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ME, MYSELF, AND I: NARCISSISTIC PERSONALITY DISORDER  
AND CRIMINAL SENTENCING

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*In recent years, society has shown an increased willingness to openly discuss and better understand mental illnesses and disorders. Often, these discussions reflect the understanding that an individual suffering from mental illness is not much different than an individual suffering from a physical illness. This discourse has underscored an important issue: individuals who suffer from a mental illness or disorder may take some action because of their condition. The way a mental disorder may impact an individual's mental state has especially important significance in the context of the criminal justice system. Indeed, the prison population in the United States has higher rates of mental illness and disorders than the general population. And the criminal's mental state can directly bare on what charges or ultimate sentence the criminal may face.*

*This Note argues that judges ought to consider a criminal defendant's personality disorder as a mitigating factor during sentencing. Specifically, this note argues that sentencing statutes should list narcissistic personality disorder ("NPD") as a mitigating factor. Symptoms of NPD can include a sense of entitlement, lack of empathy, and exploitative behavior (among other things), and some studies have linked NPD to violent behavior. Although many sentencing schemes today provide judges with great flexibility and would allow a judge to consider NPD as mitigating, presenting evidence of NPD can be a double-edged sword: the NPD evidence presented may be both aggravating and mitigating, ultimately resulting in a harsher sentence for the defendant. But because an individual may be more likely to commit a crime because of NPD—in other words, because of a mental condition—the individual's culpability is lessened and any sentence rendered should reflect this culpability. This Note advocates for sentencing statutes that specifically list NPD as a mitigating factor, allowing defendants to more freely present evidence that will lead to more just and fair sentencing.*

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## I. INTRODUCTION

You wake up and begin your extensive morning routine. While you perform your morning exercises, you wear an expensive facial mask to reduce inflammation, swelling, and redness. Before leaving your apartment, you carefully apply multiple facial cleansers and exfoliants, finishing your routine with an assortment of moisturizers and rejuvenating serums. Once at work, you join your colleagues in a brief meeting where you exchange business cards. You're proud of your business card—it's crisp, clear, and pristine. But despite your meticulous selection of typeface and color, you realize one of your colleagues has a better business card than you. Worse still, everyone in your office knows it's better. You become extremely embarrassed and angry, perhaps even irrationally so. Your business card was excellent, but nobody else thought so. To add insult to injury, your colleagues made sure you knew your card was inferior.

What do you do? You probably don't lure your colleague with the better business card into an apartment and murder him with an axe.<sup>1</sup> But if you did, and if you were found guilty, how should you be sentenced? The answer may depend on how society views your act: how culpable are you really?<sup>2</sup> *Why* did you murder your coworker? What should the judge consider before she renders a sentence?

In recent decades, society has become increasingly accepting of and willing to discuss mental illnesses and understand the realities of various mental conditions.<sup>3</sup> Data from the 1990–1992 National Comorbidity Survey and the 2001–2003 survey replication revealed important changes in public attitudes towards mental health: 41.4% of respondents would “definitely” go to a professional for mental health, compared to 35.6% just 10 years earlier; 32.4% of respondents would be “very comfortable” discussing personal problems with a professional, compared to 27.1%; and 40.3% of respondents would be “not at all” embarrassed if friends knew they were receiving professional help, compared to 33.7%.<sup>4</sup> In addition to these positive changes, a Centers for Disease Control and Prevention survey conducted from 2007–2009 found that an astounding 80% of American adults “agreed (slightly or strongly), that treatment can help people living with mental illness lead normal lives.”<sup>5</sup> This same survey found that 35–67% of adults agreed that people are caring and sympathetic towards people with mental illness.<sup>6</sup> The American public has therefore not only become more open to discussing mental illness, but also has come to understand the benefits and importance of proper mental health treatment.

The increased willingness to discuss mental health has been plainly demonstrated by celebrities and the media. CNN for example, tackled mental health struggles in the comedy industry in its series “The History of Comedy.”<sup>7</sup> In fact, an entire episode allowed comics to “talk openly about their mental struggle.”<sup>8</sup> The business world has also addressed the issue of mental illness in the context of the workplace and leadership.<sup>9</sup>

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1. This imagined scenario is derived from the film *AMERICAN PSYCHO* (Lions Gate Films 2000).

