaughter, in some of its degrees at least."[126]

3. Conclusions

Outcomes of out-of-state cases where the slayer is convicted of homicide in a degree less than murder are varied. Despite differing statutory standards[127] and discussions of policy considerations,[128] the issue consistently boils down to a single inquiry: was the killing intentional? In the case of murder and manslaughter, the combination of conflicting – and often confusing – definitions[129] do not lead to an easy result.

This is especially true where the criminal element of each degree of homicide is not exactly aligned with the threshold for the slayer statute.[130] This is evidenced by the conflicting case law, and is especially true where, as in New Jersey, the trigger for the slayer statute is not itself defined.

124. *Id.*

125. Although the court in *In re Wells*, differentiated between voluntary and involuntary manslaughter by concluding that there was no question that first-degree manslaughter constituted voluntary manslaughter while criminally-negligent homicide was involuntary manslaughter, 350 N.Y.S.2d at 117, there are many different interpretations of the differences between the two. For instance, the MPC "depart[s] from the traditional common law statement of the crime" by abandoning the difference between the two completely. MODEL PENAL CODE § 210.3 explanatory note (1962).

126. Wade, *supra* note 107, at 722.

127. "The most common statutory formulation is 'feloniously and intentionally.'" *See* Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 848 n.211 (1993). However, other state statutes specifically address varying degrees of homicide, including unintentional killings. *Id.* at 848.

128. "All social policy requires the drawing of lines . . . . Prohibitions have to be established and distinctions made even where human affairs are uncertain and hard to classify." Sisela Bok, *Death and Dying: Euthanasia and Sustaining Life: Ethical Views*, *in* 1 ENCYCLOPEDIA OF BIOETHICS 268, 277 (Darren T. Reich ed., 1978).

129. *See supra* Part IV(A)(1) (dissecting the New Jersey Criminal Code definitions of murder and manslaughter, demonstrating that the tenuous difference between the mental state of mind for murder and manslaughter hinges on the enormity of the risk and the actor's subjective state of mind).

130. An example of an exact alignment between an element of homicide and the slayer statute would be the following example: where the statute is triggered by a purposeful killing, homicide constitutes murder where the actor acts purposefully.

B. Does Insanity Preclude Application of Slayer Statutes?

Another situation in which an "intentional" killing may prove troublesome is where the killer is found not guilty by reason of insanity. Is a legally insane individual capable of the requisite mental state to trigger the slayer statute? Would allowing such an individual to inherit undermine common law principles or would it affirm them? These questions necessarily arise in this situation, and the answers are not easy.

1. Insanity in New Jersey

Though the issue of insanity as a challenge to New Jersey's slayer statute is not new, rapid changes in the statute's evolution have made the case law surrounding this issue unsteady. The court first confronted the question in the 1968 case of *Campbell v. Ray*.[131] In *Campbell*, the plaintiff wife, who murdered her husband while insane, sued for an intestate share of her husband's estate.[132] In deciding as a matter of law that a legally insane slayer should be allowed to inherit from her victim, the court considered principles of equity,[133] decisions by other jurisdictions,[134] and "the absence of any expression by the Legislature." [135] The *Campbell* court made its decision under common law principles, with questions of public policy at the forefront of its considerations.

The first statutory challenge came in 1982, when *In re Vadlamudi*[136] was decided under the then-adopted slayer statute.[137] In *Vadlamudi*, a wife who killed her husband was acquitted on the

131. 245 A.2d 761 (N.J. Super. Ct. Ch. Div. 1968). The court noted that, though there had been a number of cases in New Jersey over the rights of a murderer to acquire property from his victim, the question of what to do with a wrongdoer who did not "possess the requisite mental capacity" had not yet arisen. *Id.* at 763.

132. *Id.* Technically, the wife in this action sued not only for an intestate share, but also for the proceeds of a life insurance policy to which she was named beneficiary. *Id.*

133. *Id.*

134. *Id.* at 763-65. After determining that the issue of insanity was a question of first impression in New Jersey, the court considered a number of holdings from other jurisdictions. *See* Blair v. Travelers Ins. Co., 174 N.E.2d 209, 211 (Ill. App. Ct. 1961) (holding that the absence of any law in Illinois on point with this issue precluded judicial construction of one preventing insane slayers from inheriting); *In re* Eckardt, 54 N.Y.S.2d 484, 490 (N.Y. Sup. Ct. 1945) (concluding that an insane slayer has committed no wrong and therefore should not be barred from her inheritance); Holdom v. Grand Lodge, 43 N.E. 772, 773 (Ill. 1895) (allowing the beneficiary of a life insurance policy who kills the insured while insane to collect).

