O TO A, FOR HELPING KILL O: WISCONSIN'S DECISION NOT TO BAR INHERITANCE TO INDIVIDUALS WHO ASSIST A DECEDENT IN SUICIDE

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I. INTRODUCTION

It has been a long-standing, fundamental maxim of common law that no one shall be permitted to profit by his own fraud, take advantage of his own wrong or to acquire property by his own crime.[1] Like other states, Wisconsin has used this "slayer rule" to disqualify an individual's inheritance rights when he kills the decedent.[2] States have used the slayer rule and subsequently enacted slayer statutes to deter crime and prevent unjust enrichment.[3]

Nearly every state legislature has codified the common law principle into a slayer statute and has agreed that a prospective beneficiary who murders the benefactor may not collect his inheritance.[4] State courts, however, have inconsistently applied their slayer statutes to crimes other than murder.[5] Most recently, the Wisconsin Court of Appeals did not apply its slayer statute to the offense of assisted suicide in the case of *In re Estate of*

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1. *See In re* Wilkins' Estate, 211 N.W. 652, 654-55 (Wis. 1927), *overruled in part by In re* Will of Wilson, 92 N.W.2d 282 (Wis. 1958) (tracing the origin of the maxim that one should not profit from his wrongdoing to the Code of Napoleon, the common law of England, and the foundation of every religious faith).

2. *See, e.g., id.* at 655 (terminating the murderer's inheritance interest to prevent him from profiting from his crime).

3. *See* Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 620-22 (2009) (noting that slayer statutes typically create a mandatory prohibition on inheritance even if contrary to the testators' wishes).

4. *See, e.g.*, WIS. STAT. § 854.14 (2008) (codifying the common law principle that no beneficiary should benefit from killing a benefactor); *see also* Alissa Macomber, Note, *To Pay or Not to Pay: The Nevada Slayer Statute and the Insurance Companies' Dilemma*, 9 NEV. L.J. 475, 478 (2009) (stating that forty-five states and the District of Columbia codified the slayer rule).

5. *Compare In re* Estate of Safran, 306 N.W.2d 27, 33 (Wis. 1981) (declining to extend the slayer rule to include involuntary manslaughter), *with* Quick *ex rel.* Estate of Quick v. United Benefit Life Ins. Co., 213 S.E.2d 563, 571 (N.C. 1975) (extending the slayer rule to involuntary manslaughter because the crime involves acts that are inconsistent with a proper regard for human life).

Schunk.[6]

This Comment argues that Wisconsin should not allow an individual who commits assisted suicide to inherit from a benefactor whose death resulted from the assistance.[7] Part II examines the historical development of Wisconsin's slayer statute and the State's ban on assisted suicide.[8] Additionally, Part II of this Comment explores canons of statutory interpretation, explains the principles of causation in Wisconsin's criminal code, and discusses the facts and decision in the *Schunk* case.[9] Part III argues that the Wisconsin Court of Appeals erred in *Schunk* because its decision frustrated the purpose of the slayer rule by allowing individuals who commit assisted suicide to inherit.[10] Part IV offers policy arguments in support of disqualifying individuals who help others commit suicide from inheriting property of the decedent.[11] Finally, Part V of this Comment concludes that by barring inheritance to individuals who have committed assisted suicide, Wisconsin courts would be consistently applying the State's slayer statute while simultaneously respecting the State's criminal prohibition of assisted suicide.[12]

II. BACKGROUND

A. Wisconsin's Slayer Statute

1. Common Law Origins

In 1927, the Wisconsin Supreme Court in the case of *In re Wilkins' Estate* considered the issue of whether a potential beneficiary who murdered a testator could inherit under the will.[13] By applying the widely-

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6. *See In re* Estate of Schunk, 2008 WI App 157, ¶ 13, 314 Wis. 2d 483, 760 N.W.2d 446, 448-49, *cert. denied sub nom.* Lemmer v. Schunk, 2009 WI 23, 764 N.W.2d 532 (holding that the slayer statue does not apply to assisted suicide because it is not a "killing").

7. *See In re Wilkins' Estate*, 211 N.W. at 656 (arguing that allowing a criminal to profit from his crime subverts the purpose of law).

8. *See infra* Part II.A.1-2, II.B (outlining how the Wisconsin Legislature has expanded the statute to conform to its common law antecedent).

9. *See infra* Part II.A.3, II.C, II.D (explaining how the Wisconsin Court of Appeals concluded that the slayer statute does not reach assisted suicide).

10. *See infra* Part III (arguing that the court misinterpreted the definition of "to kill," and thus misunderstood the word "killing" in the slayer statute).

11. *See infra* Part IV (illustrating how the *Schunk* decision rewards individuals who commit assisted suicide while it penalizes those who refuse to be involved).

12. *See infra* Part V (concluding that assisted suicide is an "unlawful and intentional killing").

13. *See In re* Wilkins' Estate, 211 N.W. 652, 653 (Wis. 1927), *overruled in part by In re* Will of Wilson, 92 N.W.2d 282 (Wis. 1958) (noting that the case was one of first impression in the State).

recognized, equitable doctrine that no one should profit from his own wrongdoing ("common law principle"), the court prohibited the beneficiary from collecting his inheritance.[14]

Since the decision in *Wilkins' Estate*, Wisconsin courts have applied this common law principle in various other property contexts, including joint tenancy, insurance claims, and marital property rights.[15] Although Wisconsin courts have expanded the slayer rule in some decisions, they have also limited its application by excluding unintentional crimes such as involuntary manslaughter.[16] Until *Schunk*, the Wisconsin courts have not considered whether committing assisted suicide, an intentional crime, disqualifies a beneficiary from profiting from the benefactor's will.[17]

2. The Statutory Codification of the Common Law

Although the Wisconsin courts have consistently applied the common law principle since deciding *Wilkins' Estate* in 1927, it was not until 1981 that the Legislature codified the principle by adding several amendments to various Wisconsin statutes.[18] Through the provisions, the Legislature limited disqualification to intentional killings, thereby confirming the Wisconsin Supreme Court's holding that involuntary manslaughter would not bar a beneficiary from obtaining his inheritance.[19]

The final wave of changes to the codification of the slayer rule occurred in 1997 when the Wisconsin Legislature chose to repeal and consolidate the 1981 slayer provisions into a new section entitled "Beneficiary Who Kills Decedent."[20] While the stated intent of the Legislature was to eradicate

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14. *See id.* at 655-56 (recognizing that English and American common law have traditionally denied wrongdoers the fruits of their crimes).

15. *See, e.g., In re* Estate of Hackl, 604 N.W.2d 579, 583-84 (Wis. Ct. App. 1999) (granting the wife's estate a half interest in the husband's pension because the wife's interest in the pension would have accrued had he not killed her).

16. *See, e.g., In re* Estate of Safran, 306 N.W.2d 27, 33 (Wis. 1981) (discerning that the Legislature intended to exclude involuntary crimes from the slayer statute when it modified the word "killing" with the adjective "intentional").

17. *See* Marie Rohde, *Court Rules on Suicide Heirs: State Allows Inheritance for People Who Assist Others in Killing Themselves*, MILWAUKEE J. SENTINEL, Sept. 26, 2008, at B1 (reporting that the court recommended that the decision be published, indicating that the judges believe it should be precedent-setting).

18. *See In re Wilkins' Estate*, 211 N.W. at 656 (holding that Wisconsin's adoption of the slayer rule was consistent with other jurisdictions' affirmation of the rule); *see also* Act of Apr. 26, 1982, ch. 228, § 5, 1981 Wis. Sess. Laws 1065 (codified as amended at WIS. STAT. § 853.11(3m)(2008)) (disqualifying a beneficiary when he intentionally murders the testator).

