KILLERS SHOULDN'T INHERIT FROM THEIR VICTIMS—OR SHOULD THEY?

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I. INTRODUCTION

Almost all states have laws, called "Slayer Rules," barring killers from inheriting from their victims.[1] At first glance, the idea behind these statutes seems reasonable, indeed, morally obvious: killers should not profit from their crimes.[2] This Article, however, suggests reasons why this age-old truism may not necessarily be true. Where murder and inheritance overlap, we often find family. When family members kill one another, the equities are often

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[1] *See* ALA. CODE § 43-8-253 (2013); ALASKA STAT. ANN. § 13.12.803 (West 2013); ARIZ. REV. STAT. ANN. § 14-2803 (2012); ARK. CODE ANN. § 28-11-204 (West 2013); CAL. PROB. CODE §§ 250–258 (West 2003); COLO. REV. STAT. ANN. § 15-11-803 (West 2011); CONN. GEN. STAT. ANN. § 45a-447 (West 2009); DEL. CODE ANN. tit. 12, § 2322 (West 2008); D.C. CODE § 19-320 (2012); FLA. STAT. ANN. § 732.802 (West 2013); O.C.G.A. § 53-1-5 (West 2013); HAW. REV. STAT. ANN. § 560:2-803 (LexisNexis 2013); IDAHO CODE ANN. § 15-2-803 (2013); 755 ILL. COMP. STAT. ANN. 5 / 2-6 (West 2013); IND. CODE ANN. § 29-1-2-12.1 (West 2005); IOWA CODE ANN. § 633.535 (West 2013); KAN. STAT. ANN. § 59-513 (West 2012); KY. REV. STAT. ANN. § 381.280 (West 2012); LA. CIV. CODE ANN. art. 946 (1999); ME. REV. STAT. ANN. tit. 18-A, § 2-803 (2013); MASS. GEN. LAWS ANN. ch. 265, § 46 (West 2003); MICH. COMP. LAWS ANN. § 700.2803 (West 2012); MINN. STAT. ANN. § 524.2-803 (West 2013); MISS. CODE ANN. § 91-1-25 (West 2013); MO. ANN. STAT. § 461.054 (West 2013); MONT. CODE ANN. § 72-2-813 (2013); NEB. REV. STAT. § 30-2354 (2012); NEV. REV. STAT. ANN. § 41B.200 (West 2012); N.J. STAT. ANN. §§ 3B:7-5 to 7-7 (West 2013); N.M. STAT. ANN. § 45-2-803 (West 2012); N.Y. EST. POWERS & TRUSTS LAW § 4-1.6 (McKinney 2013); N.C. GEN. STAT. ANN. §§ 31A-3 to A-12 (West 2006); N.D. CENT. CODE § 30.1-10-03 (2013); OHIO REV. CODE ANN. § 2105.19 (West 2012); OKLA. STAT. ANN. tit. 84, § 231 (West 2013); OR. REV. STAT. ANN. §§ 112.455–112.555 (West 2013); 20 PA. CONS. STAT. ANN. §§ 8801–8815 (West 2013); R.I. GEN. LAWS ANN. §§ 33-1.1-1 to 33-1.1-16 (2013); S.C. CODE ANN. § 62-2-803 (2012); S.D. CODIFIED LAWS § 29A-2-803 (2013); TENN. CODE ANN. § 31-1-106 (West 2007); TEX. PROB. CODE ANN. § 41(d) (West 2007); UTAH CODE ANN. § 75-2-803 (West 2013); VT. STAT. ANN. tit. 14, § 551(6) (2009); VA. CODE ANN. § 64.2-2501 (West 2012); WASH. REV. CODE ANN. § 11.84.010–11.84.020 (West 2009); W. VA. CODE ANN. § 42-4-2 (West 2013); WIS. STAT. ANN. §§ 852.01(2m), 854.14 (West 2009); WYO. STAT. ANN. § 2-14-101 (West 2013). Common-law Slayer Rules exist in Maryland, see *Price v. Hitaffer*, 165 A. 470, 473 (Md. 1933); Missouri, see *Perry v. Strawbridge*, 108 S.W. 641, 648 (Mo. 1908); and New York, see *Riggs v. Palmer*, 22 N.E. 188, 190–91 (N.Y. 1889). Other countries also have Slayer Rules, for example: in Germany, THE CIVIL CODE OF THE GERMAN EMPIRE (Walter Loewy Trans., 1997) (1896), § 2339, para. 1, sentence 1 (Ger.); in France THE FRENCH CIVIL CODE REVISED EDITION (John H. Gabb trans., 1995) (1977). English law has transformed the common-law Slayer Rule stated in Cleaver v. Mut. Reserve Fund Life Ass'n, [1891] 1 Q.B. 147 (A.C.) at 151–52 (Eng.), into a statutory provision in the Forfeiture Act, 1982, c. 34 § 1 (Eng.). 1 W.J. WILLIAMS, WILLIAMS ON WILLS 102–10 (Christopher Sherrin et al. eds., 9th ed. 2008); Nicola Peart, *Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia*, 31 COMMON L. WORLD REV. 1, 5–7 (2002).

[2] *See* Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889) ("No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his iniquity, or to acquire property by his own crime."); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45(2) (2011) (stating the Slayer Rule).

cloudy. The sociopathic child who kills a grandparent to hasten an inheritance is an anomaly. In reality, murders within a family are usually a product of that family's harmful, often violent, dynamics, from which, because of the failures of state and society, a family member sometimes can find no escape except murder. Most women who kill their husbands or partners do so to protect themselves or their children from violence.[3] Most children who kill a parent act to stop severe and prolonged abuse by that parent;[4] most other parricides are acutely mentally ill.[5] Most mothers who kill their children suffer from postpartum psychosis,[6] a severe mental illness with symptoms including visual and auditory hallucinations and delusions.[7] In many of these cases, social, political, economic, and cultural factors have combined to block the suffering relative's escape, sometimes leaving murder as the only way out.[8]

Once the tragedy has played out, resulting in a murder, a corpse, and a defendant, the legal system often fails to recognize or address the defendant's plight: it often bars effective defenses at trial,[9] extorts pleas that stand in as guilty verdicts without

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[3] *See The Governor of CA: SUPPORT AB 593 – The Sin By Silence Bill*, CHANGE.ORG, http://www.Change.org/petitions/the-governor-of-ca-support-ab-593-the-sin-by-silence-bill (last visited Oct. 1, 2013) ("A California state prison study found that 93% of the women who had killed their significant others had been battered by them; 67% of these women indicated the homicide resulted from an attempt to protect themselves or their children.").

[4] Jessica L. Hart & Jeffrey L. Helms, *Factors of Parricide: Allowance of the Use of Battered Child Syndrome as a Defense*, 8 AGGRESSION & VIOLENT BEHAV. 671, 675 (2003); Rebecca A. Olla, *Redefining the Objectively Reasonable Person in Texas: A Case for Battered Child Syndrome as Pure Self-Defense for Parricide*, TEX. STATE BAR SEC. RPT., 17:4 Juv. L. 6 (2003); KATHLEEN M. HEIDE, WHY KIDS KILL PARENTS: CHILD ABUSE AND ADOLESCENT HOMICIDE 6 (1992); Susan C. Smith, *Abused Children Who Kill Abusive Parents: Moving Toward an Appropriate Legal Response*, 42 CATH. U. L. REV. 141, 141 (1992).

[5] HEIDE, *supra* note 4, at 7.

[6] Kathleen M. Heide, Denise Paquette Boots, Craig Alldredge, Brian Donerly & Jennifer Rebecca White, *Battered Child Syndrome: An Overview of Case Law and Legislation*, 43:1 CRIM. L. BULL. 219, 220 (May–June 2005) (citing studies showing that most abused children who kill parents had attempted and failed to get help from relatives and authorities and to run away from the abusive home).

[7] Sheri L. Bienstock, *Mothers Who Kill Their Children and Postpartum Psychosis*, 32 SW. U. L. REV. 451, 458–59 (2003); *see also* ARLENE M. HUYSMAN, A MOTHER'S TEARS: UNDERSTANDING THE MOOD SWINGS THAT FOLLOW CHILDBIRTH 43 (1998) (explaining how postpartum depression can lead women to feel unending despair).

[8] *See infra* notes 158–66 and accompanying text.

[9] *See infra* notes 271–364 and accompanying text.

reliably reflecting guilt,[10] and offers defendants inadequate representation.[11] Even defendants who bypass these obstacles and are found not guilty at a criminal trial may still fall within the reach of the Slayer Rules due to the lower standard of proof and different definition of intent in civil proceedings.[12] Depriving such defendants of the decedent's estate compounds their vulnerability by depriving them of resources. In this context, it is far from clear that barring such killers from inheriting is morally or legally justified, or sound public policy. I explain here why it is not, and propose revisions to the Slayer Rules to address this problem.

Traditionally, the importance of honoring the testator's intent, fairness, and preservation of the orderly transmission of property justify the Slayer Rules, but none of these justifications applies in the cases of family dysfunction presented here. First, in many of these cases, such as where a mentally ill child kills a parent, the victim's intent regarding the disposition of his or her property is much less obvious than commentators have supposed; in other cases, such as the killing of an abusive spouse, there are strong reasons *not* to honor the victim's putative intent regarding the disposition of assets. Second, as to fairness, in the enumerated cases, the equities are reversed: applying Slayer Rules in such cases is itself unfair because it fails to account for the abusive familial context that led to the homicide. Indeed, given the context, I will argue that no moral wrong has occurred. Finally, applying Slayer Rules in cases of abuse and mental illness does *not* preserve the orderly transmission of property. On the contrary, the application of the Rule itself *disrupts* the orderly transmission of property in ways that are unnecessary and harmful.

My proposal to revise Slayer Rules also stems from the basic truth that the law of inheritance distills society's hierarchies and power imbalances as they pass from one generation to the next.[13] Abuse of spouses and children is a broad cultural problem rather

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[10] *See infra* notes 304–27 and accompanying text.

[11] *See infra* notes 304–27 and accompanying text.

[12] *See, e.g.*, Polmatier v. Russ, 537 A.2d 468, 472 (Conn. 1988) (explaining that an "act" for civil purposes was an "external manifestation of the actor's will," and only involuntary movements, such as convulsions or movements of the body during sleep, failed to qualify).

[13] LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS AND INHERITANCE LAW 5 (2009) ("What DNA is to the physical body, processes of succession are to society—that is, to the social body.").

than a collection of individual pathologies, and society's structural patterns of hierarchy and power not only shape and reflect, but also perpetuate and are perpetuated by, individual cases of abuse.[14] We can say the same of mental illness: society's unwillingness to help the mentally ill often leaves them un-medicated and untreated while still in proximity to family members.[15] This negligent societal treatment of the mentally ill, which leaves them in a family context that may well exacerbate their problems, is a recipe for familial disaster—a disaster that ought not to be perpetuated and even exacerbated by inheritance law.

The problem I address is part of that larger societal pattern: depriving battered spouses, abused children, and mentally ill family members of their inheritances, social security benefits, and life-insurance proceeds skews resources away from these groups in ways that made them vulnerable in the first place, thus perpetuating their vulnerability. To change these patterns and to alleviate or remove the harm caused, we must address, among other things, inheritance law.

Scholarship to date has failed to question the underlying fairness of Slayer Rules because it has assumed the equitable basis of the Rules and ignored the implications of the family contexts in which they apply. Most recently, Nili Cohen, a Law Professor at Tel-Aviv University, wrote in a *Boston University Law Review* symposium on restitution that current discussion of the Rules "is focused not on the very recognition of the principle [that no killer should benefit from the victim], but rather on its scope."[16] Discussion of Slayer Rules focuses mainly on the Rules' underlying principles, equitable and otherwise,[17] the question whether the

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[14] EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 362–63 (2007) (noting that "men intent on subordinating [women] have expanded their tactical repertoire beyond coercion, relying heavily on the huge gap that still separates women's formal status as men's equals from their reality" and that efforts to stop woman abuse "ha[ve] failed to address the inequalities at its core").

[15] National Alliance On Mental Illness, *State Mental Health Cuts: A National Crisis*, at 1, Mar. 2011, *available at* http://www.nami.org/budgetcuts (last visited July 17, 2012); Judith Warner, *Children in the Mental Health Void*, N.Y. TIMES (Feb. 19, 2009, 9:00 PM), http://opinionator.blogs.nytimes.com/2009/02/19/is-there-no-place-on-earth/.

[16] Nili Cohen, *The Slayer Rule*, 92 B.U. L. REV. 793, 793–94 (2012).

[17] *See* Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 490 (1986) (asserting that the Slayer Rule is an essential element of the property

killer's relatives should also be barred from inheriting the victim's property,[18] the issue of the Rules' role in mercy killings,[19] the Rules' interaction with ERISA,[20] and critiques of individual state's versions of the Rules.[21] No discussion has delved into the likely origins of family killings in family violence or has considered whether the reality of family violence undermines the equity or morality of the bar to inheritance imposed by Slayer Rules.

The over-simplicity and random injustice of Slayer Rules stems in part from our culture's willful and longstanding blindness to the reality of family violence of all kinds.[22] The assumption underlying Slayer Rules is that violence between family members is an anomaly found unambiguously at the far end of the moral spectrum, free from ambiguity or extenuating circumstances. In this respect, these Slayer Rules are part and parcel of our national delusion about crime and criminals, and about family life. The reality impeaches the fantasy: nearly one in four women in the United States is abused,[23] child abuse is more prevalent in the United States than in any other industrialized country,[24] and the

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transfer law system and does not rest solely on equitable principles).

[18] *See* Karen J. Sneddon, *Should Cain's Children Inherit Abel's Property?: Wading into the Extended Slayer Rule Quagmire*, 76 UMKC L. REV. 101, 101 (2007) (examining case law grappling with the ability of the killer's relatives to receive the victim's property).

[19] *See* Kent S. Berk, *Mercy Killing and the Slayer Rule: Should the Legislature Change Something?*, 67 TUL. L. REV. 485, 486 (1992) (suggesting that Slayer Rules should not apply to mercy killings).

[20] *See, e.g.*, Katherine A. McAlister, Note, *A Distinction Without a Difference? ERISA Preemption and the Untenable Differential Treatment of Revocation-on-Divorce and Slayer Statutes*, 52 B.C. L. REV. 1481, 1481 (2011) (observing that the rationale behind ERISA's broad preemption provision applies equally to other state-level wills doctrines such as Slayer Rules).

[21] *See, e.g.*, Tara L. Pehush, Comment, *Maryland Is Dying for a Slayer Statute: The Ineffectiveness of the Common Law Slayer Rule in Maryland*, 35 U. BALT. L. REV. 271, 279–90 (2005) (examining Maryland's court decisions in the absence of a codified Slayer Rule); Julie J. Olenn, Comment, *'Til Death Do Us Part: New York's Slayer Rule and* In re Estates of Covert, 49 BUFF. L. REV. 1341, 1343 (2001) (criticizing application of New York's Slayer Rule).

[22] Jane Aiken & Katherine Goldwasser, *The Perils of Empowerment*, 20 CORNELL J.L. & PUB. POL'Y 139, 139 (2010) (examining bystander norms of disinterest and blame that inform and undermine strategies for dealing with significant social problems such as domestic violence).

[23] PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUST., NAT'L INST. OF JUST., EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, at iii (2000), *available at* http://www.nij.gov/pubs-sum/181867.htm.

[24] *National Child Abuse Statistics*, CHILDHELP.ORG, http://www.childhelp.org/pages/statistics (last visited Oct. 26, 2013).

United States offers less support for families and children and the mentally ill than do most other industrialized countries.[25]

I proceed in five parts: Part II presents the history and current status of Slayer Rules. Part III analyzes the traditional justifications for Slayer Rules, explaining why those justifications fail to operate in the cases I highlight here. Part IV analyzes the causes of murder in families, arguing that most such killings are products of extreme family dysfunctions; of women's, and often, children's, lack of true and full voluntariness in their traditional familial roles; of severe child or spousal abuse and mental illness; and of the failure of social welfare agencies, police, and other authorities in positions of responsibility to offer help or escape to those victimized by the operation of dysfunctional families.

Part V compares the criminal and probate legal systems, showing that they serve different social goals. I then argue that it is both unfair and bad policy to deprive these killers of the right to inherit from their victims, no matter what outcomes the underlying criminal trials produce. Beginning with the easier cases—those acquitted or convicted by plea bargain but nonetheless barred from inheriting—and moving to the harder cases—those convicted at trial of some form of intentional homicide—I argue that the bar set by the Slayer Rules is inequitable and thus should not operate. I conclude in Part VI by proposing and evaluating three possible ways of correcting the problem I identify: eliminating these laws altogether, reducing the coverage of the Rules to those who kill with the primary motive of financial gain, or tempering Slayer Rules with equity specifically directed toward awareness of the contexts of abuse and illness in which these killings usually occur.

II. HISTORY OF SLAYER RULES

English common law barred a slayer from inheriting from his victim through the doctrines of attainder, forfeiture, and corruption of the blood.[26] Once the process of attainder declared a

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[25] *Id.*

[26] Alison Reppy, *The Slayer's Bounty—History of Problem in Anglo-American Law*, 19 N.Y.U. L.Q. REV. 229, 241 (1942) (noting that before the rejection of criminal forfeiture "attainder, forfeiture, corruption of blood and escheat . . . constituted a fairly

defendant guilty of a capital offense (such as murder), the doctrine of forfeiture deemed all of his real and personal property forfeited to the Crown.[27] The doctrine of forfeiture also barred the convicted defendant both from inheriting property and from devising property to his heirs.[28] Thus, the issue of whether a killer could inherit from his victim did not arise, because once all of his property was seized and his blood was labeled "corrupt," the operation of the common law extracted him from the entire network of inheritance rules.[29] Early American courts rejected these feudal notions; Article I, Section 9, clause 3 of the U.S. Constitution of 1787 abolished attainder, as did all state constitutions.[30] However, this rejection of attainder created a gap in the law: under the laws of succession and inheritance, which do not provide otherwise, a murderer could inherit from his victim.[31] In fact, many early cases held exactly that such a gap existed, on the theory that to hold otherwise would be to make law, which would constitute a judicial usurpation of the legislative function.[32] Two seminal cases, however, rejected this position: *New York Mutual Life Insurance Co. v. Armstrong*[33] and *Riggs v. Palmer*.[34] In *Armstrong*, the U.S. Supreme Court ruled that an assignee of a life insurance policy who had murdered the insured could not receive the proceeds of that policy.[35] Justice Stephen J. Field wrote for the Court that "[i]t would be a reproach to the

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satisfactory . . . solution to the problem of the slayer and his bounty").

[27] THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 713 (5th ed. 1956).

[28] *Id.*

[29] *Id.*

[30] *See* U.S. CONST. art. 1, § 9, cl. 3 ("No bill of attainder or ex post facto law shall be passed.").

[31] *See* Estate of Foleno v. Estate of Foleno, 772 N.E.2d 490, 494 (Ind. Ct. App. 2002) (noting that the doctrine of attainder, though cruel, "provided one unintended benefit: separating a killer from his victim's property" and that its abolition left "an unanticipated void").

[32] *See, e.g.*, Wall v. Pfanschmidt, 106 N.E. 785, 790 (Ill. 1914) ("Whether [the ordinary application of the laws of descent] accords with natural right and justice is not for the courts to decide."); *In re* Carpenter's Estate, 32 A. 637, 637 (Pa. 1895) ("We are unwilling . . . for the plain reason that we have no lawful power so to go."); Shellenberger v. Ransom, 59 N.W. 935, 939 (Neb. 1894) ("[T]he courts have no other duty to perform than to execute the legislative will.").

[33] N.Y. Mut. Life Ins. Co. v. Armstrong, 117 U.S. 591, 600 (1886).

[34] Riggs v. Palmer, 22 N.E. 188, 191 (N.Y. 1889).

[35] *N.Y. Mut. Life Ins. Co.*, 117 U.S. at 600.

jurisprudence of the country" to allow recovery in such cases.[36] Then, in *Riggs,* a grandson, seeking to prevent his grandfather from changing his will to the boy's detriment and "to obtain the speedy enjoyment and immediate possession of his property, . . . willfully murdered [the grandfather] by poisoning him."[37] After the boy was tried for murder, convicted, and sentenced, he claimed his inheritance.[38] The New York Court of Appeals acknowledged that strict construction of the state's inheritance laws would allow the grandson to take the estate; the laws provided no exception, even for murder, to the rule that a properly executed will must be probated.[39] But the court then cautiously turned in a different direction. Anxiously invoking Bacon, Blackstone, and Aristotle for support, it ruled that an "equitable construction" of the statute would be permissible, supporting its conclusion by asserting that the state legislature, in enacting the law, could never have intended the result compelled by a strict reading of the statute in such a case as the one before the court.[40]

Having unfettered itself from a literal reading of the state inheritance laws, the New York Court of Appeals then rested its ruling on the equitable maxim that no one can profit from his own wrong, endowing this principle with a transcendent force permeating the law and thus requiring no specific statute to give it effect.[41] A vehement dissent berated the majority for overstepping its judicial role and imposing what it denigrated as "remedial justice," and for imposing, in violation of the U.S. Constitution, an additional criminal punishment on the defendant in the form of disinheritance.[42]

The *Riggs* opinion makes clear that its holding applies only to the set of facts before it: an heir killing with premeditation to hasten his inheritance.[43] This limitation, however, disappeared in the Slayer Rules adopted by state legislatures in the wake of the case—all of them bar inheritance on the part of a killer with no

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[36] *Id.*
[37] *Riggs*, 22 N.E. at 189.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 189–90.
[41] *Id.* at 190.
[42] *Id.* at 192–93 (Grey, J., dissenting).
[43] *Id.* at 190.

restriction as to motive.[44] The two bridges between *Riggs* and these broader rules are: first, the equitable maxim cited as the basis for the *Riggs* holding that "no one may benefit from his wrong," and, second, restitution theory, an important strand of late nineteenth century legal thought that has since lost its prominence in American jurisprudence.[45]

Since the early days of the common law, equity has insisted that a wrongdoer will not be allowed to benefit from his wrong, and the *Riggs* court invoked and articulated this principle as the basis for its decision.[46] Restitution theory, by contrast, was born at Harvard Law School in the late 1880s and early 1890s, with the publication of William Keener's *Treatise on the Law of Quasi-Contracts* in 1893,[47] followed by the publication of *Restatement of the Law of Restitution* by the American Law Institute in 1937.[48] The "causative event"[49] of restitution is unjust enrichment, whether occurring in the context of a breach of duty or a quasi-contract, and the related notion that the person unjustly enriched must be divested of his gain, whether or not the other party had suffered a corresponding loss. The *Restatement of the Law of*

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[44] *See* John W. Wade, *Acquisition of Property by Willfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715, 715 n.1 (1936) (discussing the various states' statutory solutions). These rules do not affect property rights that have vested before the decedent's death, such as shares in joint tenancies, tenancies in the entirety, and tenancies in common; most jurisdictions deem the killing to sever the tenancy, thereby eliminating the right of the killer to the victim's share. *E.g.*, Cappocia v. Cappocia, 505 So. 2d 624, 624–25 (Fla. Dist. Ct. App. 1987); *In re Estate of Shields*, 584 P.2d 139, 140 (Kan. 1978); Woodson v. Foster, 320 P.2d 855, 860 (Kan. 1958); *In re* Estate of Matye, 645 P.2d 955, 958 (Mont. 1982); State *ex rel.* Miller v. Sencidiver, 275 S.E.2d 10, 15 (W. Va. 1981). *But see* Hood v. Vandenvender, 661 So. 2d 198, 201 (Miss. 1995) (leaving open the possibility that a finding in civil court of "intentional" killing could result in forfeiture of the right of survivorship).