2. RICHARD J. BONNIE ET AL., *CRIMINAL LAW* 11 (Robert C. Clark et al. eds., 4th ed. 2015) (discussing how criminal law provides different grades of offenses for relative severity as well as how the law provides for assessing a sentence that “fairly reflects the blameworthiness of the individual wrongdoer and the gravity of his or her particular crime.”).

3. Ramin Mojtabai, *Americans' Attitudes Towards Mental Health Treatment Seeking: 1990–2003*, 58 *PSYCHIATRIC SERVICES* 642, 643 (2007).

4. *Id.* at 644.

5. CENTERS FOR DISEASE CONTROL AND PREVENTION, ET AL., *ATTITUDE TOWARD MENTAL ILLNESS: RESULTS FROM THE BEHAVIORAL RISK FACTOR SURVEILLANCE SYSTEM* 10 (2012), [https://www.cdc.gov/hrqol/Mental\\_Health\\_Reports/pdf/BRFSS\\_Full%20Report.pdf](https://www.cdc.gov/hrqol/Mental_Health_Reports/pdf/BRFSS_Full%20Report.pdf).

6. *Id.* This measure is important not only because of what it reveals about the American public, but because questions asking what others think about health conditions can help assess the stigma associated with that condition. See *id.* at 6. And stigma towards mental health is important because it “remain[s] [a] major obstacle[] to treatment seeking in the general population.” Mojtabi, *supra* note 3, at 642.

7. Jen Christensen, *The Sad Clown: The Deep Emotions Behind Stand-Up Comedy*, CNN, (Dec. 4, 2018, 9:47 AM), <https://www.cnn.com/2017/03/01/health/sad-clown-standup-comedy-mental-health/index.html>.

8. *Id.*

9. See Naz Beheshti, *4 Ways Leaders Can Improve Mental Health in the Workplace*, FORBES (Oct. 10, 2018, 8:45 AM), <https://www.forbes.com/sites/nazbeheshti/2018/10/10/4-ways-leaders-can-improve-mental->

The relatively recent suicides of fashion designer Kate Spade and journalist Anthony Bourdain also demonstrate an increased willingness to discuss mental health issues.<sup>10</sup> Rather than shy away from a conversation on mental illness, the news media openly discussed the impact of mental health and the importance of obtaining care.<sup>11</sup> In the aftermath of these prominent suicides, social media users opened up to their followers (and the world) about their own battles with mental health.<sup>12</sup> And following Bourdain's death, CNN primetime anchor Anderson Cooper spoke to a national audience about his brother's suicide.<sup>13</sup> While there is still stigma surrounding mental health, the increasing willingness of society to openly discuss mental illness calls for a reconsideration of how mental health and the criminal justice system interact.

Society's increased understanding and acceptance of mental illness—and more specifically depression—should be commended. Rather than blame an individual for taking his own life, emphasis has been placed on understanding the individual and the severe and debilitating mental illness with which he was afflicted.<sup>14</sup> When considering an individual who has ended his life, there is generally an understanding that he chose that particular course of action because of

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health-in-the-workplace/#d2bda33937ef; Shaheena Janjuha-Jivraj, *Why Inclusive Leaders Care About Mental Health and Stress at Work*, FORBES (Nov. 27, 2018, 6:03 PM), <https://www.forbes.com/sites/shaheenajanjuhajivraj/europe/2018/11/27/why-inclusive-leaders-care-about-mental-health-and-stress-at-work/#3579e6253f8e>; Hester Lacey, *Mental Health at Work: What Every Team Leader Should Know*, FORBES (May 19, 2014, 8:55 AM), <https://www.forbes.com/sites/hesterlacey/2014/03/19/mental-health-at-work-what-every-team-leader-should-know/#75c2bb8a1226>.

10. Ruben Castaneda, *What Anthony Bourdain and Kate Spade Can Teach Us About Mental Health*, U.S. NEWS & WORLD REP. (July 12, 2018, 10:32 AM), <https://health.usnews.com/wellness/mind/articles/2018-07-12/what-anthony-bourdain-and-kate-spade-can-teach-us-about-mental-health> (“Money can't buy health or happiness. It is an innate state of being that has to be attained through having experienced great parenting and the hard work of getting to know yourself, by identifying and working through your issues.”); Jeanne Croteau, *We Need to Talk About Suicide—Anthony Bourdain, Kate Spade, and Our Role*, FORBES (Jun. 8, 2018, 2:07 PM), <https://www.forbes.com/sites/jeannecroteau/2018/06/08/we-need-to-talk-about-suicide-anthony-bourdain-kate-spade-and-our-role/#255f87ba2223> (“The mantle of mental illness is heavy but, if we all work together to carry it, we can lighten the load. In order to be truly supportive, we have to challenge our own biases and beliefs, but it is absolutely worth the effort.”).