19. *See In re* Estate of Jackson, 569 N.W.2d 467, 470-71 (Wis. Ct. App. 1997) (holding that a killing that does not require the element of intent cannot be an intentional killing).

20. *See* WIS. STAT. § 854.14 (2008) (revoking every statutory right or benefit to which the killer may have been entitled to after the decedent's death).

variations and inconsistencies among the 1981 provisions, the drafters utilized the re-drafting opportunity to make four other significant changes.[21]

First, the drafters reduced the plaintiff's burden of proof from a "clear and convincing evidence" standard to a "preponderance of the evidence" standard.[22] Second, the new section expanded the types of killings that would disqualify beneficiaries by modifying "killing" with "unlawful" rather than "felonious."[23] Third, the drafters further extended the grasp of the common law principle by mandating that the courts treat wrongful acquisitions of property not covered under the statute in accordance with the common law principle that a killer cannot profit from his wrongdoing.[24]

Finally, the revised 1997 statute amended certain special exceptions that could nullify the application of the slayer statute to an "unlawful and intentional killing." The drafters revoked a provision that allowed killers to inherit if exempted by a benefactor in a contract while retaining a provision that has allowed killers to inherit if exempted by a testator in his will.[25] The drafters also created a new exception that has permitted the courts to nullify the slayer statute when the courts find that a decedent's wishes would be attained by not disqualifying a killer.[26]

3. *Rules of Statutory Interpretation*

A general rule of statutory construction requires that when the language of a statute is unambiguous, courts shall not look outside the language of the statute itself, but rather, give the language its common, ordinary, and accepted meaning.[27] Conversely, when the language of a statute is

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21. *See* Howard S. Erlanger, *Wisconsin's New Probate Code: A Handbook for Practitioners*, app. C at 33-34 (1998) (Drafting Committee Notes to 1997 Wisconsin Act 188) (claiming that Wisconsin's slayer statute now mirrors the Uniform Probate Code while retaining several unique provisions).

22. *See* § 854.14(5)(c) (noting that the court need not consider whether there was an "unlawful and intentional killing" if there was a criminal judgment or an adjudication of delinquency based on an "unlawful and intentional killing").

23. *See* § 854.14(2) (requiring that "killings" be "unlawful" in order to exclude killings that are in self-defense).

24. *See* § 854.14(4) (stating that the Legislature is unable to foresee all of the possible wrongful acquisitions of property that should be barred under the statute).

25. *See* § 854.14(6)(b) (mitigating the harshness of the slayer rule in acknowledgment of a benefactor's right to control the assignment and allocation of his property); *see also* Erlanger, *supra* note 21, app. C at 33 n.25 (noting that the new statute allows the decedent to waive the slayer rule only by will because the attestation requirement for wills helps ensure that the waiver is intentional and genuine).

26. See § 854.14(6)(a) (giving wide discretion to the courts to review the factual situations created by the "unlawful and intentional killing").

27. *See* State *ex rel.* Kalal v. Cir. Ct. for Dane County, 2004 WI 58, ¶ 44-46, 271 Wis. 2d 242, 681 N.W.2d 110, 123-24 (recognizing that the meaning of the words or phrases in surrounding or closely-related statutes should also be considered to avoid unreasonable results).

ambiguous, courts are to examine the legislative history, scope, and stated purpose of the statute.[28] Finally, courts must give specific legal words their technical meaning in the law.[29]

Through the exercise of statutory interpretation, the courts must strive to avoid construing a statute in a manner that would defeat its manifest purpose.[30] For example, in the case of *In re Estate of Hackl*, a husband, while imprisoned for the murder of his wife, applied for and received monthly pension benefits.[31] Although the 1981 slayer provisions were silent on how to treat a murdered spouse's marital interest in a husband's pension plan, the Wisconsin Court of Appeals used the discretion the Legislature provided it to apply the common law principle to bar the murderer from collecting his spouse's marital interest.[32]

B. Wisconsin's Ban on Assisted Suicide

Starting in 1849, Wisconsin criminalized assisted suicide, treating it as first-degree manslaughter.[33] When the Legislature began classifying degrees of felonies in 1977, it initially made assisted suicide a Class D felony, but has since reduced the crime to a Class H felony.[34] To be guilty of the crime of assisted suicide, a defendant must have intended his actions to assist the decedent in committing suicide.[35] Through its ban on assisted

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28. *See In re* P.A.K. v. State, 350 N.W.2d 677, 681-83 (Wis. 1984) (explaining that words or phrases of a statute are ambiguous if they have more than one reasonable definition).

29. *See* WIS. STAT. § 990.01 (2008) (providing definitions of a few particular words or phrases that have specific meanings under Wisconsin law, such as "acquire").

30. *See, e.g.*, Milwaukee County v. Dep't of Indus., Labor & Human Relations Comm'n, 259 N.W.2d 118, 123-24 (Wis. 1977) (extending unemployment benefits to a claimant who lost her job for failing a licensing exam that she diligently studied for because the Legislature only intended to bar employees who were terminated for "fault," which requires blameworthy, negligent conduct); *see also In re* Estate of Turner, 454 N.E.2d 1247, 1252 (Ind. Ct. App. 1983) (holding that an insane individual does not "intentionally kill" under Indiana's slayer statute because a contrary ruling would not further the purpose of the statute).

31. *See In re* Estate of Hackl, 604 N.W.2d 579, 581 (Wis. Ct. App. 1999) (rejecting the husband's argument that the wife's marital interest terminated at her death).

32. *See id.* at 582 (concluding that the Legislature's failure to exempt deferred pension benefits from the terminable interest rule was not dispositive); *see also* Wisconsin *ex rel.* La Crosse Tribune v. Cir. Ct. for La Crosse County, 340 N.W.2d 460, 464-65 (Wis. 1983) (reiterating that the law provides courts the authority to resolve statutory ambiguity).

33. *See* WIS. STAT. § 113.9 (1849) (penalizing individuals who assist in a suicide despite not punishing the act of suicide).

34. *See* Act of Nov. 23, 1977, ch. 173, § 12, 1977 Wis. Sess. Laws 731 (codified as amended at WIS. STAT. § 940.12 (2008)); *see also* WIS. STAT. § 939.50 (2008) (setting forth the maximum penalties for felony convictions, which includes a $100,000 fine and twenty-five years imprisonment for a Class D felony and a $10,000 fine and six years imprisonment for a Class H felony).

35. *See* WIS. STAT. § 940.12 (2008) (inferring that an individual is not guilty of

suicide, Wisconsin seeks to preserve human life, prevent suicide, protect vulnerable groups, such as the poor, elderly, and disabled, and avoid the slippery slope towards euthanasia.[36]

C. Causation Under Wisconsin's Criminal Code

To prove causation in Wisconsin, the State must show that the defendant's acts were a substantial factor in causing the crime.[37] A substantial factor is an act that is a significant cause of an unlawful death.[38] The Wisconsin Supreme Court and Legislature have found that acts by an accessory, co-conspirator, or accomplice in connection with an unlawful killing are substantial factors.[39] For example, in *State v. Groth*, the Court held that knowingly handing a gun to the eventual shooter was a substantial factor in the resulting murder.[40] Wisconsin uses its accomplice liability statute to prevent culpable individuals from circumventing punishment.[41]

The State courts and Legislature have also found that actions taken by an individual during a felony are substantial factors in a resulting unlawful killing, even if the defendant was not responsible for the final act that

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assisted suicide if he was unaware that the decedent would use the assistance to commit suicide); *accord* Johnstone v. City of Albuquerque, 145 P.3d 76, 85 (N.M. Ct. App. 2006) (holding the defendant, a police officer, not guilty of assisted suicide for putting his gun on an outdoor table while fixing a sprinkling system because he had no knowledge that his stepdaughter was going to commit suicide).

