

# MALICE AFORETHOUGHT AND SELF-DEFENSE: MUTUALLY EXCLUSIVE MENTAL STATES?

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*This Note analyzes the relationship between “malice aforethought,” the mens rea required to commit murder, and self-defense, a potential justification for a killing. Although both concepts are well-established in criminal law, there is a dearth of jurisprudence dealing with their intersection. Specifically, many jurisdictions, including the Second Circuit, have yet to conclusively address the issue of whether the mental state required for proving a self-defense justification is incompatible with the mens rea of malice aforethought required for committing murder under the primary federal murder statute, 18 U.S.C. § 1111. Because under federal law, self-defense is an issue of common law, rather than statutory, the existing case law on this question in federal jurisdictions is inconsistent, inconclusive, and often nonexistent. Some circuits have indicated, often in dicta, that malice is incompatible with the reasonable fear for one’s safety that is required when acting in self-defense, while other courts have found it consistent for a defendant to possess a preformulated intent to kill another person but also act (and therefore kill) in the moment due to a fear for his or her life or safety. While both positions present analytical difficulties, these problems all stem largely from the definitional ambiguity surrounding “malice aforethought” and courts’ subsequent inconsistent applications of the concept in murder trials. Therefore, this Note argues for the adoption of a clear and consistent definition of “malice aforethought” which encompasses its common law definition, requiring a depraved or evil mental state beyond mere intent to kill.*

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INTRODUCTION

Dave and Victor were once good friends. Unfortunately, their friendship languished after a series of physical confrontations and Victor’s threats to harm Dave and his pregnant girlfriend. So, one night, Dave decided to take action. He adorned a hooded sweatshirt that covered his face, armed himself with a gun, and searched the neighborhood for Victor. Upon approaching his former friend, Dave saw Victor reach for an object at his waist. Believing it to be a gun, Dave fired two shots that hit Victor, knocking him to the ground. Standing over the body, Dave fired several more rounds. He then exclaimed, “I got you now!” and fired his last shot into Victor’s head.

At the resulting murder trial, Dave claimed his actions were justified in self-defense and asked the court to instruct the jury accordingly.<sup>1</sup> Should Dave be precluded from claiming self-defense because his actions amount to deliberate and evil conduct designed to end Victor’s life, thereby making his self-defense claim purely manufactured? Or should Dave, despite his clear intent to kill Victor, still be entitled to a justification instruction because he *in that moment* acted to defend himself from a perceived gun threat, irrespective of his prior ill will towards Victor? The answer depends on whether the court believes Dave’s actions constitute “malice aforethought,” and are therefore incompatible with a claim of self-defense.

Self-defense has been an available justification to criminal defendants since the early ages of the common law.<sup>2</sup> So, too, is it an old adage that one who acts with “malice aforethought” and a preformu-

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<sup>1</sup> These facts are taken from a recent case in which the court denied the defendant’s request for a justification instruction, concluding that his “conduct precludes any reasonable inference that [he] was acting in self-defense at any point during the shooting.” *Bonilla v. Lee*, 35 F. Supp. 3d 551, 564–65 (S.D.N.Y. 2014), certificate of appealability denied, No. 14-3411 (2d Cir. Jan. 29, 2015).

<sup>2</sup> See, e.g., Sara L. Ochs, *Can Louisiana’s Self-Defense Law Stand Its Ground?: Improving the Stand Your Ground Law in the Murder Capital of America*, 59 LOY. L. REV. 673, 679–81 (2013) (tracing the evolution of self-defense at English common law from an excuse to a justification); Jason W. Bobo, *Following the Trend: Alabama Abandons the Duty to Retreat and Encourages Citizens to Stand Their Ground*, 38 CUMB. L. REV. 339, 341–42 (2008) (describing the evolution of the common law right to self-defense according to Sir William Blackstone).

lated intent to kill another person is guilty of murder.<sup>3</sup> However, despite these two longstanding, uncontroversial propositions in criminal law, there is a dearth of jurisprudence dealing with their intersection. Specifically, many jurisdictions have yet to conclusively address the issue of whether the mental state required for proving a self-defense justification is incompatible with the mens rea of malice aforethought required for committing murder.

Because under federal law, self-defense is an issue of common law, rather than statutory,<sup>4</sup> the existing case law on this question in federal jurisdictions is inconsistent, inconclusive, and often, nonexistent. In murder prosecutions under the primary federal murder statute, 18 U.S.C. § 1111,<sup>5</sup> federal courts oscillate between enunciating longstanding common law principles, relying on state case law, and looking to other circuits' articulations of self-defense principles when assessing whether a defendant is entitled to claim self-defense. However, because federal murder prosecutions are rare, and self-defense assertions even rarer, there is a paucity of existing federal precedent on this issue.

The Second Circuit, where many of the nation's most complex murder trials are prosecuted,<sup>6</sup> in particular has no precedent on this question, and has often provided both inconsistent definitions of "malice aforethought" and requirements for proving a self-defense

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<sup>3</sup> See, e.g., Suzanne Mounts, *Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation*, 33 U. S.F. L. REV. 313, 313–14 (1999) (analyzing the evolution of "malice aforethought" into "the identifying characteristic of murder"); Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 566–70 (1934) (describing malice aforethought as the state of mind required to establish murder).

<sup>4</sup> See *United States v. Desinor*, 525 F.3d 193, 199 (2d Cir. 2008) (citing *United States v. Butler*, 485 F.3d 569, 572 n.1 (10th Cir. 2007) and *Wallace v. United States*, 162 U.S. 466, 471–73 (1896)).

<sup>5</sup> See 18 U.S.C. § 1111 (2012).

<sup>6</sup> This Note focuses on the Second Circuit in particular given the extensive amount of complex violent crime trials, including conspiracy and organized crime-related offenses, involving § 1111 or other federal statutes for specific types of murder that encompass the elements of § 1111, such as 18 U.S.C. § 924(j) (2012) (firearms-related murder), prosecuted in its jurisdiction, as well as the number of relevant Second Circuit opinions on this topic. See, e.g., N.Y. CTY. LAWYERS ASS'N COMM. ON THE FED. COURTS, THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK: A RETROSPECTIVE (1990–2014) (May 2015), [https://img.nyed.uscourts.gov/files/forms/EDNY\\_Retrospective%20\\_1990-2014.pdf](https://img.nyed.uscourts.gov/files/forms/EDNY_Retrospective%20_1990-2014.pdf) (describing notable organized crime cases in the Eastern District of New York from 1999–2014). A search of Public Access to Court Electronic Records (PACER) for § 1111 or comparable federal murder statutes similarly reveals how frequently these crimes are charged in the district courts encompassed by the Second Circuit. However, as this Note discusses, the intersection of malice aforethought and self-defense is a larger problem occurring within the federal system that is not contained to the Second Circuit. While this Note discusses other federal decisions on this issue, it is beyond the scope of this Note to address the specific position of every circuit on this subject.

justification. Typically, courts in this jurisdiction look to the New York self-defense statute, New York Penal Law § 35.15,<sup>7</sup> for guidance in assessing what criteria a defendant must meet to prove a self-defense justification. Under this statute, a defendant must prove that he or she *subjectively* believed the use of deadly force was necessary to defend himself or herself or others *and* that a *reasonable person* would have believed the use of deadly force was necessary under the same circumstances.<sup>8</sup> However, the Second Circuit has yet to address whether it is possible for a defendant to both meet these requirements *and* to have acted with malice aforethought under 18 U.S.C. § 1111(a). Some circuits have indicated, mostly in dicta, that if the prosecution can prove a defendant acted with malice, he or she cannot claim a self-defense justification, because this mental state is incompatible with a reasonable fear for one's safety that is required when acting in self-defense. However, other courts have found that the two mental states *are* compatible; that is, one can have a preformulated intent to kill another person but also act (and therefore kill) in the moment due to a fear for one's life or safety.<sup>9</sup>

While some of the courts merely enunciate these conclusions without providing a rationale, relying instead on logical constructs or moral principles of good and evil, others have posited policy reasons for adopting one of the two theories.<sup>10</sup> However, many hypotheticals demonstrate the problem with both approaches. For example, if the two mental states are potentially *compatible*, a person could manufacture a self-defense claim: Person A could decide he desires to kill another, Person B, and then provoke Person B verbally or psychologically to the point where Person B feels compelled to physically strike or threaten his provoker, thereby justifying Person A to kill Person B as intended, but claim he was acting in self-defense. On the other hand, if malice aforethought and self-defense are deemed mutually exclusive mental states, one could also imagine a situation in which Person A had a violent relationship with Person B and even a desire to kill her in the future, but upon encountering Person B in the street and finding herself standing at gunpoint, Person A felt forced to shoot justifiably in self-defense. As these hypothetical situations demonstrate, the assessment of whether the mental states should be determined incompatible is laden with policy implications. One solution

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<sup>7</sup> See N.Y. PENAL LAW § 35.15 (McKinney 2004).

<sup>8</sup> See *id.*

<sup>9</sup> See *infra* Part II (discussing the competing approaches courts have taken when commenting on the compatibility of malice aforethought with the self-defense justification).

<sup>10</sup> See *infra* Section III.A.

condemns those committing justifiable homicides to murder convictions, eroding the underlying principle of our criminal justice system—that criminal liability should be proportionate to the defendant’s mental fault<sup>11</sup>—and the other permits defendants to manufacture “self-defense” situations and thereby get away with murder.

Given that definitional ambiguity is the root of these conceptual problems, a clear and consistent definition of “malice aforethought” is needed to resolve them. Ideally, Congress should amend § 1111 to clarify that the term retains its common law definition, requiring a depraved or evil mental state beyond mere intent to kill. Such a legislative change would give guidance to federal courts such as the Second Circuit who have difficulties applying the concept. However, even if the legislature does not act, the Second Circuit could also refine its interpretation of malice aforethought in its next applicable case, eliminating many of the policy problems described above. In doing so, the Circuit would ensure that one killing could not be committed both with malice aforethought *and* in justifiable self-defense, merely because both acts require intent to kill.

This Note will address this topic in three parts. Part I will assess the concept of “malice aforethought” and its various definitions in the Second Circuit and other federal jurisdictions, and will also discuss the requirements for self-defense, both in § 1111(a) murder prosecutions and under relevant New York state law. Part II will analyze the state of the law on whether malice aforethought and self-defense are compatible mental states, including the rationales advanced by various courts. Part III will compare the policy reasons advanced for both conflicting approaches and provide several hypotheticals that demonstrate the difficulties with both conclusions, as well as advocate a few ways the Second Circuit, or the legislature, can remedy this ambiguity within the law, including refining the definition of “malice aforethought.”

## I

### BACKGROUND

#### A. *What Is “Malice Aforethought”?*

The primary federal murder statute, 18 U.S.C. § 1111(a), outlaws “the unlawful killing of a human being with malice aforethought,” but

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<sup>11</sup> See, e.g., SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 186 (9th ed. 2012) (“The requirement that punishment be proportional to the seriousness of the offense is a core principle of punishment.”).

does not explicitly define the term “malice aforethought.”<sup>12</sup> Given this lack of codified definition, federal or otherwise, many legal scholars have attempted to assess the requirements of proving the mental state of malice aforethought, pointing to its ever-“shift[ing] . . . moorings” throughout criminal jurisprudence as evidence that the concept merely serves as a “convenient symbol” when the courts wish to impose it, rather than a rigid construct.<sup>13</sup>

This symbolic, shifting notion of malice aforethought is aptly demonstrated in the Second Circuit’s murder cases, which alternate between reliance on old common law principles and a more recently refined standard in defining this “famously elusive term.”<sup>14</sup> Supreme Court precedent provides little guidance on this issue, describing “malice aforethought” only as “a state of mind deemed particularly worthy of punishment.”<sup>15</sup> In § 1111(a) prosecutions, however, the Second Circuit has explained that “malice aforethought . . . follows the common law’s definition of murder,” and may be satisfied in several ways,<sup>16</sup> including proof of “intent to kill.”<sup>17</sup> Several lower court

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<sup>12</sup> 18 U.S.C. § 1111(a) (2012). The statute further defines first-degree murder as “[e]very murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing.” *Id.* Based upon this text alone, it is unclear whether “willful, deliberate, malicious, and premeditated killing” constitute methods by which one could be found to have acted with “malice aforethought,” or if they are independent requirements of a first-degree murder conviction.