[45] *See generally* Chaim Saiman, *Restitution in America: Why the US Refuses to Join the Global Restitution Party*, 28 O.J.L.S. 99 (2008) (ascribing the fall of restitution theory in the United States to the prevalence of legal realism and law and economics). On restitution theory in general, see HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION (2004).

[46] Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889) ("No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."); *see also* Cleaver v. Mut. Reserve Fund Life Ass'n, [1892] 1 Q.B. 147, 155 (C.A.) (noting that public policy prevents the murderer from taking the money of the victim). *See generally* Reppy, *supra* note 26 (investigating the legal source of the principle).

[47] WILLIAM KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS (Baker, Voorhis & Co. 1926) (1893).

[48] RESTATEMENT OF THE LAW OF RESTITUTION (1937).

[49] Saiman, *supra* note 45, at 105.

Restitution, published in 1937, provided the template for most Slayer Rules, stating that they "are applicable where the property is acquired by murder, whether or not the motive of the murderer was to acquire the property."[50] In this context, it is not surprising that the equitable principle enunciated in *Riggs* combined with the intellectual atmosphere of the day to create the basis for Slayer Rules going beyond the facts of *Riggs*.

Today, forty-seven states and the District of Columbia have Slayer-Rule statutes,[51] and the remaining three achieve the same end with common-law Slayer Rules.[52] The laws apply to inheritance, whether through will or intestacy, insurance proceeds, social security benefits[53] and probably, ERISA benefits.[54] All these statutes, as did the early prototypes, bar inheritance by the decedent's slayer, with no restrictions as to motive.[55] The statutes vary widely in wording and application; although I focus here on the statutes' failure to take account of the reality of family violence, they give rise to many other concerns.[56] The statutes vary, but the following phrasing is typical:

> (1) 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, a family allowance, and exempt property. If the decedent died intestate, the decedent's intestate estate passes as if the killer . . . disclaimed his or her intestate share.
>
> (2) The felonious and intentional killing . . . of the decedent does all of the following:
>
> (a) Revokes all of the following that are revocable:

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[50] RESTATEMENT OF THE LAW OF RESTITUTION § 187 cmt. e (1937).

[51] *See supra* note 1.

[52] *See supra* note 1.

[53] Social Security Act 202(g), 42 U.S.C.A. § 402(g).

[54] *See, e.g.*, Mack v. Estate of Mack, 206 P.3d 98, 110–11 (Nev. 2009) (holding that ERISA does not preempt the application of state Slayer Rules).

[55] *See supra* note 44.

[56] *See supra* notes 16–20 and accompanying text.

> (*i*) Disposition or appointment of property made by the decedent to the killer . . . in a governing instrument.
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> (*ii*) Provision in a governing instrument conferring a general or nongeneral power of appointment on the killer. . . .
>
> (*iii*) Nomination of the killer . . . in a governing instrument, nominating or appointing the killer . . . to serve in a fiduciary or representative capacity, including a personal representative, executor, trustee, or agent.
>
> (b) Severs the interests of the decedent and killer . . . in property held by them at the time of the killing . . . as joint tenants with the right of survivorship, transforming the interests of the decedent and killer . . . into tenancies in common.[57]

In a minority of the states, Slayer-Rule statutes omit the intent requirement and cover all felonious homicides, extending their scope beyond intentional killings to include wanton or reckless killings.[58] Most of the statutes, however, exclude negligent

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[57] MICH. COMP. LAWS § 700.2803 (2012).

[58] *See, e.g.*, ALASKA STAT. § 11.41.100–11.41.140 (2012) (listing manslaughter and negligent homicide as felony); *Estate of Blodgett*, 147 P.3d 702, 705 (Alaska 2006). This is the case in nine states and the District of Columbia. For example, Colorado's Slayer-Rule statute covers the crimes of "murder in the first or second degree or manslaughter," omitting reference to criminally negligent homicides. COLO. REV. STAT. § 15-11-803 (2013) (Slayer Rule); *id.* § 18-3-105 (criminally negligent homicide). Manslaughter in Colorado is generally a killing caused recklessly. *Id.* § 18-3-104. Delaware follows a similar scheme. *See* DEL. CODE ANN. tit. 12, § 2322 (2013) (including reckless manslaughter within its reach but excluding criminally negligent homicide). The Slayer-Rule statutes or common-law Slayer Rules from several states and the District of Columbia do, however, apply to all felonious killings. *See* D.C. CODE § 19-320 (2013) (covering felonious homicides . . . by way of murder or manslaughter); KY. REV. STAT. ANN. § 381.280 (West 2012) (covering a person who "takes the life of the decedent . . . and is convicted therefor" of a felony); LA. REV. STAT. ANN. § 22.901 (2012) (applying to persons "criminally responsible for the death" of the decedent); Quick v. United Ben. Life Ins. Co., 213 S.E.2d 563, 570–71 (N.C. 1975) (applying the common-law Slayer Rule where "culpable negligence" was shown). Another jurisdiction in the minority is Kansas, which includes all felonious killings within its Slayer-Rule statute, KAN. STAT. ANN. § 59-513 (West 2012), but does not recognize any sub-reckless homicides as felonies in its criminal code. *Compare* KAN. STAT. ANN. § 21-3404 (West 2012) (involuntary and reckless homicide is a felony), *with id.* § 21-3405 (vehicular homicide, based on negligence, is a misdemeanor). In addition, New York, which applies the common-law rule, extends that rule to reckless, but unintentional killings (second-degree

homicides and involuntary manslaughter.[59] Only five states and the District of Columbia disinherit in cases of merely negligent wrongful conduct resulting in homicide.[60] Only Alaska has a so-called "manifest injustice" component, which reads as follows:

> In the case of an unintentional felonious killing, a court may set aside the application of [the Slayer-Rule statute] 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.[61]

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manslaughter). *In re* Wells' Will, 350 N.Y.S.2d 114, 119 (N.Y. Sur. 1973).

[59] *See, e.g.*, Life Ins. Co. of N. Am. v. Wollett, 766 P.2d 893, 895 (Nev. 1988) (holding that involuntary manslaughter did not qualify for a bar under the state's Slayer Rule).

[60] The District of Columbia Slayer-Rule statute covers homicide resulting from grossly negligent conduct. *See* Turner v. Travelers Ins. Co., 487 A.2d 614, 615 (D.C. 1985) (explaining that the Slayer-Rule statute covers "unintentional killing derived from reckless or grossly negligent conduct"). Louisiana's Slayer-Rule statute covers all criminal homicide. *In re* Hamilton, 446 So. 2d 463, 465 (La. Ct. App. 1984) (holding that the Slayer-Rule statute "was intended to include situations . . . where a beneficiary does not intentionally and feloniously cause the death of the insured but is nonetheless held criminally responsible for that death"). North Carolina's common-law Slayer Rule prohibits inheritance after any wrongful homicide. Quick v. United Benefit Life Ins. Co., 213 S.E.2d 563, 568 (N.C. 1975); *In re* Estate of Cox, 388 S.E.2d 199, 201 (N.C. Ct. App. 1990). The continued application of this common-law Rule has been criticized in light of a Slayer-Rule statute barring only intentional killers from inheriting. N.C. GEN. STAT. § 31A-3 (2013); *see generally* Julie Waller Hampton, *The Need for a New Slayer Statute in North Carolina*, 24 CAMPBELL L. REV. 295 (2002) (criticizing the common-law Rule). Kentucky bars inheritance from those convicted of any felonious homicide. KY. REV. STAT. ANN. § 381.280 (West 2102). "Reckless homicide" is a felony. *Id.* § 507.050. Kentucky defines "reckless" as "a gross deviation from the standard of care that a reasonable person would observe." *Id.* § 501.020. Reckless homicide in Kentucky is therefore equivalent to criminal negligence in Alaska under ALASKA STAT. § 11.81.900(a)(4). Kansas law states that "[n]o person convicted of feloniously killing, or procuring the killing of, another person shall inherit." KAN. STAT. ANN. § 59-513 (West 2013). Involuntary manslaughter under Kansas law extends to "killing of a human being" committed recklessly, during a misdemeanor, or "during the commission of a lawful act in an unlawful manner." *Id.* § 21-5405. This arguably could extend to grossly negligent conduct, especially as KAN. STAT. ANN. § 21-3201 explains that "[t]he terms 'gross negligence,' 'culpable negligence,' 'wanton negligence' and 'wantonness' are included with the term 'recklessness' as used in this code." A federal district court has held that the Kansas Slayer-Rule statute does not apply to negligent homicide. Rosenberger v. Nw. Mut. Life Ins. Co., 176 F. Supp. 379, 382–83 (D. Kan. 1959) (explaining that "the intent of the legislature in enacting the statute must have been to give effect to the common-law rule"). The Kansas Slayer-Rule statute is essentially unchanged since *Rosenberger*.

[61] ALASKA STAT. § 13.12.803(k) (West 2013).

As I explain more fully later, this component is unhelpful because, among other things, its application is limited to cases of unintentional felonious killings. The abuse-driven killings I discuss here are usually intentional.

As noted, the links between the *Riggs* scenario and the more general prohibition on inheritance by a killer regardless of motive are the equitable maxim that "no one shall benefit from his wrong" and the currency of restitution theory at the time. I argue that, with regard to slayings arising from family violence and mental illness (the two categories comprising the overwhelming majority of familial killings), no moral wrong exists so as to trigger these equitable considerations, or, indeed, any considerations barring inheritance.

III. TRADITIONAL JUSTIFICATIONS FOR SLAYER RULES

Traditional justifications for Slayer Rules are threefold. First is the American law's respect for the testator's intent, and the concomitant assumption that a slain testator would not want the killer to inherit the estate. Second is the equitable maxim that a wrongdoer may not benefit from a wrong. Third, commentators have also justified these Rules by noting that they further the orderly transmission of property. I discuss these justifications below.

A. TESTATOR'S INTENT

Adam Hirsch is perhaps the most eloquent advocate of the intent justification for Slayer Rules; indeed, he argues that the Rules actually are too narrow in their "singular fixation on wrongdoing."[62] Hirsch identifies as the "proper scope" of Slayer Rules the zone where the "policies of unjust enrichment-*cum*-deterrence on one hand, and intent effectuation on the other, cover intersecting sets of circumstances."[63] In other words, Slayer Rules should not limit their scope to intentional conduct, but should also cover killings to which there is a successful defense of insanity or

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[62] Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 621 (2009).

[63] *Id.*

self-defense, because in these circumstances "we can infer a change of the testator's intent with some confidence."[64] Nili Cohen also assumes that the decedent's change of intent goes without saying, claiming that this presumed change stems from the decedent's "contempt and aversion towards the heir's conduct, and apparently [this change] represents the real intention of most testators, had it been possible to ask them."[65]

If, however, we look at the actual circumstances in which Slayer-Rule killings are most likely to occur, it is harder for us to guess at the testator's intent than Hirsch implies. For example, would a parent killed by a mentally ill child who was under the delusion that the parent was a dangerous alien really want to see that child deprived of all means of support after the parent's death? Not clear, but it is at least as easy and plausible to imagine—given that speculation and imagination are all we can use—that such a parent might want the child to have the resources available to finance needed care rather than to be left to the mercies of state institutions or the streets. Indeed, isn't it conceivable that a parent, inspired in the spirit of self-sacrificial parenthood, might want her child to inherit even if the child had killed her for financial gain?

In cases where an abused spouse kills an abuser and is found not guilty on the basis of self-defense, Hirsch is probably correct: the abusive spouse probably would have wished to deprive the slayer of any benefit accruing from the slaying. In this case, however, why should we care about the decedent's intent? Why should we be concerned with effectuating the likely intent of someone whose criminal conduct resulted in his own slaying by his chosen victim? This same argument applies to cases in which a child kills a parent is response to severe abuse inflicted by the parent—has not the parent, by imposing a regime of terror and violence on the child, forfeited the right to have one's putative intent respected?

By the same token, consider the case of filicide brought on by postpartum psychosis. In this case, it makes little sense indeed to speculate about the testamentary intent of the slain child or

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[64] *Id.* at 622.

[65] Cohen, *supra* note 16, at 799. Cohen's odd blend of the indicative and the subjunctive in this sentence may reveal a degree of unease with his assertion.

children. Children under age eighteen, of course, are not even deemed capable of forming testamentary intent.[66] Given that the law denies such children the capacity to form testamentary intent, inquiring as to what a slain child would intend in bequeathing the property seems a question unfit for a court, let alone one fit for reliable speculation by a third party. Such cases cast us back to notions of fairness, rather than probable testamentary intent, for their resolution.

In summary, then, my response to Hirsch's important point about testamentary intent is twofold. First, regarding killings of family members resulting from mental illness, it seems less than clear that the victim's intent would necessarily be to disinherit the killer. Second, with killings motivated by abuse, the victim has forfeited the right to have his intent respected by breaching the marital contract which gave rise to the intent in the first place. An analysis "on the ground"—that is, based on the actual circumstances of killings that likely trigger Slayer Rules—makes divining the testator's intent much cloudier than a theoretical perspective might suggest.

B. A KILLER MAY NOT BENEFIT FROM HIS WRONG

The moral basis for Slayer Rules lies in the maxim that a wrongdoer may not benefit from his wrong.[67] *The Restatement (Third) of Restitution and Unjust Enrichment* states, "A slayer's acquisition, enlargement, or accelerated possession of an interest in property as a result of the victim's death constitutes unjust enrichment that the slayer will not be allowed to retain."[68] For some, this is a principle external to the law that fills a lacuna in it,[69] while for others, it is implicit in the law.[70] Indeed, some authors see this as the controlling impulse behind the Rule and argue that killers should be barred from inheriting even when the

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[66] SUSAN GARY ET AL., CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES 445 (2011).

[67] *See, e.g.*, Riggs v. Palmer, 22 N.E. 188, 190 (1889) ("No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong . . . .").

[68] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45(2) (2011).

[69] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 68–102 (1994).

[70] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 28–29 (1977). For further analysis, see Daniel A. Farber, *Courts, Statutes and Public Policy: The Case of the Murderous Heir*, 53 SMU L. REV. 31, 32 (2000) (analyzing *Riggs* in the context of the Hart and Dworkin debate).

decedent's contrary intent can be proved—for example, in cases of mercy killing or in which the testator reaffirms the intent to benefit the killer before death.[71]

I argue here, however, that killings resulting from spousal and child abuse, as well as those caused by mental illness, do not constitute moral wrongs that should trigger Slayer Rules because those killings do not implicate the concerns underlying the Rules. First, spousal and child abuse fit into what Jane Maslow Cohen calls "regimes of private tyranny," in which, she argues, killing the perpetrator of the tyranny is morally right and deserves legal justification.[72] She delineates the requirements for such a relationship as follows:

> that the life of at least one person who lives or formerly lived . . . with the tyrant be subject to his domination and control in respect to such objectively important elements of everyday life that a reasonable member of society would not ordinarily consent to live under the same terms and conditions and would not view the consent of any other person to live under such circumstances as a rational exercise of choice.[73]

Although Cohen seems to refer only to spousal abuse, this definition fits child abuse as well, and it seems appropriate to extend her argument to cover that scenario.

Cohen supports her assertion about spousal murders in response to abuse by asserting that even though the death of the "tyrant"—the abuser—may be a moral misfortune, it "has no effective cost."[74] Further, she argues, once a regime of private

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[71] *See, e.g.*, Andrew Simester, *Unworthy But Forgiven Heirs*, 10 EST. & TR. J. 217, 217 (1991) (arguing that allowing killers to inherit after the deceased has forgiven the killer is inappropriate); Matthew B. Reisig, Comment, *O to A, for Helping Kill O: Wisconsin's Decision Not to Bar Inheritance to Individuals Who Assist a Decedent in Suicide*, 17 AM. U. J. GENDER SOC. POL'Y & L. 785, 787 (2009) (arguing that Wisconsin should not allow an individual to inherit from a benefactor whose death resulted from the individual's assisted suicide). *But see* Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 862 (1993) (arguing that decedent's intent is the key to Slayer Rules).

[72] Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law*, 57 U. PITT. L. REV. 757, 786–87 (1996).

[73] *Id.* at 763.

[74] *Id.* at 790.

tyranny has "clamp[ed] down on a life," the killing of the tyrant is legally as well as morally justified.[75] She notes that certain unlawful acts, including threats of death or serious bodily harm, abduction, and rape, justify killing in self-defense, and she identifies the common aspect of all these acts as their "drastic violations of their intended victims, violations so deep that whatever force is necessary to avoid their imposition is morally justified."[76] This is the violation at the core of a regime of private tyranny.

Rejecting the traditional self-defense framework, Cohen proposes the following alternative defense in the case of tyranny-murder: the relevant issue is whether the killing was reasonably necessary to free the victim from the tyrannical private regime.[77] She offers as an example of such necessity Judy Norman, whose husband forced her into prostitution, beat her in public in front of many witnesses who testified at her trial, and tried to stop a team of police and paramedics from saving her life after a suicide attempt.[78] These witnesses all saw the violence committed against Norman by her husband, but none of them did anything to help or protect her, or to try to get the authorities to intervene.[79] Indeed, many of the witnesses were the very agents of the state who had a duty to protect crime victims.[80] Norman's act of killing was not only reasonably necessary, but also essential to the attainment of her freedom from the regime of private tyranny as described by Cohen; the facts of her case make clear that she had no other means of escape.

C. DISRUPTING THE "NORMAL DISPOSITION OF PROPERTY"

Any proposal to tamper with Slayer Rules must address Mary Louise Fellows's argument that these rules are "not solely a matter of equity."[81] Fellows maintains that, in addition to the

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[75] *Id.* at 793.
[76] *Id.* at 796.
[77] *Id.* at 802.
[78] *Id.* at 786–87; Marina Angel, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man*, 16 BUFF. WOMEN'S L.J. 65, 69 (2008).
[79] Angel, *supra* note 78, at 70; Cohen, *supra* note 72, at 788.
[80] Cohen, *supra* note 72, at 804.
[81] Fellows, *supra* note 17, at 489.

moral basis of Slayer Rules, such doctrines are essential to a "rational property transfer law system" because the slayer "potentially interrupted the normal dispositions of property by interfering with ownership rights, donative freedom, and transfers conditioned on survivorship."[82] One could argue that my proposal to use equitable considerations to ameliorate the effects of the Slayer Rules ignores Fellows's important insight, but some reflection reveals that this is not the case.

First, Fellows agrees with the majority of states that have restricted the application of Slayer Rules to killings that are felonious and intentional, despite conceding that "the victim's premature death disrupts the normal disposition of property . . . [w]hether the conduct that results in the victim's death is intentional or merely negligent."[83] Thus, Fellows seems to acknowledge that, in deciding whether Slayer-Rule statutes apply, equitable considerations come into play before those based on rational property transfer. Once the legislature has decided what triggers the statutes, the resulting laws then should reflect the latter rationale for them as well as the former.[84] States that have decided to exempt mercy killers from these Rules exemplify this approach.[85] My proposal addresses the preliminary decision about when to apply Slayer Rules; Fellows's proposal deals with their application once that decision has been made.[86]

More importantly, isn't "the orderly transfer of property" in the eye of the beholder? In a case involving abuse, for example, the abuse already has disrupted the orderly transmission of property. Inheritance, in the form of elective shares and other restraints on one spouse's ability to disinherit the other spouse, is meant to reflect a partnership theory of marriage; here, the abuse has already disrupted that economic partnership. Among other things,

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[82] *Id.* at 494.

[83] *Id.* at 496.

[84] *Id.* ("State slayer laws, however, have been based mainly on the moral reasons for denying slayers the right to take their victims' property.").

[85] *See, e.g.*, WIS. STAT. ANN. § 854.14 (West 2007) (allowing an exception from Slayer Rules when the court finds that the decedent's wishes would best be carried out by another disposition of the property or when the decedent has provided that the statute does not apply).

[86] Fellows herself suggests that the civil proceedings determining the application of Slayer Rules should adhere to a higher standard of proof—clear and convincing evidence—than most statutes require. Fellows, *supra* note 17, at 553.

abuse deprives the victim of her resources, her earned wages, and her wealth, by domestic terrorism. The orderly transfer of property was disrupted long before the issue of inheritance arose.

Similarly, when children kill abusive parents, the orderly transfer of property has been destroyed by the abuse. The usual pattern is that children inherit from their parents—not just literal wealth, if any, but a sense of safety in the world and the ability to build successful, socially-integrated lives. Long before the killing, abuse has disinherited the child more profoundly than the deprivation of mere financial resources ever could. In this light, the killing actually restores the orderly transmission of property in that it creates at least the possibility of such an inheritance.

A similar analysis could apply to cases of mentally ill children who kill family members: isn't the original disruptive force the state's inadequate care for the mentally ill, which forces many of them to live at home, without medication or care, destroying the fabric of family on which inheritance is based?