135. *Campbell*, 245 A.2d at 765.

136. 443 A.2d 1113 (N.J. Super. Ct. Law Div. 1982)

137. *See* N.J. STAT. ANN. § 3A:2A-83 (West 1977), *superseded by* N.J. STAT ANN. 3B: 7-1.1 (West 2007).

grounds of being legally insane.[138] Under the provisions of the then-existing slayer statute, "a final judgment of conviction of intentional killing" was conclusive, but in the absence of a conviction, the court could decide by "a preponderance of the evidence whether the killing was intentional for purposes" of the statute.[139] Basing its holding on this permissive language, the court held that a civil hearing should be conducted to determine whether the slayer's insanity exempted her from the statute.[140] Its holding, however, also considered the instant circumstances of this case, which were that the homicide was unwitnessed, and that the criminal court's decision "rested on the post-event opinions of medical experts based on the history supplied by [the defendant] and on her initial statement to the police."[141] The court further noted that it could find no case law permitting a killer to acquire property on the "sole ground that he had been acquitted by reason of insanity" absent express provisions providing for this.[142]

*S*ince *Vadlamudi* was decided, the substance of the slayer statute has again changed.[143] Thus, the issue arises anew: when faced with a challenge to the current statute, which case should be controlling – *Campbell*, decided under common law and policy principles, or *Vadlamudi*, decided only after a judge liberally interpreted a provision based on the individual circumstances of a case?[144] To respond effectively, it may help to look to how other jurisdictions have resolved the issue.

2. Insanity in Other Jurisdictions

As is evident from the *Campbell* court's examination of other jurisdictional holdings, many state courts have considered this issue.[145] And although the common law has not traditionally applied

138. *Vadlamudi*, 443 A.2d at 1114.

139. N.J. STAT. ANN. § 3A:2A-83(e) (West 1977), *superseded by* N.J. STAT ANN. 3B: 7-1.1 (West 2007). The current version of the Slayer Statute also contains this provision. *See* N.J. STAT. ANN. § 3B:7-6 (West 2007).

140. *Vadlamudi*, 443 A.2d at 1118. As justification for its refusal to exonerate the criminal defendant from civil consequences of her action (namely, application of the slayer statute) as a matter of law, the court "cited the constitutional limitations on procedure and evidence in a criminal trial which do not exist in a civil action." *Id.* (internal citation omitted).

141. *Id.*

142. *Id.* at 1117.

143. *See* N.J. STAT. ANN. § 3B:7-1.1.

144. *Vadlamuni*, 443 A.2d at 1118. It should also be noted that another case in New Jersey, *Artz v. Artz*, 487 A.2d 1294, 1296 (N.J. Super. Ct. App. Div. 1985), also relied on the provision allowing for the court's discretion in determining whether the killing was intentional, and, in the *Artz* court's opinion, criminal. *Id.*

145. *See* Christopher M. Eisold, *Statute in the Abyss: The Implications of Insanity on Wisconsin's Slayer Statute*, 91 MARQ. L. REV. 875, 881 (2008) ("[S]ixteen states . . .

the rule to an insane slayer,[146] states have reinterpreted the rule differently: some have ruled conclusively on whether a mentally ill slayer triggers the rule, while others examine the situation on a case-by-case basis.[147]

Many states have determined that a killer who has been declared legally insane is not subject to a slayer statute. For example, in the California case *Ladd v. Ladd*,[148] the court held that a mother found guilty of murdering her two teenaged sons, but also found insane at the time of the commission could take their intestate shares.[149] The state code at the time forbade inheritance by one who "unlawfully and intentionally" caused the death of the decedent,[150] but the court concluded that insane persons were not capable of acting with the requisite level of intent.[151] Similarly, in *Estate of Wirth*,[152] the court considered the case where a husband who killed his wife was found not guilty by reason of insanity.[153] Relying on principles set forth in *Riggs v. Palmer*,[154] the court concluded that the husband "committed no legal wrong and that the principle barring him from profiting from his own wrong would be inapplicable."[155]

There are, however, a number of states that have declined to create an exception for mentally ill slayers. In a 1983 Indiana case, *Turner v. Turner*,[156] the court concluded that a man who killed his parents was permitted to collect[157] under an Indiana slayer statute that required the killing to be "intentional."[158] Less than two years

have considered the issue.").