11. Castaneda, *supra* note 10; Croteau, *supra* note 10.

12. Allison Klein, *After Anthony Bourdain and Kate Spade Suicides, Social Media Lit Up with Survivors' Stories*, WASH. POST (June 11, 2018, 10:34 AM), [https://www.washingtonpost.com/news/inspired-life/wp/2018/06/11/after-anthony-bourdain-and-kate-spade-suicides-social-media-lights-up-with-survivors-stories-of-how-they-made-it-through/?noredirect=on&utm\\_term=.3329a8d36f66](https://www.washingtonpost.com/news/inspired-life/wp/2018/06/11/after-anthony-bourdain-and-kate-spade-suicides-social-media-lights-up-with-survivors-stories-of-how-they-made-it-through/?noredirect=on&utm_term=.3329a8d36f66) (discussing various Twitter users sharing their own stories of depression, suicide, and mental health as well as related stories of support).

13. Faith Karimi, *No One is Immune to Suicide. But There is Hope*, CNN (June 24, 2018, 8:18 PM), <https://www.cnn.com/2018/06/24/health/finding-hope-suicide-anderson-cooper-special-report/index.html> (explaining how Anderson Cooper, Glenn Close, David Axelrod, Karl Rove, and Zak Williams (son of comedian Robin Williams) discussed, on television, the impact of suicide on their lives and the importance of mental health).

14. See MollyKate Cline, *How to Talk About Suicide Without Adding to Mental Health Stigma*, TEENVOGUE (June 8, 2018), <https://www.teenvogue.com/story/how-to-talk-about-suicide-without-adding-to-mental-health-stigma>; Karyl McBride, *Why We Can't Judge Suicide*, PSYCHOL. TODAY (Jun. 11, 2018), <https://www.psychologytoday.com/us/blog/the-legacy-distorted-love/201806/why-we-can-t-judge-suicide>; Desiree Woodland, *Why I Don't Say My Son 'Committed' Suicide*, NAT'L ALLIANCE ON MENTAL ILLNESS (Oct. 26, 2018), <https://www.nami.org/Blogs/NAMI-Blog/October-2018/Why-I-Don-t-Say-My-Son-'Committed-Suicide>.

extreme mental stress and anguish, not because of any selfish or malicious motive.<sup>15</sup> While individuals who end their own lives undoubtedly cause their loved ones pain, it is often understood that their suicides were not done *in order to* cause pain.<sup>16</sup> In other words, the pain caused was ultimately the result of a disease—depression—and not an inherent desire to harm.<sup>17</sup> Importantly, the person who takes his own life usually does not take the life of someone else—he is not a murderer.

But what if the individual afflicted with mental illness were a murderer? Would we feel the same? Would we understand the murder was not motivated by hate or evil, but was committed because the individual was suffering? These questions are inevitably presented when one considers criminal acts committed by defendants with mental health conditions. If we recognize that individuals with depression are in many ways blameless for the harm they cause others when they take their own lives, should we have similar recognition for individuals who cause harm to others not through suicide, but through their actions directly affecting others?<sup>18</sup> Perhaps this question is attempting to compare incomparable things—someone who takes his own life because of a mental health condition is fundamentally different than someone who, also because a mental health condition, takes the life of another. At the same time, the criminal justice system recognizes that mental illnesses can sometimes serve as a complete defense to a crime.<sup>19</sup> Although not all mental conditions are the same—nor should every mental health condition be a defense to a crime—mental conditions generally, including personality disorders, ought to function as strong mitigating factors during sentencing if the condition may affect how an individual acts.

This Note argues that sentencing statutes should specifically list narcissistic personality disorder (“NPD”) as a mitigating factor. Although current federal law, and many state codes,<sup>20</sup> do not explicitly preclude judges from considering NPD as a factor,<sup>21</sup> specifically listing the disorder as a mitigating factor would focus judges when they make sentencing determinations.