The receipt of inheritance is hardly a "reward" or a norm-violating windfall for the killing in these cases. Rather, it preserves the norms, the default ways of transmitting wealth. Spouses inherit from each other; children inherit from their parents; parents inherit from children who predecease them. Allowing these norms to control does not create a windfall; rather, it declines to further disrupt the already violated norm.

IV. THE CAUSES OF MURDER IN FAMILIES

A. DOMESTIC VIOLENCE: BATTERED WOMEN WHO KILL

About one third of the women in prison for homicide in the United States were convicted of killing a husband, ex-husband, or boyfriend.[87] Many of these killings were likely related to domestic violence.[88] Many Wills, Trusts, and Estates casebooks,[89] in fact, introduce Slayer Rules with a case involving abuse (although no

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[87] ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 146 (2000).

[88] SCHNEIDER, *supra* note 87, at 146; ROBBIN S. OGLE & SUSAN JACOBS, SELF-DEFENSE AND BATTERED WOMEN WHO KILL 45–48 (2002).

[89] *See, e.g.*, JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 145 (8th ed. 2009) (using *In re* Estate of Mahoney to introduce homicide as a bar to succession).

one has written about it as such until now): the 1966 Vermont case of *In re Estate of Mahoney*.[90] Charlotte Mahoney shot her husband twice with a rifle and was convicted of manslaughter, whereupon the slain husband's relatives brought suit to bar her under equity from succeeding to his intestate estate.[91] The probate case describes the underlying crime as follows:

> The decedent, Howard Mahoney, died intestate on May 6, 1961, of gunshot wounds. His wife, Charlotte Mahoney, the appellant here, was tried for the murder of Howard Mahoney in the Addison County Court and was convicted by jury of the crime of manslaughter in March 1962. She is presently serving a sentence of not less than 12 nor more than 15 years at the Women's Reformatory in Rutland.[92]

This opinion exemplifies, as do many of these cases, a total lack of interest in the context or details of the crime—in what Richard Posner calls "the rebarbative character of reality."[93] In this sense, it exemplifies what I am criticizing about Slayer-Rule cases overall: their lack of interest in or concern for the origins and context—the "reality"—of the killing. The terse summary in *Mahoney* is so intent on repressing whatever reality existed in that case that it creates a gap where the actual deed should appear; there is no act between "Howard Mahoney[ ] died . . . of gunshot wounds" and "Charlotte Mahoney . . . was tried for the murder . . . and was convicted" connecting the two events.[94] The narrative structure presents them as completely separate and unrelated, connected only by syntax. Such a gap raises, rather than suppresses, the key question: why did she shoot him?

I suspected that Charlotte Mahoney's killing of her husband might have been related to spousal abuse.[95] Considerable digging

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[90] *In re* Estate of Mahoney, 220 A.2d 475 (Vt. 1966).

[91] *Id.* at 476.

[92] *Id.*

[93] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 447 (1990).

[94] *In re Estate of Mahoney*, 220 A.2d at 476.

[95] There are no such indicators in the *Riggs* case; young Elmer does seem to have been a true sociopath. LAWRENCE PLAINDEALER, Nov. 15, 1882, at 1. The worst thing that his grandfather seems to have done to him was to grab the reins out of his hands once when

in the archives revealed support for my intuition. As it turns out, Charlotte Mahoney was the first woman to be tried for murder in Vermont in fifty years and her case generated considerable press: the archives of the *Burlington Free Press* and other local papers contain over twenty articles about her trial.[96] They reveal signs that she suffered abuse at the hands of her husband, and that her killing of him was a result of that abuse. She testified that, on the day of the murder, they had been having an argument in front of the house: she had tried to get into a car that her husband was getting ready to drive and he slammed the window shut on her hand several times before rolling it down and punching her in the face.[97] Getting out of the car, he chased her into the house, shouting that "he would kill her if he got her," and if she ever tried to leave him, he would kill her.[98] She testified that he then slapped her face and pulled her by the arm.[99] She locked herself in the bedroom, but he entered it through another door, carrying his rifle.[100] She testified that, as she tried to escape the house through the front door, he "made a pass" at her with the butt of the gun, causing her to fall.[101] Her dog jumped him, the gun went off, and he fell "in a sitting position on the floor."[102] From this position, he cursed her and picked up the gun.[103] She ran for help. When she returned, he was dead.[104]

Some of the evidence in these accounts of abuse does not require a trained eye to detect: the physical assaults are explicit, as are the state doctor's finding of bruises on Charlotte Mahoney's neck and jaw.[105] There are also more subtle signs, including the

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they were driving because of his impatience with Elmer's handling of the horses. *Id.* Elmer said later that he "wished he had tipped the old man over." *Id.* The grandfather seems to have been in the habit of threatening his grandson with the loss of his inheritance if he didn't behave better, and it does seem to have been in response to this repeated threatening that Elmer slipped arsenic into his grandfather's rum. *Id.*

[96] *Mrs. Mahoney to Face Sentencing*, ST. ALBANS MESSENGER, Apr. 3, 1962, at 1.

[97] Nancy Jean Beals, *"I Never Killed My Husband," Charlotte Mahoney Testifies*, BURLINGTON FREE PRESS, Mar. 9, 1962, at 1.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] James L. Eisbrenner, *Wool Attempts to Break Down Evidence Chain*, ST. ALBANS

husband's reported threat to kill her if she ever tried to leave him, a threat typical of spousal-abuse situations.[106] Other evidence adduced at trial gives rise to the same inference of abuse: one witness stated that the couple seemed "more concerned about each other than normal"[107]—a phrase hinting at the surveillance and control associated with abuse.[108] Of course, we will never know for sure what went on in the Mahoneys' marriage, but the evidence is sufficient to raise a serious question about the presence of abuse as a significant factor in this case. In any event, a jury of seven women and five men convicted Charlotte of manslaughter, and the court sentenced her to twelve to fifteen years in the Reformatory for Women in Rutland.[109]

After the trial, the slain husband's parents brought suit, claiming that Charlotte Mahoney should be barred from succeeding to his estate through intestacy.[110] After a review of precedent from across the nation addressing this issue, the court finally compromised between the strictness of the laws of intestacy and the demands of equity, allowing the property to pass to Charlotte, as "constructive trustee" for the parents, thus in effect transferring the estate to them.[111] In doing so, the court drew attention to the fact that there was no statute on point.[112] Vermont, like most states, subsequently addressed this issue.[113]

MESSENGER, Mar. 2, 1962, at 1.

[106] OGLE & JACOBS, *supra* note 88, at 75; EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 112–32 (2007); *see also* Jan Bostock, Maureen Plumpton & Rebekah Pratt, *Domestic Violence Against Women: Understanding Social Processes and Women's Experiences*, 19 J. COMMUNITY & APPLIED SOC. PSYCHOL. 95, 96 (2009) (noting that battered women may not bring formal proceedings in "fear of further violence"); Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 620 (2000) (explaining that the trauma of violence interferes with a woman's ability to flee an abusive relationship).

[107] *Testimony Hit By Defense Attorney Wood*, ST. ALBANS MESSENGER, Feb. 28, 1962, at 5.

[108] *See* STARK, *supra* note 14, at 131–32 (discussing how abusive men control women); *see also* OGLE & JACOBS, *supra* note 88, at 74–77 (describing the lack of resources available to battered women); Bostock, Plumpton & Pratt, *supra* note 106, at 96 (noting the emotional commitment to the abuser associated with abuse); Jones, *supra* note 106, at 620 (noting that coercion and control affects a battered woman's perceptions).

[109] Bob Smith, *Mrs. Mahoney Seeks Parole; Killed Husband in St. Alban*, BURLINGTON FREE PRESS, Nov. 14, 1963, at 1.

[110] *In re* Estate of Mahoney, 220 A.2d 475, 478 (Vt. 1966).

[111] *Id.* at 477–79.

[112] *Id.* at 478.

[113] VT. STAT. ANN. tit. 14, § 551(6) (2007).

We will never know for sure whether Charlotte Mahoney was a victim of spousal abuse who fought back against her abuser. In any event, without investigating the context of the Mahoneys' marriage, the Vermont court decided that, as a slayer, Mrs. Mahoney was prohibited from taking her husband's estate and imposed a constructive trust on her share. A version of this rule is now the law, whether by statute or case law, in all fifty states.[114] If Charlotte was indeed a battered spouse, today she might have brought a self-defense claim, rather than claiming, as she did, that the gun went off by accident; if she had, she might well have been acquitted and allowed to inherit. On the other hand, she might have tried to claim self-defense and been unsuccessful for all the reasons that such claims fail today: the judge's refusal to allow evidence of battered woman syndrome (BWS) due to Charlotte's possible failure to fit the stereotype of the battered spouse,[115] her failure to flee instead of trying to grab the gun,[116] or a lack of the element of imminence required for a self-defense claim.[117] Or, the jury's verdict in her case might foreshadow a common outcome today: a verdict convicting her of the reduced charge of voluntary manslaughter, based on the jury's sympathy, which still would bar her inheritance.[118] Finally, Charlotte Mahoney, having brought a

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[114] *See supra* note 1.

[115] *See* Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303, 319 (1997) ("[I]f a woman laughs at inappropriate moments, becomes highly irritable in response to a minor incident or otherwise acts contrary to the meek, helpless battered woman stereotype, her credibility will be questioned."); Christine Needle Beckner, Comment, *Clemency for Killers? Pardoning Battered Women Who Strike Back*, 29 LOY. L.A. L. REV. 297, 319–20 (1995) (discussing how black battered women have difficulty meeting "good battered women" stereotypes and are less likely to benefit from testimony on the battered woman syndrome); *id.* at 327 ("[B]attered women may be denied either a self-defense instruction or expert testimony on battered woman syndrome based upon their nonconformance with the paradigmatic battered woman or the good battered woman stereotypes.").

[116] Alan D. Eisenberg & Earl J. Seymour, *The Self-Defense Plea and Battered Women*, 14 TRIAL 34, 41 (July 1978) (arguing that battered women's cases require reevaluation of traditional self-defense concepts such as immediate threat of harm and flight rule).

[117] Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 229 (2002) ("A battered woman who kills during a non-confrontational moment encounters two related problems when claiming self-defense—the requirement of imminence and her failure to leave the relationship.").

[118] Even if a battered woman does not succeed in showing self-defense, a victim of domestic violence today is unlikely to be convicted of premeditated murder; murder is reduced to the lesser offense of manslaughter when "committed under the influence of

successful self-defense claim, might have been found not guilty, only to be barred from the estate at a later civil proceeding under a lower standard of proof and a different definition of intent.

1. Social Norms and Societal Failures: The Entrapment of Women in Abusive Relationships. It is unfair to punish women who kill abusers by depriving them of resources for two reasons. First, these women's entrapment in the relationships that lead to such killings of abusive spouses is overdetermined by society and politics that also block their escape. Second, the resulting deprivation of wealth resonates with their vulnerability in such abusive relationships, and may even re-create that vulnerability in the next generation. At this point, justice demands a contextual re-reading and re-writing of the Slayer-Rule statutes. The application of these Rules in killings arising from abusive relationships must take into account the many factors trapping women in these relationships and preventing their escape.

Women get trapped in abusive relationships because of social and gender dynamics that make them vulnerable, parallel dynamics leading some men to try to exert coercive control over women, and, finally social, economic, and political systems that block the woman's ability to escape the abusive situation.[119] Despite the work of the first advocates for battered women to emphasize the circumstances giving rise to and exacerbating abuse, the social context supporting battering becomes invisible in much recent literature about abuse.[120] Nonetheless, social and

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extreme mental or emotional disturbance for which there is reasonable explanation or excuse." MODEL PENAL CODE § 210.3(1)(b) (Proposed Official Draft 1962).

[119] *See* STARK, *supra* note 14, at 132 (explaining the factors that trap women in abusive relationships); *see also* Bostock, Plumpton & Pratt, *supra* note 106, at 96 ("Women experiencing violence . . . can result in psychological distress, emotional commitment to the perpetrator and economic dependence."); OGLE & JACOBS, *supra* note 88, at 74–77 ("[S]ocial coping resources may do as much to foster the battering/homicidal process as they do to eliminate it."); Jones, *supra* note 106, at 620 ("[A] battered woman can be so affected by abuse that her survival skills are lessened . . . [and] so affected by these symptoms that she becomes coercively controlled.").

[120] STARK, *supra* note 14, at 362–63 ("[M]illions of women are entrapped in personal life because interventions to stem woman abuse . . . [have] failed to address the inequalities at its core."); *see also* Jones, *supra* note 106, at 620 (explaining that the current approach to domestic violence emphasizes empowering women only after experiencing abuse and, often, the development of a coercive relationship); Aiken & Goldwasser, *supra* note 22, at 180 (noting that current empowerment model limits responses to domestic violence only after they have occurred rather than prevention and education).

political structures still support and reinforce the abuse of women in intimate relationships. As Donna Coker explains:

> The batterer does not, indeed could not, act alone. Social supports for battering include widespread denial of its frequency or harm, economic structures that render women vulnerable, and sexist ideology that holds women accountable for male violence and for the emotional lives of families, and that fosters deference to male familial control. Batterers often use the political and economic vulnerability of women to reinforce their power and dominance over particular women. Thus, their dominance or their attempts at dominance, are frequently bolstered by stigmatization of victims through the use of gender social norms that define the "good" woman (wife/mother). . . . Battering also increases women's social and economic vulnerability. Battered women lose jobs, educational opportunities, careers, homes, and savings. They may also lose relationships with family and friends that might otherwise provide material aid.[121]

Women also get trapped in abusive relationships with men because society teaches them to value romantic, heterosexual love above all else and thus to sacrifice their well-being, and even the well-being of their children, to achieve and keep that love—even if it is abusive. Susan Smith, who infamously drowned her two toddlers in an effort to resume her affair with a man who didn't want a family, had received that message about the value of heterosexual relationships loud and clear from her own mother.[122] As Barbara Ehrenreich wrote, everything in Smith's life "taught her to put the pull of sexual, romantic love above the needs of little children."[123] When her stepfather started molesting her at the age of fifteen, she reported the abuse, but she and her mother then

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[121] Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 39–41 (1999).

[122] Barbara Ehrenreich, *Susan Smith: Corrupted by Love?*, TIME, Aug. 7, 1995, at 78.

[123] *Id.*

"decided" to drop the charges against the abusive stepfather.[124] The mother's message to her daughter was clear: nothing—not even the rape of her child—was worth the cost of losing a man.[125] This message is consistent with the larger cultural messages that bombard girls and women: love of a man is the supreme good, and all other values—bodily integrity, self-esteem, even life itself—must be sacrificed to it.[126]

This process begins in the teenage years.[127] As Simone de Beauvoir observed, at some point in adolescence "[g]irls who were the subjects of their own lives become the objects of others' lives. . . . [They] experience a conflict between their autonomous selves and their need to be feminine, between their status as human beings and their vocation as females."[128] Battering is the inevitable result of "a culture that raises young girls to 'stand by their man' no matter what, to put men first, and to make the 'magic of love' the most important thing . . . that places primary responsibility on women to keep the family together, that blames mothers for any problems in the family."[129]

Once ensnared in an abusive relationship, women find it difficult if not dangerous to leave because of the same cultural dynamics, which render signs of an abusive relationship both "normal" and invisible to the outside world and which make it harder to find help.[130] Further, the seemingly normal appearance of what is actually an abusive relationship, combined with the presumption of normality in marriages and other heretosexual relationships, lead to the failure of police and social welfare agencies to act.[131] Judy Norman, who was convicted of murder for killing her husband who had physically abused and prostituted her for twenty years, tried to leave the relationship several times, once visiting a social services office to inquire about welfare

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[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *See generally* MARY PIPHER, REVIVING OPHELIA: SAVING THE SELVES OF ADOLESCENT GIRLS (1994) (exploring this process by which society forces girls to choose between their own identity or the narrow identity society has for them).

[128] *Id.* at 21–22; *see also* SIMONE DE BEAUVOIR, THE SECOND SEX (1949).

[129] SCHNEIDER, *supra* note 87, at 231–32.

[130] *Id.*

[131] *Id.*

benefits for her and her children.[132] Her husband barged in, "interrupted" the meeting, and "made" her return home.[133] As Jane Maslow Cohen notes, "[t]here is no evidence that the social services worker sought in any way to intervene."[134] Why not? Is it so unremarkable for a woman's husband to interrupt a private meeting in which she is seeking help from a social-services worker and to force her to go home with him? Does such an occurrence fade into the wallpaper of our culture? In fact, women killed while trying to leave abusive relationships have usually called state agencies, including the police, many times for protection before their abusers kill them.[135] If cultural norms trap women in these relationships, and police departments and social-services agencies fail to help them escape, how can the same culture then deny them life-saving resources when they take the only remaining way out by killing their abusers?

Other reasons that women fail to leave violent relationships include the increased likelihood of being killed upon trying to leave,[136] as well as the women's lack of financial resources, family support, and protection and aid from police and social-services agencies.[137] The bad economy and deep cuts in welfare programs also force women to return to violent partners, often "with children in tow."[138] Donna Fogle returned to her husband, despite his history of beating her, because she was "[u]nable to pay the family bills, [and] feared [that she and the children] would lose their home."[139] The times Donna did manage to leave, she was forced to split up the family, staying with one child in a trailer with her

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[132] State v. Norman, 378 S.E.2d 8, 10–11 (N.C. 1989).

[133] *Id.*

[134] Cohen, *supra* note 73, at 804.

[135] Melanie Randall, *Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 150 (2004) (citing evidence that abused women repeatedly called upon state agencies for help in leaving and protection from their abusers).

[136] *Id.* at 149 (citing studies that of women who have left violent relationships, "one third will be assaulted again by these same ex-partners").

[137] SCHNEIDER, *supra* note 87, at 12 (describing how economic vulnerability is used to abuse women). *See generally* Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 COLO. LAW. 19 (1999) (listing reasons abuse victims stay, including financial despair, isolation, and a lack of a place to go).

[138] Jason DeParle, *Welfare Limits Left Poor Adrift as Recession Hit*, N.Y. TIMES, Apr. 8, 2012, at A1.

[139] Metro. Life Ins. Co. v. Fogle, 419 S.E.2d 825, 826 (S.C. Ct. App. 1992).

mother and letting the other child stay with her sister.[140] On March 22, 1988, after the "reconciliation," her husband knocked her to the floor as she was trying to leave the house and "began choking her, pulling her mouth open, ramming his fingers down her throat and trying to break her neck."[141] She pulled a gun out of her purse and shot him.[142] Donna was tried and found not guilty by reason of self-defense.[143] The life insurance company then filed an interpleader complaint, seeking to pay the funds owed to her into the court and to be dismissed from liability; the decedent's children cross-claimed, asserting that the named beneficiary, their mother, was barred under the Slayer Rule from taking because she had feloniously and intentionally killed the decedent.[144] The trial court barred payment, but the New York Court of Appeals reversed, holding that the mother had acted in self-defense and was entitled to take the proceeds.[145] The *Fogle* court noted that Donna stayed with her husband to try to keep her family together.[146] This is not unusual: women often earn less than men, and, to make matters worse, one feature of an abusive relationship is that the abuser often interferes with the victim's ability to find or hold a job by harassing her at work, preventing her from getting to work, and leaving bruises that leave her unable to show up for work or job interviews.[147] Thus, women's systemic problem of having less access to wealth is not only exacerbated by, but also contributes to, the abuse cycle.

All these factors are socially and culturally determined. In other words:

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[140] *Id.* at 827.
[141] *Id.*
[142] *Id.*
[143] *Id.* at 827–28.
[144] *Id.* at 826.
[145] *Id.*
[146] *Id.* at 828.
[147] Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 959 (2004) ("Batterers frequently sabotage victims' efforts to seek and maintain employment, causing tardiness, absenteeism, and harassment that may result in the women being fired."). *See generally* Jody Raphael, *Keeping Women Poor: How Domestic Violence Prevents Women From Leaving Welfare and Entering the World Of Work*, *in* BATTERED WOMEN, CHILDREN, AND WELFARE REFORM 31 (Ruth A. Brandwein ed., 1999) (discussing abuse as a "welfare-to-work" barrier).

> [T]he social conditions of inequality often impose severe limitations on the options which are actually available to women, including a lack of second stage housing, sex segregation and unequal pay in the labour market, a lack of available and affordable child care facilities, the social, ideological, and economic pressures to "keep the family together," and the stigmatizing and victim-blaming attitudes which still prevail and which often hold women accountable for the violence perpetrated against them.[148]

My point is not to dispute the agency of battered women, nor to force them into one category or another; rather, I emphasize the systemic reinforcement of abuse to support my central point—it is unfair for the law to punish women for acts of self-preservation that in part the law has made necessary, and it is doubly unfair to punish them by depriving them of resources and thereby replicating the economic vulnerability that likely helped to intensify their entrapment in the abusive relationship in the first place. This unjust result is especially problematic and troubling when these women's economic vulnerability is part of the system that seeks to punish them by compounding it. When women face the possibility of death because the state has failed to protect them, it is wrong for that state to punish them by re-deploying its own failures upon them, and, in so doing, reproducing the same systemic vulnerability that created the cycle of abuse.

Further, studies have demonstrated that abuse is passed on through families: children who grow up seeing or experiencing abuse are much more likely to engage in abuse themselves.[149] Men

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[148] Randall, *supra* note 135, at 125; *see also* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1232–40 (1993) (noting various social and cultural contextual factors that influence battered women). The foregoing discussion of the social factors contributing to the entrapment of women in abusive relationships should not be interpreted to deny the agency that battered women exercise every day in surviving abuse, or in protecting themselves and their children. Oppression and power are not static or monolithic; women experience both subordination and resistance in the context of abuse; a rigid dichotomy of "victim" versus "survivor" reflects a false understanding of how systems of power operate.