146. *See* Stephen J. Karina, Ford v. Ford*: A Maryland Slayer's Statute is Long Overdue*, 46 MD. L. REV. 501, 503 n.21 (1987); *see also* Campbell v. Ray, 245 A.2d 761, 765 (N.J. Super. Ct. Ch. Div. 1968).

147. *See* Eisold, *supra* note 145, at 881-82.

148. 153 Cal. Rptr. 888 (Cal. Ct. App. 1979).

149. *Id.* at 891.

150. *Id.* The California Code was later updated to preclude inheritance by one who "feloniously and intentionally" kills the decedent. CAL. PROB. CODE § 258 (West 2002).

151. *Ladd*, 153 Cal. Rptr. at 893-94. The court also noted that this conclusion was consistent with a review of the defenses of insanity and diminished capacity, specifically, that findings of either would establish that the defendant in a criminal trial did not form the mental state necessary to commit the offense. *See id.* at 894-95.

152. Estate of Wirth, 298 N.Y.S.2d 565 (N.Y. Sup. Ct. 1969).

153. *Id.* at 566. Subsequent to the finding, the husband was released from the mental hospital because, although "[h]is commitment [there] was mandatory . . . he showed no evidence of mental illness." *Id.*

154. *Id.* (citing Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889)) (discussing the role played by *Riggs* in the evolution of slayer statutes).

155. *Id.* at 567.

156. 454 N.E.2d 1247 (Ind. Ct. App. 1983).

157. *Id.* at 1252.

158. IND. CODE § 29-1-2-12 (1982) (repealed 1984, current version at § 29-1-1-12.1 (2004 & Supp. 2009)); *see also* IND. CODE § 35-41-3-6(a) (2004).

after this decision, the Indiana Legislature eliminated the exception for mentally ill slayers, grouping them instead with all whose wrongs prevent their enrichment.[159] Similarly, Ohio created a statute that prevented killers found insane from benefiting from the death of the victim, "regardless of the criminal acquittal."[160] This issue – whether a mentally ill slayer may profit from his wrong – continues to be a controversial issue, with states constantly confronting challenges to their reasoning.[161]

3. Conclusions

Though states like Indiana and Ohio have codified the principle that an insane killer should not be exempted from the rule denying slayers their bounty,[162] other states, including New Jersey, have not explicitly determined whether insanity precludes collection.[163] Rather, these states have relied on the "intent" requirements of their statutes to determine, on a case-by-case basis, whether a killing triggers the slayer statute.[164]

It is true that in the past New Jersey courts have held that an insane killer may collect from his victim's estate. However, these decisions were often based on an interpretation of the criminal intent standard enumerated in the statute and a reflection of an individual case's facts.[165] Considering the ambiguities in the current statute's use of "intentional" as a mental state,[166] it is not impossible to imagine the dangers that a challenge to the current statute might pose, not only to the victim's estate, but also to the morality underlying the statute's application.

159. Eisold, *supra* note 145, at 882-83; *see also* IND. CODE § 29-1-2-12.1 (imposing a constructive trust on a person of any property he would otherwise be entitled to receive if he has been found guilty but mentally ill of murder, causing suicide, or voluntary manslaughter).

160. Eisold, *supra* note 145, at 882; *see also* OHIO REV. CODE ANN. § 2105.19 (West 2005).

161. *See*, *e.g.*, Matthew Heller, *Estate Claims "Insane" Killer Can't Be Victim's Heir*, On Point News, May 15, 2007, http://www.onpointnews.com/NEWS/estate-claims-qinsaneq-killer-cant-be-victims-heir.html (discussing the 2005 West Virginia case in which the estate of a woman who was killed by her mentally diseased son tried to bar him from inheriting even though he was not adjudged guilty of a crime).