Part II of this Note discusses personality disorders and, in particular, NPD. Part II also discusses the prevalence of mental disorders in the criminal justice

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15. Woodland, *supra* note 14.

16. *Id.*

17. *Id.*

18. A solution offered to deal with individuals who may be prone to conflict due to a mental disorder may simply be avoidance. See Bill Eddy, *Five Types of High-Conflict Personalities*, PSYCHOL. TODAY (Nov. 6, 2017), <https://www.psychologytoday.com/us/blog/5-types-people-who-can-ruin-your-life/201711/five-types-high-conflict-personalities> (discussing a number of “high-conflict” personality disorders and how to best avoid them).

19. See, e.g., D.C. CODE § 24-501(d)(1) (2019) (“If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission. . . .”); NEB. REV. STAT. § 29-2203(1) (2018) (“Any person prosecuted for an offense may plead that he or she is not responsible by reason of insanity at the time of the offense and in such case the burden shall be upon the defendant to prove the defense of not responsible by reason of insanity by a preponderance of the evidence.”); N.C. GEN. STAT. § 15A-959(c) (2018) (“If the court determines that the defendant has a valid defense of insanity with regard to any criminal charge, it may dismiss that charge, with prejudice, upon making a finding to that effect.”); see also BONNIE ET AL, *supra* note 2.

20. See *infra* Section III.C.

21. See 18 U.S.C. § 3553 (2018).

system as well as criminal sentencing generally. Part III addresses how NPD has been considered in the sentencing context. Specifically, Part III considers sample capital cases involving defendants who presented evidence of NPD and how this evidence was received. Part III further discusses several state statutes and analyzes the ways these statutes may or may not allow for NPD to be considered as a mitigating factor. Finally, Part IV considers how a sentencing statute that specifically discusses NPD might function.

## II. BACKGROUND

### A. *Mitigation in Sentencing Generally*

Federal judges have significant discretion to consider a variety of mitigating and aggravating factors at the sentencing phase of criminal trials.<sup>22</sup> Specifically, the court must determine a sentence

to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.<sup>23</sup>

In assessing what sentence properly accomplishes these goals, judges are free to consider a variety of factors under 18 U.S.C. § 3553(a), such as “the nature and circumstances of the offense and the history and characteristics of the defendant;”<sup>24</sup> “the need for the sentence imposed;”<sup>25</sup> “the kinds of sentences available;”<sup>26</sup> the kinds of sentence and sentencing ranges based on the sentencing guidelines;<sup>27</sup> “any pertinent policy statement;”<sup>28</sup> “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct;”<sup>29</sup> and “the need to provide restitution for any victims of the offense.”<sup>30</sup>

During sentencing, federal judges “should consider *all* of the § 3553(a) factors to determine whether they support the sentence requested by a party.”<sup>31</sup> Notably, § 3553(a)(1) is a “broad command”<sup>32</sup> to judges to consider “the nature and circumstances of the offense and the characteristics of the defendant.”<sup>33</sup> Given the broad nature of § 3553(a)(1), it is under this sentencing factor that courts

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22. *See id.*; *see also* 730 ILL. COMP. STAT. 5/5-5-3.1(a) (2018).

23. 18 U.S.C. §§ 3553(a)(2)(A)–(D) (2018).

24. § 3553(a)(1).

25. § 3553(a)(2).

26. § 3553(a)(3).

27. *See* § 3553(a)(4).

28. § 3553(a)(5).

29. § 3553(a)(6).

30. § 3553(a)(7).

31. *Gall v. United States*, 552 U.S. 38, 49–50 (2007) (emphasis added).

32. *Id.* at 50 n.6.

33. § 3553(a)(1).

often consider mental health when they sentence defendants.<sup>34</sup> Although mental health is technically covered as a factor under § 3553(a), it is not explicitly mentioned anywhere in the statute.