[149] Alan J. Tomkins et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 LAW & PSYCHOL. REV. 137, 150–51 (1994) (noting that "[a]dult batterers are likely to have grown up in families in which

who grow up seeing their mothers being battered are several times more likely to batter their wives or partners; women who grow up seeing the same thing are more likely to find themselves in abusive relationships, on the receiving end of the battering.[150] This generational trail, combined with the economic elements of abuse, suggest that applying Slayer Rules in cases of spousal abuse may perpetuate the cycle by depriving the victim of resources to be self-sufficient and raise her children in a violence-free environment. Finally, it is noteworthy that the parties who petition for forfeiture in cases in which an abuse victim kills an abuser are often the parents of one of the spouses who are the contingent beneficiaries of the estate or the life insurance policies.[151] In such cases, there may well be a state of unclean hands: given that most abuse victims have sought help or escape, it seems likely that parents or other relatives had reason to be aware of the abuse and failed to act to stop it or aid the victim.[152] Apart from anything else, such complicity in the violence, if proven, should constitute an equitable bar to these parties' inheritance.[153]

B. DOMESTIC VIOLENCE: CHILDREN WHO KILL

The overwhelming majority—ninety percent—of adolescent parricides are children who have been severely abused by the parent or parents they kill.[154] Other categories of children who kill include those who are severely mentally ill or dangerously antisocial (*i.e.*, the sociopath), who kills to achieve some personal, selfish end.[155] The problem is that while these categories seem

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battering occurred" and that "[a] significant percentage of battered women have childhoods marked by witnessing violence themselves or being physically and sexually abused").

[150] *Id.*

[151] *See, e.g.*, McClure v. McClure, 403 S.E.2d 197, 198 (W. Va. 1991) (involving an action filed by the decedent husband's parents to prevent the daughter-in-law from inheriting after she killed him).

[152] I am grateful to Tiffany Murphy for this insight.

[153] *See* Amy L. Nilsen, Comment, *Speaking Out Against Passive Parent Child Abuse: The Time has Come to Hold Parents Liable for Failing to Protect Their Children*, 37 HOUS. L. REV. 253, 270–71, 278–79 (2000) (arguing that the policy justifications for the parental immunity doctrine, which allows a parent to recover the child's inheritance, are inapplicable to suits against passive parents).

[154] HEIDE, *supra* note 4, at 6.

[155] *Id.* at 6–11. Technically, the term "sociopath" is outdated: psychologists today refer to

clear cut, in reality the symptoms can overlap, making a specialist's assessment essential.[156] For example, children who have been abused sometimes adopt an antisocial-appearing demeanor as a means of psychological survival, acting out in an antisocial fashion to distract from the abusive home environment.[157]

The severely abused child who kills a parent has typically been both physically (often sexually) and psychologically abused and commits the murder out of desperation, seeing it as the only way to stop the abuse.[158] Studies show that attempts to get help from friends, teachers, social service agencies, and the state have failed.[159] If the child runs away, state agencies likely return him to the home, otherwise benign state laws force him to stay by mandating school attendance until age sixteen and limiting the amount of time he can work outside the home.[160] These children are trapped, and when they kill, it is "an act of desperation—the only way out of a family situation they could no longer endure."[161]

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either "conduct disorder" or "antisocial personality disorder," depending on age and the presence of specified criteria. *Id.* at 9. The main distinction between these disorders and psychosis is that people suffering from conduct and antisocial personality disorder are free of delusions and are oriented in time and space. *Id.* An example of a parricide stemming from antisocial personality disorder is Ernie Sherer III, who beat his parents to death in 2008 in order to get his inheritance and pay off gambling debts. *Pleasanton Poker Pro Gets 2 Life Terms For Murdering Parents*, CBS SAN FRANCISCO BAY AREA (May 20, 2011, 2:45 PM), http://sanfrancisco.cbslocal.com/2011/05/20/Pleasanton-poker-pro-gets-2-life-terms-for-murdering-parents.

[156] HEIDE, *supra* note 4, at 11.

[157] *Id.* Heide gives the example of fourteen-year-old Debra Mattingly, who, along with two codefendants, bludgeoned and choked her father to death in 1970. *Id.* at 11–12. Psychiatric evaluation revealed that the father was an abusive alcoholic, to whom Debra had been returned after the death of her mother, who had left him. *Id.* at 12. Debra had run away from home several times and been placed in various detention homes, summer camps, and parochial schools; a few months before the homicide, she had sought psychiatric help and asked a judge to commit her to a mental hospital, a request which was refused. *Id.*

[158] *Id.* at 6.

[159] Heide, Boots, Alldredge, Donerly & White, *supra* note 6, at 220–21 (citing studies showing that most abused children who kill parents had attempted and failed to get help from relatives and authorities, and to run away from the abusive home).

[160] Jennifer R. James, *Turning the Tables: Redefining Self-defense Theory for Children who Kill Abusive Parents*, 18 LAW & PSYCHOL. REV. 393, 395 (1994).

[161] Kathleen M. Heide, *Why Kids Kill Parents*, PSYCHOLOGY TODAY (Sept. 1, 1992), http://www.psychologytoday.com/articles/200910/why-kids-kill-parents (last viewed July 17, 2012) ("The true killer in these cases is child mistreatment.").

In one of these cases, a judge articulated the essence of this argument: George Burns, Jr., had shot his father six times in the chest and back after years of documented physical and psychological abuse.[162] In pronouncing the sentence, the judge, while emphasizing that society did not condone the murder, also said, "I believe that the chain of violence and abuse that led to this end were brought about by your father's actions rather than by yours."[163] Children who kill under these circumstances are generally "compliant individuals of above-average intelligence, who have no prior criminal records and pose no threat to society at large."[164]

All the defenses applicable to battered spouses are also applicable here. With respect to self-defense, the child's belief in the imminence of attack, like that of the abused spouse's, is "reasonable" based on the years of abuse.[165] As in the case of the battered spouse, years of failure on the part of social service agencies and relatives to intervene have created the reasonable belief that murder is the only way out.[166] Courts have generally, however, been unwilling to accept the defense of "battered child syndrome" in cases of parental murder.[167] Deborah and Richard Jahnke, for instance, were convicted of voluntary manslaughter for the 1982 killing of their father, who had physically and sexually abused them for years.[168] Sometimes, however, these defenses are successful: in the case of Diana Goodykoontz, who shot her father

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[162] HEIDE, *supra* note 4, at 17.

[163] *Id.* at 18 (quoting the judge in the Burns case).

[164] James, *supra* note 160, at 394.

[165] Heide, Boots, Alldredge, Donerly & White, *supra* note 6, at 222–23 ("Like battered wives, children and adolescents who have been severely abused may believe, based on their experiences, that they are in danger of being severely beaten or killed in the near future if they do not take lethal action when it is possible.").

[166] *See id.* at 220–21 (stating the problem of failed help for the children along with a specific example clarifying why parricide is the only apparent option for these children); DeShaney v. Winnebago Cnty. Dep't of Soc. Serv., 489 U.S. 189, 202 (1989) (illustrating that the failure on the part of the state is legally permitted).

[167] Diana J. Ensign, Note, *Links Between the Battered Woman Syndrome and the Battered Child Syndrome: An Argument for Consistent Standards in the Admissibility of Expert Testimony in Family Abuse Cases*, 36 WAYNE L. REV. 1619, 1626 (1989–1990); *see also* Heide, Boots, Alldredge, Donerly & White, *supra* note 6, at 227–28 (discussing how state laws hinder the defense of abuse victims who kill).

[168] Jahnke v. State, 682 P.2d 991, 993–94, 1009 (1984). *See generally* ALAN PRENDERGAST, THE POISON TREE: A TRUE STORY OF FAMILY VIOLENCE AND REVENGE (The Notable Trials Library 2004) (1986) (telling the Jahnkes' story).

after he had abused the family for years, threatened to kill them, and made sexual advances toward her, the judge held that Diana suffered from post traumatic stress disorder brought on by the abuse, that she committed the murder out of fear of bodily harm, and that she "reasonably believed that deadly force was necessary to prevent that harm from occurring."[169] Extended abuse can lead to post traumatic stress disorder in victims; the condition can cause reexperiencing of the traumatic event that can lead to violent response.[170]

Another complicating factor is that parricide is so deeply embedded within the family that it is very difficult to hold the child-killer solely responsible. These killings arise in the complex network of family relationships and their motivation is sometimes difficult to ascribe to one person alone. Indeed, one psychologist has studied a number of cases of parricide in which he argues, "[C]hildren who kill are simultaneous victims of an unconscious family conspiracy."[171] The immaturity of the child's ego and the special emotional bond between the child and the parent create "the child's susceptibility to, and readiness to act upon the unconscious prompting of the adult," which results in the adult being able to benefit from the child's act.[172] One mother of an eight-year-old who killed his abusive father with a shotgun said that if the boy had not done so, she "would be sitting up in jail right now."[173] She had replied to the boy's query as to when they could live with her by saying "[n]ot as long as your father is alive."[174]

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[169] B. Kaczor, *Precedent-Setting Defense Gets Girl Cleared in Slaying*, TAMPA TRIB., July 1, 1989, at B1, B5.

[170] HEIDE, *supra* note 4, at 71.

[171] Douglas Sargent, M.D., *Children Who Kill—A Family Conspiracy?*, 7 SOC. WORK 35, 42 (Jan. 1962).

[172] *Id.* at 35.

[173] *Id.* at 36.

[174] *Id.* This particular story has many strange elements, all of which make clear the interwoven nature of the individual psyches in a family: the father had developed the delusion that he was Jesus Christ, and that he would die when he was thirty-three and a half years old; the night before he was killed, at age thirty-three, he commanded his sons not to come near or touch him, promised the boys a beating the next day, and sat down in his cabin with his back to the door to read his Bible. *Id.* The boys took their father's gun from his car, loaded it and shot him where he sat. Sargent concludes by suggesting that the father, "in order to fulfill the requirements of his religious delusion, managed to commit suicide by provoking his children to kill him" and that the mother "planted the idea in [the

Thus, compelling reasons exist not to bar such children from inheriting. First, many are trapped in the abusive situation and society has failed in its responsibility to protect them, leaving them no other way out. Second, many of these murders may be the product of family dynamics for which it is impossible to extricate fully the child's sole responsibility.

There is as yet very little legal basis for these children to mount a defense that adequately addresses the context of their crimes;[175] as a result, juries may nullify or compromise on lesser charges, which will still likely trigger the Slayer-Rule bar. For example, Michael, a sixteen-year-old who killed his abusive father, had been the target of severe abuse from a very young age: his father had beaten him regularly with objects ranging from a shovel to a two-by-four.[176] To punish Michael for playing with matches when he was six, the father held the child's hand over a burning lighter until the skin blistered.[177] The abuse escalated over time, but Michael did not turn to his mother for help because he knew his father would retaliate against her.[178] When he told his high school principal about the abuse, the principal complained about the concomitant paperwork, refused to believe him, and finally insisted that he repeat the allegations with the father present, which, unsurprisingly, the boy would not do.[179] A friend's mother reported the abuse to police who told her that Michael was a troublemaker and threatened to charge her with aiding and abetting his attempts to run away.[180] Michael was tried and convicted of involuntary manslaughter.[181] His defense attorney polled the jury and discovered that the verdict represented a compromise between the six jurors who wanted to acquit on the

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boy's] mind that she would not be unhappy if his father were dead." *Id.*

[175] *See* Heide, Boots, Alldredge, Donerly & White, *supra* note 6, at 232–33 (explaining the inapplicability of self-defense and BWS to children charged with murder and the sometimes insurmountable difficulty in asserting a legal defense to the crime).

[176] PAUL A. MONES, WHEN A CHILD KILLS: ABUSED CHILDREN WHO KILL THEIR PARENTS 90–91 (1991).

[177] *Id.* at 91.

[178] *Id.* at 94.

[179] *Id.* at 100, 102.

[180] *Id.* at 101.

[181] *Id.* at 111.

grounds of self-defense and six who wanted to convict of first degree murder.[182]

Application of Slayer Rules in these cases should take into account the social factors that led the child to kill and evaluate the purpose served by depriving that child of the estate. An equitable reading of the Rule and a contextual reading of the facts should lead to the conclusion that there is no justice in the Rule's application.

C. MENTAL ILLNESS: THE MENTALLY ILL FAMILY MEMBER

Another category of intra-family killing occurs because of mental illness. Because of the lack of resources for treating and housing the mentally ill, as well as the stigma attendant on seeking help for mental illness,[183] many mentally ill children live with family members and never receive treatment.[184] A recent *New York Times Magazine* article chronicles a personal story reflecting the prevailing reality of mental illness in American families: in this article, Jeneen Interlandi described her elderly father's descent into a severe episode of mania, brought on by bipolar syndrome, during which he became convinced that nameless people, and then members of his family, were trying to kill him; he became violent, hitting Jeneen's mother, and threatened to burn the family house down.[185] The quest to have him housed and treated in a way that would have kept her mother safe revealed that the "safety net was full of holes":[186]

- Despite the father's threats and violent acts, his behavior did not meet the standard of

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[182] *Id.*

[183] Ami C. Janda, *Keeping a Productive Labor Market: Crafting Recognition and Rights for Mentally Ill Workers*, 30 HAMLINE J. PUB. L. & POL'Y 403, 436 (2008) (citing H.R. Con. Res. 134, 110th Cong. (2008) (passed the House of Representatives May 21, 2008, the Senate concurring)).

[184] Dennis E. Cichon, *Encouraging a Culture of Caring for Children with Disabilities*, 25 J. LEGAL MED. 39, 39 (2004) (citing U.S. DEP'T HEALTH & HUMAN SERV., REPORT OF THE SURGEON GENERAL'S CONFERENCE ON CHILDREN'S MENTAL HEALTH: A NATIONAL ACTION AGENDA (2000), *available at* http://www.ncbi.nlm.nih.gov/books/NBK44233/pdf/TOC.pdf).

[185] Jeneen Interlandi, *A Madman in Our Midst*, N.Y. TIMES MAG., June 24, 2012, http://query.nytimes.com/gst/fullpage.html?res=9402E0DE1138F937A15755C0A9649D8863.

[186] *Id.*

> imminence required for involuntary commitment.[187]
> - There is only one inpatient care bed for every 7,000 Americans, less than one third of what is needed.[188]
> - One and a half billion dollars has been cut from state mental health budgets since late 2008.[189]
> - No facility would keep her father long enough to stabilize him; the family's choices were to take him home, endangering her mother, leave him to the streets, or get the police to arrest him for violating the restraining order that the family had taken out against him and take him to jail.[190] They chose the latter.[191]

Eventually, with the help of a criminal defense attorney, the family was able to craft an agreement under which their father was released from jail on the condition that he take medication and see a psychiatrist, steps that enabled him to return home, and, ultimately, stabilize his mental condition.[192]

Other families are not so lucky. Joe Bruce's son, who was schizophrenic, was discharged from a mental-health facility even though he had threatened two people with a gun.[193] Bruce begged the facility to reconsider, arguing that the boy would likely kill someone and that the target of his homicidal act would likely be his mother.[194] A year after being released, the boy killed his mother with a hatchet.[195]

Families who manage to avoid such tragedies spend all their resources doing so. A commentator on Minnesota Public Radio described her family's efforts to get treatment for an adolescent son who was both bipolar and autistic, had hallucinations, heard

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[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*

voices, had thoughts of strangling neighborhood children, and tried to kill his parents.[196] When she tried to have him admitted to a hospital mental ward, the social worker told her that "[t]hey don't want to make it easy to get kids into the mental ward."[197] There were no long-term residential hospitals for the mentally ill in Minnesota, as is the case in many other states.[198] The parents were finally able to find a residential treatment facility in Texas, where their son spent a year at the cost of the couple's retirement fund.[199]

American families of the mentally ill have few options, either through private insurance or state funding, to find treatment for their mentally ill children and protect themselves.[200] Most insurance plans offer little or no coverage for any kind of treatment for mental illness, much less inpatient treatment, and Medicaid offers no coverage at all for inpatient treatment.[201] The current recession has exacerbated the problem, as states slash mental health budgets.[202] Although one in ten children has a serious mental illness, fewer than twenty percent of these children receive treatment of any kind;[203] forty percent of people with schizophrenia and fifty-one percent of those with bipolar disorder are not receiving treatment.[204] Those who do receive treatment often wait three to four months for appointments.[205] Programs

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[196] Karen Sylte, Commentary, *"Why Didn't the Parents Do Something?" Most Likely, They Tried*, MINN. PUB. RADIO NEWS (Jan. 24, 2011).

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *See generally* Warner, *supra* note 15 (discussing the difficulty of finding services and funding for mental health treatment and insurance limitations on coverage for psychiatric treatment).

[201] *Id.*; *see also* Clarence J. Sundram, *In Harm's Way: Research Subjects Who Are Decisionally Impaired*, 1 J. HEALTH CARE L. & POL'Y 36, 37 (1998) ("Medicaid coverage . . . excludes long-term institutionalization for mental illness in specialty hospitals while providing coverage for similar hospitalizations for other illnesses.") (citing to 42 U.S.C.A. § 1396d(a)(1) (West Supp. 1997) and 42 C.F.R. § 435.1008 (1997)).

[202] National Alliance on Mental Illness, *supra* note 15.

[203] Marilyn Elias, *Mentally Ill Kids Adrift in System*, USA TODAY (May 1, 2004), http://usatoday30.usatoday.com/lnews/2004-06-01-mentally-ill-main_x.htm.

[204] David Abel, *Parents of Troubled Adults Face Dilemmas*, BOSTON GLOBE (Nov. 19, 2011), *available at* http://www.boston.com/news/local/Massachusetts/articles/2011/11/19/no_easy_answers_when_dealing_with_mentally_ill_adult_children_who_become_violent/.

[205] *Report: Mentally Ill Kids Lack Treatment*, ABC News (Jan. 3, 2012), *available at* http://abcnews.go.com/health/story?id=117721.

that could help, such as therapeutic after-school care, outpatient services, and transitional care, barely exist and usually are not covered by insurance.[206] Parents sometimes face the extreme step of having to make their children wards of the state in order to get care for them.[207]

D. MENTAL ILLNESS: INFANTICIDE AND POSTPARTUM PSYCHOSIS

Another cause of killing in families is postpartum psychosis (PPP), a major cause of infanticide.[208] I limit my discussion here to what is technically termed "filicide," the killing of a child older than one day, as distinguished from "neonaticide," the killing of an infant under twenty-four hours old.[209] These two types of crimes are distinct and have very different motives and perpetrators: the woman who kills her newborn is likely an unwed, socially-isolated teenager who has hidden or denied the pregnancy throughout its term and who kills the newborn out of a combination of fear, shame, and a simple desire to be rid of the child;[210] these cases are unlikely to raise inheritance issues. By contrast, mothers who kill older children tend to be married, suffer from serious mental illness, and kill their children for altruistic reasons, believing that they are alleviating the children's suffering or protecting them from those who wish to harm them.[211] Sometimes these slightly older children may have estates, whether through college funds, life insurance policies, or wrongful death awards.[212]

Nine to sixteen percent of postpartum women suffer from some form of postpartum depression, a medically recognized syndrome.[213]

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[206] Warner, *supra* note 15.

[207] *Id.*

[208] Margaret G. Spinelli, *Maternal Infanticide Associated With Mental Illness: Prevention and the Promise of Saved Lives*, 161 AM. J. PSYCHIATRY 1548, 1550 (2004).

[209] Philip Resnick was the first person to make this distinction. Philip J. Resnick, *Murder of the Newborn: A Psychiatric Review of Neonaticide*, 126 AM. J. PSYCHIATRY 1414 (1970).

[210] *Id.* at 1415; Shannon Farley, Comment, *Neonaticide: When the Bough Breaks and the Cradle Falls*, 52 BUFF. L. REV. 597, 604 n.52 (2004) (arguing that courts should recognize a clinically-defined "Neonaticide Syndrome" as a defense in these cases).

[211] Farley, *supra* note 210, at 599; Resnick, *supra* note 209, at 1415.

[212] *See, e.g.*, *In re* Estate of Fusscas, No. CV0408329465, 2005 WL 1971195, at *1 (Conn. Super. Ct. June 1, 2005) (observing that the eight-month-old child who was killed by the mother left an estate worth approximately $250,000).

[213] Postpartum Depression, AMERICAN PSYCHOLOGICAL ASSOCIATION, http://www.apa.org/pi/women/programs/depression/postpartum.aspx.

A very small percentage of these cases—0.2% of childbearing women—turn into cases of actual psychosis, which constitutes a severe break from reality, with such attendant symptoms as hearing voices, experiencing delusions, and believing that because of the mother's incompetence or other reasons, the child is better off dead.[214] Of these, only one in twenty so afflicted will try to kill herself or her children.[215] About four percent of mothers with PPP may attempt infanticide.[216] Conversely, fifty percent of women who kill their children are mentally ill—a higher proportion than in any other crime.[217]

A woman suffering from PPP is overcome by despair and loses the ability to think or function normally.[218] She hears voices and becomes preoccupied with them, and becomes obsessed with death and tormented by thoughts that her children are possessed by evil forces or must be killed.[219] Jeanette Swanson, who shot two of her children to death, for example, had hallucinations and delusions that people were trying to harm the children; she killed them so they could go to heaven and be safe.[220] The doctors who evaluated Swanson after her arrest diagnosed her as suffering from

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[214] *See* Velma Dobson & Bruce Sales, *The Science of Infanticide and Mental Illness*, 6 PSYCHOL. PUB. POL'Y & L. 1098, 1106 (2000) (discussing the scientific knowledge on infanticide and mental illness).

[215] Christine A. Littleton, *Reconstructing Sex Equality*, *in* FEMINIST LEGAL THEORY FOUNDATIONS 248, 258 (D. Kelly Weisberg ed., 1993). Infanticide falls into two categories: neonaticide, which is the killing of a child in the first twenty-four hours after birth, and filicide, which is the killing of older children. Farley, *supra* note 210, at 599. Women who commit neonataicide are generally younger and unmarried, and are often motivated by fear and the wish to hide the pregnancy, and even denial of its existence. *Id.* at 599–601; CHERYL L. MEYER & MICHELLE OBERMAN, MOTHERS WHO KILL THEIR CHILDREN: UNDERSTANDING THE ACTS OF MOMS FROM SUSAN SMITH TO THE "PROM MOM" 45 (2001).

[216] Susan Hatters Friedman & Philip J. Resnick, *Child Murder by Mothers: Patterns and Prevention*, 6 WORLD PSYCHIATRY 137 (2007), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2174580.