36. *See* Washington v. Glucksburg, 521 U.S. 702, 734-35 (1997) (upholding the State of Washington's assisted suicide ban because it is rationally related to its interest in preserving life); *see also* Gilbert v. State, 487 So. 2d 1185, 1187-89 (Fla. Dist. Ct. App. 1986) (affirming the trial court's decision to convict the defendant of euthanasia rather than assisted suicide because he did not merely help his wife commit suicide but directly caused the death by shooting her); BLACK'S LAW DICTIONARY 594 (8th ed. 2004) (defining euthanasia as the act of directly killing or bringing about the death of a person who suffers from an incurable disease or condition for reasons of mercy).

37. *See, e.g.*, State v. Block, 489 N.W.2d 715, 718 (Wis. Ct. App. 1992) (holding that stabbing the decedent was a substantial factor in causing the decedent's death even though the hospital's medical malpractice was the direct cause of death).

38. *See* State v. Toliver, 2001 WI App 254, ¶ 48, 248 Wis. 2d 527, 635 N.W.2d 905, at *12 (unpublished table decision) (holding that an instruction to kill was a substantial cause of the murder); State v. McClose, 289 N.W.2d 340, 342 (Wis. Ct. App. 1980) (holding that car racing was a substantial cause of the resulting death).

39. *See* WIS. STAT. § 939.05 (2008) (stating that although an individual does not directly commit a crime, he is a principal to that crime so long as he either (1) intentionally aids or abets the commission of the crime or (2) directly or indirectly participates in a conspiracy to commit the crime).

40. *See* State v. Groth, 2002 WI App 299, ¶¶ 4-5, 258 Wis. 2d 889, 655 N.W.2d 163, 166-67, *abrogated on other grounds by* State v. Tiepelman, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1 (applying the State's accomplice liability provision to find the defendant guilty of first-degree intentional homicide).

41. *See* State v. Sharlow, 317 N.W.2d 150, 154 (Wis. Ct. App. 1982), *aff'd*, 327 N.W.2d 692 (Wis. 1983) (holding that as a party to the murder, the defendant's acts were a substantial factor in the killing).

directly caused the death.[42] For example, in *State v. Jackson*, the State convicted the defendant of felony murder when his accomplice shot and killed the victim.[43] Wisconsin uses its felony murder provision to deter violent crimes that have an improper disregard for human life.[44]

D. In re *Estate of Schunk*

1. Facts

The decedent and testator, Edward A. Schunk, Jr., committed suicide in 2006.[45] In his will, which apportioned his estate, Mr. Schunk granted most of his estate to his wife Linda and their daughter Megan, leaving next to nothing for his six older children from previous relationships.[46] In an attempt to disqualify Linda and Megan from inheriting, the older children filed a demand for formal proceedings to determine whether Linda and Megan "unlawfully and intentionally killed" Mr. Schunk by assisting in his suicide.[47] The plaintiffs claimed that Linda and Megan assisted in Mr. Schunk's suicide by taking him to an isolated location and knowingly providing him with the means to commit suicide.[48] In response, Linda and Megan filed a motion for summary judgment, claiming that even if they assisted Mr. Schunk in committing suicide, the Wisconsin slayer statute does not disqualify anyone who commits assisted suicide because it is not a "killing."[49]

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42. *See* WIS. STAT. § 940.03 (2008) (applying the State's felony murder provision to felonies that make an ensuing death likely, such as burglary and robbery).

43. *See* 2009 WI App 27, ¶ 2, 763 N.W.2d 559, at *1 (unpublished table decision) (describing how the defendant and his accomplice were robbing two drug dealers); *see also* State v. Oimen, 516 N.W.2d 399, 404-05 (Wis. 1994) (holding the defendant responsible for the death of his co-felon by applying the felony murder provision).

44. *See* State v. Noren, 371 N.W.2d 381, 384 (Wis. Ct. App. 1985) (contending that felony murder should only attach to crimes inherently dangerous to life).

45. *See In re* Estate of Schunk, 2008 WI App 157, ¶ 13, 314 Wis. 2d 483, 760 N.W.2d 446 (mentioning that Mr. Schunk suffered from non-Hodgkin's lymphoma).

46. *See id.* (stating that Mr. Schunk lived with Linda and Megan); *see also* Ryan J. Foley, *Suicide Case Decided; Court Says Family Can Inherit Estate Even if They Assisted the Victim*, WIS. STATE J., Sept. 26, 2008, at A6 (stating that Mr. Schunk's estate was valued at $488,000 in 2006, and that it included eighty acres of land, a $100,000 life insurance policy, equipment from his logging company, and other money).

47. *See Schunk*, 2008 WI App 157, ¶ 3, 760 N.W.2d at 447; *see also* David Ziemer, *Wisconsin Court of Appeals Rules Relatives Who Assist Suicide Can Inherit*, WIS. L.J., Oct. 6, 2008 (stating that the Wisconsin Attorney General did not bring criminal charges alleging that Linda and Megan committed assisted suicide).

48. *See Schunk*, 2008 WI App 157, ¶ 5, 760 N.W.2d at 447 (noting that Mr. Schunk's cause of death stemmed from a single gunshot wound to the chest).

49. *See id.* ¶ 4, 760 N.W.2d at 447 (arguing that assisted suicide is not a "killing" because a person who assists another in committing suicide is not depriving the other of his desire to live).

2. Opinion

Construing the facts in the light most favorable to the party opposing the motion for summary judgment—Mr. Schunk's other children—the Wisconsin Court of Appeals assumed that Linda and Megan had assisted in Mr. Schunk's suicide.[50] The court then proceeded to interpret the slayer statute to determine whether assisted suicide was an "intentional and unlawful killing" within the meaning of the State's slayer statute.[51]

Claiming that the definition of "to kill" is "to deprive of life," the court found that a person who assisted another in voluntarily taking his own life was not depriving him of life because he no longer had a desire to live.[52] Because Mr. Schunk's final act of pulling the trigger was the act that directly deprived him of life, the court held that Linda and Megan did not "kill" Mr. Schunk when they provided him the shotgun he used to commit suicide.[53]

III. ANALYSIS

A. In Wisconsin, When an Individual Commits Assisted Suicide, He "Kills"

The Wisconsin Court of Appeals misapplied the statutory principle that a court must interpret words and phrases according to their common, ordinary, and accepted meaning.[54] The Wisconsin Court of Appeals applied a plain, ordinary meaning to the word "to kill" without determining whether the word had a specific legal definition.[55] Failing to recognize the statutory principle that courts are to give legal words their specific definitions as they exist in the law, the court consulted a dictionary and found that the ordinary definition of "to kill" was "to deprive of life."[56]

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50. *See id.* ¶ 5, 760 N.W.2d at 447 (recognizing that it was disputed whether Linda and Megan had knowledge of Mr. Schunk's suicide plans).

51. *See id.* ¶¶ 10-13, 760 N.W.2d at 448-49 (discussing that when a word has an ordinary meaning, the court must use that meaning).

52. *See id.* ¶ 13, 760 N.W.2d at 448-49 (finding that Mr. Schunk deprived himself of life by shooting himself with the shotgun).

53. *See id.* ¶ 13, 760 N.W.2d at 448-49 (maintaining that one who provides the means to a suicide is not commonly labeled a killer). *But see* People *ex rel.* Oakland County Prosecuting Att'y v. Kevorkian, 534 N.W.2d 172, 173 (Mich. Ct. App. 1995) (describing how Dr. Kevorkian illegally furnished the means to a suicide).