162. *See* Eisold, *supra* note 145, at 882. On the other hand, South Dakota has taken a clear, if opposite position on the issue, deciding that its statute should apply only to sane killers. *Id.* at 883.

163. *Id.*

164. *Id.*

165. *See id.*

166. *See infra* Part III.B (examining the ambiguities in the current New Jersey statute, which triggers disinheritance through an "intentional" killing).

C. May a Minor Form the Intent to Trigger the Statute?

Finally, Tess Damm's case[167] brings to the forefront a third issue for New Jersey courts: may a minor killer, who may not be adjudged guilty in an adult criminal court, form sufficient intent to trigger application of the New Jersey slayer statute? In large part, this depends on whether a conviction is a necessary prerequisite to enforcement of the statute[168] and, of course, the policy underlying the statute.

1. New Jersey and Minors

Although New Jersey has not yet been confronted with this issue, examination of the statutes already in force and controlling case law is essential to its analysis. Under New Jersey criminal law, a child of less than fourteen years of age "shall not be tried for or convicted of an offense"[169] unless he has requested indictment and trial by jury.[170] Similarly, if, at the time of the conduct in question, the child was between fourteen and seventeen, he may not be tried or convicted unless the family court has no jurisdiction, has entered an order waiving its jurisdiction, or the accused has asked for indictment and trial by jury.[171]

Because both of these laws note that a child may not be tried or "convicted," it is important to consider the question of whether a conviction is necessary to invoke the statute. If a child may not be convicted, does this necessarily mean that he is precluded from losing his inheritance? This question is uniquely troublesome because over time, New Jersey has specifically repealed this requirement from its slayer statute.

This silence on whether the absence of a conviction precludes application of the statute requires a deeper glimpse into how New Jersey has, in the past, treated its juvenile killers. Until 1954, the general rule was that even if a statute gave juvenile courts exclusive jurisdiction, it could not be construed to deprive criminal courts of jurisdiction to try juveniles accused of murder.[172] However, in the 1954 case of *State v. Monahan*,[173] a fifteen-year-old boy who engaged

167. *See* Aguilar, *supra* note 5.

168. *See* Walsh, *supra* note 67, § 2(a).

169. N.J. STAT. ANN. § 2C:4-11(a)(1) (West 2007).

170. *Id.*

171. *Id.* § 2C:4-11(a)(2)(a)-(c).

172. R.P. Davis, Annotation, *Homicide by Juvenile as Within Jurisdiction of a Juvenile Court*, 48 A.L.R. 2d 663, 684 (1956). Assumedly, the New Jersey statutes addressed in this Note give juvenile courts exclusive jurisdiction. *See* N.J. STAT. ANN. § 2C:4-11(b) (West 2007).

173. 104 A.2d 21 (N.J. 1954).

in a robbery that resulted in the deaths of two persons was indicted for murder.[174] Relying on social policy,[175] the court narrowly held that the matter should be remanded to the juvenile and domestic relations court.[176] In the more recent 2001 case *In re Registrant J.G.*,[177] the court relied on much of the *Monahan* court's reasoning in recognizing that there is "a substantial distinction in the criminal responsibility of juveniles over and under the age of fourteen."[178]

2. Minority in Other Jurisdictions

Other jurisdictions have considered the issue of whether a slayer's minority status insulates him from the effect of a slayer statute precluding inheritance from his victim.[179] In the North

174. *Id.* at 21.

175. *Id.* at 26-27. The court noted that the issue presented by *Monahan* was inarguably serious; however, it also relied on social psychology: "Criminal behavior is learned behavior. . . . The environment which the adult community provides its growing children is the most important factor underlying the behavior patterns cultivated by the normal child." *Id.* (quoting John Edgar Hoover, *Juvenile Delinquency*, 4 SYRACUSE L. REV. 179, 184 (1953)). In recognition of this principle, the court held that "the pathway lies not in unrelenting and vengeful punishment, but in persistently seeking and uprooting the causes of juvenile delinquency" to strengthen the reformative process. *Id.* at 27.