[217] Marianne Szegedy-Maszak, *Mothers and Murder*, U.S. NEWS & WORLD REPORT, Mar. 18, 2002, at 23.

[218] Bienstock, *supra* note 7, at 459; *see also* HUYSMAN, *supra* note 7, at 43 ("When a mother is in the grip of this disease in its most serious form, she passes beyond reason.").

[219] Bienstock, *supra* note 7, at 459. Angela Thompson developed PPP after her first child, and went around her house shouting hymns and switching lights on in an effort to banish evil spirits. Laura E. Reece, Comment, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide*, 38 UCLA L. REV. 699, 706 (1991). After the birth of her second child, she became convinced that the nine-month-old son was the devil and drowned him in the bath. *Id.*

[220] *In re* Estates of Swanson, 187 P.3d 631, 632–33 (Mont. 2008).

schizoaffective disorder, agnosia, depression, and psychosis.[221] Andrea Yates (discussed in greater detail below) heard voices and saw hallucinations.[222] Causes of PPP are complex: in part, it arises because the woman's body goes through major chemical changes during and after birth, and these changes occur while the new mother is stressed and sleep deprived.[223] A genetic predisposition to mental illness is another factor that increases the likelihood that the syndrome will occur.[224]

Despite PPP's biological roots, however, it is impossible and misleading to "extract [this clinical entity] from the larger culture within which it is embedded."[225] It is also at least partly a result of women's position in a culture that makes the full voluntariness of motherhood questionable, while isolating and subordinating women in that role. As Rebecca Hyman has observed, Andrea Yates's crime of infanticide "cannot be adequately understood outside an analytic of gender difference."[226]

Although Jeanette Swanson, who shot her children because she believed someone in the area was trying to harm them, had a family history of mental illness, her case also shows signs that many factors in her immediate environment could have contributed to her depression as well.[227] At the time of the murders, her husband "was sleeping in a camp trailer outside the home,"[228] suggesting trouble in the marriage and little participation by the husband in childcare. Moreover, Jeanette's life seems to have been fairly isolated, except for the almost constant presence of her children, whom she homeschooled and "spent every minute of the day with," according to Jeanette's

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[221] *Id.* at 633.

[222] *See* Deborah W. Denno, *Who Is Andrea Yates? A Short Story About Insanity*, 10 DUKE J. GENDER L. & POL'Y 1, 27–35 (2003) (detailing Andrea Yates's postpartum disorders, her mental illness, and the murders of her children).

[223] HUYSMAN, *supra* note 7, at 33–34.

[224] Current understandings of postpartum disorders reflect multifactor models that consider "hormonal, neurochemical, neuronatomical, genetic, evolutionary, psychosocial, sociocultural, and environmental factors." Stacey A. Tovino, *Scientific Understandings of Postpartum Illness: Improving Health Law and Policy?*, 33 HARV. J.L. & GENDER 99, 121 (2010).

[225] Rebecca Hyman, *Medea of Suburbia: Andrea Yates, Maternal Infanticide, and the Insanity Defense*, 32/3-4 WOMEN'S STUD. Q. 192, 193 (2004).

[226] *Id.* at 207.

[227] GREAT FALLS TRIBUNE, Aug. 27, 2002, at M1.

[228] *Id.*

mother.[229] The local newspaper reported that "the Swansons were loners" on their isolated ranch about six miles southwest of Augusta, Montana, where they had lived for fifteen years, with "No Trespassing" signs in the trees and a closed wire gate around the property.[230] In the weeks before the murders, Jeanette's mother said, she had seen that something was wrong: the "normally social mother" had become "tired, very passive and quiet" and asserted that she "should have been hospitalized [the day she saw the doctor] and not allowed to go home."[231]

Thus, PPP, though it may have a genetic cause, is also inextricably connected to the subordinate nature of many women's lives, in particular society's imposition of limits on their choices in bearing and caring for children and on their access to help when they are not blissfully happy doing so. The pressures and images in our culture push women toward sexual availability and motherhood, raising questions about the complete voluntariness of some women's choices.[232] Once they become mothers, many American women face a chronic lack of affordable, quality childcare, as well as reluctance on the part of employers to allow them flexible schedules or to hire them in the first place.[233] At home, many women lack partners who are willing to share childcare tasks, especially the taxing and unfulfilling ones.[234]

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[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *See* Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181, 197–98 (2001) (discussing the effects of social pressures on women's sexual and reproductive decisions).

[233] *See* PAMELA STONE, OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME 221–22 (2007) (emphasizing the need for flexible workplaces and better part-time options); *see also* Jill Maxwell, *Leveraging the Courts to Protect Women's Fundamental Rights at the Intersection of Family-Wage Work Structures and Women's Role as Wage Earner and Primary Caregiver*, 20 DUKE J. GENDER L. & POL'Y 127, 135 (2012) (discussing the marginalization of mothers in the workplace).

[234] *See* Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, *in* APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION 549, 550 (D. Kelly Weisberg ed., 1996) ("Women's entry into the paid workforce has not led to equitable redistribution of work."). *See generally* ARLIE HOCHSCHILD WITH ANNE MACHUNG, THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME (2012) (discussing how women are often responsible for most childcare and housework even when they work outside the home).

People make choices based on what the culture around them presents as available and acceptable. Contemporary American culture presents motherhood as the default setting for women's lives, viewing women without children as the only ones who have made a choice—a "nontraditional, nonconventional, and for some, non-natural" choice at that.[235] Social, familial, and political forces combine to exert pressure on women to become mothers; women are gender-coded during childhood, encouraged to play with dolls, chastised for acting in ways that are not nurturing and supportive, and showered with references to future children clearly based on the assumption that these children will come to be.[236] That women without children are suspect finds a nice illustration in the experience of Hillary Clinton in the 1992 presidential election: upon discovering that voters thought that Clinton had no children, her advisors "interrupted daughter Chelsea's parentally imposed privacy in order to rehabilitate her too-professional mother."[237]

In this context, it is hard for women to admit that they are experiencing depression instead of the unalloyed joy that society tells them is the lot of the new mother. As Adrienne Rich put it, "I only knew that I had lived through something which was considered central to the lives of women, fulfilling even in its sorrows . . . and that I could remember little except anxiety, physical weariness, anger, self-blame, boredom and division within myself."[238]

Women are also programmed to self-sacrifice and nurture to an extent that they may exhaust themselves and break down trying to care for others.[239] Many mothers who kill their children fit this mold. Andrea Yates's mother told the press that "[s]he was always trying to be such a good girl. . . . She was the most compassionate of my children. Always thinking of other people, never herself.

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[235] Franke, *supra* note 232, at 187.

[236] *See generally id.* (discussing motherhood and reproductive normality and their roles in legal feminism).

[237] Carol Sanger, *Separating From Children*, 96 COLUM. L. REV. 375, 411 (1996). Interestingly, as Katherine Franke points out, feminist legal scholarship has tended to replicate this stereotype. Franke, *supra* note 232, at 183 ("[T]he legal feminist frame tends to collapse women's identity into motherhood.").

[238] ADRIENNE RICH, OF WOMAN BORN 1986.

[239] Franke, *supra* note 232, at 183.

She was always trying to care for everybody."[240] It is not hard to find examples of this programming in popular culture. For example, a commercial for Pillsbury Toaster Strudel shows a little blond girl offering to share her Toaster Strudel with (presumably) her brother; she breaks it in half and offers him a piece.[241] He then grabs the other piece from her hand and runs off, leaving her calling "Hey!" impotently.[242] The message is clear: girls do not feed themselves, they nurture others, and if they are left empty-handed—even hungry—it is cute.

In addition to being programmed to be mothers, women often have no real choices when it comes to staying at home with the children. In all of the infanticide cases I cite, the mother had given up a career to stay home and care for the children. For example, Beth Feltman had left middle-school teaching to stay home with her children;[243] Andrea Yates had left a career as a nurse for the same purpose.[244] Despite the recent media blitz[245] about women "choosing" the "mommy track," such choices are actually constrained by social reality. If that were not the case, would not men choose to stay home at the same rates that women do? Clearly, that is not the case. By contrast, women, not men, are almost always the ones who face the dilemma of choosing between career and family.[246]

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[240] Evan Thomas et al., *Motherhood and Murder*, NEWSWEEK, July 2, 2001, at 20–25. Further information about Andrea Yates's case can be found in Christine Michalopoulos, *Filling in the Holes of the Insanity Defense: The Andrea Yates Case and the Need for a New Prong*, 10 VA. J. SOC. POL'Y & L. 383 (2003).

[241] *Pillsbury Toaster Strudel—"Brother and Sister,"* http://vimeo.com/29134857.

[242] *Id.*

[243] C. Crowder, *Death of Young Siblings Leave Mourners Puzzled*, ROCKY MTN. NEWS, Apr. 18, 1998.

[244] *See Jury Finds Yates Insane, Not Guilty*, HOUSTON CHRONICLE, July 26, 2006, *available at* http://www.chron.com/disp/story.mpl/front/4073570.html.

[245] *See, e.g.*, Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, at 42 ("It's not just that the workplace has failed women. It is also that women are rejecting the workplace."); *cf.* Sylvia Ann Hewlett & Carolyn Buck Luce, *Extreme Jobs: The Dangerous Allure of the 70-Hour Workweek*, HARV. BUS. REV., Dec. 2006, at 49, 59 (arguing that women, especially mothers, "simply can't—or don't choose to—work exceedingly long hours").

[246] Amy C. Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J.L. & POL. 241, 354 (1997) ("Society already presents many serious dilemmas to women that men tend to escape, such as the conflict of whether to work for their own independence or to stay at home for their children, a decision that *men may choose* to consider but generally are not expected to face." (emphasis added)).

Viewed on a theoretical level, these images turn women into what the French philosopher Michel Foucault called "docile bodies," programmed to do as the state wishes but also "so that they may operate as one wishes, with the techniques, the speed and the efficiency that one determines.[247] Thus discipline produces subjected and practiced bodies, 'docile' bodies."[248] In psychoanalytic terms, the minute the subject utters the word "I" and makes choices, that subject is already constrained by the surrounding linguistic world and the forms of expression available in that world.[249] Thus, articulating the female "I" as "Not-Mother" is much harder in a linguistic world full of women whose expressed self-identification is always, "I'm a mom."

Another aspect of these cases underlying women's lack of choices in assuming these roles is the cases' connection to fundamentalist religion, with its rigid, hierarchical notions of gender.[250] Extreme fundamentalism seems to appear too often in cases of mothers killing their children.[251] In most such cases, women who murder their babies lack not only adequate family networks but also lack husbands who provide enough emotional support; significantly, these women also have ties to a fundamentalist church of some kind.[252] For example, Andrea

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[247] MICHEL FOUCAULT, DISCIPLINE AND PUNISH 138 (Alan Sheridan trans. 1995).

[248] *Id.*

[249] *See* Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1548 (2010) ("The metaphors floating in our minds determine our *linguistic choices*, which in turn affect social discourse and ultimately social action." (emphasis added)).

[250] *See* Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271, 273 (1997) (noting that fundamentalism is "accompanied by a vigorous promotion and enforcement of *gender* roles whose explicit intent entails the subordination and disempowerment of women" (emphasis added)).

[251] *See generally* Renata Salecl, *The Real of Crime: Psychoanalysis and Infanticide*, 24 CARDOZO L. REV. 216 (2003). *See* Caleb E. Mason, *Faith, Harm, and Neutrality: Some Complexities of Free Exercise Law*, 44 DUQ. L. REV. 225, 258–70 (2006) (providing several examples of individuals from fundamentalist backgrounds harming their children as a result of hallucinations with a religious theme). The most notorious recent example is the case of Andrea Yates.

[252] WilmzBvewxs, Guilty by Reason of . . ., ASK DR. JONES (Dec. 16, 2004), http://www.askdrjones.com/index.php/category/postpartum-psychosis/; Robert L. Sadoff, *Mothers Who Kill Their Children*, 25 PSYCHIATRIC ANN. 601, 602 (1995).

Yates and her husband were members of a fundamentalist church led by preacher Michael Peter Woroniecki.[253]

Although varying to some degree, fundamentalist doctrines all share an essentialist ideology of gender, insisting that female and male roles are biologically based: women are born to be mothers and wives, and to defer to their husbands' leadership in life's important decisions.[254] The belief system that teaches that one's role in life is defined by one's biology limits choices: if women are anatomically destined to reproduce, then that is what they must do. Any woman's ambivalence about or rejection of the maternal role must originate from evil forces that subvert the natural order of things. Moreover, such an ideology would induce feelings of guilt and shame in response to such ambivalent or negative feelings about one's preordained role, making it extremely difficult for that conflicted individual to seek help. Thus, adherence to a fundamentalist religion that dictates roles based on gender rather than on personal affinity or choice creates yet another context confining women involuntarily to the situation of motherhood.

Correlating to the conclusion that such "choices" are not fully voluntary, but to varying degrees socially enforced, is the inability of women who know that they are not meeting those norms to seek help. The provision of such resources, in effect, would be a cultural admission that nurturing does not necessarily come naturally to women, and that fulfilling cultural stereotypes comes with hidden but real costs. Again, turning to Andrea Yates, we find that she had been left alone to care for and homeschool the couple's five children, all under the age of eight; she was also caring for her father, who was stricken with Alzheimer's disease,[255] even though care for relatives or others in the months before or after giving birth has been shown to be a risk factor for postpartum depression.[256] The Yates family (including their first

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[253] *Yates' Preacher Warned of Hellfire*, ABCNEWS, http://abcnews.go.com/GMA/story?id=126229 (last visited Oct. 26, 2013). Woroniecki wrote private letters to Yates in which he asserted "that 'the role of woman is derived . . . from the sin of Eve' and that bad children come from bad mothers." Timothy Roche, *The Yates Odyssey*, TIME, Jan. 28, 2002, at 42, 48.

[254] *See* Howland, *supra* note 250, at 284.

[255] Roche, *supra* note 253, at 96.

[256] Elizabeth K. Herz, *Prediction, Recognition, and Prevention*, *in* POSTPARTUM PSYCHIATRIC ILLNESS: A PICTURE PUZZLE 65, 73–74 (James Alexander Hamilton & Patricial Neel Harberger eds., 1992).

four children) lived in a converted bus, until Andrea's second suicide attempt, at which point her husband Rusty bought a house.[257] Rusty was so uninvolved with child-care duties that he reportedly never changed a diaper.[258] Finally, Andrea became pregnant with the couple's fifth child against medical advice.[259]

Even after Andrea Yates was diagnosed with clinical depression, tried to commit suicide twice, and was treated four times in a mental hospital, her husband failed to hire help for her or to assist her himself, instead insisting that she continue to homeschool their children.[260] When in desperation she and her husband sought medical help for her depression, hallucinations, and suicide attempts, her doctor looked her in the face and told her to "think positive thoughts."[261] Andrea Yates was discharged from the hospital while still clearly ill, and soon afterward she killed her children.[262] As this tragedy makes all too clear, society shows little recognition of PPP and offers little support to mothers who are in danger of hurting their children.[263]

The outcomes of filicide cases featuring indicia of PPP span the spectrum. At her first trial, Andrea Yates was sentenced to life in prison.[264] Lisa Gambill, after ingesting methamphetamines and having delusions that "they" were going to hurt her and her five-year-old son, drowned her child in a lake, and then removed her clothes and waited for the coming of Jesus.[265] Disregarding four expert witnesses who testified that she was legally insane at the time of the crime, the trial jury found her "Guilty but Mentally Ill" and sentenced her to sixty years imprisonment.[266] The Supreme Court of Indiana refused her appeal of the verdict, but reduced her sentence to forty years.[267] By contrast, Cheryl Lynn Massip, who

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[257] Carol Christian, *Deciding Fate Takes Heavy Toll*, HOUS. CHRON., Mar. 10, 2002, at A1.

[258] Sue Pleming, *Texas Mother's Family Points Finger at Husband*, REUTERS, Mar. 18, 2002.

[259] Philip J. Resnick, *The Andrea Yates Case: Insanity on Trial*, 55 CLEV. ST. L. REV. 147, 148 (2007).

[260] Hyman, *supra* note 225, at 196.

[261] Roche, *supra* note 253, at 49.

[262] *Id.* at 49–50.

[263] Barbara Barnett, Medea *in the Media: Narrative and Myth in Newspaper Coverage of Women Who Kill Their Children*, 7(4) JOURNALISM 411, 420 (2006).

[264] Yates v. State, 171 S.W.3d 215, 216 (2005).

[265] Gambill v. State, 675 N.E.2d 668, 671 (1997).

[266] *Id.* at 670, 672.

[267] *Id.* at 678.

placed her six-week-old baby under the wheel of her car and ran him over, was found by the court to have been insane when she committed the crime and sentenced to outpatient psychiatric treatment.[268]

Again, a contextual application of Slayer Rules would take the realities of motherhood and PPP into account and would acknowledge the factors that shaped both the act and the person who committed the act. Such understanding would lead to an evaluation of the purpose of denying the defendant the property in the estate or life insurance proceeds, which in turn would shape the decision whether to deny the defendant her property rights.

These, then, are the circumstances in which Slayer-Rule cases arise. Domestic abuse and mental illness in families sometimes end in murder because of political and social failures that trap perpetrators and victims in a downward spiral. Depriving the killer of an inheritance perpetuates injustice and may set the cycle in motion again. As the next section explains, the inheritance law's response to these fact patterns need not mirror that of the criminal justice system.

V. THE CRIMINAL JUSTICE SYSTEM VERSUS THE PROBATE SYSTEM

A. DIFFERENT RELATIONSHIPS TO SOCIAL NORMS

The argument for exempting from Slayer Rules even those convicted at trial stems partly from the different roles of criminal and inheritance law. Most scholars believe that criminal law must reflect and respond to social norms and beliefs to be credible, and because the law can't punish every wrongdoer, it relies on social acceptance of its basic premises to be obeyed.[269] Thus, the argument goes, if criminal law tried to institute or change, rather than reflect, social norms, it would lose its credibility and risk

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[268] The trial judge reduced the verdict from the jury's finding of second-degree murder to voluntary manslaughter and set aside the jury's finding of sanity; court of appeals denied the People's petition for writ of mandate and affirmed the judge's power to set aside the original verdict. People v. Massip, 271 Cal. Rptr. 868, 869 (Cal. Ct. App. 1990).

[269] PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 176–78 (2008); ERIC A. POSNER, LAW AND SOCIAL NORMS 110–11 (2000) (referring to the normative model of criminal behavior whereby "people commit crimes unless the criminal law has 'legitimacy' ").

losing its effect.[270] Thus, its purpose—deterrence—would be undermined.

Inheritance law, on the other hand, may be a more receptive arena for social policies, such as the ones implicated here, protecting abuse victims and the mentally ill. The primary purpose of wills law in the Anglo-American tradition is to effectuate the testator's intent, with certain limitations based on public policy, such as protecting the decedent's surviving spouse, preventing crime, etc. Unlike criminal law, inheritance law does not serve to deter dangerous or violent crimes or other socially disruptive acts. Thus, it may be a better, and less risky, vehicle for advancing, rather than merely reflecting, social norms. In this context, it therefore makes sense to argue that even a defendant who is convicted at trial of homicide should be exempted from the coverage of the Slayer Rules if the killing was the result of abuse or mental illness.

Moreover, as a practical political matter, inheritance law may simply be easier to change than criminal law. Public sentiment against any perceived leniency toward criminals makes any change in that direction politically risky for anyone identified with it.[271] Moreover, criminal law is also resistant to change because of its internal dynamics, which William J. Stuntz identifies as a "politics of institutional competition and cooperation" between legislators, prosecutors and judges, which keeps pushing it toward broader liability.[272] Inheritance law, on the other hand, might be a much less politically risky arena in which to propose change: very few people are aware of inheritance laws, and the public seems less likely to pay attention to or become exercised over changes in their operation.

Inheritance law is directly implicated in what Martha Albertson Fineman has identified as the politics of vulnerability.[273]

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[270] ROBINSON, *supra* note 269, at 178 (noting that the criminal law's "social influence depends upon it having moral credibility with the community").

[271] *See generally* Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997) (discussing the consequences politicians face when they appear to be too soft on crime).

[272] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

[273] Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human*

Vulnerability is part of the human condition, something all humans experience at different times in life, at least at life's beginning and end, and many of us at times in between.[274] Fineman identifies inheritance law as one of the institutions that "play[s] an important role in lessening, ameliorating, and compensating for vulnerability" by distributing what she calls "physical assets"—money and resources—that, along with human and social assets, determine how devastating these times of vulnerability will be.[275] Inheritance law, as an "asset-conferring entity," must balance its commitment to honoring the testator's intent with a concern for not disproportionately benefiting the less vulnerable at the expense of the more so.[276] The groups I identify here are vulnerable because they lack resources—physical, human, and social—that would allow them to escape or manage their vulnerability. Inheritance law is a fit arena for consideration of these realities.

The case of Lyle and Erik Menendez offers an illustration of the different roles played by the criminal justice and inheritance systems.[277] The Menendez brothers were the two wealthy teenagers who gunned down their parents in their Beverly Hills home and then claimed that the killings were the result of years of emotional, physical, and sexual abuse inflicted on them by their parents.[278] The prosecution insisted, by contrast, that the motive

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Condition, 20 YALE J.L. & FEMINISM 1, 1 (2008).

[274] *Id.*

[275] *Id.* at 13–14.

[276] *Id.* at 20.

[277] The literature on the Menendez brothers is extensive. Books include TAMMI MENENDEZ, THEY SAID WE'D NEVER MAKE IT: MY LIFE WITH ERIK MENENDEZ (2005); NORMA NOVELLI WITH MIKE WALKER, THE PRIVATE DIARY OF LYLE MENENDEZ: IN HIS OWN WORDS! (1995); RON SOBLE & JOHN H. JOHNSON, BLOOD BROTHERS: THE INSIDE STORY OF THE MENENDEZ MURDERS (1995). Recordings include *The Menendez Murder Trial: Courtroom Cassettes* Vol. 1 (2003); *The Menendez Brothers on Trial: The Real Story* (courtroom Television Network 1994); *Murder in Beverly Hills–The Menendez Brothers Murder Trial*, abc News Specials (1993); *Murder in Beverly Hills: The Menendez Trial* (1991). News feature stories include Dominick Dunne, *Nightmare on Elm Drive*, VANITY FAIR Oct. 1990; Dominick Dunne, *The Menendez Murder Trial*, VANITY FAIR, Oct. 1993; Dominick Dunne, *Menendez Justice*, VANITY FAIR, Mar. 1994. There are also numerous articles in various newspapers which will be cited individually throughout.