54. *Cf.* WIS. STAT. § 990.01 (2008) (requiring that all words and phrases be construed according to common and approved usage except when they have a specific meaning in the law).

55. *See* State v. Block, 489 N.W.2d 715, 718 (Wis. Ct. App. 1992) (reaffirming that the prosecution needs to prove beyond a reasonable doubt only that a defendant's conduct was a substantial factor in the unlawful death of another in order to convict him for a "killing" under Wisconsin law).

56. *See Schunk*, 2008 WI App 157, ¶ 13, 760 N.W.2d at 448-49 (describing how

After having defined "to kill," the court examined whether a person who assisted a decedent in voluntarily taking his own life deprived the decedent of life.[57] In the court's opinion, an individual does not "kill" unless his act is the direct cause of death.[58] The court deemed the word "deprive" as the operative word in its analysis to find that Mr. Schunk deprived himself of life when he voluntarily decided to shoot himself with the shotgun.[59] Therefore, the court ruled that suicide assistance, such as providing the means to commit suicide, can never be the direct cause of death because it never deprives an individual of life.[60]

Although the court's analysis appears to be reasonable, it notably failed to recognize a key principle of statutory interpretation: when words or phrases have technical or specific meanings in the law, the court must apply those definitions rather than their ordinary meanings.[61] Under Wisconsin law, an individual "kills" if his act is a substantial factor in the death of another individual.[62] Thus, the State's basic legal principles of causation do not exclude an individual's conduct from causing a "killing" simply because it is not the direct cause of death.[63] The proper legal definition of "to kill" is much broader: to do an act that is a substantial factor in causing the death of another individual.[64]

If the definition of the phrase "to kill" was as narrow as the Wisconsin Court of Appeals interpreted it to be, the unlawful conduct necessary to trigger the slayer rule would be substantially narrower than its common law

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the court's definition of "to kill" was ironically from the dictionary referred to by the plaintiffs, who argued that assisted suicide is a "killing").

57. *See id.* ¶ 5, 760 N.W.2d at 447 (assuming Linda and Megan provided Mr. Schunk with the loaded shotgun).

58. *See id.* ¶ 14, 760 N.W.2d at 448-49 (arguing that assisting in a suicide is not the same as depriving the decedent of his life).

59. *See id.* ¶ 13, 760 N.W.2d at 448-49 (defining "to kill" as "to deprive of life" as referred to by the plaintiffs in their motion in objection to summary judgment).

60. *See id.* ¶ 13-14, 760 N.W.2d at 448-49. *But see* State v. Willie, 2007 WI App 27, ¶ 27, 299 Wis. 2d 531, 728 N.W.2d 343, 354 (upholding the defendant's felony conviction because his acts, such as the purchase of alcohol for minors, were substantial factors in the victim's death).

61. *See, e.g.*, WIS. STAT. § 990.01 (2008) (providing that the specific meaning of "acquire" includes an acquisition by purchase, grant, gift, bequest, or through an exercise of condemnation power).

62. *See, e.g.*, State v. Block, 489 N.W.2d 715, 718 (Wis. Ct. App. 1992) (finding that despite the hospital's negligence, the act of stabbing the decedent was a substantial factor in the death because without that act, the decedent would not have been at the hospital requesting medical care to keep himself alive).

63. *See Willie*, 2007 WI App 27, ¶ 26, 728 N.W.2d at 353-54 (equating an act that is a substantial factor with an act that is likely to cause death as a natural and probable result).

64. *See, e.g.*, *Block*, 489 N.W.2d at 718 (analyzing how medical negligence that directly causes death cannot break the causal chain when it occurs as a result of a life-threatening situation that the defendant created).

predecessor and would allow accomplices, accessories, and individuals involved in a felony murder to avoid the slayer rule. Such a narrow interpretation is contrary to the intent of the Legislature.[65] Therefore, when the court gave the phrase "to kill" a plain, ordinary meaning rather than its specific meaning in the law, the court failed to correctly apply the rules of statutory interpretation to effect the intent of the Legislature.[66]

B. Culpability in Wisconsin Is Not Limited to Acts that Are the Direct Cause of Death

In Wisconsin, the law only requires that a defendant's acts be a substantial factor in causing death for him to be culpable of "killing." The Wisconsin Court of Appeals therefore erred by narrowly defining "to kill" as to "deprive of life," and in so doing, thwarted the intent of the Legislature.[67] Whereas a common, collegiate dictionary definition of the phrase "to kill" may indeed be to deprive of life, the accurate legal definition of "to kill" is "to cause death."[68] To establish that an act "caused" a death in Wisconsin, the State must prove that the act was a substantial factor in bringing about the death.[69] Because the defendant's acts only need to be a substantial factor in bringing about the death of another individual, the appropriate definition of the phrase "to kill" includes acts that are not the direct cause of death.[70]

Wisconsin law penalizes acts as substantial factors in the death of an individual when death is a reasonably foreseeable result of such acts.[71] In

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65. *See* WIS. STAT. § 939.05 (2008) (criminalizing the acts of accomplices, accessories, and co-conspirators even if they did not directly commit the crime); WIS. STAT. § 940.03 (2008) (penalizing an individual for felony murder even if he does not directly cause the death of the victim).

66. *See* WIS. STAT. § 854.14 (2008) (excluding inheritance to any killer who "*unlawfully* and intentionally kills" another) (emphasis added).

67. *See Block*, 489 N.W.2d at 718 (observing that there can be multiple substantial factors causing a death).

68. *See, e.g.*, State v. Toliver, 2001 WI App 254, ¶ 15, 248 Wis. 2d 527, 635 N.W.2d 905, at *4 (unpublished table decision) (upholding the defendant's conviction for first-degree intentional homicide because his actions, telling his brother to tie up and then shoot the individual who stole money from them, were substantial factors in causing the death of the victim).

69. *See, e.g.*, State v. McClose, 289 N.W.2d 340, 342 (Wis. Ct. App. 1980) (holding that when car racing on a public road leads to a fatal accident, each actor is responsible for the death regardless of which automobile directly causes it); *see also* Walter Dickey et al., *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, WIS. L. REV. 1323, 1329 (1989) (describing how the "substantial factor" test applies to every homicide in Wisconsin's penal code).

70. *See, e.g.*, *Block*, 489 N.W.2d at 718 (holding that the hospital's medical malpractice was not an intervening cause of death because the defendant's action put the decedent in a position to require medical attention to remain alive).

71. *See, e.g.*, *McClose*, 289 N.W.2d at 342 (finding that the death of a motorist or pedestrian is a reasonably foreseeable result of car races on public roads).

particular, Wisconsin treats two specific types of actors as "killers" when death is a natural and probable result of their conduct: (1) an accessory, accomplice, or co-conspirator, and (2) a felony murderer.[72] Individuals who assist in a suicide are similar to these actors in various ways.[73]

1. Like Wisconsin's Accomplice Liability Provision, Its Ban on Assisted Suicide Punishes Conduct that Is a Substantial Factor in a "Killing"

Wisconsin's accomplice liability provision holds a felon accountable for having "killed" regardless of whether the death was directly attributable to his acts.[74] Therefore, the Wisconsin Court of Appeals hindered the purpose of the slayer statute when it failed to recognize that the State's criminal prohibition of assisted suicide similarly holds a defendant accountable for having "killed" regardless of whether the death was directly attributable to his acts.[75] The court failed to notice the logical connection between an accomplice, accessory, or co-conspirator and someone who commits assisted suicide: none of them can be said to have directly "killed" the deceased.