176. *Id.* at 27. Though this case was also decided under now-repealed statutes that vested exclusive jurisdiction in the juvenile courts over any child under sixteen years of age who had committed an offense which would be criminal if committed by an adult, N.J. STAT. ANN. §§ 2A:85-4 (repealed 1978), 4-14 (repealed 1973), the majority of the court's opinion rested on policy reasons.

177. 777 A.2d 891 (N.J. 2001) (considering whether a juvenile who pled guilty to what would be sexual assault if he was an adult should still be subject to Megan's Law notification).

178. *Id.* at 905. The court referred specifically to the infancy defense, which recognized that under common law principles, "a child is not criminally responsible 'unless he is old enough, and intelligent enough, to be capable of entertaining a criminal intent.'" *Id.* (quoting *Monahan*, 104 A.2d at 28 (Heher, J., concurring) (internal citations omitted)).

Although the *J.G.* court ultimately decided that the defendant in question should be subject to Megan's Law notification, it did so only in light of the legislative intent underlying Megan's Law. *Id.* at 910-12. At the same time, it noted that if the court were "writing on a clean slate, [its] inclination would be to exclude juveniles under age fourteen." *Id.* at 913. Again reinforcing *Monahan*'s reasoning, it justified its inclination by explaining that much of the sexually deviant behavior by juveniles under age fourteen is "more a reflection of inadequate adult supervision, immaturity, inappropriate media exposure, or a prior history of emotional abuse than it is of irremediable sexually predatory inclinations." *Id.* at 913-14.

179. *See*, *e.g.*, *In re* Sengillo's Estate, 134 N.Y.S.2d 800, 802 (N.Y. Sur. Ct. 1954) (denying a fifteen-year-old boy who fatally shot his father his inheritance based on the common law principle that no one should profit from his wrong); *see also* Lofton v. Lofton, 215 S.E.2d 861, 866 (N.C. Ct. App. 1975) (holding that a boy who killed his parents while under fourteen, and was subsequently declared a "delinquent child," was barred from inheriting).

Dakota case *Freidt v. Josephson* (*In re Estates of Josephson)*,[180] a minor child who shot his adoptive parents was barred from inheriting from his parents because he "feloniously and intentionally" caused their deaths.[181] The defendant argued that a statute stating that a result in a juvenile proceeding "is not a conviction of crime and does not impose any civil disability ordinarily resulting from a conviction"[182] meant that the slayer statute should not apply.[183]

The court, however, disagreed. It cited the North Dakota slayer statute, which explains that although a "final judgment of conviction of felonious and intentional killing is conclusive for purposes of [the statute]," in the absence of a conviction, a court may independently determine whether the killing would trigger the statute.[184] The court held that although the slayer statute might be considered "a civil disability[,] it does not arise from any order . . . [of the] juvenile court" but is rather "imposed by statute separate and apart from" the court's disposition.[185] Moreover, the defendant's interpretation of the word "felonious" would contravene obvious statutory intent that although conviction of a felony is conclusive, it is not *necessary* before an heir may be barred from inheriting.[186]

3. Conclusions

The issue of whether a slayer's minority insulates him from the slayer rule is complicated. On the one hand, the *Josephson* court is undeniably correct when it notes that because social policy aims to prevent a slayer from profiting from his own wrong, perversion of statutory technicalities to allow him to profit would be contrary to both legislative intent and moral principles.[187] On the other hand, as the *J.G.* court emphasized, juveniles are treated differently from adult offenders because they are not old enough to understand the nature of their act – and thus, unable to form sufficient intent to perform the act.[188] New Jersey has not yet had to make this decision;

180. 297 N.W.2d 444 (N.D. 1980).

181. *Id.* at 446 (citations omitted).

182. *Id.* at 447 (quoting N.D. CENT. CODE § 27-20-33 (2008)).

183. *Id.*

184. *Id.* (quoting N.D. CENT. CODE § 30.1-10-03 (2008)).

185. *Josephson*, 297 N.W.2d at 447.

186. *Id.* at 448.