[278] *See, e.g.*, *Defense: It Wasn't Murder: Menendez Brothers' Attorneys Point to Abuse*, CNN, Oct. 12, 1995, http://www.cnn.com/US/9510/menendez/10-12/ (describing the events of the Menendez case); Elizabeth Gleick, *Blood Brothers*, PEOPLE MAGAZINE, Sept. 27, 1993, *available at* http://www.people.com/people/archive/article/0,,20106325,00.html.

was sheer greed. The first two trials resulted in hung juries, with the jurors evenly split—six women finding not guilty, six men finding guilty—on whether they believed that the abuse alleged by the brothers had led them to kill their parents out of fear for their lives.[279] In the third trial, following public outrage over the acquittal of O.J. Simpson (which had occurred a week earlier), the judge excluded the evidence of abuse and the brothers were convicted of murder.[280]

The testimony of abuse, given by the boys themselves and corroborated by many friends and family members, was highly credible: a younger cousin of Erik Menendez testified that a ten-year-old Erik had asked him if it was normal for his father to give him massages; an expert witness who did a blind study of the Menendez family testified about the boys' maltreatment at each of the children's developmental stages.[281] In the words of Hazel Thornton, a juror in one of the first trials who later wrote a book about her experience, "[W]hat I got out of it was that Erik, having been psychologically maltreated to such a degree his whole life, was probably *incapable* of having *planned* his parents' murder."[282] A witness that helped the FBI testified that the crime exhibited many signs of disorganization typical of domestic homicides.[283] Thornton sums up her impression as follows:

> [T]he cumulative events, overt and subtle, of the week prior to the killings were such that (together with [their father's] actual death threats, their belief that he was capable of anything, and their never having seen anyone successfully stand up to him in their lives) the boys became convinced that their lives were in imminent danger.[284]

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[279] Dominick Dunne, *L.A. in the Age of O.J.*, VANITY FAIR, Feb. 1995, *available at* http://vanityfair.com/magazine/archive/1995/02/dunne199502; Elizabeth Gleick, *Blood Brothers*, PEOPLE MAGAZINE, Sept. 27, 1993, *available at* http://www.people.com/people/archive/article/0,,20106325,00.html.

[280] *See generally* HAZEL THORNTON, HUNG JURY: THE DIARY OF A MENENDEZ JUROR (1995) (recounting the testimony of witnesses during the Menendez Trial).

[281] *Id.*

[282] *Id.* at 41.

[283] *Id.* at 42.

[284] *Id.* at 43.

The different result in the third trial, based on the trial judge's exclusion of the abuse evidence, lends weight to the argument that the criminal justice system is not a reliable proxy for guilt or innocence in cases involving domestic violence. There were, however, possible political reasons for the judge's reversal of prior rulings with respect to the evidence of abuse: the nation was outraged over the O.J. Simpson verdict, seeing it as proof that the criminal justice system had failed; cynicism was rampant that the Menendez brothers would be found not guilty by a system that was too easy on defendants and could be hoodwinked by any kind of tale of victimhood.[285] If Judge Weissberg's evidentiary ruling was motivated by an impulse to restore the public's faith in the system, even if that ruling resulted in individual injustice, such a motivation, commendable or not, at least nicely expresses concerns that animate the criminal law. By contrast, the inheritance system has less at stake in the realm of public credibility, but much more in the realm of the distribution of resources.

The next section questions the moral culpability of abuse- and mental illness-related killings in families, and argues that a legal and social system that traps victims in these situations should not then deprive them of wealth for exercising their only option for escape.

B. THE RESULTS PRODUCED BY THE CRIMINAL JUSTICE SYSTEM AS INADEQUATE JUSTIFICATION FOR APPLYING SLAYER RULES IN THE CASES DISCUSSED

The criminal justice system does not adequately adjudicate the acts of defendants in cases of killings resulting from mental illness or family violence. I show the inadequacy of criminal justice adjudication in this context by addressing the possible outcomes of the criminal justice process in these cases. This Part begins with the easiest case to make: the defendant who is either acquitted by means of a justification defense or whom a grand jury declines to indict. It turns next to the somewhat harder case of the defendant acquitted on the basis of excuse, and it concludes by assessing the cases of those convicted either on a failed or imperfect self-defense

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[285] David A. Kaplan & Donna Foote, *The Menendez Brothers Run Out of Excuses*, NEWSWEEK, Apr. 1, 1996, at 64.

argument, or through some form of plea bargain. All of these scenarios often result in the application of Slayer Rules.

1. The Justification/Acquittal/Failure-to-Indict Cases. While most Slayer Rules provide that a conviction is preclusive in the civil litigation, they also state that an acquittal is not.[286] This is the general rule: an acquittal on a criminal charge is not res judicata in a subsequent civil action.[287] This is not the case in every country that has Slayer Rules: Israel, for example, requires a conviction for the Rules to apply.[288] The *Restatement (Third) of Restitution and Unjust Enrichment*, on the other hand, eliminates the need for a conviction.[289]

Acquittals can come about in a number of ways: a finding of not guilty, insanity, or justification. Justification is a complete defense to a criminal charge: a finding that the defendant's acts were justified is a finding that no crime occurred, that under the circumstances the killing was acceptable, even commendable.[290] Self-defense is a specific form of justification defense: a defendant who successfully pleads self-defense is asserting that under the circumstances her actions were appropriate and not deserving of sanction because she faced the threat of imminent death or serious bodily harm from the person she killed and she had no other recourse than to kill that person.[291]

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[286] *See, e.g.*, N.J. STAT. ANN. 3B:7-6 (West 2005); 20 PA. CONS. STAT. ANN. §§ 8814–8814.1 (West 2013); Levenson v. Word, 686 S.E.2d 236, 237 (Ga. 2009) ("A final judgment of conviction or a guilty plea for murder, felony murder, or voluntary manslaughter is conclusive in civil proceedings . . . ."); United Farm Bureau Fam. Life Ins. Co. v. Fultz, 375 N.E.2d 601, 608 (Ind. Ct. App. 1978) (holding acquittals non-preclusive as a common-law matter); Jones v. All Am. Life Ins. Co., 325 S.E.2d 237, 241 (N.C. 1985) (noting that "the standard of proof applicable to ordinary civil actions such as this is proof by the preponderance of the evidence" and that "the required degree of proof is not changed by the fact that the conduct . . . amounts to a crime"); Pinion v. Pinion, 611 S.E.2d 271, 273 (S.C. Ct. App. 2005) ("In the absence of a conviction . . . the civil 'preponderance of evidence' standard applies. . . . [U]se of a civil burden of proof does not negate the fact the triggering event is the criminal act of a 'felonious and international killing.' ").

[287] Helvering v. Mitchell, 303 U.S. 391, 397 (1938).

[288] Cohen, *supra* note 16, at 800.

[289] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45(1) (2011).

[290] Monu Bedi, *Excusing Behavior: Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role*, 101 J. CRIM. L. & CRIMINOLOGY 575, 578 (2011); Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1337 (2006).

[291] Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 267–84 & n.7 (1975) ("If the criminal law is

Such a defense, if successful, should rule out any application of the Slayer Rules because there was no underlying crime, but it does not necessarily do so. A defendant who is acquitted in a criminal trial can still be barred under Slayer Rules: on October 6, 1982, Sawart Hampton, a Thai immigrant, killed her husband with a baseball bat after what she claimed were years of abuse, including a forced abortion, physical abuse of the children, beatings, and isolation.[292] A jury acquitted her, but the Supreme Court of Oklahoma found that the acquittal did not entitle her to the insurance policy proceeds; rather, it held that the issue of her guilt had to be relitigated in a civil proceeding, at which the contingent beneficiaries would have the opportunity to prove by a preponderance of the evidence that she committed a "felonious, intentional, unjustifiable homicide."[293]

Even in cases in which a grand jury fails to indict, or when the police find insufficient probable cause to arrest, Slayer Rules can bar the individual in question from inheriting.[294] Often, reading between the lines, we can discern hints of domestic violence behind the jury's refusal to indict. For example, in *Peoples Security Life Insurance Co. v. Arrington*, a husband was shot to death while he and his wife were together in a car, but the wife was never indicted for murder.[295] Nonetheless, the Supreme Court of Virginia held that this fact did not bar the insurance company

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limited . . . to situations involving a harm of some sort, then an act found to be beneficial, or at least not harmful, should be of no concern to the criminal law.").

[292] Steve Ward, *Self Defense or Cold Murder, Jury Asked to Decide*, TULSA TRIB., July 13, 1983, at 7D.

[293] State Mut. Life Assurance of Am. v. Hampton, 696 P.2d 1027, 1034 (Okla. 1985).

[294] *See, e.g.*, Castro v. Ballesteros-Suarez, 213 P.3d 197, 204 (Ariz. Ct. App. 2009) ("The slayer statute's provisions may be invoked without having probable cause to arrest."); Julia v. Russo, 984 So. 2d 1283, 1286 (Fla. Dist. Ct. 2008) (holding that because there had not yet been a trial, a civil court would have to determine the matter of intent); State Farm Life Ins. v. Allison, 493 S.E.2d 329, 329–30 (N.C. Ct. App. 1997) (holding that a grand jury's failure to indict did not bar a civil suit over Slayer Rule application); Jones v. All Am. Life Ins. Co., 316 S.E.2d 122, 125 (N.C. Ct. App. 1984) ("Although plaintiff does not fit the statutory definition of 'slayer' because she has not been convicted . . . she nonetheless is barred [from benefitting from the deceased's life insurance policy]."). *Cf.* State Farm Life Ins. Co. v. Smith, 363 N.E.2d 785, 791 (Ill. 1977) (holding that lack of prosecution is no bar when the slayer acts in fear of death or bodily harm).

[295] 412 S.E.2d 705, 706 (Va. 1992).

from trying in a civil proceeding to prove the wife complicit in her husband's death.[296]

In several of these cases, the killer spouse or girlfriend claimed to have acted in self-defense. In *State Farm Life Insurance Co. v. Smith*, an insurance company sued to be excused from paying out to the beneficiary because she had killed the insured and therefore should not benefit from her act under the Slayer Rule.[297] It took two appeals before the Supreme Court of Illinois ruled that it had not been proved by a preponderance of the evidence that a wife whose husband beat her viciously, knocked her to the ground, " 'bounced' her head on the car until she collapsed," threw her into the back seat of the car, and drove away with her, had committed "willful" murder of her husband.[298] The Court rejected the lower court's finding that the wife should be barred under the Slayer Rule, despite the lack of criminal prosecution.[299]

In *Metropolitan Life Insurance Co. v. Fogle*, the appellants were the couple's minor children, who claimed that their mother should be deprived of the proceeds of the life insurance policy because she had killed their father.[300] The evidence at trial indicated clearly that the mother had frequently prevented or stopped the father's abuse of the children.[301] On the day of the murder, she had shoved the husband off one of the children, who he was trying to beat with a belt.[302] The sons, who were contingent beneficiaries, still tried to have their mother barred from recovering the insurance money, claiming that the mother "intentionally placed herself in a position to continue receiving the physical abuse from [her husband] so she would have the opportunity to kill him and claim justification."[303] Although it is impossible to know how this claim evolved—for example, to what extent the decedent's parents and attorneys were involved in forming it—it does suggest one of the most insidious aspects of abuse: the frequent tendency of children to take their abuser's side, to consider the abuser's behavior as normal, and

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296 *Id.* at 707.
297 363 N.E.2d at 785.
298 *Id.* at 786–88.
299 *Id.* at 786–87.
300 419 S.E.2d 825, 826 (S.C. Ct. App. 1992).
301 *Id.* at 827.
302 *Id.*
303 *Id.* at 828 (internal quotation marks omitted).

even to perpetuate it. At the least, even if nothing but greed was involved, the Slayer Rule still allowed the children to become the mother's adversaries when in reality she was their only ally and protector; even more insidiously, these Rules allow the children or those manipulating them to perpetuate a fiction that the children might well come to believe.

2. Excuse Cases. A second possible outcome is an acquittal based on excuse—the claim that the defendant's actions, though legally wrong, were excusable under the circumstances.[304] Insanity, for example, is an excuse defense, as is (in some jurisdictions) so-called "imperfect self defense"—a claim based on the defendant's good-faith, subjective belief of death even though that belief was not objectively reasonable.[305] This type of acquittal could also result in the application of the Slayer Rule.

Even a defendant found not guilty by reason of insanity may still be barred from inheritance by the state's Slayer Rule, whether because "willful" is defined differently in the civil context or because the court determines that the Slayer Rule supplements, but does not abrogate, the common-law principle that no one should benefit from a wrong, regardless of intent.[306] If the statute covers "felonious and intentional" killings, courts in many states have held that the "intentional" prong may be met by the defendant's mere awareness that he or she was killing a human being, disregarding whatever hallucinations or delusions may have motivated him or her to do so.[307] In other states, despite being exempted from the Slayer Rules by virtue of insanity, a defendant may be barred by the common-law prohibition on profiting from a wrong, a restitution-based rule that ignores intent.[308]

In addition to the difficulty of proving insanity at trial, even a finding of "not guilty by reason of insanity" does not bar the civil proceeding. Because of the lower standard of proof, and especially the lower standard for intent, in civil cases than in criminal cases, a defendant found not to have had the requisite intent in a

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[304] WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 9.1(a)(4) (2d ed. 2012).

[305] *Id.* § 10.4(i).

[306] *See* Osman v. Osman, 737 S.E.2d 876, 879 (Va. 2013) (noting that the statute is construed broadly to effect the policy that no person shall be allowed to profit by his wrong); Reisig, *supra* note 71, at 803.

[307] *See Osman*, 737 S.E.2d at 880 (comparing criminal intent and civil intent).

[308] Reisig, *supra* note 71, at 788.

criminal case can still be found liable in a civil action.[309] The definition of intent is much broader in the civil context, requiring only a showing of the defendant's intention to commit the act, but not necessarily of the intention to achieve the consequences of the act.[310]

In *In re Estate of Kissinger*, for example, a mentally ill son, Joshua Hoge, stabbed his mother and stepbrother to death under the delusion that they were imposters.[311] Hoge was found not guilty by reason of insanity: he had a long history of severe mental illness, including paranoid schizophrenia, Capgras Syndrome (in which victims believe that those around them have been replaced by imposters), and hearing voices from the age of nine.[312] He had created an imaginary daughter, and he believed that he could enlarge toys by magic and travel through time.[313] Hoge had been on antipsychotic medication and had spent long periods of time in psychiatric hospitals.[314] As part of his plea agreement, he stipulated that he had committed the acts charged.[315]

The personal representative for the mother's estate filed a wrongful-death action against the psychiatric hospital that had failed to supply Hoge with his medication, and then brought a motion for a determination of statutory benefits, arguing that Hoge was a "slayer" who had killed "willfully and unlawfully" under the state's Slayer Rule and therefore was barred from inheriting the estate.[316] The Supreme Court of Washington agreed.[317]

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[309] *See, e.g.*, Polmatier v. Russ, 537 A.2d 468, 472 (Conn. 1988) (explaining that an "act" for civil purposes was an "external manifestation of the will," and only involuntary movements, such as convulsions or movements of the body during sleep, failed to qualify).

[310] *Id.* at 473.

[311] *In re* Estate of Kissinger, 206 P.3d 665, 667 (Wash. 2009). For similar reasoning, see *Osman*, 737 S.E.2d at 878; *Dougherty v. Cole*, 934 N.E.2d 16, 18 (Ill. App. Ct. 2010); *In re Estate of Young*, 831 P.2d 1014 (Okla. Civ. App. 1992); *In re Estate of Vadlamudi*, 443 A.2d 1113, 1114 (N.J. Super. Ct. Law Div. 1982); and *In re DeMatteo Estate*, Pa. D. & C. 3d 184 (1980). Some states do prevent the Slayer-Rule bar from applying to defendants found to be criminally insane: see, for example, *Ford v. Ford*, 512 A.2d 389, 398 (Md. 1986); and *Turner v. Turner*, 454 N.E.2d 1247 (Ind. Ct. App. 1983).

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

[313] *Id.* at 667.

[314] *Id.* at 666.

[315] *Id.* at 667.

[316] *Id.* at 666.

[317] *Id.*

The Washington Supreme Court found that Hoge's acts, while qualifying him as legally insane in a criminal context, were in fact "willful and unlawful" in the civil context, as required for the Slayer Rule to take effect.[318] As to the meaning of "willfully," the court rejected the criminal definition of the term and used its "ordinary, everyday" meaning, holding that Hoge "could [not] have been so delusional that he did not . . . know that he was killing a human being," thus interpreting "willfully" as "intentionally."[319] With respect to the "unlawfully" prong, the Court reasoned that a finding of insanity, because it is not a finding of innocence, does not negate any of the elements of the crime; in the court's words, it does not "legally authorize a person to kill another human being."[320] This holding left open the possibility that "[n]ot every homicide committed by the criminally insane is willful and deliberate," but the court based its decision on the lower court's finding that Hoge acted with "premeditated intent" when he committed the killings.[321] The same result occurred in *Dougherty v. Cole*, in which a mentally ill son stabbed his mother to death during "a severe manic episode with psychotic features" including voices in his head telling him that she was his enemy and that he had to kill her.[322] The *Dougherty* court reasoned that the Slayer Rule applied because the son "knew he was grabbing the knife and trying to kill her when he stabbed her."[323]

Ironically, the *Kissinger* court alluded to equity in analyzing the reasons that the Slayer Rule might not bar "an innocent[,] such as a subsequent heir or a victim," from inheriting.[324] But the real inequity in *Kissinger* arises from the court's simplistic and rigid reading of the terms "willfully and unlawfully" and its linked obliviousness to the equities at issue in depriving a mentally ill person of resources to get help for a condition over which that person has no control.

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[318] *Id.*

[319] *Id.* at 671.

[320] *Id.* at 670.

[321] *Id.* at 671.

[322] 934 N.E.2d 16, 21 (Ill. App. Ct. 2010).

[323] *Id.* Many cases reach a similar result: see, for example, *In re Estate of Vadlamudi*, 443 A.2d 1113, 1117 (N.J. Super. Ct. Law Div. 1982).

[324] 206 P.3d at 670.

This legal difficulty contrasts with the state of the law in most developed countries. Approximately twenty-four countries recognize PPP as a legal defense to infanticide.[325] According to the British Infanticide Act of 1922, a mother who kills her infant during its first year of life cannot be convicted of murder but only of manslaughter, upon the showing of a postpartum mental disorder.[326] In the United States, however, not only are there no such laws, but the successful use of the defense is extremely rare.[327] This lack of success seems to be related to the American public's suspicion of the insanity defense in general,[328] as well as to its romanticization of the maternal role and its corresponding harshness in regarding mothers accused of killing their infant children.

3. Convictions. The hardest cases for my argument are those in which the defendant is convicted, most likely through a failed self-defense claim or as the result of some kind of plea bargain. I address plea bargain cases first, for two reasons: (1) they represent the overwhelming majority of cases,[329] and (2) plea bargaining is

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[325] Susan Hatters Friedman & Renée Sorrentino, *Commentary: Postpartum Psychosis, Infanticide, and Insanity—Implications for Forensic Psychiatry*, 40 J. AM. ACAD. PSYCHIATRY L. 326, 327 (2012).

[326] Stacey A. Tovino, *Scientific Understandings of Postpartum Illness: Improving Health Law and Policy?*, 33 HARV. J. L. & GENDER 99, 123–24 (2010); *Infanticide Act*, 1922, 12 & 13 GEO. 5, c. 18 § 1 (Eng.), *repealed and reenacted by Infanticide Act*, 1938, 1 & 2 GEO. 6, c. 36, § 1(1) (Eng.).

[327] *See* José Gabilondo, *Irrational Exuberance About Babies: The Taste for Heterosexuality and Its Conspicuous Reproduction*, 28 B.C. THIRD WORLD L.J. 1, 68–69 (2008) ("Law in the United States law [sic] is 'remarkably inconsistent' and gives only limited recognition to 'post-partum psychosis' as a legal defense."); Jennifer L. Grossman, *Postpartum Psychosis–A Defense to Criminal Responsibility or Just Another Gimmick?*, 67 U. DET. L. REV. 311, 333–43 (1990) (detailing failed attempts to use postpartum depression and premenstrual syndrome as defenses to murder and the success of post-traumatic stress disorder as a defense to murder due to its acceptance in the medical field).

[328] Jennifer L. Skeem et al., *Venirepersons's Attitudes Toward the Insanity Defense: Developing, Refining, and Validating a Scale*, 28 LAW & HUM. BEHAV. 623, 624 (2004) ("Although public opinion surveys and empirical studies sometimes find support for the abstract rationale of the insanity defense, they consistently unveil strong negative attitudes toward the defense. . . . For example, in a large survey . . . 78% of respondents believed the insanity defense was sometimes justified. Nevertheless, about half of respondents believed the defense should be abolished, and virtually all believed that it required substantial reform. Results across studies reflect a primary concern that the insanity defense is a frequently abused 'loophole' in the law that allows many guilty criminals to escape punishment. . . ." (citations omitted)).

[329] *See infra* notes 320–44 and accompanying text.

commonly acknowledged to be a flawed proxy for actual guilt.[330] Plea bargains "count" as convictions for Slayer Rules purposes.[331]

Indeed, only a very small percentage of battered women are acquitted at trial; up to four of every five such defendants take plea bargains or are convicted.[332] Defendants accused of killing their partners are more likely to plead guilty than those who are accused of killing non-intimate partners.[333] The opinion in the recent U.S. Supreme Court case, *Missouri v. Frye*, acknowledged that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system."[334] For example, the defendant might be persuaded to plead *nolo contendere* in exchange for parole or a light sentence. By making this plea, the defendant refuses to admit guilt, but accepts the punishment as if he were guilty.[335] Most states allow these pleas,[336] which many have criticized as promoting such procedural values as speed and efficiency over such substantive values as truth and the differentiation between guilt and innocence.[337] Legal scholar Stephen J. Schulhofer asserts that "plea bargaining seriously impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent."[338] Risk-averse defendants, including innocent ones, may well accept a plea that treats them as guilty rather than risk conviction after a long and expensive trial.[339] Moreover, the prosecutor's goal is to enhance her political standing by appearing to control crime by a

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[330] *See infra* notes 320–44 and accompanying text.