Even though federal law does not specifically mention “mental illness” or any other mental condition as a listed mitigating factor, state sentencing statutes do not necessarily reflect this same structure. Illinois, for example, specifically mentions that if a defendant suffered from “serious mental illness,” then this fact “shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment.”<sup>35</sup> But even though mental illness is explicitly mentioned in the Illinois statute, the mental illness must be “serious,” the defendant must have been suffering from it at the time he or she committed the crime, and the illness must have “substantially affected his or her ability to understand the nature of his or her acts or to conform his or her conduct to the requirements of the law.”<sup>36</sup> Thus, even when a state sentencing statute lists mental illness as a factor, it still may place others conditions on how and when that mental illness may qualify as a mitigating factor.<sup>37</sup>

### B. *Through the Looking Glass: Mental Disorders in Society and Prison*

Mental illness is not uncommon among members of the general public. Approximately 18.5% of Americans experience mental illness in a given year, and 4% have suffered from a serious mental illness that affected their lifestyle.<sup>38</sup> Personality disorders are less prevalent in the general population, though approximately 9.1% of adult Americans (age 18 or older) have suffered from “any” personality disorder.<sup>39</sup> Among young Americans, the rate of personality disorders is even higher: one in five suffer from a personality disorder.<sup>40</sup>

The rates of mental illness and personality disorders in prison are significantly higher. In 2006, over 50% of state prison inmates were characterized as

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34. See *United States v. Wilson*, 581 F. App'x 156, 157 (3d Cir. 2014) (“[W]e find no merit to Wilson’s argument that the District Court failed to give sufficient weight to Wilson’s mental health history as a mitigating factor under § 3553(a) and instead treated it as an aggravating factor. To the contrary, the District Court acknowledged Wilson’s ‘extensive’ history of mental illness.”); *United States v. Potoski*, 377 F. App'x 40, 41 (2d Cir. 2010) (“Here, even though the district court did not cite specifically to § 3553(a) the record makes clear that it considered Potoski’s history and background, including his mental illness, in imposing a sentence that was below the advisory Guidelines range.”); *United States v. Ull*, 370 F. App'x 225, 226 (2d Cir. 2010) (“While Ull now argues that the district court erred by not adequately considering the ‘characteristics of the defendant,’ 18 U.S.C. § 3553(a)(1), the sentencing transcript demonstrates that the court was fully aware of Ull’s mental condition, and took it into account.”).

35. 730 ILL. COMP. STAT. 5/5-5-3.1(a)(16) (2018).

36. *Id.*

37. *Id.*

38. *Mental Health by the Numbers*, NAT'L ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/Learn-More/Mental-Health-By-the-Numbers> (last updated Sept. 2019).

39. *Personality Disorders*, NAT'L INST. MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/personality-disorders.shtml> (last updated Nov. 2017).

40. Associated Press, *1 in 5 Young Americans Has Personality Disorder*, NBC NEWS (Dec. 1, 2008, 5:10 PM), [http://www.nbcnews.com/id/28002991/ns/health-mental\\_health/t/young-americans-has-personality-disorder/#.W9EAXC-ZM\\_U](http://www.nbcnews.com/id/28002991/ns/health-mental_health/t/young-americans-has-personality-disorder/#.W9EAXC-ZM_U).

having “any mental problem.”<sup>41</sup> Nearly 50% of individuals in state prisons had symptoms associated with mental illness.<sup>42</sup> Inmates in local jails had higher rates of both “any mental problem” and general symptoms associated with mental illness.<sup>43</sup> A more recent survey of mental illness in prisons, conducted in 2011 and 2012, found that 14% of state and federal prisoners and 26% of jail inmates had conditions that amounted to “serious psychological distress.”<sup>44</sup> An astounding 37% of prisoners and 44% of jail inmates “had been told in the past by a mental health professional that they had a mental disorder.”<sup>45</sup> In short, the rates of mental illness among prison inmates are “consistently higher” than the rates of mental illness among the general population.<sup>46</sup> Importantly, 13% of prison inmates and 13.5% of jail inmates had been told in the past by a mental health professional they had PTSD or a personality disorder.<sup>47</sup> Indeed, researchers tend to “assume” the “prevalence of severe personality disorders (“PDs”) among prison inmates in general.”<sup>48</sup> It is apparent that American jails and prisons have populations that suffer from higher rates of both mental illnesses and personality disorders when compared to the general population.