187. *Id.*

188. *See* In re Registrant J.G., 777 A.2d. 891, 905-06 (N.J. 2001) (citing State v. Monahan, 104 A.2d 21, 28 (N.J. 1954) (Heher, J., concurring) (citations omitted)); *see also* Alison Powers, Note, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried as Adults Without the Possibility of Youth as a Mitigating Factor*, 62 RUTGERS L. REV. 241, 254 (2009) (noting the Supreme Court's acknowledgement that juveniles, in some cases, may be considered less culpable than their majority-age counterparts due to their developmental stage).

however, should it have to do so, its analysis would be undeniably compromised by the vagueness of the statutory trigger.

V. COMPARISONS TO OTHER STATUTES

The issues confronted in this Note are by no means new; state legislatures continuously amend their slayer statutes with an eye toward addressing new difficulties that arise in their application. This changing body of law makes it even more difficult to find a standard by which one can interpret an existing statute. However, an analysis of two slayer statutes that are similar to New Jersey's may provide some guidance in drafting a more comprehensive statute.

A. Alabama Slayer Statute

The Alabama statute that governs the effect of homicide on inheritance[189] is in many ways similar to New Jersey's. The statute is triggered at the same level of mental intent: "[a] surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under" either testate or intestate succession.[190] Moreover, Alabama addresses some of the same issues, including the effect of homicide on joint tenancy, tenancy in common during the lives of the grantees,[191] and a named beneficiary of a governing instrument.[192]

The Alabama statute, however, contains additional sections that offer more guidance to courts. First, a comprehensive definitional section gives courts explicit guidance on what does and does not trigger application of the statute.[193] Alabama's Criminal Code explains that "[a] person acts intentionally *with respect to a result or to conduct described by a statute defining an offense*, when his purpose is to cause that result or to engage in that conduct."[194] This definition guides courts in their determination of conduct that triggers the statute, thus resolving many of the underlying issues addressed in this Note.

189. ALA. CODE § 43-8-253 (2008).

190. *Id.* § 43-8-253(a). When the statute is triggered, "the estate of the decedent passes as if the killer had predeceased the decedent." *Id.*

191. *Compare id.* § 43-8-253(c), *with* N.J. STAT. ANN. § 3B:7-1.1(b)(2) (West 2007) (explaining that an intentional killing "severs the interests of the decedent and the killer in property held by them at the time of the killing as joint tenants with the right of survivorship or as tenants by the entireties").

192. *Compare* ALA. CODE § 43-8-253(c) (revoking any benefit from a named beneficiary of a "bond, life insurance policy, or other contractual arrangement" who intentionally or feloniously killed the decedent), *with* N.J. STAT. ANN. § 3B:7-1.1(b)(1) (West 2007) (revoking "any revocable disposition . . . made by the decedent to the killer in a governing instrument").

193. ALA. CODE § 13A-2-2 (2008).

194. *Id.* § 13A-2-2(1) (emphasis added).

Second, the official commentary accompanying the statute addresses and offers solutions to some of the issues discussed in this Note.[195] It notes specifically that the section "is confined to intentional and felonious homicide and excludes the accidental manslaughter killing."[196] Thus, the Alabama legislature has drawn a bright-line rule to guide courts in deciding when and where application of the slayer statute is appropriate. It also indicates the purpose of the statute – to prevent enrichment by criminal wrongdoing – by stating that the section is meant to codify the prevailing public policy under prior Alabama law.[197] This clarification makes it clear that when an issue arises, the court's primary concern should be consistency with public policy – which would not allow a slayer to inherit when it would be morally wrong for him to do so.

B. Illinois Slayer Statute

Similarly, the Illinois slayer statute[198] has many characteristics in common with New Jersey's. A slayer who has "intentionally and unjustifiably cause[d] the death of another shall not receive any property, benefit, or other interest by reason of the death."[199] This statute applies to inheritance as an "heir, legatee, beneficiary, joint tenant, survivor, [or] appointee" through "any form of title registration, testamentary or nontestamentary instrument, intestacy, renunciation, or any other circumstance."[200] When the statute is triggered, any intestate property passes as if the killer predeceased the decedent,[201] just as it does in New Jersey.[202]

However, the Illinois statute is significantly altered in ways that make it easier for Illinois courts to determine its proper application.[203] First, the Illinois legislature has explicitly defined the

195. The comments explicitly recognize that there are a number of problems that arise in conjunction with slayer statutes; they note that "[a] growing group of states have enacted statutes dealing with the problems covered by this section, and uniformity appears desirable." ALA. CODE § 43-8-253 commentary (2008).