[331] *See, e.g.*, Seidlitz v. Eames, 753 P.2d 775, 776 (Colo. App. 1988) (denying insurance proceeds to one who plea guilty to murdering the insured).

[332] Silja J.A. Talvi, *Cycle of Violence*, IN THESE TIMES (Oct. 11, 2002), http://inthesetimes.com/article/386/cycle_of_violence.

[333] Myrna Dawson, *Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decisionmaking Over Time*, 38 LAW & SOC'Y REV. 105, 123 (2004) (citing study showing that those defendants who killed intimate partners were more likely to enter guilty pleas for their crimes).

[334] Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (alteration in original) (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)); *see also* Lafler v. Cooper, 132 S. Ct. 1376, 1397 (2012) (explaining the same idea in a companion opinion).

[335] Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1363 (2003).

[336] *Id.* at 1371.

[337] *Id.* at 1367.

[338] Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979 (1992).

[339] *Id.* at 1981.

high conviction rate, a calculus into which actual innocence may or may not factor.[340] Defense attorneys also have many incentives to avoid trial: even those who are paid by their clients are mostly paid a one-time fee regardless of whether the case goes to trial, while those appointed to represent the indigent are sometimes required to serve without pay, and when they are paid, they often receive far below the market value of their services.[341] Similarly, Alford pleas, which allow defendants to plead guilty while maintaining their innocence, have drawn attacks for undermining the requirement of proof of guilt beyond a reasonable doubt and allowing innocent defendants to plead guilty and receive punishment.[342]

Even though ninety-four percent of state court convictions result from guilty pleas,[343] defendants enter into plea bargains for many reasons, and by no means do a majority of them flow from a defendant's wish to acknowledge his or her guilt. Several state courts have banned Alford pleas on the grounds that they risk being unintelligent, involuntary, and inaccurate.[344] That a defendant is innocent does not mean that the defendant is a fully-informed autonomous actor who can or does make an intelligent decision based on the law, especially if, as is often the case, the lawyer is an overworked and underpaid appointed counsel who pressures the defendant to plead guilty.[345] Moreover, people may plead guilty to avoid forcing their families to go through the pain, embarrassment, and expense of a trial. An excellent example of innocent defendants pleading guilty is the Wenatchee case, in

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[340] *Id.* at 1980.

[341] *Id.* at 1989.

[342] Neil H. Cogan, *Entering Judgment on a Plea of Nolo Contendere: A Reexamination of* North Carolina v. Alford *and Some Thoughts on the Relationship Between Proof and Punishment*, 17 ARIZ. L. REV. 992, 1016 (1975); *see also* Walker B. Lowman, *Recent Developments,* State of North Carolina v. Henry C. Alford*, 400 U.S. 25 (1970)*, 32 OHIO ST. L.J. 426, 433, 438–40 (1971) (expressing concern that *Alford* will lead to pressure on innocent defendants to plead and higher sentences for those who refuse to plead).

[343] Adam Liptak, *Justices Expand Right of Accused in Plea Bargains*, N.Y. TIMES, Mar. 22, 2012. The corresponding percentage for Federal Courts is ninety-seven percent. *Id.*

[344] *See, e.g.*, Ross v. State, 456 N.E.2d 420, 423 (Ind. 1983) (holding that a judge may not accept a plea of guilty when the defendant pleads guilty and maintains his innocence at the same time).

[345] *See* Martin Guggenheim, *The People's Right to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 404 (2012) (noting that the lack of resources in public defenders' offices often compels public defenders to favor guilty pleas).

which twelve people entered nolo contendere or Alford pleas to charges of child molestation; subsequent media coverage revealed that police had led the children to fabricate thousands of unfounded complaints.[346]

One can easily imagine that the pressures causing innocent people in general to plead guilty might well be intensified in the case of a female defendant charged with killing an abusive spouse or with harming her children. Such a defendant might feel unable to face the public humiliation of trial, including public testimony about the ways that she was abused, demeaned, and maltreated. A mother accused of child murder might feel so distraught with guilt that she would be unable to face trial, and both types of defendants might well fear for their fates at the hands of juries notoriously unsympathetic to those charged with either kind of crime. Jeanette Swanson, for example, who shot and killed her two children believing that someone in the area wanted to harm them and that she had to send them to heaven where they would be safe, pled guilty to two counts of deliberate homicide.[347] She was committed to the Montana state hospital for treatment under the Department of Public Health and Human Services for the "term of her natural life,"[348] even though psychological tests determined "that she was suffering from a severe mental disorder; specifically . . . schizoaffective disorder, which ran in her family, as well as agnosia, depression, and psychosis."[349] Doctors who examined Swanson agreed that she had been suffering from these illnesses for quite some time before the shootings.[350] The week before, a doctor had put Swanson on Paxil, a medication that (some claim) causes delusions and nightmares (much like the hallucinogenic drug LSD); Paxil also was the medication that Andrea Yates was taking when she drowned her children.[351]

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[346] *Id.* Details of the subsequent reversals and exonerations are discussed in Bibas, *supra* note 335, at 1385 n.118. *See also* Everett v. Perez, 78 F. Supp. 2d 1134, 1135 (E.D. Wash. 1999) (noting that two defendants entered Alford pleas to the charges of sexual abuse).

[347] *In re* Estates of Swanson, 187 P.3d 631, 632–33 (Mont. 2008).

[348] *Id.* at 633.

[349] *Id.* at 632–33.

[350] *Id.*

[351] Kim Skernogoski, *National Expert Blames Side Effects of Depression Medication*, GREAT FALLS TRIB., Aug. 28, 2002, at A1.

In *Estates of Swanson*, Jeanette's husband petitioned the district court to bar his wife from taking an interest in the children's estates.[352] He argued that Jeanette had forfeited her rights to her children's estates under the Montana Slayer-Rule statute, which covers anyone who "feloniously and intentionally kills" another.[353] The district court granted his petition, but the Montana Supreme Court reversed, holding that Jeanette's guilty plea did not have collateral estoppel effect on the civil case.[354] It noted that, whereas a guilty verdict does establish the elements of a defendant's crime, a guilty plea does not; indeed, "it is difficult to discern a defendant's motive for pleading guilty. . . . [Her plea] may have been a strategic decision, or perhaps even a choice to spare her family the added trauma of a public trial."[355] Swanson still faced a civil trial, of course, in which a showing of liability by the preponderance of the evidence of her intent would suffice to bar her.

Given this context, it seems wrong to allow guilty pleas as evidence in civil cases arising from the criminal accusation. Indeed, Federal Rule of Evidence 410 decrees that a nolo contendere plea, an offer to make a nolo contendere plea, or statements related to such a plea, are not, in any civil or criminal proceeding, "admissible against the defendant who made the plea or participated in the plea discussions."[356] Many states have similar statutes.[357]

Despite these concerns, however, many Slayer-Rule statutes allow pleas of various kinds (whether guilty, nolo contendere, or Alford) to be treated as the equivalent of convictions in probate

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[352] *In re Estates of Swanson*, 187 P.3d at 632–33.

[353] *Id.* at 633; MONT. CODE ANN. § 72-2-813(2); *see also* Peter Arant, Note, *In re* Ests. of Swansons*: The Slayer Statute and the Impact of a Guilty Plea on Collateral Estoppel in Montana*, 71 MONT. L. REV. 217, 218 (2010).

[354] *In re Estates of Swanson*, 187 P.3d at 631–32.

[355] *Id.* at 635.

[356] FED. R. EVID. 410. *But see* Walker v. Schaeffer, 814 F.2d 138 (6th Cir. 1988) (ruling that FRE 410 did not apply to civil cases brought by the criminal defendant, as opposed to civil cases in which she was the civil defendant).

[357] Colin Miller, *The Best Offense is a Good Defense: Why Criminal Defendants' Nolo Contendere Pleas Should Be Inadmissible Against Them When They Become Civil Plaintiffs*, 75 U. CIN. L. REV. 725, 726 (2006); *see, e.g.*, ARK. R. EVID. 410 (1997); O.C.G.A. § 24-4-410 (2013); OKLA. ST. ANN. tit. 12 § 2410 (West 2013); NEV. REV. STAT. ANN. 48.125 (West. 2007); N.H. REV. STAT. ANN. § 605:6 (2013); W. VA. R. EVID. 410.

proceedings.[358] These rules of admissibility vary from state to state: the Uniform Probate Code does not specifically provide that such a plea can stand in for a conviction at trial, so states that have adopted that code's provisions regarding Slayer Rules do not do so.[359] Several states, however, do: Colorado's law, for example, defines felonious killing as:

> 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, as said crimes are defined in sections 18-3-102 to 18-3-104, C.R.S.[360]

Similarly, a Louisiana court has held that "when [the defendant] pled guilty to manslaughter she admitted criminal responsibility for [the victim's] death."[361] As we have seen, plea bargains bear little relation to actual guilt, especially in the cases described here. Allowing them to trigger the Slayer-Rule bar can work gross injustice.

To turn to actual convictions resulting from trial: with respect to battered women, even though testimony about BWS is now accepted in all fifty states as evidence to substantiate a self-defense claim, this change in the law has "not made the legal system any more responsive to the self defense claims of battered women."[362] Most commentators agree that, even though most

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[358] See, for example, Colorado, Georgia, Maryland, and North Carolina's current Slayer-Rule statutes allowing pleas to be treated as, or entered as evidence of, a conviction. COLO. REV. STAT. ANN. § 15-11-803(7) (2013); O.C.G.A. § 53-1-5 (2013); MD. CODE ANN. § 10-919 (2013); N.C. GEN. STAT. ANN. § 31A-3, 31A-4 (2013); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS) § 8.4 cmt. e (2003) (noting that a plea may give rise to application of the Slayer Rule).

[359] *See, e.g.*, *In re Estates of Swanson*, 187 P.3d. at 635 (declining to accept a guilty plea as conclusive evidence of guilt and noting that "it is difficult to discern a defendant's motive for pleading guilty. . . . [The] guilty plea may have been a strategic decision or perhaps even a choice to spare her family the added trauma of a public trial.").

[360] COLO. REV. STAT. ANN. § 15-11-803(1)(b) (2011); *see also* Lunsford v. Western States Life Ins. Co., 908 P.2d 79, 83 (Colo. 1996) ("[G]uilt [for Slayer Rule purposes] is established by trial or by judgment entered on the individual's own plea, providing reliable evidence of criminal culpability.").

[361] *In re* Hamilton, 446 So. 2d 463, 465 (La. Ct. App. 1984).

[362] SCHNEIDER, *supra* note 87, at 280–81 nn.114–15. The issue of women's self-defense in

jurisdictions allow evidence of BWS to be considered when determining the reasonableness of the defendant's belief that she was in imminent danger of death or severe bodily harm, battered spouses who kill are still not adequately served by the criminal justice system.[363] In a broad sense, this inadequacy shows that men still hold disproportionate power in many social institutions, including the legal system, thus allowing them to shape the law and legal institutions around a male perspective and making them resistant to shifting to a perspective inclusive of women.[364] Whereas women are three times more likely to be killed by an intimate than to kill one themselves,[365] and far more likely to be acting in self-defense when they do kill, women who kill intimates receive significantly longer sentences than men who kill their partners.[366] Whereas women who kill generally receive longer sentences than men across the board, battered women who kill "tend to receive even longer sentences" than non-battered women, with one survey showing that "83.7 percent of [battered women] received sentences ranging from twenty-five years to life."[367]

A common outcome of trials in which the defendant makes a claim of self-defense or other defense arising from domestic

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the home calls to mind the recent growth of the so-called Castle Doctrine, embodied in a growing body of state laws that delete the duty to retreat from the self-defense doctrine and, in some cases, create a presumption that a resident who kills a home intruder is reasonable to fear bodily harm even if the intruder does not attack. For a discussion of the Castle Doctrine, see generally Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL'Y 504 (2007); and Catherine L. Carpenter, *Of the Enemy Within, The Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653 (2003). For a feminist critique of the doctrine, see JEANNIE SUK, AT HOME IN THE LAW 80 (2009), which notes that "an obvious worry [about these laws] is that in general laws that are more permissive of violence, even for self-defense purposes, increase dangers to DV victims."

[363] Marybeth H. Lenkevich, *Admitting Expert Testimony on Battered Woman Syndrome in Virginia Courts: How* Peeples *Changed Virginia Self-Defense Law*, 6 WM. & MARY J. WOMEN & LAW 297, 311 n.102 (1999).

[364] Victoria Nourse, *The "Normal" Successes and Failures of Feminism and the Criminal Law*, 75 CHI.-KENT L. REV. 951, 972–75 (2000) (noting that these social norms create an extra burden for defendants in committed relationships by imposing a "pre-retreat rule," requiring women to leave dangerous relationships simply because they are dangerous in order to meet the standard of self-defense).

[365] A.L. Kellerman & J.A. Mercy, *Men, Women, and Murder: Gender-Specific Differences in Rates of Fatal Violence and Victimization*, THE NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, PUBMED, July 1992, *available at* http://www.ncbi.nlm.nih.gov/pubmed/1635092.

[366] SCHNEIDER, *supra* note 87, at 280 n.114.

[367] *Id.*

violence is a conviction for voluntary manslaughter. Such was the case of Fayette Nale in 2007, where Nale was charged with second-degree murder and convicted of voluntary manslaughter for stabbing her husband to death.[368] In 2009, the deceased husband's personal representative, his mother, petitioned the court for forfeiture under the Michigan Slayer Rule, arguing that voluntary manslaughter fell under that statute's purview because it was "felonious and intentional," and the court granted that petition.[369] An appeal of this ruling is pending as of this writing. The denial of inheritance is not unusual; other courts hold a conviction for voluntary manslaughter to be preclusive for purposes of the Slayer-Rules bar.[370]

Fayette Nale, however, had presented evidence at trial that she was a battered spouse.[371] Indeed, there was little dispute of this claim, since the husband had admitted to raping and physically abusing his wife in the months before he died,[372] and trying to kill her at least twice during that time.[373] A neighbor reported, "There's been a lot of violence over there. It just seems to have kept escalating."[374] The police had been called to the home several

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[368] *In re* Nale Estate, 803 N.W.2d 907, 909 (Mich. Ct. App. 2010).

[369] *Id.* at 909, 910.

[370] *See, e.g.*, Harper v. Prudential Ins. Co. of Am., 662 P.2d 1264, 1271 (Kan. 1983) ("[T]he statute is applicable in situations where there has actually been a conviction of the beneficiary and bars him from recovering under an insurance policy."); Quick v. United Benefit Life Ins. Co., 213 S.E.2d 563, 569 (N.C. 1975) ("[T]he record of the beneficiary's conviction of a 'willful and unlawful killing' would be introduced and admissible in evidence . . . as a separate relevant fact which would of itself bar the beneficiary form acquiring or retaining the proceeds."); Shrader v. Equitable Life Assurance Soc'y of the United States, 485 N.E.2d 1031, 1034 (Ohio 1985) (noting that the Slayer Rule eliminates the need to prove that a beneficiary committed an act when they have been convicted of a homicide offense, but does not impair pre-existing law absent explicit legislative intent); State Mut. Life Assurance Co. of Am. v. Hampton, 696 P.2d 1027, 1032 (Okla. 1985) (finding that a conviction of first-degree manslaughter is sufficient to bar a beneficiary from recovering under the deceased's insurance policy); McClure v. McClure, 403 S.E.2d 197, 200 (W. Va. 1991) (summarizing authority where the conviction of voluntary manslaughter was sufficient to conclusively bar a slayer's right to obtain property).

[371] Paul Egan, *Wife Jailed in Killing Sues over Denied Spousal Benefits*, DETROIT NEWS, Sept. 2, 2009, at A3.

[372] Amber Hunt, *Richmond: Convicted Killer of Husband Gets Prison*, DETROIT FREE PRESS, Mar. 25, 2009 at B2.

[373] Craig Davison, *Wife Held in Richmond Man's Death*, TIMES HERALD, Sept. 15, 2007, at A1.

[374] *Jury Continues Deliberation in Case of Macomb Woman Accused of Killing Husband*, TIMES HERALD, Sept. 15, 2007, at 1A.

times on reports of domestic violence, and at the time of the husband's death, a charge of domestic assault was pending.[375] The conditions of the pending charge were that the husband refrain from alcohol; the autopsy, however, revealed high levels of alcohol in his system.[376] Although the police initially promised to release records of previous domestic assault calls from the Nale home, they reneged at the request of the prosecutor's office.[377] Apparently, the jurors had difficulty reaching a verdict: one had to leave the jury room, and the same juror cried as the verdict was read.[378] Fayette Nale's attorney speculated that the juror had been the object of "intense pressure, maybe coercion."[379]

The Nale case is not unusual.[380] Because seventy to eighty percent of battered spouses are convicted when charged with killing their abusers[381] due to flaws afflicting their self-defense claims, the results are not, and should not be, seen as a proxy for the real kind of wrong that the equitably-based Slayer Rules require. The record in probate court cases often makes it hard to determine underlying facts of the murder case—sometimes only trace indicators in the opinion raise suspicions that domestic violence was involved.[382] Another problem with manslaughter convictions is that states that fail to distinguish between voluntary and involuntary manslaughter allow the civil proceeding to determine whether the killing occurred "intentionally," a question determined by a lower "preponderance of the evidence"

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[375] Appellant's Brief at 6, *In re* Nale Estate, 803 N.W.2d 907 (Mich. Ct. App. 2010).

[376] *Id.*

[377] Shannon Murphy, *Wife Charged with Killing her Husband*, TIMES HERALD, Sept. 18, 2007, at A1.

[378] Amber Hunt, *Jury Convicts Woman in Husband's Death Mt. Clemens*, DETROIT FREE PRESS, Feb. 20, 2009, at B2.

[379] *Id.*

[380] *See, e.g.*, Ovalle v. Ovalle, 604 S.W.2d 526, 529 (Tex. Civ. App. 1980) (holding in a probate proceeding that the trial court's finding that defendant acted in self-defense was against the weight of the evidence).

[381] Carol Jacobson, *When Justice is Battered*, SOLIDARITY (Sept.–Oct. 2007), http://www.solidarity-us.org/site/node/729 ("[D]omestic violence victims had higher conviction rules (78%) and longer sentences than all others charged with homicide. . . .").

[382] *See, e.g.*, *In re* Matter of McCarty, 762 S.W.2d 458, 459 (Mo. Ct. App. 1988) (describing defendant's aggressive behavior prior to shooting her husband, where she claimed she would shoot him if he hit her, and the multiple calls to the police and interactions with third parties moments before the killing).

standard.[383] Thus, a jury feeling sympathy for the defendant's self-defense claim but also feeling constrained by the law to convict (potentially for a lesser crime) would leave the defendant vulnerable to a finding of intent under a lower standard that would trigger the Slayer-Rules bar.[384]

Another potential twist on the significance of convictions arises even when the defendant is convicted of involuntary manslaughter. This non-willful crime does not fall under the ambit of the typical Slayer-Rule statute, but some courts hold that the statute does not preempt the common law and thus crimes that would have barred the defendant under the common law, including involuntary killings, can continue to have the same effect.[385] Yet another scenario is posed by a conviction that is pending appeal. Appeals allow for the review of rulings concerning the admissibility of potentially exculpatory psychiatric or other scientific evidence, yet the existence of a pending appeal does not necessarily bar the Slayer Rules from operating.[386] This confusing state of affairs creates the risk that the estate or life-insurance proceeds will be distributed based on the collateral-estoppel effects of the trial conviction, allowing the distributee to dissipate the funds before the appeals process has ended.[387] This problem is of special concern, because appeals courts are usually the venues

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[383] *Id.* at 461.

[384] *See, e.g.*, *In re* Estate of Hoover, 682 P.2d 469, 473 (Ariz. Ct. App. 1984) (noting that a conviction for manslaughter, which requires only reckless intent, is "something less than" an intentional killing).

[385] *See, e.g.*, Quick v. United Benefit Life Ins. Co., 213 S.E.2d 563, 569 (N.C. 1975) (holding that the Slayer-Rule statute that specified "unlawful and willful" killings did not preempt the common-law doctrine that no one should profit from his wrong, and thus even one convicted of a non-willful crime was barred); McClure v. McClure, 403 S.E.2d 197, 200 (Va. Ct. App. 1991) (determining the Slayer-Rule statute was not intended to change the common law and its basic rule that "one shall not profit from his own wrong").

[386] *See, e.g.*, State Farm Life Ins. Co. v. Davidson, 495 N.E.2d 520, 522 (Ill. App. Ct. 1986) (asserting that the judgment of the trial court is a determination of guilt until reversed); Home Ins. Co. v. Butler, 922 S.W.2d 66, 68 (Mo. Ct. App. 1996) ("A judgment of conviction . . . is conclusive evidence that the beneficiary . . . killed the insured and is not subject to collateral attack . . . ."); *In re* Estate of Stafford, 244 S.W.3d 368, 370 (Tex. Ct. App. 2008) ("[Slayer-Rule statute] does not require a 'final conviction' before a beneficiary forfeits his right to the proceeds . . . ."). *But see* VIRGINIA CODE ANN. § 64.1-18 (1973) (requiring a conviction of murder for the Rule to operate); Prudential Ins. Co. of Am. v. Tull, 524 F. Supp. 166, 169 (E.D. Va. 1981) (interpreting Virginia statute to mean that all appeals must be exhausted before proceeds can be distributed).

[387] *State Farm*, 495 N.E.2d at 522 (Kasserman, J., dissenting).

where abused spouses, children, and the mentally ill find relief: these courts often reverse rulings about the admissibility of expert psychological evidence and are often better equipped to apply the nuances of the law to such evidence.