<sup>13</sup> See Perkins, *supra* note 3, at 570 (describing malice aforethought as “not a rule of thumb which can dispense with a rigid scrutiny of the facts of each particular case”); Howard J. Curtis, *Malice Aforethought, in Definition of Murder*, 19 YALE L.J. 639, 646 (1910) (arguing that malice aforethought “is a technical term which is used for convenience as covering all unlawful killings which the law deems murder”). Some argue that the entire concept of malice is only necessary because “crimes are [not] clearly defined.” Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21, 41–42 (2001) (arguing that the vague conception of malice as “do no evil” alone would permit too much government discretion and not enough fair warning to criminal defendants).

<sup>14</sup> See *United States v. Gotti*, No. S802CR743, 2004 WL 2389755, at \*7 (S.D.N.Y. Oct. 26, 2004) (quoting *United States v. Jackson*, 351 F. Supp. 2d 108, 114 (S.D.N.Y. 2004)) (referring to the “imprecision of the term ‘malice aforethought’”). One could argue, contrary to this Note, that the imprecision of “malice aforethought” arises from its common law definition, which an “intent to kill” definition helps to eliminate. However, the additional definitional complications that could arise from uniform adoption of the common law definition, apart from the intersection of self-defense, are beyond the scope of this Note.

<sup>15</sup> *Id.* (“The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those . . . who would be spared.” (citing *Tison v. Arizona*, 481 U.S. 137, 156 (1987))); see also *Patterson v. New York*, 432 U.S. 197, 215 (1977) (describing malice aforethought required for murder as “a deliberate, cruel act committed . . . without . . . provocation”).

<sup>16</sup> See *United States v. Thomas*, 34 F.3d 44, 48 (2d Cir. 1994) (explaining that “there are several ways in which the element of malice aforethought [in § 1111] can be satisfied . . . [including] felony murder”); *Gotti*, 2004 WL 2389755, at \*7 (“The Second Circuit has

cases in the Second Circuit have utilized this interpretation in § 1111(a) first-degree murder prosecutions, requiring the government to prove intent to kill to establish malice aforethought.<sup>18</sup> Similarly, the Second Circuit and its lower courts, as well as other circuits, have equated malice and intent in second-degree murder cases under § 1111(a).<sup>19</sup>

However, when courts apply this seemingly clear “intent to kill” standard, they seem to also rely on the common law notions of evil and a “depraved heart” when finding a defendant acted with malice aforethought.<sup>20</sup> Other circuits have similarly included *both* intent to

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stated that malice aforethought can be shown through proof of intent to cause serious bodily harm, killing in the commission of a felony, or when an assailant acts with awareness of a serious risk of death or serious bodily harm.” (internal quotation marks omitted)). Because the malice element can be satisfied in ways other than by proof of intent to kill, it is important to distinguish between cases analyzing a justification for an intentional killing and a justification for a non-intentional malice killing, such as depraved-heart murder. Although cases involving the latter category of killings often provide useful general analysis of the law of justification, the relationship between their mens rea requirements and the mental state necessary for self-defense are beyond the scope of this Note, which focuses on the intersection of mental states for intentional malice killings and self-defense.

<sup>17</sup> See *Thomas*, 34 F.3d at 49 (explaining that statutes have retained the common law conception of “malice aforethought” as “intent to kill and the intent to commit a felony” by now including “premeditated murder and some form of felony murder” (quoting *Schad v. Arizona*, 501 U.S. 624, 639–40 (1991))); *Gotti*, 2004 WL 2389755, at \*7 (stating that malice “may be proven by evidence that the defendant acted consciously with intent to kill” (quoting MODEL FED. JURY INSTRUCTIONS ¶ 41.01 (2004))).

<sup>18</sup> See, e.g., *United States v. Guerrero*, 52 F. Supp. 3d 643, 652 (S.D.N.Y. 2014) (“The Government has sufficiently proved malice aforethought [under § 1111] by proving intent to kill.”); *United States v. Daija*, 529 F. Supp. 2d 465, 467–68 (S.D.N.Y. 2008), *aff’d*, 333 F. App’x 658 (2d Cir. 2009) (“Under the common law, malice aforethought is ‘the characteristic mark of all murder . . . . It may be discoverable in a specific deliberate intent to kill. It . . . may also be inferred from circumstances which show a wanton and depraved spirit, a mind bent on evil mischief without regard to its consequences.’” (quoting *Virgin Islands v. Lake*, 362 F.2d 770, 774 (3d Cir. 1966))).

<sup>19</sup> See, e.g., *United States v. Regnier*, 44 F. App’x 524, 528 (2d Cir. 2002) (“[S]econd degree murder’s malice aforethought element is satisfied by: (1) intent-to-kill without the added ingredients of premeditation and deliberation; (2) intent-to-do-serious-bodily-injury; (3) depraved-heart; or (4) commission of a felony when the felony in question is not one of those specified in the first degree murder paragraph of § 1111(a).” (quoting *United States v. Pearson*, 159 F.3d 480, 486 (10th Cir. 1998))); *Gotti*, 2004 WL 2389755, at \*7 (finding that malice aforethought requires “at least a finding of recklessness” (quoting *Jackson*, 2004 WL 2181136, at \*4)). Courts have also drawn the same conclusion in second-degree murder cases prosecuted under New York state law, which includes “depraved-indifference murder.” See *id.* at \*8 (finding that “malice and intent have overlapping meanings, and therefore the same evidence would be relevant to prove both”).

<sup>20</sup> See, e.g., *Daija*, 529 F. Supp. 2d at 468 (finding that the defendant “was acting with the requisite malice aforethought” because his “plain intent was to . . . mak[e] certain [the victim] was dead” by shooting him again after their altercation ended and explaining that “even assuming arguendo that this was not his express intent, he certainly acted so recklessly as to show ‘a mind bent on evil mischief without regard to its consequences’”); *cf.* *United States v. Gonzalez*, 399 F. App’x 641, 649 (2d Cir. 2010) (finding that defendant

kill *and* “a depraved heart” when articulating ways to satisfy the malice aforethought requirement in § 1111(a).<sup>21</sup> To further complicate the malice aforethought definition, the Second Circuit has sometimes seemed to equate malice and premeditation in dicta, even though they are separate concepts in § 1111(a)’s description of murder.<sup>22</sup> Therefore, while the definition of malice aforethought sounds clear when announced in principle, in practice the courts both define and apply it inconsistently.

### B. *Defining the Self-Defense Justification*

The self-defense justification is recognized in all jurisdictions,<sup>23</sup> but it is defined differently throughout different states’ statutes and within federal law.<sup>24</sup> Because the law of self-defense is “a matter of federal common law,”<sup>25</sup> federal precedents in this area are inconsistent, ambiguous, and, most significantly, not binding.<sup>26</sup> However,

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had the “requisite mental state” for a § 924(j) charge of murder through the use of a firearm in relation to a drug conspiracy because he knew of a drug dispute between his co-conspirator and the victim, received a gun, and gave it to the co-conspirator in a location “where the victim was trapped; cocked the gun after it jammed; and received and hid the gun after the murder”).

<sup>21</sup> See, e.g., *United States v. Woods*, 59 F. App’x 319, 324–25 (10th Cir. 2003) (“The malice aforethought requirement can be satisfied by showing: ‘(1) intent-to-kill without the added ingredients of premeditation and deliberation; (2) intent-to-do-serious-bodily-injury; (3) depraved-heart; or (4) commission of certain felonies.’”) (internal citation omitted). In *Woods*, the Tenth Circuit found that the evidence was sufficient to prove the defendant “intended to kill, or do serious bodily injury to [the victim] or that his conduct evidenced a depraved heart.” *Id.* at 325 (emphasis added); see also *Pearson*, 159 F.3d at 486 (including “depraved-heart” and “intent-to-kill” as different ways to satisfy the malice aforethought element in second-degree murder).

<sup>22</sup> Cf. *Thompson v. United States*, 155 U.S. 271, 282–83 (1894) (indicating that a preformulated “purpose to kill” may constitute premeditation). Compare § 1111(a) (defining “[m]urder” as “the unlawful killing of a human being with malice aforethought” but listing “premeditated killing” as one way to “perpetrate[ ]” first degree murder) with *United States v. Chang*, 59 F. App’x 361, 364 (2d Cir. 2003) (“Title 18 U.S.C. § 1111(a) . . . defines the crime of murder punishable under the statute as . . . any killing committed with premeditation (or ‘malice aforethought’”).

<sup>23</sup> See generally Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999 (2005) (distinguishing between the different theories which could justify the availability of the self-defense justification).

<sup>24</sup> See, e.g., Ochs, *supra* note 2, at 682 (explaining that “[t]he laws of self-defense have been largely left up to state legislatures, and there is no uniform federal law or Supreme Court precedent” to guide them); Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399, 409–10 (2007) (discussing the availability of self-defense in the federal and states’ constitutions and how their scopes vary).

<sup>25</sup> *United States v. Desinor*, 525 F.3d 193, 199 (2d Cir. 2008) (describing the development of the federal justification defense by looking to state common law).

<sup>26</sup> See David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 AM. J. CRIM. L. 293, 325 (2000) (explaining that the

despite the lack of clarity in federal self-defense jurisprudence, all federal murder cases acknowledge the maxim that “[d]etached reflection cannot be demanded in the presence of an uplifted knife”<sup>27</sup> and thereby permit a self-defense instruction where warranted. The question for courts, then, is not whether to permit self-defense justifications in murder prosecutions, but rather *how* to assess whether the justification has been proven.

Many circuits have articulated various (and often inconsistent) requirements for establishing self-defense justifications in § 1111(a) prosecutions. The circuits that have considered the issue require the defendant to have a “reasonable belief” that the use of deadly force was “necessary” to repel a threat of death or bodily harm,<sup>28</sup> and most jurisdictions also require that the threat be “imminent.”<sup>29</sup> The jurisdictions are split, however, on whether there is a “duty to retreat” that can invalidate a self-defense claim if violated.<sup>30</sup> While some courts seem to permit self-defense instructions in situations where one would presume the imminence or necessity requirements were not met, such as where the defendant’s fear for his or her safety relates to prior altercations with the victim<sup>31</sup> or the defendant could easily have

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Supreme Court’s older cases about self-defense “remain available as persuasive, if not necessarily binding, precedents for any court which must consider common law self-defense issues”).

<sup>27</sup> See *Brown v. United States*, 256 U.S. 335, 343 (1921) (establishing the right to self-defense and refusing a duty to retreat in the face of deadly threats).

<sup>28</sup> See *United States v. Francisco*, 497 F. App’x 412, 420 (5th Cir. 2012) (requiring the defendant to prove that he or she “was under an unlawful and present, imminent, and impending [threat.] [and] had no reasonable legal alternative to violating the law” (quoting *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998))); *United States v. Milk*, 447 F.3d 593, 598 (8th Cir. 2006) (approving jury instructions which require a reasonable belief “that force is necessary to protect himself or another person from . . . unlawful physical harm”).