Wisconsin law regards an accessory, accomplice, or co-conspirator to a homicide as a "killer" even when he is not responsible for the final act that directly causes a death.[76] For example, in *State v. Groth*, the defendant was an accomplice who faced charges of second-degree reckless homicide for providing the murder weapon to his partner.[77] The court found that the defendant intentionally aided and abetted in the killing because he provided a loaded gun to his partner knowing he would use it to kill.[78]

Similar to the accomplice in *Groth*, a person who assists in a suicide

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72. *See, e.g.*, State v. Oimen, 516 N.W.2d 399, 404-05 (Wis. 1994) (ruling that the defendant, an accomplice in an attempted robbery, caused the death of his co-felon, even though the store clerk shot the co-felon, because the defendant's decision to rob the store was a substantial factor).

73. *See* WIS. STAT. § 940.12 (2008) (requiring a defendant who commits assisted suicide to be charged with a Class H felony).

74. *See* WIS. STAT. § 939.05 (2008) (using the substantial factor, as opposed to a direct cause, doctrine to criminalize the acts of accomplices, accessories, and co-conspirators that lead to homicides).

75. *See* § 940.12 (requiring that a defendant's assistance be a substantial factor in a suicide).

76. *See* § 939.05 (punishing an accomplice, accessory, or co-conspirator as a principal in the first-degree).

77. *See* 2002 WI App 299, ¶4, 258 Wis. 2d 889, 655 N.W.2d 163, 166-67 (discussing how the defendant was the only one carrying a loaded weapon and how the defendant and his friends got into a scuffle the previous weekend at the same tavern with the same group of men).

78. *See id.* ¶¶ 4-5, 655 N.W.2d at 166-68 (explaining that to intentionally aid and abet a codefendant in first-degree intentional homicide, a defendant must have known that the codefendant intended to kill the victim and had the purpose to assist the codefendant in committing the crime).

must have knowledge that the recipient of the assistance intends to use it in a "killing."[79] Therefore, like the accomplice in *Groth*, a person intentionally aids and abets in a suicide when he hands a loaded weapon to an individual who intends to kill himself because he knows that death will be a substantially likely result of his assistance.[80]

As illustrated in *Groth* and the State's prohibition of assisted suicide, Wisconsin's courts and Legislature have determined that a "killer" need not be the principal in the first degree to be responsible for the "unlawful and intentional killing" of another individual.[81] A principal in the second degree, such as an accomplice, co-conspirator, or accessory, shares equal responsibility with a principal in the first degree for an "unlawful and intentional killing."[82] The law extends equal responsibility to these individuals because they engage in conduct that is inconsistent with a proper regard for human life.[83] Without equal punishments, individuals could reduce exposure to criminal and civil sanctions by simply hiring or procuring someone else to directly cause a death.[84] As a result, Wisconsin courts disqualify accessories, accomplices, and co-conspirators under the State's slayer statute.[85] Because an individual who commits assisted

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79. *See* WIS. STAT. § 940.12 (2008) (requiring the actor to not only assist in a suicide, but also requiring him to know or intend that his acts will naturally result in suicide). *Compare Groth*, 2002 WI App 299, ¶ 3, 655 N.W.2d at 166 (finding that the defendant knew his friend was intending to get revenge for a bar scuffle that injured the friend the previous weekend), *with In re* Estate of Schunk, 2008 WI App 157, ¶ 2, 314 Wis. 2d 483, 760 N.W.2d 446, 446-47 (assuming that, for purposes of the motion for summary judgment, the defendants knew Mr. Schunk intended to commit suicide).

80. *Compare Groth*, 2002 WI App 299, ¶ 5, 655 N.W.2d at 167-68 (providing a friend a loaded weapon knowing he was going to use it to kill), *with Schunk*, 2008 WI App 157, ¶ 5, 760 N.W.2d at 447 (providing a loved one a loaded weapon knowing he was going to use it to kill himself).

81. *See, e.g.*, *Groth*, 2002 WI App 299, ¶ 5, 655 N.W.2d at 167-68 (holding an individual guilty of first-degree murder, an "unlawful and intentional killing," when he provided a loaded gun to a friend who he knew intended to use it to kill); *see also* WIS. STAT. § 940.12 (making it a Class H felony for an individual to assist in a suicide with the intent that death will result).

82. *See* WIS. STAT. § 939.05 (2008) (treating accomplices, accessories, and co-conspirators as principals in the first degree); *see also*, Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 849 n.214 (1993) (stating that some states have expressly barred accomplices, accessories, or co-conspirators from inheriting under their slayer rules).

83. *See, e.g.*, State v. Bobby P., 539 N.W.2d 338, at *1 (Wis. Ct. App. 1995) (unpublished table decision) (upholding charges against an accomplice as a principal in the first-degree because his participation in a premeditated attempt to kill one person and his reckless endangerment of others showed an utter disregard for life).

84. *See, e.g.*, State v. Sharlow, 317 N.W.2d 150, 154 (Wis. Ct. App. 1982), *aff'd*, 327 N.W.2d 692 (Wis. 1983) (rejecting the defendant's argument that he should not be convicted of first-degree murder because his actions exhibited his desire to participate in the murder).

85. *See, e.g.*, § 939.05(1)(c) (charging a person who hires or procures an individual to perform a murder with first-degree intentional homicide—an "unlawful and intentional killing"); *accord* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER

suicide intentionally and knowingly aids and abets in the "killing" of another individual, Wisconsin courts should also disqualify these individuals under the State's slayer statute.[86]

2. Like Wisconsin's Felony Murder Provision, Its Ban on Assisted Suicide Punishes Conduct that Is a Substantial Factor in a "Killing"

Wisconsin's felony murder provision holds a felon accountable for having "killed" an individual in the course of a violent crime regardless of whether the death was directly attributable to his acts.[87] The Wisconsin Court of Appeals failed to notice the logical connection between someone who commits felony murder and someone who commits assisted suicide: neither individual can be said to have directly "killed" the deceased.[88]

Wisconsin law regards an individual who causes the death of another individual while committing or attempting to commit a felony as a "killer" even if he is not responsible for the final act that directly causes the death.[89] For example, in *State v. Jackson*, the State convicted the defendant of felony murder when his accomplice killed one of the victims during the course of a burglary and robbery.[90] The State's felony murder provision applied to the defendant because the felonies of burglary and robbery are crimes that have an improper disregard for the value of human life.[91]

Felony murder and assisted suicide have three specific similarities that exhibit why Wisconsin has an interest in disqualifying individuals who commit assisted suicide from the decedent's inheritance.[92] First,

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DONATIVE TRANSFERS § 8.4 cmt. g (2003) (describing how slayer statutes disqualify an accomplice, accessory, or co-conspirator to an "unlawful and intentional killing").

86. *See, e.g.*, Robert Garrison, *Eagle Teen Accused of Assisting in Roommate's Suicide*, KJCTNEWS8.COM, Sept. 22, 2008, http://www.kjct8.com/global/story.asp?s=9026486 (reporting that after the victim told the arrestee he wanted to commit suicide, the arrestee retrieved a loaded shotgun and handed it to him).

87. *See, e.g.*, State v. Oimen, 516 N.W.2d 399, 404-05 (Wis. 1994) (finding the defendant guilty of felony murder even though the direct cause of his accomplice's death was the store clerk's decision to fire his gun in self-defense).

88. *See* WIS. STAT. § 940.12 (2008) (stating that a defendant's actions do not need to directly cause a suicide for the State's criminal prohibition of assisted suicide to apply).

89. *See* WIS. STAT. § 940.03 (2008) (penalizing a felony murderer for not more than fifteen years in excess of the maximum term of imprisonment for the felony that led to the killing).