Moreover, because many lawyers who represent battered women who kill lack any training in the context of domestic violence, or in applying the law to domestic violence cases, they often fail to mount an adequate defense, or even to see the possibility of doing so,[388] and therefore may recommend some kind of plea bargain instead of a vigorous defense. A majority of ineffective-assistance-of-counsel claims brought by women who were convicted of killing their abusers fall under the heading of attorney error rarely reviewed by courts, especially if the claimed error consists of the attorney's failure to seek out evidence helpful to the defense.[389] The majority of such ineffective-assistance claims by battered women who kill identify faulty advice in the plea-bargaining process or in deciding whether the defendant should testify, with the result that the woman's fear of death or severe bodily harm is not in evidence.[390]

With respect to mental illness, a conviction based on a failed insanity plea is also an unreliable indicator of the defendant woman's or child's culpable mental state. It is very hard to make an insanity claim in a criminal context because the American public, which is generally suspicious of insanity pleas, tends to view them as fakery simulated by the defendant to avoid paying for a crime. The Insanity Defense Reform Act of 1984 shifted the burden of proof in federal courts to the defendant to prove insanity, rather than leaving it with the prosecution to prove the defendant's mental state, and raised the standard of proof from a preponderance of the evidence to clear and convincing evidence.[391] Most state courts followed suit.[392] These two changes significantly increased the difficulty of proving insanity, a task that was never easy. Moreover, the applicable tests offer limited scope for such a

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[388] SCHNEIDER, *supra* note 87, at 121–22.

[389] *Id.* at 144–45.

[390] *Id.*

[391] Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057 (1984) (codified at 18 U.S.C. § 17 (2006)).

[392] *The Insanity Defense Among the States*, FINDLAW, http://criminal.findlaw.com/criminal-procedure/the-insanity-defense-among-the-states.html (last visited Oct. 26, 2013).

defense. Thus, a defendant raising such a defense is likely to be found guilty.

"Proving insanity is very difficult, even in cases with overwhelming evidence of long-term, untreated mental illness."[393] This difficulty is especially true then in cases of postpartum depression, where the defense must prove "mental impairment in a seemingly normal woman with no history of mental illness."[394] Although the psychosis from which the woman is suffering may have been going on for some time, it often goes undetected, thus creating the illusion that it is being invoked as a ruse to escape punishment.

VI. POSSIBLE SOLUTIONS

A. ELIMINATING SLAYER RULES ALTOGETHER

One possible solution to this dilemma is to rescind Slayer Rules across the board. The advantage to this solution is that it would clearly eliminate the many cases of injustice that seem to flow from Slayer Rules' enforcement in the family context. A number of drawbacks, however, attend this proposal. First, in cases of killers motivated by financial gain or abusive spouses who kill their victims as the culmination of the cycle of abuse—*i.e.*, cases which might support the application of Slayer Rules—relatives would be left to file wrongful death suits in civil court, possibly after the proceeds of the estate have been disbursed and dissipated. Such a change would delay and perhaps eliminate these plaintiffs' ability to collect damages. Aside from likely being politically unpalatable, this plan entails the risk that a high-profile-family-murder-for-profit case (like *Riggs*) might reinitiate the cycle that led to these laws in the first place: plaintiffs who demand that a court deny inheritance to a financially motivated or sociopathic slayer, leading to a decision seen as unfair or legally suspect and the demand for reinstatement of Slayer Rules.

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[393] 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 (2011).

[394] Lindsey C. Perry, Note, *A Mystery of Motherhood: The Legal Consequences of Insufficient Research on Postpartum Illness*, 42 GA. L. REV. 193, 204 (2007).

B. ENFORCING SLAYER RULES ONLY IN CASES OF FINANCIAL MOTIVE

A second possibility would be to limit Slayer Rules to cover only cases in which the killer was motivated by financial gain. Such a statute might read as follows:

> (1) An individual who feloniously and intentionally kills the decedent with the primary motivation of gaining financial benefit from the decedent's death through inheritance or succession or through the proceeds of a life insurance policy, or an individual who kills the decedent as an act of domestic violence: 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, a family allowance, and exempt property. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his or her intestate share.
>
> (2) The felonious and intentional killing of the decedent does all of the following:
>
> (a) Revokes all of the following that are revocable:
>
> (*i*) Disposition or appointment of property made by the decedent to the killer in a governing instrument.
>
> (*ii*) Provision in a governing instrument conferring a general or nongeneral power of appointment on the killer.
>
> (*iii*) Nomination of the killer in a governing instrument, nominating or appointing the killer to serve in a fiduciary or representative capacity, including a personal representative, executor, trustee, or agent.
>
> (b) Severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship, transforming the interests of the decedent and killer into tenancies in common.

The question of the decedent's primary motive can be decided, if necessary, in a civil proceeding similar to the proceedings that resolve these cases as the law stands now, by a preponderance of the evidence. The criminal trial would not necessarily have established motive; as Jerome Hall stated in 1960, "hardly any part of penal law is more definitely settled than that motive is irrelevant,"[395] due to the notorious "inscrutability of other minds."[396] The lower standard of proof in the civil proceeding would alleviate both some of the possible concerns about the susceptibility of motive to proof and concerns that a defendant might pretend to have had some other motive—self-defense, for example—to disguise the fact that the real motivation for the crime was financial gain.

Because fraud might seem like a reasonable worry under the modified regime I propose, it is addressed below. After all, might not a conniving spouse find a way to kill her husband to inherit his estate and manage to disguise the killing as a response to spousal abuse? Likewise, might not a sociopathic child—the Menendez brothers, who I will discuss more shortly come to mind—kill a parent for gain and then claim what Alan Dershowitz calls "the abuse excuse?"[397] Or imagine the same sociopathic child scenario with the child then claiming insanity.

The fact is, however, that successful fraud is unlikely. In fact, I suggest that false negatives are much more likely in this context. As I have explained elsewhere and as numerous experts in the field have noted, batterers are gifted dissemblers, experts at hiding their abuse from the outside world, relatives, and friends.[398] Batterers' denial of their actions is so profound that they deny their actions to themselves.[399] They are talented at presenting

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[395] JEROME HALL, GENERAL PRINCIPLE OF CRIMINAL LAW 88 (2d ed. 1960).

[396] Gavin F. Quill, *Motivation, Causation, and Hate Crimes Sentencing Enhancement: A Cautious Approach to Mind Reading and Incarceration*, 59 DRAKE L. REV. 187, 191 (2010); *see also* George P. Fletcher, *Rethinking Criminal Law*, § 6.6.4, at 472 (1978) ("[T]he requirement of manifestly criminal conduct might be defended on evidentiary grounds. . . . It is so difficult to discern the subjective state of intending. . . .").

[397] ALAN M. DERSHOWITZ, THE ABUSE EXCUSE 3, 45 (1994).

[398] *See generally* Erin Street Mateer, Comment, *Compelling Jekyll to Ditch Hyde: How the Law Ought to Address Batterer Duplicity*, 48 HOW. L.J. 525 (2004) (discussing how batterers hide their abuse); DONALD G. DUTTON, THE ABUSIVE PERSONALITY: VIOLENCE AND CONTROL IN INTIMATE RELATIONSHIPS (1998) (same).

[399] Mateer, *supra* note 398, at 525 (noting that the batterer "shields [himself] from the

themselves to people outside the home as "nice guys." One observer commented that "[he] murdered his wife . . . . [Y]ou would have never believed it . . . . [H]e was the nicest guy."[400] More than one battered women's advocate has used the phrase "Jekyll and Hyde" to describe the changes in the batterer's personality.[401] Victims have observed that "[h]is friends never see the other side of him; they think he's just a nice guy, just one of the boys."[402] Batterers carefully regulate their behavior in public, needing to cultivate a positive image among their peers to maintain their positive image of themselves.[403]

An objection to this proposal might arise from concerns about administrability: how can a court determine the "primary motive" behind a murder when the origins of murder are rarely completely rational or even discernible? How can a jury see into the mind of a defendant clearly enough to pronounce with certainty as to its motivation? The answer to this is that there already exits a framework for precisely this kind of analysis in employment discrimination law. The case of *Price Waterhouse v. Hopkins* sets out the steps in the inquiry; according to *Price Waterhouse*,

> when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.[404]

Two years after the decision in *Price Waterhouse*, Congress overruled it by a statute, the 1991 Civil Rights Act, which requires only that illegal factors such as race and gender be a "motivating factor . . . even though other factors also motivated the

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demands of his own conscience" by denying the violence to himself).

[400] *Id.*

[401] *See, e.g.*, *id.* (using Jekyll and Hyde analogy); DUTTON, *supra* note 398, at 53 (reporting that his notes from therapy sessions contain allusions to batterers as having Jekyll and Hyde personalities).

[402] DUTTON, *supra* note 398, at 53.

[403] Mateer, *supra* note 398, at 544.

[404] Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075, *as recognized in* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2571 (2013).

[discriminatory] practice."[405] Nonetheless, because of the divergent purposes underlying civil rights law and succession law, I propose using the *Price Waterhouse* framework to determine "primary motive" in slayer cases. Congress supplanted the *Price Waterhouse* test because it feared that the holding had lessened the reach of employment discrimination claims by allowing employers to prevail by showing that they would have taken the same employment action absent the illegal consideration, thus depriving plaintiffs in so-called "mixed motive" cases.[406] Since considerations other than the protection of civil rights, such as efficiency and administrability, apply here, I suggest that the *Price Waterhouse* test would work well. The objecters to the will or the intestate inheritance would have to show that financial gain was a motivating factor in the killing, upon which showing, the burden of proof would shift to the defendant to show the killing would have taken place without the financial element.

Although administrability may not be a concern, a drawback to this solution is that the abusive spouse who kills his abuse victim likely eludes the statute's reach. Although profit may be the result of such a killing, it could be plausibly argued that the chief motivation was the need to control the victim and punish her for seeking to escape the abuser's control, a motivation which is not primarily financial.

C. ADDING EQUITABLE EXCEPTIONS TO THE STATUTES IN CASES OF DOMESTIC VIOLENCE OR MENTAL ILLNESS

The third possible solution consists of equitable exceptions that specifically target domestic abuse and mental illness in the family. Although some equitable exceptions, or equivalents, exist under current law, none of them addresses the dysfunctional family scenario in ways that overcome the Slayer Rules' injustice in these situations.[407]

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[405] Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991).

[406] *See generally* Jeffery S. Klein et al., *Assessment of Evidence In "Mixed Motive" Discrimination Cases*, EMPLOYER UPDATE (Labor and Emp. Law and Emp. Benefits Grp. Of Weil, Toshel & Manges, LLP, New York, N.Y.) (2003) (discussing Congress's motives for overruling *Price Waterhouse*).

[407] *See infra* notes 410–26 and accompanying text.

1. Current Equitable Exceptions. Although there have been various attempts to modify the strict application of these Rules, both in the United States and abroad, none of these "equitable exceptions" completely solves the problems that the Rules raise in the kinds of cases I discuss here.

The only state in the United States that has some sort of equitable exception in its Slayer Rule is Alaska, where a unique "manifest injustice" doctrine allows a court, in cases of unintentional felonious killings, to set aside the application of the Slayer-Rule statute if it finds that the application of that statute would result in "manifest injustice."[408] But this statutory escape hatch is still deficient in many respects. First, and most obviously, it covers only unintentional felonious killings,[409] a category that as argued above, does not cover the full range of killings in which Slayer Rules can result in injustice. For example, a woman who kills her batterer may be acquitted on the grounds of self-defense, but she has still killed intentionally and thus is subject to Slayer Rules. Second, the statute is too vague to address the concerns that I have raised. As one court complained, the statutory exception "does not explain what circumstances might justify a finding of manifest injustice."[410]

A look at comparable laws in other nations is instructive. The English Forfeiture Act, for example, contains a similar provision, allowing the court to examine "the conduct of the offender and of the deceased, and [ ] such other circumstances as appear to the court to be material."[411] A court explained:

> The court is entitled to take into account a whole range of circumstances relevant to the discretion, quite apart from the conduct of the offender and the deceased: the relationship between them; the degree of moral culpability for what has happened; the nature and gravity of the offence; the intentions of the deceased; the size of the estate and the value of the property in dispute; the financial position of the

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408 ALASKA STAT. ANN. § 13.12.803(k) (West 2013).

409 *Id.*

410 *In re* Estate of Blodgett, 147 P.3d 702, 713 (Alaska 2006) (Eastaugh, J., concurring).

411 Forfeiture Act, 1982, c. 34, § 2(2) (Eng.).

> offender; and the moral claims and wishes of those who would be entitled to take the property on the application of the forfeiture rule.[412]

Whereas this "equitable window" is slightly more focused, instructing the court to take account of the parties' relationship and the degree of moral culpability for the murder, it does not even mention abuse as a factor for the court to consider. A court might seek or pay attention to signs of abuse under this rubric, but it would not be directed or compelled to do so.

There is also an equitable window in the New York probate jurisprudence. Oddly, the state that produced *Riggs v. Palmer*[413] does not have a codified Slayer Rule; rather, it relies on *Riggs* as case-law authority for denying inheritance or other benefits to killers.[414] While theoretically this gap should leave room for a court to consider evidence of abuse or mental illness as a mitigating factor, a review of the New York cases indicates that courts are not doing so.[415] Part of the problem is that New York law, like that of most other states, draws the line between intentional and unintentional homicide,[416] and killings motivated by abuse are intentional. Nor do New York courts seem to distinguish precedent to relieve those adjudicated as not guilty by reason of insanity from the application of Slayer Rules. Although they allow for a separate hearing in these cases, the lower standard of proof in civil cases (as discussed above) still can lead to unjust results.

The New York courts' failure to apply equitable considerations, arising from a history of abuse in Slayer-Rule cases, appears most recently in *In re Estate of Barrett*.[417] In *Barrett,* a wife shot her husband and was convicted of manslaughter in the first degree. Her conviction was later overturned based on erroneous

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[412] Dunbar v. Plant, [1998] Ch. 412 at 427–28 (Eng.).

[413] 22 N.E. 188 (N.Y. 1889).

[414] *See, e.g.*, Union Sec. Life Ins. Co. of N.Y. v. JJG-1994, No. 1:10-CV-00369, 2011 WL 3737277, at *3 (N.D.N.Y. Aug. 24, 2011) (referring to New York's "common law rule"); *In re* Loud's Estate, 334 N.Y.S.2d 969, 970 (1972) (noting that "[p]ublic policy in this state denies benefits" to killers of decedents, and referring to *Riggs* as authority).

[415] *See, e.g.*, *Union Sec. Life Inc. Co.*, 2011 WL 3737277, at *1 (applying Slayer Rule despite circumstances of death).

[416] *In re Loud's Estate*, 334 N.Y.S.2d at 971.

[417] *Matter of Barrett*, 637 N.Y.S.2d 751, 752 (N.Y. App. Div. 1996).

evidentiary rulings, and the grand jury declined to reindict her.[418] Despite ample evidence at trial of spousal abuse by the husband—for example, several witnesses testified that the decedent regularly beat and threatened the defendant, that on the day in question he had threatened to "blow her head off," and that she had heard a "clicking sound" as if he were loading a gun[419]—the Appellate Division reversed the Surrogate's Court ruling that the wife could receive the insurance proceeds, holding that there was an issue of fact whether the defendant had acted in self-defense.[420]

The same failure occurred in a 2011 case where a minor son killed his father with a shotgun while the father was lying on a couch.[421] The son was found to have been acting under "extreme emotional disturbance," but not in self-defense.[422] The facts of the case strongly suggest a background of abuse: the finding of "extreme emotional disturbance," the killing of the parent in a nonconfrontational situation, and, indeed, the killing itself combine to indicate that this murder was likely the result of abuse.

In a hearing to determine the beneficiary of the father's life insurance policy, the defendant urged the court that, "because the slayer rule is not codified, [it] should not apply the law in consideration of [the defendant's] age and emotional disturbance."[423] The court declined to apply these equitable considerations; in fact, it declined to make an equitable ruling at all, stating that "because neither [the defendant's] age nor his emotional state fall under the exception to the slayer rule [for non-voluntary acts such as those committed under somnambulism,[424] insanity, self-defense or accident], the Court finds that there are

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[418] *Id.*

[419] People v. Barrett, 189 A.D.2d 879, 879–80 (N.Y. App. Div. 1993).

[420] *Matter of Barrett*, 637 N.Y.S.2d at 752.

[421] Union Sec. Life Ins. Co. of N.Y. v. JJG-1994, No. 1:10-CV-00369, 2011 WL 3737277, at *1 (N.D.N.Y. Aug. 24, 2011).

[422] *Id.* at *3. The boy's attorney explained that "there were allegations [of abuse] but they never went anywhere" in the Family Court case. E-mail to author, August 29, 2012 (on file with author).

[423] *Union Sec. Life Ins. Co.*, 2011 WL 3737277, at *5.

[424] *See, e.g.*, *In re* Eckhardt's Estate, 54 N.Y.S.2d 484, 986 (Sur. Ct. Orange Cnty. 1945) (noting that defendant wife was unable to appreciate the nature of her acts due to somnambulism (*i.e.*, sleepwalking)).

no genuine issues of material fact" and that the minor son was barred from receiving the proceeds.[425]

The fact is, as Tim Stretton and Rosemary Auchmuty have shown, equity broadly defined does not necessarily help women or other vulnerable groups.[426] For equity to help those groups, it must be focused in the right direction. The reformed statute I propose in this section would achieve this end without constraining judges' application of their discretion too severely; rather than limiting discretion, I seek to focus it on the areas most in need. This statute requires consideration of a history of abuse and the effects of that abuse, as well as mental illness, as background relevant to determining the nature of the killing in Slayer-Rules cases. It also provides that a finding under the statute that the Slayer Rule does not apply will bar any civil action for wrongful death against the defendant. This is necessary to make the statute effective, since without such a provision, a claimant could obviate the effect of the law by bringing and winning a civil action against the defendant for money damages.

2. Proposed Reforms. The reformed statute I propose provides:

> In any hearing to determine the effect of the State Slayer Rule [codified at xxx] on a defendant's right to inherit or succeed to the victim's estate or receive the proceeds from a life insurance policy on the victim's life to which the defendant is a beneficiary, the Court shall decline to apply the Slayer Rule as a bar if the decedent was related to the defendant by blood or marriage or shared commitment to an intimate relationship and:
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> a. The Court finds by a preponderance of the evidence that the decedent engaged in a pattern of severe and prolonged psychological, physical,

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[425] *Union Sec. Life Ins. Co.*, 2011 WL 3737277, at *4–5.

[426] Rosemary Auchmuty, *The Fiction of Equity*, *in* FEMINIST PERSPECTIVES ON EQUITY AND TRUSTS 1, 14 (Susan Scott-Hunt & Hilary Lim eds., 2001) ("[R]ecent research by legal feminists has all but dismantled equity's claim to offer women special protection."). For an early modern account, see TIM STRETTON, WOMEN WAGING LAW IN ELIZABETHAN ENGLAND (1998), which discusses the experience of women in litigation and compares the legal rights and status of women in theory to the true experience of women.

or sexual abuse of the defendant which was a substantial factor in the killing; or

b. The Court finds by a preponderance of the evidence that the defendant suffered from a severe mental illness which was a substantial factor in the killing.

Under this section, a finding by a criminal court that the defendant was not guilty by reason of insanity, or that a defendant acted in self defense [or imperfect self-defense], or a refusal of a grand jury to indict, will be preclusive in any hearing in a civil court as to the application of the Slayer Rule.

Under this section, any of the following shall constitute sufficient evidence to require the admission of expert testimony to establish the existence or non-existence of a pattern of spousal/child abuse:

a. Physical violence, in the form of assault, extreme corporal punishment beyond the range of the normal child disciplining (in the case of a child), prolonged deprivation of food and/or medicine;
b. Intimidation, in the form of physical assault or the threat of physical assault, or threats of harm to self, children, pets, or others the victim cared about, in order to force the victim to perform acts against her/his will;
c. Emotional abuse, including but not limited to: insulting the victim, making the victim think she/he is crazy, humiliating the victim, and calling the victim names;
d. Isolation (of a spouse), including but not limited to: restricting the victim's involvement with friends, family, and/or co-workers; controlling the victim's activities, such as where she/he goes, what she/he does, what she/he reads or watches on television; and controlling access to transportation;
e. Economic abuse (of a spouse), including but not limited to: preventing the victim from getting or keeping a job, making her/him ask for money,

making her/him live on an allowance, taking her/his money, denying the victim access to family resources or income, and causing disruptions at her/his workplace that result in her/his losing her/his job or not allowing her/him to get a job; or

f. Coercion and threats, including but not limited to: forcing the victim to perform illegal acts, making the victim drop charges against the abuser, and forcing the victim to have sex.

It is an affirmative defense under this section that the defendant's conduct did not constitute an ongoing pattern of abuse toward the decedent, but rather consisted of isolated and/or mutual acts of physical or verbal aggression.

Under this section, any of the following shall constitute sufficient evidence to require the admission of expert testimony to establish the existence or non-existence of severe mental illness on the part of the killer, which played a substantial part in the killing:

a. Medical diagnosis of a severe mental disorder by a licensed psychiatrist, psychologist, or other health professional qualified to make such a diagnosis;
b. A history of psychotic episodes requiring hospitalization or medication;
c. A history of threats to family members or others brought on by delusions and hallucinations; or
d. A history of psychotic episodes involving auditory or visual hallucinations.[427]

A finding that application of the Slayer Rule is barred will serve as a bar to any wrongful death lawsuit against the defendant.

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[427] This draft is modeled after MODEL PENAL CODE § 5.01 "Criminal Attempt."

VII. CONCLUSION

Legal, moral, and policy considerations demand reassessment and reformulation of the interacting laws of homicide and inheritance. It is time to face the real circumstances in which Slayer-Rule killings occur and to acknowledge and remedy the injustices resulting from applying these Rules to those individuals (usually women and children) that society and law have trapped in regimes of terror or without help for mental illness. For example, in consequence of losing her probate action, Charlotte Mahoney lost about $3,000, the exact amount that it would have taken to pay the remaining mortgage on her house.[428] As a result, she emerged from prison homeless. If indeed she was a battered spouse, her case offers an illustration not just of Slayer Rules, but of their need for reform.

[428] The bank holding the mortgage foreclosed on it while Charlotte was in prison; the remaining balance was $5,435. *Ban Files Foreclosure Against Mrs. Mahoney*, 2 ST. ALBANS MESSENGER, June 27, 1962.