<sup>29</sup> See, e.g., *United States v. Higginbotham*, 577 F. App’x 948, 950 (11th Cir. 2014) (upholding jury instructions that required “that any threat of death or serious harm [to the defendant] be imminent before resorting to deadly force”); *United States v. Toledo*, 739 F.3d 562, 567 (10th Cir. 2014) (“A person may resort to self-defense if he reasonably believes that he is in imminent danger of death or great bodily harm, thus necessitating an in-kind response.”); *Francisco*, 497 F. App’x at 420 (rejecting the defendant’s justification defense because although he “likely feared for his safety,” there was no evidence that “he was under a ‘present, imminent, and impending’ threat” sufficient to constitute “a real emergency leaving no time to pursue any legal alternative” (internal citation omitted)).

<sup>30</sup> Compare *Higginbotham*, 577 F. App’x at 950 (upholding jury instruction that included a “duty to retreat” if possible before resorting to deadly force), with *Toledo*, 739 F.3d at 567–68 (noting that although the defendant “could have retreated rather than defend himself at the fence line,” he was only required to entertain a “reasonable belief” in the necessity of resorting to physical force, not to “exercise a duty to retreat”).

<sup>31</sup> For example, in *Higginbotham*, the district court permitted a self-defense instruction for a defendant who stabbed a fellow inmate who verbally mocked him earlier that day, even though he left the table, retrieved a knife, and then *returned* to stab the victim. *Higginbotham*, 577 F. App’x at 949–50 (“Higginbotham argued that he had attacked

escaped without engaging the victim,<sup>32</sup> other courts still refuse the defendant a self-defense jury instruction due to lack of imminence and availability of escape, even when the threat seems closer in proximity and time.<sup>33</sup> In addition to these various justification requirements, the Second Circuit has also held that an initial aggressor of conflict resulting in killing cannot claim self-defense in a § 1111(a) prosecution.<sup>34</sup> Although these cases provide only a synopsis of the criteria used to assess self-defense claims in § 1111(a) prosecutions, they demonstrate the complexities and inconsistencies that pervade federal self-defense jurisprudence.

To further complicate the self-defense entitlement, the Second Circuit (as well as its sister circuits)<sup>35</sup> “look[s] to state court decisions for guidance” when assessing this issue of “federal common law.”<sup>36</sup> The circuit looks in particular to the self-defense requirements set forth in New York Penal Law Section 35.15 when analyzing a defen-

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Pritchard out of necessity and in self-defense. He specifically stated that “[e]verything that [] happen[ed] was brought [] by Mr. Pritchard’s intoxication, by Mr. Pritchard’s aggressiveness, and by an inmate being called out in front of other inmates.”)

<sup>32</sup> In *Toledo*, the defendant stabbed the victim, a neighbor with whom he had a feud, through a fence, but because the court held that self-defense does not include a duty to retreat, he was entitled to a justification jury instruction despite his ability to move away from his neighbor who was lunging at the fence. *Toledo*, 739 F.3d at 567–68. The Tenth Circuit found the trial court’s refusal of a self-defense instruction to be error because the size difference between the victim and defendant, the victim’s tendency to become violent when drunk, and the weakness of the fence combined to make it possible that defendant’s fear was reasonable. *Id.* (finding that while “the self-defense issue [is] a close call,” the evidence was sufficient to justify a jury instruction since “the burden of production” is low).

<sup>33</sup> In *Francisco*, the Fifth Circuit upheld the decision to deny the defendant a self-defense instruction because, although he “likely feared for his safety” from the Crips gang he was attempting to quit, there was no evidence that he could not escape the food line or that there was a “real emergency” requiring him to stay and fight his Crips aggressor. 497 F. App’x at 420.

<sup>34</sup> See *United States v. Thomas*, 34 F.3d 44, 48 (2d Cir. 1994) (holding that “one who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation” (quoting *United States v. Peterson*, 483 F.2d 1222, 1231 (D.C. Cir. 1973)); see also *United States v. Desinor*, 525 F.3d 193, 198 (2d Cir. 2008) (citing *Thomas* and section 35.15 of the New York Penal Law for the proposition that the self-defense justification “is not available to an initial aggressor”). For example, in *Thomas*, because the defendants initiated the aggression by approaching the victim’s car with guns in order to rob him, they could not claim self-defense to killing him, even if the victim did draw a gun. *Thomas*, 34 F.3d at 48.

<sup>35</sup> The Eighth Circuit, for example, has looked to Missouri law to assess what the government must prove when a criminal defendant asserts self-defense to a federal murder charge. See *United States v. Tunley*, 664 F.3d 1260, 1262–63 (8th Cir. 2012) (citing section 563.01 of the Missouri Revised Statutes, which contains the state’s self-defense laws, in describing what the government must refute beyond a reasonable doubt).

<sup>36</sup> See *United States v. Davis*, 531 F. App’x 65, 68 (2d Cir. 2013), *cert. denied*, 135 S. Ct. 48 (2014) (quoting *Desinor*, 525 F.3d at 199) (looking to New York state justification law in assessing defendant’s self-defense claim).

dant's justification claim.<sup>37</sup> However, while courts in the Second Circuit rely on New York law when analyzing self-defense claims in federal murder cases, some acknowledge that its requirements are not identical to the federal common law of self-defense.<sup>38</sup> Although it is unclear why courts rely so heavily on state law in this area, as it is neither binding nor "identical," one possible explanation, at least in the context of federal murder prosecutions, is that the Second Circuit also holds § 1111 to be "the most analogous federal offense" to murder under New York Penal Law, and thereby may find the defenses to such similar offenses sufficiently analogous as well.<sup>39</sup>

New York Penal Law Section 35.15 permits a self-defense justification when a person "reasonably believes [the use of physical force] to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person," subject to several exceptions.<sup>40</sup> The justification is "not an affirmative defense," so the government must prove beyond a reasonable doubt that the defendant did not act in self-defense.<sup>41</sup> The New York state cases inter-

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<sup>37</sup> *Id.* (applying the two-pronged test under section 35.15 to assess whether the jury's self-defense instructions were accurate); *Desinor*, 525 F.3d at 198–99 (citing to section 35.15(b)'s requirements in assessing whether defendants constituted "initial aggressors" unentitled to claim self-defense).

<sup>38</sup> *E.g.*, *United States v. Jackson*, 351 F. Supp. 2d 108, 115 (S.D.N.Y. 2004) (describing N.Y. Penal Law Section 35.15 as "one statutory formulation of these complex rules, which very likely differs in various respects from the less precisely formulated common-law rules followed by the federal courts").

<sup>39</sup> *United States v. Carr*, 424 F.3d 213, 231 (2d Cir. 2005) (describing "first degree murder under [18 U.S.C.] § 1111" to be "the most analogous federal offense" to second-degree murder under New York Penal Law (quoting *United States v. Minicone*, 960 F.2d 1099, 1110 (2d Cir. 1992))). Courts in this jurisdiction have found this to be the case for sentencing purposes, even though New York law does not contain the "malice aforethought" and "premeditation" requirements in § 1111(a). *Id.* ("[T]he absence of reference to premeditation or malice aforethought [in the state law] does not mean that federal first degree murder is not the most analogous federal offense." (quoting *United States v. Diaz*, 176 F.3d 52, 123 (2d Cir. 1999))); *Minicone v. United States*, 353 F. Supp. 2d 316, 320 (N.D.N.Y. 2005) (finding that "[§] 1111's definition of federal first degree murder is analogous to that of § 125.25" despite the lack of premeditation or malice in the New York statute). Additionally, federal courts may look to state self-defense law because state courts process a higher criminal case-load, resulting in more law on this issue.

<sup>40</sup> N.Y. PENAL LAW § 35.15 (McKinney 2004). The exceptions include: a) when the victim's threats were "provoked by the actor with intent to cause physical injury" to the victim; b) when "[t]he actor was the initial aggressor," unless "the actor has withdrawn from the encounter and effectively communicated such withdrawal to [the] other person"; and c) "[t]he physical force involved is the product of a combat by agreement not specifically authorized by law." *Id.* The statute also imposes a duty to retreat, unless the actor is i) at home "and not the initial aggressor"; ii) "a police officer" in the line of duty; or iii) "reasonably believes that such other person is committing or attempting to commit" an enumerated felony. *Id.*

<sup>41</sup> *See In re Y.K.*, 663 N.E.2d 313, 315 (N.Y. 1996).

preting and applying this provision explain that it contains a “two-part test which involves both subjective and objective components:” 1) whether the defendant subjectively “believed physical force . . . was necessary” to avoid imminent attack; and 2) whether the defendant’s belief “was [objectively] reasonable.”<sup>42</sup> The rationale provided for adopting this dual-pronged test is to preclude “citizens [from] set[ting] their own standards for the permissible use of force,” and thereby getting away with murder due solely to their unreasonable perceptions of threats.<sup>43</sup> However, although the second component of this test is objective, New York courts have held that it must evaluate “the defendant’s circumstances,” including prior encounters with the victim “which could provide a reasonable basis for a belief that” such other person intended to injure or kill the defendant, or “that the use of deadly force was necessary.”<sup>44</sup>

In applying these various requirements, courts seem willing to permit the defendant a self-defense instruction as long as the facts could permit the inference that the defendant acted in self-defense and did not provoke or instigate the incident. Therefore, the Second Circuit has found self-defense possible even when the victim’s hands were pinned behind his back, due to the lingering “threat [that the victim] could shoot him” in conjunction with evidence suggesting a struggle for the gun.<sup>45</sup> Similarly, courts have been unwilling to find the defendant violated the duty to retreat in circumstances where it seems unclear whether he or she can retreat “with complete safety.”<sup>46</sup> However, in cases where the New York courts *have* refused self-defense justifications because the defendant “could have” retreated, the courts’ language suggests they believe the defendant instigated the confrontations or was being disingenuous in claiming fear for his or her life.<sup>47</sup> In denigrating the defendant’s failure to retreat to safety,

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<sup>42</sup> See *id.*; *People v. Goetz*, 497 N.E.2d 41, 52 (N.Y. 1986) (“The jury must first determine whether the defendant had the requisite beliefs under section 35.15 . . . . If the People do not prove beyond a reasonable doubt that he did not have such beliefs, then the jury must also consider whether these beliefs were reasonable.”).

<sup>43</sup> See *Goetz*, 497 N.E.2d at 50.

<sup>44</sup> See *id.* at 52.

<sup>45</sup> *Blazic v. Henderson*, 900 F.2d 534, 541 (2d Cir. 1990) (applying New York law in a habeas corpus case).

<sup>46</sup> *In re Y.K.*, 663 N.E.2d at 315 (finding that the defendant could not “retreat safely” when she was pinned to the ground and surrounded by others, justifying her response of deadly physical force to this “unprovoked attack”). In construing New York Penal Law Section 35.15, *Goetz*, and *Y.K.* on this issue, the Second Circuit has held that “the justification defense remains available even if a prudent person in the defendant’s position might have retreated earlier, or avoided the area where the potential assailant was to be found.” *Davis v. Strack*, 270 F.3d 111, 127 (2d Cir. 2001).