90. *See* 2009 WI App 27, ¶ 4, 763 N.W.2d 559, at *1 (unpublished table decision) (describing how the defendant knew that weapons were involved because he hit a victim over the head with his gun and because he asked the victims where their guns were).

91. *See* § 940.03 (applying felony murder to battery, sexual assault, false imprisonment, kidnapping, arson, burglary, operating a vehicle without an owner's consent, and robbery).

92. *See* Foley, *supra* note 46, at A6 (quoting Barbara Lyons, Executive Director of

Wisconsin, like other states, uses a felony murder provision to deter violent crimes such as robbery and burglary because these crimes often result in unlawful deaths.[93] Similarly, Wisconsin outlaws assisted suicide to deter conduct that the State also feels is inconsistent with a proper regard for human life.[94] Second, whereas crimes deterred by felony murder provisions are likely to result in an ensuing death, when someone knowingly offers assistance to help one commit suicide, an ensuing death is substantially likely to occur.[95] Finally, and most significantly, to assign culpability for assisted suicide or felony murder, the State only needs to prove that the defendant's conduct was a substantial factor in causing the death.[96] Therefore, in the crimes' respective contexts, the State may convict a defendant of assisted suicide or felony murder even though another person fires the fatal shot, and hence, Wisconsin regards both actors as "killers."[97]

3. Wisconsin's Slayer Statute Should Punish Assisted Suicide as It Does Accomplice Liability and Felony Murder

Wisconsin's felony murder, accomplice liability, and assisted suicide provisions exhibit that the State's proper legal definition of "to kill" does not require the unlawful act to be the last, direct act in the causal chain.[98] The Wisconsin Court of Appeals failed to carry out the legislative intent of the slayer statute when the court applied the plain meaning of the phrase

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the Wisconsin Right to Life) ("It's a horrendous decision . . . . It certainly gives impetus to any one who wants more money to assist their loved one who has money with their suicide.").

93. *See* State v. Noren, 371 N.W.2d 381, 384 (Wis. Ct. App. 1985) (arguing that felonies causing death must be inherently dangerous to life for felony murder to apply).

94. *See* WIS. STAT. § 940.12 (2008) (continuing the State's prohibition against assisted suicide, which started in 1859); *see also* Washington v. Glucksburg, 521 U.S. 702, 728, 733 (1997) (noting that states have a vested interest in preserving human life).

95. *Compare* State v. Groth, 2002 WI App 299, ¶4, 258 Wis. 2d 889, 655 N.W.2d 163, 166-67 (finding that when the defendant furnished a loaded gun to his friend, he knew it was highly likely that the friend was going to use it to kill in an act of vengeance), *with* People *ex rel.* Oakland County Prosecuting Att'y v. Kevorkian, 534 N.W.2d 172, 173 (Mich. Ct. App. 1995) (finding that when Dr. Kevorkian furnished the suicide device to the decedent, he knew she was going to use it to kill herself).

96. *See, e.g.*, State v. Oimen, 516 N.W.2d 399, 404-05 (Wis. 1994) (holding that the defendant's acts were substantial factors in causing his accomplice's death because the robbery attempt would not have taken place without the acts, and because the death was a reasonably foreseeable result of the robbery).

97. *See, e.g.*, *id.* at 404 (holding that the defendant caused the death of his co-felon even though the direct cause of death was from the gun of the intended victim because the defendant planned and set the robbery in motion).

98. *See* State v. Block, 489 N.W.2d 715, 718 (Wis. Ct. App. 1992) (holding that an individual "kills" whenever his conduct is a substantial factor in the unlawful death of another).

"to kill" rather than its specific legal definition.[99] Although the Wisconsin Court of Appeals may be correct in stating that an individual who assists in a suicide is not directly depriving another person of life, Wisconsin law still considers and treats him as a "killer."[100]

To be guilty of assisted suicide under Wisconsin law, an individual must intend for the decedent to take his own life and the individual's actions must be a substantial factor in either the decedent's decision to, or ability to, commit his suicide.[101] Therefore, anyone who is found guilty of assisted suicide has caused a death and is appropriately regarded as a "killer."[102] Such a result is practical because it prevents an individual from circumventing both criminal sanctions and civil penalties.[103] As exhibited in *Schunk*, Linda and Megan circumvented civil penalties by arguing that because none of their acts were a direct cause of death, the slayer statute should not apply.[104]

In addition, the slayer statute should apply to assisted suicide because, like felony murder and accomplice liability provisions, the disqualification of individuals who commit assisted suicide furthers Wisconsin's interest in preserving life.[105] Like an accomplice to a killing or a party to a felony murder, one who commits assisted suicide should be barred from inheriting under the slayer statute because his assistance was a substantial factor in causing the decedent's death.[106]

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99. *See In re* Estate of Schunk, 2008 WI App 157, ¶ 13, 314 Wis. 2d 483, 760 N.W.2d 446, 448-49 (arguing that to cause a "killing," an act must directly deprive another of life).

100. *See* WIS. STAT. § 940.12 (2008) (penalizing assisted suicide as a felony because it is a crime against life).

101. *See id.*; *see also* State v. Webster, 538 N.W.2d 810, 815-16 (Wis. Ct. App. 1995) (noting that intent also can be established by showing that the actor knew death would be a natural and probable result of his acts).

102. *Compare* State v. Groth, 2002 WI App 299, ¶¶ 4, 39, 258 Wis. 2d 889, 655 N.W.2d 163, 166-67, 174-75 (affirming the defendant's conviction of second-degree reckless homicide when he furnished a loaded gun to his friend who he knew was intending to kill someone), *with In re* Ryan N., 112 Cal. Rptr. 2d 620, 636 (Cal. Ct. App. 2001) (finding that an individual is penalized under the criminal code when he furnishes the means of a resulting suicide).

103. *See* WIS. STAT. § 939.30 (2008) (setting forth penalties for defendants who attempt to avoid criminal liability by soliciting others to commit them, such as a Class F felony for one who solicits another for murder).

104. *See Schunk*, 2008 WI App 157, ¶13, 760 N.W.2d at 448-49 (suggesting that furnishing the means of death should not render an individual guilty of having "killed" because the subsequent acts are intervening causes). *But see* People *ex rel.* Oakland County Prosecuting Att'y v. Kevorkian, 534 N.W.2d 172, 173 (Mich. Ct. App. 1995) (describing how Dr. Kevorkian helped kill the decedent by furnishing a suicide device that merely required the decedent to press a button to inject herself with deadly chemicals).

105. *See* Washington v. Glucksburg, 521 U.S. 702, 728, 733 (1997) (analyzing how statutes that bar assisted suicide make suicide and euthanasia less likely).

106. *Compare* WIS. STAT. § 939.05 (2008) (punishing an accomplice, accessory or

C. When Wisconsin's Slayer Statute Is Silent, the Courts Must Apply the Common Law Principle that No Killer Should Benefit from His Own Wrongdoing

Wisconsin's slayer statute mandates that the courts apply the common law principle when faced with wrongful acquisitions not covered by the statute. The Wisconsin Court of Appeals failed to identify the intent of the Legislature, and thus, the court erred by not applying the common law slayer rule to disqualify individuals who commit assisted suicide.[107]

When state legislatures codified their respective slayer rules, they often left general discretion to the courts to interpret language that included undefined or broad legal terms, such as "intent," "unlawful," and "killing."[108] Moreover, these legislatures understood that state courts would eventually be presented with disputes not previously foreseen by the drafters, and thus expressly gave broad discretion to the state courts to adjudicate these issues according to the common law principle.[109] In *Schunk*, the Wisconsin Court of Appeals failed to properly utilize such discretion when determining whether the slayer statute should disqualify an individual who commits assisted suicide.[110]

Judicial review under slayer statutes is also a practical device that state legislatures envisioned.[111] To preclude the courts from hearing issues that the legislature had not previously considered would moot the claims of legitimate plaintiffs while placing an inordinate burden on the legislative process to resolve uncertainties in the law.[112] Moreover, the right to

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co-conspirator to a homicide as a principal in the first-degree even if he did not directly cause the death), *and* WIS. STAT. § 940.03 (2008) (punishing a felon for a homicide even if he did not directly cause the death), *with* WIS. STAT. § 940.12 (punishing one who assists in a suicide even if he did not directly cause the death).