196. *Id.*

197. *Id.* The comments cite some landmark cases dealing with slayer statutes to support this public policy motive, including the seminal inheritance case *Weaver v. Hollis*, 247 Ala. 47 (1945), and other life insurance cases, including *American Life Insurance Company v. Anderson*, 246 Ala. 588 (1945), and *Protective Life Insurance Company v. Linson*, 245 Ala. 493 (1944).

198. 755 ILL. COMP. STAT. ANN. 5/2-6 (West 2009).

199. *Id.*

200. *Id.*

201. *Id.*

202. *See* N.J. STAT. ANN. § 3B:7-1.1(a) (West 2007) (providing that "[i]f the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his share").

203. It is interesting to note that the type of killing that triggers the statute is more

"intentional" mental state: a person acts intentionally or with intent "to accomplish a result or engage in conduct described by the statute defining the offense when his conscious objective or purpose is to accomplish that result or engage in that conduct."[204] This definition, of course, weighs heavily on concerns presented by New Jersey's statute.

Second, the statute refers specifically to those convicted of first and second degree murder, explaining that an individual convicted of either crime is "conclusively presumed to have caused the death intentionally and unjustifiably."[205] This designation of specific offenses to which the slayer statute applies not only eliminates frivolous litigation by a slayer attempting to pervert the common law underpinnings of the statute, but also gives the court a standard against which it may measure the more ambiguous situations.

Third, in the absence of a conviction, a determination under the slayer statute may be made "by any court of competent jurisdiction separate and apart from any criminal proceeding arising from the death."[206] In the event that no criminal charge is brought forth, a probate court may consider the application of the slayer statute so long as it does so at least one year after the date of the decedent's death.[207] This provision is unique in that it allows an individual to seek to prevent inheritance based on a killing even where the killer is

detailed than in New Jersey: not just intentional, but unjustifiable as well. 755 ILL. COMP. STAT. ANN. 5/2-6 (West 2009). Although an "unjustifiable" murder is not specifically defined within the code governing administration of estates, an entire Article is dedicated to the justifiable use of force in Chapter 720, the criminal offenses chapter. *See* 720 ILL. COMP. STAT. ANN. 5/7-1 to 14. Some examples of justifiable uses of force include defending another person when an individual "reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force," *id.* 5/7-1, acting "under the compulsion of threat or menace of the imminent infliction of death or great bodily harm," *id.* 5/7-11(a), and performing conduct which would otherwise be an offense if the individual "was without blame in occasioning or developing the situation," but acted in a way "necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct," *id.* 5/7-13.

Assumedly, a use of deadly force under this chapter is a justifiable murder that would be exempt from the slayer rule. This is something that has not been addressed at all by New Jersey's statute; again, it gives the court a guide by which it may resolve some of the issues addressed in this Note.

204. 720 ILL. COMP. STAT. ANN. 5/4-4.

205. 755 ILL. COMP. STAT. ANN. 5/2-6.

206. *Id.* This provision is limitedly qualified: a determination under the slayer statute may be made by any court with proper jurisdiction so long as the civil proceeding does not proceed to trial and the individual charged is not required to submit to discovery until the criminal proceeding is complete. *Id.* However, even with this limitation, the provision adds to the comprehensiveness of the statute.

207. *Id.*

not charged.[208] Thus, the Illinois legislature has made it clear that its primary concern is the moral underpinnings of the statute by allowing suspicion of murder to halt distribution of proceeds.

VI. CONCLUSION

New Jersey's slayer statute contains ambiguities that may result in decisions that run contrary to the statute's moral underpinnings. Although the statute is triggered by an "intentional" killing,[209] there are no definitions, comments, or case law to guide a court in determining exactly when a killer has formed sufficient mental intent. As a result, the judiciary has been forced to rely on artificial judicial constructs based in philosophy, public policy, or even guesswork. This lack of definition risks disastrous consequences in "gray" or ambiguous situations.