<sup>47</sup> The New York Court of Appeals, the state’s highest court, has denied a self-defense justification to a defendant who “sought . . . out [his enemies] for a confrontation” and shot

one court has even gone so far as to describe the defendant's actions as a "premeditated ambush [which] was antithetical to a justification defense."<sup>48</sup>

The reasoning in these cases seems to suggest that courts will deny a self-defense claim when the facts demonstrate the defendant acted with malice, or with methods analogous to those listed in § 1111(a), such as "lying in wait" or "premeditat[ion]," or when the defendant appears to have manufactured a claim of self-defense.<sup>49</sup> Yet, despite the clear comparison that courts are making between the requisite mental states for the crime of murder and the self-defense justification, New York's highest court has found "no basis for limiting the application of the defense of justification to any particular *mens rea*."<sup>50</sup> Rather than "negate a particular element of a crime," the court explained the justification of self-defense "renders such conduct entirely lawful."<sup>51</sup> The court therefore dismissed "[t]he apparent conceptual difficulty in reconciling" a *mens rea* of malice and the self-defense justification, and instead deemed acquittal required whenever the government fails to disprove self-defense.<sup>52</sup> Despite the court's somewhat dismissive language on this question, however, it is a highly

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them "before he had completed his 'retreat'" that "could have been consummated by withdrawal in complete safety to his home." *People v. Collice*, 363 N.E.2d 340, 340 (N.Y. 1977). The court's condemnation of defendant's failure to retreat is embedded in language illustrating the court's disbelief that he was truly in fear for his life. *Id.* ("If his fear had been that of close combat with his alleged pursuers, retreat into his home would have been of avail rather than wanton shooting.").

<sup>48</sup> *People v. White*, 758 N.Y.S.2d 41, 42 (N.Y. App. Div. 2003) (affirming a denial of a justification jury instruction where the "defendant shot the victim from a hiding place where [he] was lying in wait" and the "defendant could have retreated from the scene in complete safety").

<sup>49</sup> Compare *id.* (describing defendant's actions of "premeditated ambush" and "lying in wait" as "antithetical to a justification defense"), with 18 U.S.C. § 1111(a) (2012) ("Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing . . . is murder in the first degree.").

<sup>50</sup> See *People v. McManus*, 496 N.E.2d 202, 205 (N.Y. 1986) (noting the lack of "limiting language" in section 35.15 of the New York Penal Law and permitting a justification jury instruction "against diverse charges involving the use of force, regardless of the relevant *mens rea*").

<sup>51</sup> See *id.*

<sup>52</sup> See *id.* at 206–07 ("The defense must not be viewed as one that operates to negate or refute an aspect of the crime charged. Rather, if the People fail to disprove justification, the use of force is deemed lawful and the defendant is entitled to an acquittal." (citing N.Y. PENAL LAW § 35.15 (McKinney 2004))). Although this case specifically addresses the issue of whether depraved indifference murder, which is a *non-intentional* malice killing, can be justified in self-defense, the court's broad interpretation of section 35.15 of the New York Penal Law and its applicability to *all* mental states demonstrates the conceptual confusion in courts' assessment of the compatibility of self-defense and malice aforethought. *Id.*

contested and complicated issue on which the federal (and state) courts are by no means settled.

## II PROBLEM

### A. *Malice and Self-Defense Are Compatible*

Although many courts have found, mainly in dicta, that malice aforethought and self-defense are not mutually exclusive, the rationales are often sparse or nonexistent. However, if one were to attempt to categorize the existing cases according to their rationales, they would fall under one of three approaches: 1) self-defense does not negate the mens rea element required for murder but rather justifies the act; 2) if malice means “intent to kill,” it cannot be inconsistent with self-defense, because one can still be justified in intending to kill another; and 3) prior malice does not preclude one from acting in necessary self-defense in the spur of the moment. This Part will examine each of the cases within these rationales in order to discern their strengths and why they differ from one another.

The first rationale, the most common among the federal circuits that have considered this issue, purports that self-defense is a *justification*, and thus renders the homicide noncriminal rather than negating any particular mens rea element. This argument, discussed by the New York Court of Appeals at length in *People v. McManus*,<sup>53</sup> is premised on the distinction between excuse and justification,<sup>54</sup> and explains that, regardless of a defendant’s mens rea, his or her “use of force [can] be privileged under certain circumstances” and thus justifiable.<sup>55</sup> In *McManus*, the court addressed this question in the context of a charge of “depraved indifference murder,”<sup>56</sup> finding that “[i]f the conduct is justified, it simply cannot be the basis of depraved indifference

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<sup>53</sup> See 496 N.E.2d at 204–05.

<sup>54</sup> The complex distinctions between justification and excuse are beyond the scope of this Note, but many adopt a position like the *McManus* court’s that “[j]ustification negates the criminality of the act (the *actus reus*), rather than the *mens rea*, arguably rendering the self-defender’s motives irrelevant.” Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 661 n.125.

<sup>55</sup> See *McManus*, 496 N.E.2d at 204–05.

<sup>56</sup> See N.Y. PENAL LAW § 125.25 (McKinney 2006) (“A person is guilty of murder in the second degree when: . . . Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person . . .”). The mens rea for this crime, then, is recklessness, which the trial court found to be incompatible with the intent to kill required for asserting self-defense. *McManus*, 496 N.E.2d at 204, 206 (“The court reasoned that a depraved mind murder, by its very definition, cannot be justified and hence, that the defense is necessarily precluded. The argument is that justification and depraved

murder or any other crime,” and thus the defendant’s mens rea (of recklessness) should not “alter[] the rationale or operation of the defense.”<sup>57</sup> Interestingly, the court explicitly rejected the concept that the defendant must have acted intentionally in order to claim self-defense, contrary to the many courts who have found that self-defense and malice are compatible precisely because both *require* an intent to kill,<sup>58</sup> and instead found that the justification defense should be available whenever the crime involves the use of force in order to avoid “incongruous result[s].”<sup>59</sup>

Other federal circuits have followed the New York Court of Appeals’s approach and found a defendant’s mens rea irrelevant to whether a homicide is rendered justifiable through self-defense. The Second Circuit, in evaluating self-defense claims under New York Penal Law Section 35.15, has rejected the notion that self-defense must include intent to kill or that justification would negate such an intent, instead holding that “justification is a defense that renders non-criminal an otherwise criminal act, regardless of the defendant’s intent.”<sup>60</sup> In construing the New York justification statute as “a legislative judgment that the circumstances surrounding an otherwise criminal act warrant an exception to the criminal liability that ordinarily would attach,” the court thereby dismissed the notion that the defendant’s mens rea could be, by definition, inconsistent with a claim of self-defense.<sup>61</sup> Similarly, the Fifth Circuit has found that “[t]he mere

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indifference are incompatible concepts: that the defense cannot excuse a reckless disregard of an unjustified risk.”).

<sup>57</sup> *McManus*, 496 N.E.2d at 206 (“To contend, as do the People, that depraved indifference murder, by definition, cannot be justified is to beg the very question at issue. Such an argument assumes the criminality of the use of force which the defense of justification renders entirely lawful.”).

<sup>58</sup> See *infra* notes 63–66 and accompanying text.

<sup>59</sup> See *McManus*, 496 N.E.2d at 206 (arguing that limiting the justification defense to cases where defendant acted intentionally would result in unacceptably narrow application, because it would permit “murder convictions . . . under the depraved indifference statute even where . . . [they] could not be obtained either for the lesser offense of manslaughter . . . or for the greater offense of intentional murder” because those reckless murders still receive justification defenses).

<sup>60</sup> *Harris v. Scully*, 779 F.2d 875, 879–80 (2d Cir. 1985) (explaining that “one can act in self defense . . . consistently with a number of possible intentions,” including to kill, wound, frighten, or with no purpose at all, and that “justification does not negate the intent to kill, or . . . any other criminal intent”).

<sup>61</sup> See *Gibbs v. Donnelly*, 673 F. Supp. 2d 121, 146 (W.D.N.Y. 2009), *aff’d*, 402 F. App’x 566 (2d Cir. 2010) (quoting *Harris*, 779 F.2d at 879) (“The New York courts do not view the statutory defense of justification as negating any of the elements of second degree murder, or any other crime.” (citation omitted)). The district court found that even though the defendant’s testimony was inconsistent with a claim of self-defense, a justification charge was still proper because a jury could still reasonably find the elements of self-defense were proven. *Id.* at 147–48 (holding that a finding that the defendant’s testimony

raising of self-defense . . . does not establish that the defendant had the intent to kill.”<sup>62</sup> Even circuits that accept that “the defendant’s . . . motives and mental attitudes toward the victim are especially important” in self-defense cases recognize that “the absence of malice” is not “an element of the defense” and “absence of the elements of self-defense [should not be] equated with the presence of malice.”<sup>63</sup> As these few cases demonstrate, even when circuits agree on certain overarching principles related to the intersection of malice and self-defense—such as the proposition that self-defense does not negate intent to kill—their reasoning and applications of these principles conflict, with some finding *mens rea* completely irrelevant, others finding it relevant but not dispositive, and others still finding it relevant but potentially dispositive if proven independently beyond a reasonable doubt.

The second rationale advanced by courts finding malice aforethought and self-defense compatible relates to the definition of “malice.” Many courts find that if malice is defined as “intent to kill,” as it is in many Second Circuit cases,<sup>64</sup> it cannot be incompatible with self-defense, which often includes a preformulated intent to kill to protect one’s self necessitated by an imminent threat. Cases dating back to the nineteenth century have explicitly rejected the contention that a defendant cannot be justified in killing out of necessity if he or she intended to kill.<sup>65</sup> Although these cases do not always provide rationales to accompany their powerful rhetoric, some courts suggest that the problem is with defining malice as intent to kill. Instead, they advocate that malice should be determined based upon the circumstances, thereby permitting the conclusion that “there may be an

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that he did not intend to kill the victim does not preclude a finding of self-defense because self-defense is not meant to negate his *mens rea*).

<sup>62</sup> See *Mason v. Balkcom*, 669 F.2d 222, 227 (5th Cir. 1982) (explaining that “one can shoot to kill” with a variety of intentions, including no intention whatsoever). The court found that the government was required to prove the defendant possessed “the specific intent to kill” beyond a reasonable doubt. *Id.* However, this language seems to suggest that the court may believe specific intent to kill and self-defense *are* incompatible, and reversed the conviction only because the government failed to prove the intent. *Id.* at 224 (“[B]ecause malice is an element of murder and deliberate intention to kill is an essential part of malice, intent to kill is an essential element of the crime of murder . . .”).

<sup>63</sup> *United States v. Guyon*, 717 F.2d 1536, 1548–49 (6th Cir. 1983) (rejecting finding below that jury’s denial of defendant’s self-defense claim should be “interpreted as an implicit finding of malice”).

<sup>64</sup> See *supra* notes 16–22 and accompanying text (discussing how the Second Circuit equates malice with intent to kill).

<sup>65</sup> See, e.g., *Palmer v. State*, 59 P. 793, 795–96 (Wyo. 1900) (rejecting as definitively “not the law” jury instructions which permitted the jury to infer “that[] if the killing was intentional, the defendant could not be . . . justified . . . although the killing was necessary to save his own life”).

intentional killing in justifiable self-defense.”<sup>66</sup> Other cases do not discuss malice, but suggest that its definition (or the mens rea required for murder) must be more than intent to kill, because “the design to kill is formed prior to the act of killing” in justifiable self-defense.<sup>67</sup> While these cases are quite old, they still compose a body of law that a federal court may draw upon when assessing whether a defendant is entitled to a self-defense jury instruction, because this question is one of federal common law and therefore often invokes state law.<sup>68</sup>

The third rationale many courts provide when finding malice and self-defense compatible relies on basic logic: although Person A harbors malice towards Person B, that fact does not preclude Person A from acting in real, justifiable self-defense if faced with a genuine, imminent threat from Person B. A famous mid-nineteenth century case from the Supreme Court of Georgia states this proposition quite explicitly: “[One] may kill another against whom he has malice, and yet not be guilty of murder.”<sup>69</sup> The court explains that regardless of one’s feelings of hatred about the person he or she kills, if the killing is done “to save his own life . . . his malice shall not be taken into account.”<sup>70</sup> The highest courts of other states, such as California and Missouri, have concurred with this principle, holding that “previous ill will or malice sustained towards the deceased could not take away his right to self-defense, or convert a justifiable homicide into murder.”<sup>71</sup> The Supreme Court of Missouri has come the closest to providing a rationale for these findings, explaining that  *motive*, such as revenge or

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<sup>66</sup> See *State v. Vaughan*, 39 P. 733, 733, 736 (Nev. 1895) (rejecting jury instruction stating “[m]alice aforethought means the intention to kill” and holding that “malice is an inference to be drawn from all the facts in the case”).