107. *See* WIS. STAT. § 854.14(4) (2008) (preventing "killers" from benefiting from their crimes when the slayer statute is silent or ambiguous on the type of benefit at issue or how it was acquired).

108. *See, e.g.*, *In re* Estate of Turner, 454 N.E.2d 1247, 1250-52 (Ind. Ct. App. 1983) (interpreting whether in order for a "killing" to be "intentional," a "killer" needs to have either (a) merely intended his conduct or (b) had the necessary criminal intent when committing the crime).

109. *See, e.g.*, *In re* Estate of Hackl, 604 N.W.2d 579, 583-84 (Wis. Ct. App. 1999) (using the general discretion the Legislature had given to it, the court applied the common law principle to disqualify a killer from receiving his wife's marital interest in his pension); *see also* § 854.14(4) (mandating that the courts treat a wrongful acquisition of property not covered by the statute in accordance with the common law principle).

110. *See In re* Estate of Schunk, 2008 WI App 157, ¶¶ 7-18, 314 Wis. 2d 483, 760 N.W.2d 446, 447-50 (limiting analysis to the question of whether one who commits assisted suicide deprives another of life).

111. *See* Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 547 (1986) (arguing that the inevitable ambiguity of statutory language requires toleration of some statutory interpretation by the courts).

112. *See* State *ex rel.* La Crosse Tribune v. Cir. Ct. for La Crosse County, 340

resolve property disputes arising from wills and intestate succession is a power that legislatures reserved to state courts.[113]

In Wisconsin, the Legislature has not only given broad discretion to the courts, but the courts have recognized and frequently referred to this discretion in their decisions.[114] After the Wisconsin Legislature codified the slayer rule in 1981, the Wisconsin Supreme Court did not hesitate, when the statute was silent on the issue of wrongful accquisitions, to base its decision on the common law principle rather than consulting extrinsic sources to ascertain what the Legislature might have intended in a particular circumstance.[115]

In *Hackl*, the Wisconsin Supreme Court applied the common law slayer principle to bar a murderer from receiving his wife's marital interest in his pension even though the 1981 slayer provisions were silent on whether an "unlawful and intentional killing" prevents the terminable interest rule from canceling his wife's interest.[116] In its reasoning, the court found that the Legislature intended for the courts to rely on the common law principle when the statute was ambiguous on an issue.[117] Like the court in *Hackl*, the court in *Schunk* should have consulted the common law principle because the slayer statute was ambiguous on whether assisted suicide was an "unlawful and intentional killing."[118]

The Wisconsin Legislature explicitly authorized the result in cases such as *Hackl* and authorized the continued use of the common law principle in its 1997 amendments to the slayer provisions.[119] Wisconsin's slayer statute

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N.W.2d 460, 464 (Wis. 1983) (claiming that when an issue is likely to arise again, the court should consider it to resolve the uncertainty in the law).

113. *See In re* Wilkins' Estate, 211 N.W. 652, 655 (Wis. 1927), *overruled in part by In re* Will of Wilson, 92 N.W.2d 282 (Wis. 1958) (stating that all doctrines and maxims of equity that are applicable to courts of equity generally are likewise applicable to county courts when they decide probate matters).

114. *See, e.g.*, *Hackl*, 604 N.W.2d at 582-84 (basing its decision on the common law principle that no killer should profit from his wrongdoing rather than consulting extrinsic sources to determine the intent of the slayer statute).

115. *See, e.g.*, *id.* (applying the common law principle to prevent a murderer from wrongfully acquiring a marital interest of his wife's, which the State's terminable interest statute had terminated at her death).

116. *See id.* at 583 nn.4-5 (noting that the murder occurred before the Legislature consolidated all the various slayer provisions into the slayer statute in 1997); *see also* WIS. STAT. § 766.31(3)(a) (2008) ("terminable interest rule") (terminating the marital property interest of a nonemployee spouse in a deferred employment plan when she or he predeceases the employee spouse).

117. *See Hackl*, 604 N.W.2d at 584 (finding that the uncertainty in the law was a result of the Legislature's failure to contemplate the case's circumstances when it enacted the terminable interest rule).

118. *See id.* (recognizing that if the common law principle had not been applied, the wife's death would have terminated her marital interest in her husband's pension benefits).

119. *See* WIS. STAT. § 854.14(4) (2008) (mandating that the courts treat a wrongful

now mandates that the courts treat a wrongful acquisition of property not covered by the slayer statute in accordance with the common law principle.[120] Therefore, when the Wisconsin Court of Appeals neglected to apply the common law principle after doing a textual interpretation of the slayer statute in *Schunk*, it failed to use the broad discretion the Legislature reserved to the courts.[121]

The Wisconsin Legislature not only expressly authorized the courts to use the common law principle when needed, but it expanded and broadened the scope of the slayer statute when the drafters made several key amendments.[122] First, the drafters amended the type of "killing" from "felonious" to "unlawful," thereby extending the statute to non-felonious killings.[123] Second, the drafters lessened the burden of proof of the party opposing acquisition by the killer from clear and convincing evidence to a preponderance of the evidence, thereby extending the statute's reach to cases with less evidentiary proof.[124] Because the amendments result in the inclusion of a greater number of killings, the drafters did not intend for the Wisconsin Court of Appeals to apply the slayer statue as narrowly as it did in *Schunk*.[125]

IV. POLICY IMPLICATIONS AND SUGGESTIONS

The Wisconsin Court of Appeals's decision in *Schunk* creates three unintended and onerous consequences by allowing individuals who commit assisted suicide to benefit from a wrongdoing.[126]

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acquisition of property not covered by the slayer statute in accordance with the principle that a killer cannot profit from his wrongdoing).

120. *See* § 854.14(4), (6) (exempting a beneficiary from the common law principle only if the decedent's wishes would be best carried out by allowing him to inherit or if the decedent expressly exempts the beneficiary from the application of the slayer statute in his will).

121. *See In re* Estate of Schunk, 2008 WI App 157, ¶¶ 7-18, 314 Wis. 2d 483, 760 N.W.2d 446, 447-50 (limiting analysis to the question of whether one who commits assisted suicide deprives another of life).

122. *See* UNIF. PROBATE CODE § 2-803 cmt. (Supp. 2009) (claiming that the principle that a wrongdoer may not profit from his own wrongdoing is a civil concept, and that the probate court is the proper forum to determine the effect of various killings on succession to the decedent's property).

123. *See* § 854.14(2) (opening the door to the application of the slayer statute to misdemeanors).

124. *See* § 854.14(5)(c) (noting that a court does not need to decide whether there was an "unlawful and intentional killing" when there is a final criminal judgment or adjudication of delinquency establishing an "unlawful and intentional killing").

125. *Cf. In* re Estate of Hackl, 604 N.W.2d 579, 584-86 (Wis. Ct. App. 1999) (extending the scope of the slayer statute broadly to include the wrongful acquisition of marital benefits).