First, where the slayer is convicted of homicide in a degree less than murder, courts are divided on whether the slayer statute should apply. Those that allow an individual to collect state that to be culpable under the statute, a killer must desire the result.[210] On the other hand, those that bar such an individual from taking explain that awareness of the risk is sufficient to be intentional for purposes of a slayer statute.[211] In New Jersey, a person commits manslaughter when he consciously disregards a substantial risk that the result will occur.[212] Without a concrete definition of "intentional," it is impossible to determine conclusively whether substantial disregard of a risk rises to the level of conduct prescribed by the statute.

The second issue arises where a killer is mentally diseased: does such an individual have sufficient mental capacity to trigger the slayer statute? Although the common law typically exempted slayers judged not guilty by reason of insanity,[213] some states have passed legislation specifically including mentally ill slayers in the group of killers barred from inheriting.[214] Though New Jersey has considered this issue, changes in the slayer statute have rendered this body of law unstable. With the New Jersey legislature silent on the issue, it

208. This section of the statute is further supplemented by the requirement that any person who "knows or has reason to know that a potential beneficiary caused the death . . . fully cooperate with law enforcement authorities and judicial officers in connection with any investigation." *Id.*

209. N.J. STAT. ANN. § 3B:7-1.1 (West 2007).

210. *In re* Kramme, 573 P.2d 1369, 1372 (Cal. 1978).

211. *E.g.* Will of Wells, 350 N.Y.S.2d 114, 119 (N.Y. Sur. Ct. 1973).

212. *See* N.J. STAT. ANN. § 2C:11-4(b)(1) (West 2007) (stating that a killing is manslaughter if committed recklessly).

213. *See* Karina, *supra* note 146, at 503-04 n.21.

214. *See*, *e.g.*, IND. CODE § 29-1-2-12.1 (2004 & Supp. 2009); OHIO REV. CODE ANN. § 2150.19 (2005).

is difficult to determine its true intent.

Finally, as is illustrated by Tess Damm's case,[215] disparate treatment of juvenile killers raises the issue of whether a minor may form sufficient intent under the slayer statute. Though many states have determined that a juvenile slayer is precluded from taking under the will or by intestacy,[216] New Jersey has been dogged in its insistence that there is a "substantial distinction in the criminal responsibility of juveniles."[217] However, there is no way to determine just how far such a distinction reaches, especially when the intent standard under the statute is not defined, and the statute is silent on whether insulation from a conviction is dispositive.

These issues threaten to render the equitable basis of the statute moot. Slayer statutes are meant to fulfill the common law principle that no man may profit from his own wrongdoing.[218] However, where there is no standard by which the court can judge whether the killer acted intentionally, it is impossible to judge whether its application would fulfill this principle, at least not without risking inequitable application of justice.

Though these issues seem insurmountable, there are available remedies. First, the New Jersey legislature should define the word "intentional." It can easily do so by adopting the portion of the Model Penal Code it specifically omitted, which explains that a person acts with intent when he acts purposely.[219] Second, it should state specifically when the statute does *not* apply, for example, where the killing was justified under criminal law.[220] Finally, it can – and should – make clear the primary concern in the statute's application by stating, in official comments or in the text, its exact purpose in enacting the statute.[221]

By acting affirmatively, the New Jersey legislature may address the ambiguities in its slayer statute and help courts determine when application of the statute is proper. To do so would ensure that courts have the resources and the direction to apply justice consistently and with regard to legislative intent, public policy, and the laws of equity in which the statute was originally based.

215. *See* Scanlon et al., *supra* note 1.

216. *See, e.g., In re* Estates of Josephson, 297 N.W.2d 444, 449 (N.D. 1980) (holding that any construction of the statute that would permit a minor slayer to inherit would be contrary to public policy).

217. *In re* Registrant J.G., 777 A.2d 891, 905 (N.J. 2001).

218. *See* Olenn, *supra* note 20, at 1345 n.19.

219. MODEL PENAL CODE § 1.13(12) (1962).

220. *See*, *e.g.*, 755 ILL. COMP. STAT. ANN. 5/2-6 (2009) (precluding a slayer who "intentionally and unjustifiably causes the death of another" from inheriting).

221. *See*, *e.g.,* ALA. CODE § 43-8-253 commentary (2008) (explaining the purpose of the statute in the commentary).