<sup>67</sup> *Manis v. State*, 58 S.W. 81, 82 (Tex. Crim. App. 1900). While this case does not use the term “malice,” it does distinguish between lawful and “unlawful design[s]” to kill, suggesting that a definition of malice more akin to the common law definition of evil or a malignant heart, see *supra* notes 20–21 and accompanying text, could still be incompatible with a claim of self-defense. *Manis*, 58 S.W. at 82.

<sup>68</sup> See *supra* notes 35–39 and accompanying text (discussing how the Second Circuit and sister circuits draw on state law when fashioning federal self-defense law).

<sup>69</sup> See *Golden v. State*, 25 Ga. 527, 532 (1858).

<sup>70</sup> *Id.* The court explains: “One may harbor the most intense hatred toward another; he may court an opportunity to take his life; may rejoice while he is imbruing his hands in his heart’s blood; and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into the account. This principle is too plain to need amplification.” *Id.*

<sup>71</sup> *People v. Hyndman*, 33 P. 782, 785 (Cal. 1893). In this case, the California Supreme Court rejected a jury instruction which relied upon the jury finding that the victim had harbored intentions to hurt the defendant in order to find unjustifiable homicide, concluding that the prior fights between them were not relevant to finding the defendant acted out of fear for his life and in self-defense. *Id.* at 6; see also *State v. Rapp*, 44 S.W. 270, 271 (Mo. 1898) (“[W]here a killing is really necessary in self-defense, it will not be murder, though the slayer had express malice.” (quoting 2 BISHOP’S NEW CRIMINAL LAW § 716)).

hatred, is not relevant to the determination of whether a killing was justifiable, but *intent* is relevant, and thus courts must look at whether the defendant intended to save his or her own life or whether he or she intended to cause the death of the deceased.<sup>72</sup> Again, while these cases provide little guidance by way of precisely defining when malice aforethought and self-defense are or are not compatible, they demonstrate that most of the inconsistencies between the approaches are due in large part to the incomprehensible definition of “malice aforethought.”

### B. *Malice and Self-Defense Are Incompatible*

By contrast, many courts have found malice incompatible with self-defense, but the rationales advanced for this proposition vary widely and are often inconsistent. Much of this discrepancy again stems from the lack of a coherent definition of “malice aforethought.” While some courts conceive of malice as solely the intent to kill, others require something more akin to the common law notion of evil or a decidedly unlawful purpose. Overall, the cases supporting a finding of incompatibility rely on one of three rationales: 1) self-defense negates mens rea, because the defendant acts with the purpose of self-preservation rather than to kill; 2) the intent to kill from malice, such as out of retaliation, is mutually exclusive with a *lawful* purpose to kill in self-defense; or 3) “malice aforethought” requires more than intent to kill, and thus this mental state is incompatible with intent to kill only in self-defense. Although the first two categories rely on similar arguments, it is worth separating them conceptually to demonstrate the inconsistency with which courts assess mens rea: some find it possible to “negate,” while others find one mens rea merely incompatible with others.

The first rationale advanced for the proposition that malice aforethought and self-defense are incompatible argues that self-defense negates the mens rea required for murder.<sup>73</sup> Several legal scholars

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<sup>72</sup> State v. Logan, 126 S.W.2d 256, 261 (Mo. 1939). The court explained this distinction between motive and intent by examining a hypothetical in which “A harbored the most intense hatred toward B and desired B’s death,” but “the facts established only that A killed B to save his own life or killed B accidentally,” concluding that A’s feelings about B cannot render his killing unjustifiable. *Id.* Although the distinctions between motive and intent go beyond the scope of this Note, see generally Gardner, *supra* note 54, and Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645, 658–63 (1917) for an in-depth discussion of the topic.

<sup>73</sup> Some courts apply an entirely separate doctrine of “imperfect self-defense” which operates to “negate malice aforethought” and mitigate murder to manslaughter, but this argument is beyond the scope of this Note. 42 AM. JUR. *Trials* § 22.5 (1991); see also United States v. Milk, 447 F.3d 593, 599 (8th Cir. 2006) (defining imperfect self-defense as

have made this argument, concluding that when a defendant acts out of self-preservation, rather than “evil motives” inherent in malice aforethought, he or she has acted without a guilty mens rea.<sup>74</sup> Because a person acting in self-defense is thinking about himself or herself, rather than “the possibility that the aggressor-victim may die,” the defendant is not acting with the “depraved mind or heart” of malice aforethought, thereby negating the mens rea required for murder.<sup>75</sup> Several courts have adopted similar approaches, finding that self-defense negates malice, albeit without great additional explanation.<sup>76</sup> However, other courts have held that evidence of *malice* negates a self-defense claim, and have even held that a jury’s finding of malice implies the government proved the defendant did not act in self-defense.<sup>77</sup> One district court considering a § 1111(a) charge even men-

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“involv[ing] defendant’s unreasonable use of deadly force” and proving the defendant “does not have the requisite mens rea to be guilty of . . . murder”).

<sup>74</sup> See Gardner, *supra* note 54, at 665–66 (“Coerced offenders lack evil motives; they act in order to avoid serious harm to themselves or others. Thus, they act without *mens rea*.”). Therefore, a person who “took the aggressor’s life not with the predominant motive of self-preservation, but with an evil purpose, such as a desire to see the aggressor suffer” could not claim self-defense, even if the defendant “was aware that self-defense was justified.” *Id.* at 660 n.123 (quoting 2 HENRY D. BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 340–41 (Samuel E. Thorne trans., 1968)); *cf.* Samuel H. Pillsbury, *Evil and the Law of Murder*, 24 U.C. DAVIS L. REV. 437, 473–74 (1990) (arguing that “[a]ll murders involve a conscious decision to place self over others,” and conceiving of all “killings as ranging along a moral continuum, from the most aggravated, which involve the purest expression of disregard . . . to justified homicides”).

<sup>75</sup> Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 516–17 (1987). This sentiment holds true for second-degree murder as well, because the defendant’s lack of awareness that death would result from his or her act of self-preservation negates the requisite mens rea of recklessness. *Id.* at 516.

<sup>76</sup> See Commonwealth v. Miller, 634 A.2d 614, 617 (Pa. Super. Ct. 1993) (stating that a finding of “self-defense tends to negate the malice required to prove murder” (quoting Commonwealth v. Heatherington, 385 A.2d 338, 341 (Pa. 1978))); Connolly v. Commonwealth, 387 N.E.2d 519, 522 (Mass. 1979) (explaining that “proper exercise of self-defense negates malice”); State v. Clifton, 290 N.E.2d 921, 923 (Ohio Ct. App. 1972) (finding that “one who kills in self-defense does so without the *mens rea* that otherwise would render him culpable of the homicide” and therefore has “no criminal intent . . . [when] exercising a lawful right of self-defense”).

<sup>77</sup> See Conklin v. Schofield, 366 F.3d 1191, 1200 (11th Cir. 2004) (rejecting the defendant’s claim that “the evidence only shows . . . self-defense” because the government proved “malice beyond a reasonable doubt” and found that the jury’s murder conviction implies a rejection of the defendant’s self-defense theory); *see also* People v. Hoffman, No. SC075890A, 2014 WL 5342901, at \*4 (Cal. Ct. App. Oct. 21, 2014) (finding that “first degree murder [is] a finding wholly inconsistent with defendant’s claim of self defense” and describing the conviction as an “implicit finding of malice”); Miller, 634 A.2d at 617 (holding that “where there is evidence from which a jury can reasonably infer malice, the Commonwealth has met its burden of proving beyond a reasonable doubt that the defendant did not act in self-defense”). *But see* Lecount v. Patrick, No. 06-0774, 2006 WL 2540800, at \*5 (E.D. Pa. Aug. 30, 2006) (suggesting that the government must *both* prove

tioned in dictum that “[premeditation or malice] negate[s] . . . that the slayer acted in self-defense.”<sup>78</sup> The Second Circuit has similarly indicated that evidence of a motive to kill may “prove premeditation” and “negate . . . self-defense.”<sup>79</sup> Therefore, in finding that “malice imports the absence of justification,” these courts, although not focusing on the definition of malice aforethought, seem to rely upon the common law definition which extends beyond intent to kill to include “wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty.”<sup>80</sup>

The second category of cases finding malice aforethought and self-defense incompatible relies upon a similar conception of good and evil, but rather than describing one element as negating the other, courts focus on the mutual exclusivity between malicious intentions, such as revenge or desire to cause suffering, and lawful intentions. Many cases simply state this proposition in dicta without further elaboration.<sup>81</sup> However, some courts have suggested that the distinction between lawful intentions, such as self-preservation, and unlawful intentions, such as retaliation and revenge, explains the incompatibility of malice and justifiable self-defense.<sup>82</sup> The Supreme Court of Nebraska, for example, explained that permitting a jury to find both malice and self-defense would “be equivalent to saying that under some circumstances murder is not murder in the eye of the law,” and

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malice *and* negate self-defense in affirming the conviction, although it uses the terminology “negate self-defense”).

<sup>78</sup> *Franklin Life Ins. Co. v. Strickland*, 376 F. Supp. 280, 283 (N.D. Miss. 1974).

<sup>79</sup> *United States v. Puff*, 211 F.2d 171, 175 (2d Cir. 1954) (finding it proper to admit evidence indicating defendant’s “motive to shoot his way out of the hotel in which he found himself entrapped” because it “had powerful bearing on . . . premeditation and of self-defense”). The court also found that the same evidence it used to dismiss the defendant’s self-defense claim “was ample in [its] judgment to support a finding that the killing was willful, deliberate, malicious and premeditated,” suggesting the incompatibility of the defense and elements of first-degree murder under § 1111(a). *Id.* at 180.

<sup>80</sup> *E.g.*, *Miller*, A.2d at 617 (quoting *Commonwealth v. Drum*, 58 Pa. 9, 15 (1868) and *Commonwealth v. Hill*, 629 A.2d 949, 951 (Pa. Super. Ct. 1993)) (internal citation omitted).

<sup>81</sup> *See, e.g.*, *Guthrie v. Warden, Md. Penitentiary*, 683 F.2d 820, 824 n.5 (4th Cir. 1982) (“Self-defense is wholly inconsistent with malice . . . .”); *Commonwealth v. Carballo*, 407 N.E.2d 1295, 1297 (Mass. 1980) (upholding jury instructions that “made it clear to the jury that malice and self-defense are mutually exclusive”); *State v. Arpin*, 410 A.2d 1340, 1351 (R.I. 1980) (“[W]e are willing to state unequivocally that killing a person in self-defense and killing ‘unlawfully’ are inconsistent, even mutually exclusive . . . .”); *cf.* *United States v. Jackson*, 351 F. Supp. 2d 108, 115–16 (S.D.N.Y. 2004) (implying that malice and premeditation could be incompatible with self-defense, but stating there are not sufficient facts in the record to make these findings at sentencing).