126. *See Schunk*, 2008 WI App 157, ¶¶ 13, 15, 760 N.W.2d at 448-49 (holding that although assisted suicide may be "intentional" and "unlawful," it is outside the scope of the slayer statute because it is not a "killing").

First, the *Schunk* decision increases the likelihood that suicide will be pursued and achieved because individuals will be more likely to offer assistance – a result inconsistent with Wisconsin's criminal prohibition of assisted suicide.[127] The lack of a ban on inheritance may financially motivate individuals to try to hasten or increase their inheritance by either accepting a request to assist in a suicide or inducing one to commit suicide.[128] For example, without the risk of inheritance disqualification, potential beneficiaries who are paying high medical bills or sacrificing a large amount of time and care are likely to have an expanded role in encouraging individuals who are terminally ill to commit suicide.[129]

Second, the *Schunk* decision attaches a possible inheritance penalty to individuals who refrain from offering assistance, and thus makes assistance more likely.[130] By not complying with a loved one's request to assist in his suicide, a testator might reduce the inheritance of that beneficiary while increasing the inheritance of the beneficiary that ultimately assists in the suicide.[131]

Third, the *Schunk* decision creates a presumption against life for terminally ill individuals like Mr. Schunk, a presumption that is at odds with the State's interest in preserving life.[132] A lack of an inheritance bar creates a loophole for potential beneficiaries who no longer wish to spend the time or money necessary to keep terminally ill individuals alive for as long as they might wish.[133]

Despite these policy arguments, the final section of Wisconsin's slayer statute allows a testator to nullify the statute to allow a beneficiary who

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127. WIS. STAT. § 940.12 (2008).

128. *See* Washington v. Glucksburg, 521 U.S. 702, 729 (1997) (noting that despite the lack of bans on suicide, bans on assisted suicide continue because they reflect the gravity with which society views the decision to take one's own life and its reluctance to encourage or promote these decisions).

129. *See, e.g.*, Gilbert v. State, 487 So. 2d 1185, 1187 (Fla. Dist. Ct. App. 1986) (finding that the mercy killer's motives may have included a desire to no longer care for the victim who had osteoporosis and Alzheimer's Disease).

130. *See* Rohde, *supra* note 17, at B1 (inferring that Linda and Megan might have received a larger portion of the estate because they agreed to assist in Mr. Schunk's suicide).

131. *See* WIS. STAT. § 854.14(6) (2008) (omitting language that would prevent testators from adjusting beneficiaries' inheritance interests, but making two exceptions to the application of the slayer rule: (1) when the testator exempts an individual from the statute's application in his will or (2) when the "factual circumstances" of the killing show that the testator's will would best be carried out by alternate disposition).

132. *See Glucksburg*, 521 U.S. at 732 (finding that assisted suicide bans protect the poor, elderly, and terminally ill from public presumptions that these groups have a lower desire to live and from taxpayers' and family members' potential desire to avoid financing their end-of-life health-care costs).

133. *See Gilbert*, 487 So. 2d at 1187 (upholding the murder conviction of a mercy killer, noting that his motives likely included a desire to no longer care for the victim).

assists in his suicide to inherit.[134] Nonetheless, requiring a testator to exempt an individual from the slayer statute has better policy implications than the decision in *Schunk* because, by manifesting an intent to die in a notarized will, the presumption that a terminally ill individual wishes to continue living will be negated while the likelihood that beneficiaries can induce loved ones into committing suicide in the spur-of-the moment will be reduced.[135]

In light of these detrimental policy implications, the Legislature should nullify the *Schunk* decision and amend the slayer statute to prevent testators from rewarding exempted individuals who assist in a suicide and from penalizing individuals who refuse.[136] The Legislature should require a testator who (a) exempts an individual from the slayer statute in his will, and (b) in the ten years before or after the exemption increases the individual's interest, to document reasons other than agreeing to assist in his suicide to validate the beneficiary's increased allotment.[137] By so doing, a court can later determine whether the primary purpose of the increased allotment was for the beneficiary's assistance in the suicide rather than for the documented reasons provided in the will.[138]

V. CONCLUSION

By choosing not to review the Wisconsin Court of Appeals's decision in *Schunk*, the Wisconsin Supreme Court missed an opportunity to harmonize the State's slayer statute with its prohibition against assisted suicide.[139] Without a review, the Wisconsin court system has effectively failed to

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134. *See* § 854.14(6)(b) (nullifying the slayer statute in limited circumstances when the State places a greater emphasis on the express wishes of the testator than on its interest in not rewarding wrongdoers).

135. *See id.* (limiting exemptions to individuals who testators expressly exempt in their will); *see also* Erlanger, *supra* note 21, app. C at 33 n.25 (stating that the drafting committee believes that the attestation requirement for wills helps ensure that the waiver is intentional and genuine).

136. With the *Schunk* decision nullified and in order to effect the purpose of section 854.14(6)(b) of the Wisconsin Probate Code, the Legislature should prevent state prosecutors from using wills as prima facie evidence to convict individuals for assisted suicide.

137. *Cf.* 26 U.S.C. § 302(c)(2)(B) (2006) (requiring that a shareholder must neither have received the redeemed stock from a family member ten years before, nor have received other stock from the redeeming corporation ten years after the redemption in order for the family attribution tax rules not to apply).

138. *See In re* Wilkins' Estate, 211 N.W. 652, 655 (Wis. 1927), *overruled in part by In re* Will of Wilson, 92 N.W.2d 282 (Wis. 1958) (noting that courts can apply equity doctrines to decide probate matters, especially pertaining to wills).

139. *See In re* Estate of Schunk, 2008 WI App 157, ¶ 13, 314 Wis. 2d 483, 760 N.W.2d 446, 448-49, *cert. denied sub nom.* Lemmer v. Schunk, 2009 WI 23, 764 N.W.2d 532 (implying that Linda and Megan may have prevailed even if the case survived summary judgment since there was not strong evidentiary proof that they had committed assisted suicide).

address that, like a felony murderer, an accomplice, a co-conspirator, and an accessory, an individual who commits assisted suicide "kills" because his assistance is a substantial factor in the resulting death.[140]

As a result, the Wisconsin court system has opened the door to several onerous consequences – chief among them the potential to benefit from a felony at the detriment of other beneficiaries.[141] The Wisconsin Legislature should not only act to expressly reject the decision in *Schunk*, but should also work to prevent benefactors from increasing a beneficiary's inheritance in exchange for suicide assistance when they utilize section 854.14(6)(b) to nullify the slayer statute.[142]

The consequences that now may impact Wisconsin without legislative action may also soon extend far beyond the State's borders. As other states have yet to determine whether their respective slayer statutes disqualify individuals who commit assisted suicide, the reasoning of the Wisconsin Court of Appeals may become a persuasive basis for other state courts or legislatures to exempt assisted suicide from the slayer rule.[143]

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140. *Compare* WIS. STAT. § 940.12, *with* WIS. STAT. § 939.05 (2008), *and* WIS. STAT. § 940.03 (2008).

141. *See* WIS. STAT. § 854.14(6)(b) (2008) (allowing testators to exempt individuals from the slayer statute in their wills so the individuals may inherit despite committing assisted suicide, while not prohibiting testators from decreasing the interests of beneficiaries who are not involved in the assisted suicide).

142. *Cf.* DEL. CODE ANN. tit. 12, § 2322 (2008) (eliminating any vagueness in Delaware's slayer statute by defining "slayer" to describe only persons guilty of committing manslaughter and first and second-degree murder).

143. *See* Foley, *supra* note 46, at A6 (quoting Boston College Law Professor Ray Madoff) ("I think this is a significant ruling . . . . This is something that people have been curious about where the law would draw the line and it's interesting to actually have a case addressing it.").