<sup>82</sup> *See Carleton v. State*, 61 N.W. 699, 710 (Neb. 1895) (explaining that it was impossible for “self-defense and malice [to] combine . . . [or] coexist” because “the purpose of self-preservation” is incompatible with killing “from an unlawful and unjustifiable motive,” or malice).

instead held that if the defendant was found to have “sought” or “brought on” the altercation “from a spirit of retaliation and revenge,” he was not entitled to a self-defense justification.<sup>83</sup> Other courts have similarly rejected self-defense claims when the defendant appeared to act with vengeful intention, equating this with malice aforethought rather than justifiable killing.<sup>84</sup>

Because self-defense is reliant upon fundamentally “good” intentions and malice upon “bad” or “evil” ones, legal scholars explain, a person cannot act with both mental states simultaneously.<sup>85</sup> One scholar, Professor Perkins, demonstrates this thesis with a simple hypothetical: if a sheriff decides to “take the life of his prisoner for some unlawful purpose of his own,” he could not be acquitted of murder because “there existed, unknown to him, a mandate for him to execute that man on that very day.”<sup>86</sup> Because the sheriff acts with a malicious intent, his actions are unlawful, even if the conditions existed to justify his acts. As these principles demonstrate, this category of cases seems to rely on both the common law and the simpler intent-to-kill conception of malice; while some cases refer to notions of evil and antisocial character, others speak of unlawful intent and whether or not one intends to kill another when acting in self-preservation.

However, the third rationale provided by courts in proclaiming that malice aforethought is inconsistent with self-defense is grounded in the idea that malice cannot solely mean intent to kill. Like the cases rejecting the idea that malice and self-defense are inconsistent,<sup>87</sup> these cases criticize defining malice as intent to kill, and instead advocate

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<sup>83</sup> *Id.*

<sup>84</sup> *E.g.*, *United States v. Milk*, 447 F.3d 593, 599 (8th Cir. 2006) (finding that the defendant’s “intent was to hurt or kill [the victim] to avenge the maltreatment his father suffered,” and not a situation of self-defense); *State v. Manus*, 597 P.2d 280, 285 (N.M. 1982), *overruled by Sells v. State*, 653 P.2d 162 (N.M. 1982) (“If the defendant intentionally caused the victim to do acts which the defendant could claim provoked him, he cannot kill the victim and claim that he was provoked. In such case, the circumstances show that he acted with malice aforethought, and the offense is murder.”); *Lyons v. People*, 27 N.E. 677, 682 (Ill. 1891) (upholding jury instructions that require a party to have “really acted under the influence of those fears, and not in a spirit of revenge, in order to justify the killing”); *Wortham v. State*, 70 Ga. 336, 339 (1883) (holding that “those who, for reasons not authorized by law, seize the bloody knife or deadly pistol, and slay an enemy or a rival; not [out of fear], but in a spirit of revenge” are not justified in killing).

<sup>85</sup> See GEORGE P. FLETCHER, *FLETCHER’S ESSAYS ON CRIMINAL LAW* 219 (2013) (describing self-defense as an action “in good faith,” which is “incompatible with hatred or malice towards the victim”); Perkins, *supra* note 3, at 568 (arguing that “intent to kill for the purpose of self-defense . . . is psychically different from” intent to kill with malice).

<sup>86</sup> Perkins, *supra* note 3, at 568.

<sup>87</sup> See *supra* notes 60–64 and accompanying text (describing how courts find self-defense compatible with malice if it is defined as intent to kill).

for the incompatibility of “malice aforethought” and self-defense.<sup>88</sup> The crucial distinction, courts explain, is between “malicious intent to murder” and intent to kill, because one can intentionally kill in self-defense without committing murder, but cannot justifiably kill with an “intent to murder.”<sup>89</sup> Another court expands on this by explaining that “malice aforethought” cannot mean “a predetermination to kill” because such a definition would render killings in self-defense to be “legal murder”; instead, the required mental state should be “a predetermination to do the act without lawful excuse,” regardless of when the unlawful predetermination is formulated.<sup>90</sup> Therefore, according to these longstanding state decisions, malice aforethought must be unlawful, and not simply predetermined, intent.<sup>91</sup>

### III

#### SOLUTION

##### A. *The Policy Implications of Both Approaches*

###### 1. *Policy Arguments in Favor of Finding Malice and Self-Defense Compatible*

While the arguments in favor of finding an incompatibility between malice and self-defense rely upon ways defendants could exploit the legal standard,<sup>92</sup> arguments in favor of rejecting exclusivity focus on the harms that will befall innocent, lawful defendants if the justification standard is heightened. The main policy rationales in favor of preserving compatibility seem to shift according to the definition of malice. One of the most prominent arguments relates to the theory of justification, arguing that regardless of a defendant’s malice or hatred towards a victim, there are still conceivable scenarios in which that defendant may feel forced to kill in self-defense.<sup>93</sup> However, if malice is equivalent to intent to kill, only an impermissibly

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<sup>88</sup> See *Hammond v. People*, 64 N.E. 980, 983 (Ill. 1902) (“Malice aforethought is incompatible with the taking of human life in self-defense, yet a man may deliberately and intentionally use a deadly weapon to protect himself, in self-defense.”).

<sup>89</sup> *Mills v. State*, 17 So. 2d 215, 216 (Miss. 1944) (distinguishing between “a purpose either to kill in malice or to slay in self-defense”); *Hammond*, 64 N.E. at 982 (explaining that if the defendant, when firing the shot, “was not in good faith acting in self-defense, but was actuated by a malicious intent to murder [the victim],” it was irrelevant when he formulated this intent, because his actions constituted murder).

<sup>90</sup> *Armstrong v. Commonwealth*, 23 S.W. 654, 655 (Ky. 1893) (quoting *Bohannon v. Commonwealth*, 71 Ky. (8 Bush) 481, 485 (1871)).

<sup>91</sup> See *Bohannon*, 71 Ky. (8 Bush) at 485 (“A killing to constitute murder must be done unlawfully, and unless it be unlawful it can not have been done with malice aforethought, although it may have been predetermined.”).

<sup>92</sup> See *infra* Section III.A.2.

<sup>93</sup> See, e.g., *supra* notes 70–71 and accompanying text.

small number of situations would constitute valid self-defense, because most actors claiming self-defense *intended* to kill, but out of necessity, not ill will. Therefore, the definitional ambiguity surrounding “malice aforethought” once again drives policy discussions about the appropriate standards for self-defense.

Commentators and courts alike have strongly advocated against finding malice and self-defense incompatible because of its implications for defendants who are truly acting in conditions that justify killing. A hypothetical easily demonstrates this concern: assume Person X has a tumultuous relationship with Person Y, and is on the way to kill Person Y, bearing a concealed firearm. If Person X later encounters Person Y, who has a gun pointed at Person X’s head, in a narrow passageway, should Person X not be justified in shooting Person Y first in self-defense? Person X clearly harbored malice towards Person Y in the common law sense—ill will and evil intentions—and perhaps even an intent to kill under the Second Circuit approach.<sup>94</sup> However, his actions also meet all of the requirements of self-defense: he felt a reasonable fear for his safety given an imminent threat of death. However, if malice aforethought and self-defense were found incompatible, Person X would be unable to avail himself of a justification defense, and would likely be found guilty of first-degree murder. Scholars have posited similar hypotheticals in demonstrating the pitfalls of this approach for criminal defendants.<sup>95</sup> The Supreme Court, although considering slightly different circumstances, has similarly found that prior altercations, ill will, and even arming one’s self, should not preclude a defendant from asserting self-defense if a later situation necessitates killing.<sup>96</sup>

The other major reason advanced in favor of finding malice and self-defense compatible relates to the conception of malice as intent to kill. Many courts, both in jurisdictions that support findings of mutual

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<sup>94</sup> See *supra* notes 16–19, 79–80 and accompanying text (explaining the Second Circuit’s willingness to equate intent to kill with malice aforethought and its potential to preclude a self-defense instruction).

<sup>95</sup> See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 88 (2d ed. 1960) (“If the deceased was advancing on the defendant with drawn knife, saying, ‘I’m going to kill you,’ and safe escape was impossible, it makes not the slightest difference whether the defendant hated his assailant or whether the assailant was his son whom he loved beyond measure.”).

<sup>96</sup> See *Thompson v. United States*, 155 U.S. 271, 279–80 (1894) (finding that “[i]f the accused was justified in the eye of the law in arming himself for self-defense, and if, without seeking, but on meeting, his adversary, on a subsequent occasion, he killed him,” his arming himself following prior altercations with the victim does not preclude him from asserting self-defense (quoting *Gourko v. United States*, 153 U.S. 183, 191–92 (1894))).

exclusivity<sup>97</sup> and in those that support permitting consistency,<sup>98</sup> have argued that malice should not be defined this way. Typically, their rationale relies on the fact that most killings in self-defense involve an intent to kill, albeit a justifiable one. New York courts, for example, have permitted a self-defense jury instruction even in situations where a defendant left the scene of an altercation, retrieved a weapon, and returned to chase after his aggressors to kill them, because his intent to kill could be found justifiable given the threat to his and his companion's lives.<sup>99</sup> However, if malice, defined as intent to kill, were found incompatible with self-defense, the scope of situations in which a defendant could claim self-defense would dwindle to those in which the defendant did not intend his or her victim's death. In the context of murder charges, this would functionally mean a defendant could only claim self-defense if he or she were being prosecuted for second-degree murder, with a requisite *mens rea* of recklessness,<sup>100</sup> but could not be justified if intending to kill in a first-degree murder situation or on a lesser charge of first-degree voluntary manslaughter,<sup>101</sup> because both crimes involve an intent to kill.<sup>102</sup> Therefore, because self-defense typically includes a justifiable intent to kill,<sup>103</sup> a finding that this form of justification is incompatible with malice aforethought would functionally deny the self-defense justification to defendants who arguably need it most.

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<sup>97</sup> See *supra* notes 83–87 and accompanying text (describing the approaches of courts who reject the intent to kill definition of malice and instead advocate for a higher malice standard that is incompatible with self-defense).

<sup>98</sup> See *supra* notes 65–68 and accompanying text (discussing why an intent to kill definition of malice is not inconsistent with self-defense).

<sup>99</sup> *People v. McManus*, 496 N.E.2d 202, 203–05, 207 (N.Y. 1986) (“The evidence was sufficient to support a jury finding that defendant reasonably believed his actions were necessary to protect his companion from the use of deadly force and robbery.”).

<sup>100</sup> “‘Recklessly’ is defined in New York Penal Law section 15.05(3), which provides, in part, that a ‘person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur.’” *Id.* at 206 n.2.

<sup>101</sup> “A person is guilty of manslaughter in the first degree when . . . [w]ith intent to cause serious physical injury to another person, he causes the death of such person . . . or . . . he causes the death of such person . . . under circumstances which do not constitute murder . . .” N.Y. PENAL LAW § 125.20 (McKinney 2004).

<sup>102</sup> *Contra supra* note 59 and accompanying text (arguing that permitting a self-defense justification only when defendant acted with intent to kill would result in incongruous results).

<sup>103</sup> *But see supra* notes 70–72 and accompanying text (arguing that most people acting in self-defense do not intend to kill but merely intend to act in self-preservation).

## 2. *Policy Arguments in Favor of Finding Malice and Self-Defense Incompatible*

However, on the other side of the equation, many arguments for incompatibility exist. In addition to the arguments explicitly advanced by courts in favor of finding malice and self-defense incompatible, many external policy considerations should be considered when deciding which approach is preferable. The theme underlying all of these concerns is, of course, that defendants may get away with murder. However, there are many ways in which one could define “getting away with” murder. The two greatest problems with finding malice aforethought not mutually exclusive with self-defense are: 1) defendants can manufacture self-defense scenarios in order to commit desired murders; and 2) an actor may kill with malicious intent under conditions which, unknown to him or her, would justify the killing, thus permitting him or her to claim self-defense. Although these are not the only problems with adopting a compatibility approach, they are both the most likely and the ones most frequently mentioned by courts and commentators.<sup>104</sup>

The concern that defendants will manufacture self-defense is fairly intuitive: a person could have malice, or a desire and intent to kill another, and then create conditions compelling that other person to physically assault or seriously threaten him, thereby justifying the malicious provoker to kill his enemy but claim he acted in self-defense. For example, Person A could, desiring to kill Person B, stalk her, verbally accost her, and harass her to the point that Person B feels compelled to threaten or even harm Person A, allowing Person A to kill Person B while claiming he had a reasonable fear for his safety. This scenario, though it sounds far-fetched when described as a hypothetical, can arise in actual murder cases. For example, in a recent case in South Carolina, the defendant planned in advance to rob his victim at a drug transaction and brought a gun with him, which he ultimately fired at the victim, killing him.<sup>105</sup> The jury was therefore required to assess whether the defendant shot in self-defense, as a “mere[ ] attempt[ ] to stop the victim from shooting [him and his partner] . . . rather than [to] perpetrat[e] violence upon the victim,” or whether the defendant, who believed the victim owed him drug money, purposely and with malice brought the gun to the drug transaction, “leaning inside the . . . victim’s vehicle” to brandish it in order

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<sup>104</sup> See, e.g., *supra* notes 82–86, 94–103 and accompanying text.

<sup>105</sup> *State v. Niles*, 772 S.E.2d 877 (S.C. 2015).

to provoke the victim into showing and/or firing his own weapon.<sup>106</sup> The problem is so manifest that several courts have consistently emphasized that defendants “may not manufacture a situation wherein [they] become[ ] . . . imperiled” and claim self-defense.<sup>107</sup> Some states have even explicitly referred to such acts of provocation as “malice aforethought [rendering] the offense . . . murder.”<sup>108</sup> The Eighth Circuit similarly rejected a self-defense claim when defendants drove “to a different location and then verbally confront[ed] an intended victim . . . before assaulting him.”<sup>109</sup>

New York cases, both in state courts and in the Second Circuit, have rejected self-defense in situations such as these, finding facts of clear provocation or manufactured self-defense to preclude the possibility of a justification.<sup>110</sup> In *United States v. Desinor*, one of the few self-defense cases the Second Circuit considered involving federal murder charges, the court expressed particular concern about manufactured self-defense in the context of violent actors or members of organized crime, finding that engaging in a violent conspiracy involves the creation of a “dangerous situation” which disentitles defendants

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<sup>106</sup> *Id.* at 879–80. In this case, the trial court instructed the jury as to the law of murder and self-defense, but not to the lesser included offense of voluntary manslaughter, because “the evidence showed Niles was either guilty of murder or he was not guilty of any crime based on his claim of self-defense.” *Id.* at 879. Therefore, the trial court deemed malice aforethought and self-defense incompatible.

<sup>107</sup> *See, e.g.*, *Johnson v. Commonwealth*, 147 S.W.2d 1048, 1052 (Ky. 1941). In *Johnson*, the defendant invited his hated enemy to a duel, and when the enemy tried to retreat, defendant followed him and threatened him, prompting the enemy to pull out his gun, and so the defendant killed him, allegedly in response to this shooting threat. *Id.* at 1051. However, the court rejected the defendant’s self-defense claim, finding that he “invit[ed] the danger that he [sought] to repel.” *Id.* at 1052; *see also* *People v. Williams*, 32 Cal. 280, 285–86 (1867) (finding that a defendant is not entitled to a justification if he acted “in a spirit of revenge” rather than “under the influence of [reasonable] fears”).

<sup>108</sup> *See, e.g.*, *State v. Manus*, 597 P.2d 280, 285 (N.M.), *overruled by* *Sells v. State*, 653 P.2d 162 (N.M. 1979) (“If the defendant intentionally caused the victim to do acts which the defendant could claim provoked him, he cannot kill the victim and claim that he was provoked.”).

<sup>109</sup> *United States v. Milk*, 447 F.3d 593, 599–600 (8th Cir. 2006); *cf.* *United States v. Tunley*, 664 F.3d 1260, 1264 (8th Cir. 2012) (demonstrating a court’s willingness to reject a self-defense claim as “fabrication aimed at furthering [the defendant’s] own legal defense”).

<sup>110</sup> *E.g.*, *People v. Collice*, 363 N.E.2d 340, 340 (N.Y. 1977) (rejecting justification jury instruction because defendant “initially sought [his enemies] out for a confrontation, backed away when outnumbered,” and then “shot at them” while in retreat without fully “withdraw[ing] in complete safety to his home”). This logic is often associated with the “first aggressor” or “initial aggressor” doctrine, which is recognized in other states besides New York. *See supra* note 34 and accompanying text (describing the initial aggressor doctrine).

from receiving a justification jury instruction.<sup>111</sup> However, despite the implication of these cases that courts would find self-defense unavailable in a situation of manufactured self-defense, no case explicitly mentions malice aforethought and its connection to the court's denial of a justification jury instruction. Because no clear, discernible rule exists on this issue, at least in the Second Circuit, lower courts may be hesitant to deny defendants' self-defense justifications unless their actions *clearly* do not meet the requirements of self-defense.<sup>112</sup> Perhaps more significantly, defendants who are better able to disguise their malice, whether through more subtle provocations or by exploiting another person's psychological weaknesses, may still be able to claim self-defense.<sup>113</sup>

The second potential implication of deeming malice compatible with self-defense is that the "unknowingly justified" defendant may still be entitled to claim self-defense. This situation arises when one actor kills another out of the desire to kill him or her, but "unbeknownst to [the actor], the conditions would justify his killing . . . in self-defense."<sup>114</sup> Some scholars believe this "unknowingly justified" defendant would be found guilty of murder by "the consensus of Western legal systems," because "a justificatory intent" is required to invoke self-defense.<sup>115</sup> However, others believe that as long as there is an "objective justification" for the defendant's actions, "no legal harm"—and thus "no crime"—has been committed.<sup>116</sup> Yet, another group of commentators criticize this objective approach to self-defense analysis, instead arguing that permitting a defendant who acts with malice aforethought to take advantage of an unknown justification would function to make "evil acts permissible."<sup>117</sup> These

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<sup>111</sup> 525 F.3d 193, 200 (2d Cir. 2008) (holding that because "the danger from the conspiracy to kill [another person] still loomed at the time of the [victim's] murder," the defendants could not claim self-defense to the "dangerous situation" they created).

<sup>112</sup> See *United States v. Bell*, 584 F.3d 478, 485 (2d Cir. 2009) (finding that the district court's overriding of jury verdict and ordering a new trial because "defendant acted in self-defense" was erroneous based on "record viewed as a whole"). *But see* *United States v. Goldson*, 954 F.2d 51, 55–56 (2d Cir. 1992) (finding the district court erred in refusing defendant a self-defense jury instruction merely because he "present[ed] wholly inconsistent defenses").

<sup>113</sup> *E.g.*, *State v. Niles*, 772 S.E.2d 877 (S.C. 2015) (involving a defendant who leaned into his victim's window and brandished a gun, which could have been perceived as subtle intimidation or an actual threat of violence given their relationship and the purpose of their meeting).

<sup>114</sup> Gardner, *supra* note 54, at 661 n.125.

<sup>115</sup> *Id.* (quoting GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 557 (1978)).

<sup>116</sup> *Id.* at 661–62 n.126 (citing 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* 12–29 (1984)).

<sup>117</sup> *E.g.*, Reid Griffith Fontaine, *An Attack on Self-Defense*, 47 AM. CRIM. L. REV. 57, 72 (2010) (arguing that "the kind of luck bestowed upon [the defendant] (i.e., that his

opposing views demonstrate not only the complexity of this intersection between malice and self-defense, but also the potential repercussions of failing to clarify this legal ambiguity.

### B. *Adopting a Consistent Definition of “Malice Aforethought”*

As one scholar aptly noted, “[t]he most important, and confusing, element of murder continues to be ‘malice aforethought.’”<sup>118</sup> As if this concept were not complicated enough, courts have no coherent, uniform system of applying it in cases where the defendant asserts self-defense. The Second Circuit in particular has no guiding precedent on the compatibility of these two mental states and whether one can both act with malice aforethought *and* justifiably in reasonable fear for his or her safety.<sup>119</sup> Because the issue is one of federal common law, the courts look to a further inconsistent body of state and federal law for guidance in federal murder prosecutions involving self-defense claims, resulting in a patchwork of inconsistent cases with no unifying criteria for assessing whether a defendant is entitled to a justification defense.<sup>120</sup> While courts in other jurisdictions have taken positions on both sides of this debate, neither approach is without its flaws or anomalous results.<sup>121</sup> The problems with both positions, however, stem largely from the definitional ambiguity surrounding “malice aforethought” and courts’ subsequent inconsistent applications of the concept in murder trials.<sup>122</sup>

Therefore, one solution would be to refine the definition of “malice aforethought” to encompass more specific criteria for its proof. Ideally, such a change would come from the legislature. Historically, legislative proposals have attempted to remove the language of “malice aforethought” altogether because of its incoherent definition and the difficulties for courts in applying it.<sup>123</sup> In fact, New York’s

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homicidal act prevented [another] from wrongfully killing him) is naturally moral such that it reverses the wildly impressive (and evil) act and makes it permissible”).

<sup>118</sup> Sean J. Kealy, *Hunting the Dragon: Reforming the Massachusetts Murder Statute*, 10 B.U. PUB. INT. L.J. 203, 213 (2001); *see also* Mounts, *supra* note 3, at 313 (“As every student of criminal law knows, the meaning of ‘malice aforethought’ is one of law’s great mysteries.”).

<sup>119</sup> *See supra* notes 7–10 and accompanying text (describing the Second Circuit’s lack of guiding precedent).

<sup>120</sup> *See supra* notes 28–34 and accompanying text (describing the competing requirements for proving a self-defense justification in different federal circuits).

<sup>121</sup> *See supra* Section III.A (discussing the policy implications of both approaches).

<sup>122</sup> *See supra* Part II (analyzing the role that “malice aforethought” plays in courts’ rationales when approaching this issue).

<sup>123</sup> *E.g.*, Kealy, *supra* note 118, at 211 (describing Stephen’s Code proposal which eliminated “malice aforethought” from murder law “because the term was too complex, ill-defined and incompatible with the goal of simplifying the law”).

murder statute does not mention “malice aforethought,” although it is considered the most analogous offense to § 1111(a) by the federal courts for sentencing purposes.<sup>124</sup> This omission is largely owed to the drafters’ reluctance to permit courts to “rely[ ] on common law precedent to intelligibly decipher” the term’s meaning.<sup>125</sup> However, complete elimination of the term “malice aforethought” is unnecessary, provided that a clear definition is given to guide courts in implementing it. Because the Second Circuit alternates between interpreting the term as “intent to kill” and as something more akin to an evil spirit or depraved heart,<sup>126</sup> self-defense cases often turn on which definition the court chooses to apply. Presuming that the legislature desires to retain the self-defense justification, which it should given its longstanding common law tradition<sup>127</sup> and its widespread acceptability among the federal and state courts,<sup>128</sup> the legislature should instead modify the statute to clarify that “malice aforethought,” a crucial element of first-degree murder, retains its common law definition and therefore encompasses more than mere intent to kill. This clarification would not only provide guidance to federal courts such as the Second Circuit that have yet to adopt a consistent meaning of the term,<sup>129</sup> but it would also resolve many of the policy issues on both sides of the debate involving the compatibility of “malice aforethought” and self-defense.<sup>130</sup>

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<sup>124</sup> See *supra* note 39 and accompanying text (describing New York’s murder statute as analogous to § 1111(a) despite its failure to include malice or premeditation requirements).

<sup>125</sup> Kealy, *supra* note 118, at 211 (explaining the intentions of the drafters of the New York code in the nineteenth century); cf. Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler’s Predecessors*, 78 COLUM. L. REV. 1098, 1137 (1978) (portraying local nineteenth century enactments of the Draft Code as flawed because they “reintroduce[d] the concept[ ] of malice aforethought . . . in the homicide provisions”). Note, however, that New York’s decision to eliminate “malice aforethought” from its Penal Code was also likely influenced by the adoption of the 1962 Model Penal Code, which deliberately omitted this concept. See John C. Duffy, Note, *Reality Check: How Practical Circumstances Affect the Interpretation of Depraved Indifference Murder*, 57 DUKE L.J. 425, 428–29 (2007) (explaining that the 1962 Model Penal Code deliberately omitted the concept of “malice aforethought”).

<sup>126</sup> See *supra* notes 14–19 and accompanying text (describing the Second Circuit’s inconsistent applications of the term “malice aforethought”).

<sup>127</sup> See *supra* note 2 and accompanying text (explaining the common law tradition of self-defense).

<sup>128</sup> See *supra* notes 23–24 and accompanying text (cataloguing the widespread adoption of the self-defense justification in the American judicial system).

<sup>129</sup> See *supra* notes 45–50 and accompanying text (providing examples of cases in which district courts were unable to discern or properly apply self-defense standards given questionable malicious intentions by defendants).

<sup>130</sup> See *supra* Section II.A and accompanying text (detailing the anomalies presented by finding malice compatible and incompatible with self-defense when one defines “malice aforethought” as intent to kill).

However, even if the legislature were unable or unwilling to modify § 1111(a) to clarify the definition of “malice aforethought,” the Second Circuit could take the next available opportunity to do so itself. Although the court does not hear many murder cases, and even fewer if one were only to include § 1111(a) prosecutions, it could also state its refined interpretation of “malice aforethought” in a habeas case<sup>131</sup> or on review of a sentence involving cross-reference to § 1111(a) as the murder statute most analogous to state law.<sup>132</sup> Regardless of when it takes the opportunity to do so, the Second Circuit should choose how it will define “malice aforethought” going forward and eliminate this ambiguity for district courts attempting to resolve self-defense claims in § 1111(a) murder prosecutions. The most preferable course, as stated above, would be to adopt the common law definition, which encompasses more than intent to kill. This approach would resolve the issue of manufactured self-defense and the unknowingly justified defendant, because the defendant’s “evil” or depraved intentions in killing (or, the intent to murder) would preclude a justification defense, even if the statutory conditions for self-defense were in place.<sup>133</sup> Additionally, one of the major arguments in favor of finding malice and self-defense compatible—that intent to kill can be justifiable—would also cease to complicate courts’ decision-making.<sup>134</sup> The only major anomaly left in place by this solution, then, is the case of the evil defendant who actually finds himself or herself in a situation necessitating and justifying homicide.<sup>135</sup> However, this situation can be potentially resolved in one of two ways: 1) district courts, in deciding whether to permit a defendant a self-defense instruction, can provide one, as they do now, unless there is no possible construal of the evidence from which a reasonable jury could conclude the defendant’s killing of his enemy was both necessary and justified,<sup>136</sup> and 2) the jury, as the fact-finder, can evaluate

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<sup>131</sup> *E.g.*, *supra* note 45 and accompanying text (demonstrating an application of New York self-defense law in a habeas case).

<sup>132</sup> *See supra* note 39 and accompanying text (finding that the Second Circuit and its lower courts find § 1111(a) analogous to New York murder law for sentencing purposes).

<sup>133</sup> *See supra* Section III.A.2 and accompanying text (describing the manufactured self-defense problem and the unknowingly justified defendant issue when malice and self-defense are found compatible).

<sup>134</sup> *See supra* notes 69–72 and accompanying text (elaborating upon the policy implications of defining malice as intent to kill when self-defense encompasses a justifiable intent to kill for self-preservation purposes).

<sup>135</sup> *See supra* notes 105–06 (using a real case in South Carolina to demonstrate how a defendant with malicious desires and intentions to kill can still become embroiled in a situation justifying killing).

<sup>136</sup> *See, e.g.*, *Smith v. Artus*, 610 F. App’x 23, 25 (2d Cir.), *cert. denied sub nom.*, *Smith v. LaValley*, 136 S. Ct. 405 (2015) (explaining that the defendant is entitled to a justification

whether the defendant's case of self-defense is credible as compared to the government's evidence of "malice aforethought."<sup>137</sup> Although this solution sounds like a perpetuation of the status quo, the refined definition of "malice aforethought" will make it much easier for courts to discern whether the evidence of a defendant's mental state is truly *incompatible* with a self-defense justification, because it will no longer include within it a mental state that can also exist when one acts in self-defense.

Adopting this refined definition of "malice aforethought" would influence case outcomes in several ways.<sup>138</sup> First, it would affect the defendant's initial entitlement to a self-defense jury instruction. If the prosecution could convince the judge that no reasonable jury could find anything but "malice aforethought" given the facts set forth at trial—in other words, that the defendant's conduct went beyond mere intent to kill and included some other evil intent or conduct constituting the "willful, deliberate, malicious, and premeditated killing" outlined in § 1111(a)<sup>139</sup>—the defendant would not be entitled to a self-defense jury instruction, and thereby would be much less likely to "get away with" a truly malicious murder.<sup>140</sup> However, if the common

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jury instruction "if any reasonable view of the evidence would permit the fact finder to decide that the conduct of the accused was justified"); *Bonilla v. Lee*, 35 F. Supp. 3d 551, 563 (S.D.N.Y. 2014), *certificate of appealability denied*, No. 14-3411 (2d Cir. Jan. 29, 2015) (applying the same "reasonable view of the evidence" jury instruction standard under New York law); 36 CAROLYN M. ROSS, CARMODY-WAIT 2D NEW YORK PRACTICE WITH FORMS § 200:64 (2d ed. 2016) ("A trial court must charge the fact finder on the defense of justification for using physical force on another person whenever there is evidence to support it.").

<sup>137</sup> See, e.g., *United States v. Bell*, 584 F.3d 478, 485 (2d Cir. 2009) (rejecting district court's overriding of jury verdict because the jury can reject a self-defense claim by making "credibility determinations"); *United States v. Goldson*, 954 F.2d 51, 55–56 (2d Cir. 1992) (finding that credibility determinations about self-defense claims are for the jury to decide and district court erred in rejecting a justification instruction purely because defendant's defenses were inconsistent).

<sup>138</sup> In jurisdictions requiring the defendant (as opposed to the government) to bear the burden of proving self-defense, this definitional change would also be significant, because a jury finding that the government failed to prove murder beyond a reasonable doubt would not equate to an automatic finding of self-defense. However, the Second Circuit has held that "the government generally has the burden of disproving self-defense beyond a reasonable doubt once it is raised by a defendant." *United States v. Thomas*, 34 F.3d 44, 47 (2d Cir. 1994).

<sup>139</sup> 18 U.S.C. § 1111(a) (2012). For example, the evidence could show several types of conduct enumerated in the statute—such as poison and lying in wait—that would constitute "malice aforethought" and thereby disqualify the defendant from a justification instruction. *Id.*; *Bonilla*, 35 F. Supp. 3d. at 564–65 (holding that defendant's conduct, in which he "methodically prepared for the encounter . . . affirmatively sought it out, [and] initiated it," prevented "any reasonable inference that [he] was acting in self-defense at any point").

<sup>140</sup> Compare *Peguero v. Smith*, No. 14CV6128RAMHD, 2015 WL 10641786, at \*13–14 (S.D.N.Y. Nov. 23, 2015), *report and recommendation adopted*, No. 14-CV-6128(RA), 2016

law definition of “malice aforethought” did not apply, evidence of defendant’s intent to kill could simultaneously support both murder *and* self-defense, thereby entitling a defendant to a justification instruction. Second, even if a defendant still received a self-defense jury instruction under the new definition of “malice aforethought,” the jury would be informed that the two concepts were *incompatible*—even if the defendant intended to kill, that intent can be either an intent to murder or an intent of self-preservation, but not both.<sup>141</sup> This type of instruction could also make it less likely that juries uncertain of the veracity of the defendant’s self-defense theory would convict simply because the defendant undeniably did and *intended to kill* the victim. Rather, the jury must find the defendant acted with common law “malice aforethought”—not merely intent to kill—beyond a reasonable doubt.<sup>142</sup> Therefore, consistent adoption of the common law definition of “malice aforethought” would provide more consistent, fairer jury instructions in future § 1111(a) murder prosecutions, and would resolve many if not all of the policy concerns with the status quo approach.

#### CONCLUSION

“Malice aforethought” and self-defense are both complex concepts that present their own unique legal challenges, but their combination even more so proves daunting for any court or scholar to disentangle. However, resolution of this issue is crucial to the effective analysis of any self-defense claim. Despite how a court conceives of self-defense, it cannot evaluate the justification without evaluating a

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WL 1446225 (S.D.N.Y. Apr. 11, 2016) (affirming a decision that defendant was not entitled to a justification jury instruction when he initiated the conflict with a gun and the victim only revealed a weapon after the defendant instructed him to “take his hand out of his pocket,” while posing no “obvious immediate danger” to defendant), *with* *People v. Austin*, 22 N.Y.S.3d 457, 457 (App. Div. 2015) (holding the trial court’s decision not to instruct the jury as to defendant’s justification defense due to manufactured self-defense concerns to be error).

<sup>141</sup> Some courts have indicated such a rationale in explaining why a defendant cannot convince the jury of multiple inconsistent theories of how a killing occurred. *See, e.g.*, *State v. Niles*, 772 S.E.2d 877, 879 (S.C. 2015) (“[T]he trial court instructed the jury on the law of murder and self-defense, but refused Niles’s request to instruct the jury on voluntary manslaughter, reasoning that the evidence showed Niles was *either guilty of murder or he was not guilty of any crime based on his claim of self-defense.*”). In *Niles*, therefore, the Supreme Court of South Carolina rejected defendant’s claim that he acted “within a sudden heat of passion” because it was incompatible with his claim of self-defense, which requires a “lack[ ] [of] intent to harm the victim.” *Id.* at 880–81.

<sup>142</sup> Therefore, this clearer, distinct standard for “malice aforethought” resolves the earlier hypothetical about the hateful but definitively and imminently threatened defendant in the defendant’s favor, as opposed to condemning a justifiable homicide as a murder. *See supra* notes 105–06 and accompanying text.

defendant's mental state. Thus, the analysis inevitably leads to one final inquiry: If the defendant claims his or her mental state was one of reasonable fear for his or her safety, thereby justifying killing, is this compatible with the defendant's mens rea of malice present before, and during, the killing? The question is impossible to answer without a coherent, stable definition of "malice aforethought."