C. *Narcissistic Personality Disorder: Symptoms and Causes*

*“For there is only one thing in the world worse than being talked about,  
and that is not being talked about.”*<sup>49</sup>

The *Diagnostic and Statistical Manual of Mental Disorders* (“DSM”) was developed by the American Psychiatry Association and functions as a “classification of mental disorders with associated criteria designed to facilitate more reliable diagnoses of these disorders.”<sup>50</sup> Although the DSM itself maintains that it is impossible to identify every underlying condition regarding mental disorders, the manual’s criteria “are the best available description of how mental disorders are expressed and can be recognized by trained clinicians.”<sup>51</sup> The DSM’s characterization of mental disorders is important to clinicians because it allows for a “common language to communicate the essential characteristics of mental disorders presented by their patients.”<sup>52</sup> The symptoms listed under each category of

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41. Olga Khazan, *Most Prisoners Are Mentally Ill*, THE ATLANTIC (Apr. 7, 2015), <https://www.theatlantic.com/health/archive/2015/04/more-than-half-of-prisoners-are-mentally-ill/389682/>.

42. *Id.*

43. *Id.*

44. JENNIFER BRONSON & MARCUS BERZOFSKY, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–12 (2017).

45. *Id.*

46. Janet I. Warren et al., *Personality Disorders and Violence Among Female Prison Inmates*, 30 J. AM. ACAD. PSYCHIATRY & L. 502, 502 (2002).

47. BRONSON & BERZOFSKY, *supra* note 44, at 3.

48. Warren et al., *supra* note 46, at 502.

49. OSCAR WILDE, THE PICTURE OF DORIAN GRAY 4 (George Stade ed., Barnes & Noble Classics ed., 2003).

50. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xli (5th ed. 2013) [hereinafter DSM].

51. *Id.*

52. *Id.*



mental illness allow for a common understanding of the particularities of that illness or disorder.<sup>53</sup> The DSM provides this kind of information for a variety of mental illnesses and disorders, including narcissistic personality disorder.<sup>54</sup>

Before examining NPD and its characteristics specifically, it is important to consider personality disorders more generally. Personality disorders are “enduring pattern[s] of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.”<sup>55</sup> The DSM itself discusses a number of specific personality disorders and characterizes them into “clusters” based on descriptive similarities.<sup>56</sup> NPD is classified as a “Cluster B” disorder, which also includes antisocial, borderline, and histrionic disorders.<sup>57</sup> Individuals with Cluster B disorders may often be characterized as “dramatic, emotional, or erratic.”<sup>58</sup>

When personality traits are “inflexible, maladaptive, persisting, and cause significant functional impairment or subjective distress,” they may be diagnosed as a personality disorder.<sup>59</sup> Diagnosing a personality disorder often requires more than one interview, and the clinician making a diagnosis must be careful to distinguish traits that characterize a personality disorder from traits that are in response to “specific situational stressors or more transient mental states,” like bipolar or depressive disorders and intoxication.<sup>60</sup> This is important because personality disorders and the traits that accompany the disorders are relatively stable over time.<sup>61</sup>

Narcissistic personality disorder is a condition characterized by “a pervasive pattern of grandiosity (in fantasy or behavior), need for admiration, and lack of empathy,” characteristics that are present in “a variety of contexts.”<sup>62</sup> The DSM lists a number of specific diagnostic criteria that may be present in individuals with NPD:

1. Has a grandiose sense of self-importance (e.g., exaggerates achievements and talents, expects to be recognized as superior without commensurate achievements).
2. Is preoccupied with fantasies of unlimited success, power, brilliance, beauty, or ideal love.

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53. *Id.* (“The criteria are concise and explicit and intended to facilitate an objective assessment of symptom presentations in a variety of clinical settings—inpatient, outpatient, partial hospital, consultation-liaison, clinical, private practice, and primary care—as well in general community epidemiological studies of mental disorders.”).

54. *See id.* at xii–xi.

55. *Id.* at 645.

56. *Id.* at 646 (“The personality disorders are grouped into three clusters based on descriptive similarities . . . . [T]his clustering system, although useful in some research and educational situations, has serious limitations and has not been consistently validated.”).

57. *Id.*

58. *Id.*

59. *Id.* at 647.

60. *Id.*

61. *Id.*

62. *Id.* at 669.

3. Believes that he or she is “special” and unique and can only be understood by, or should associate with, other special or high-status people (or institutions).
4. Requires excessive admiration.
5. Has a sense of entitlement (i.e., unreasonable expectations of especially favorable treatment or automatic compliance with his or her expectations).
6. Is interpersonally exploitative (i.e., takes advantage of others to achieve his or her own ends).
7. Lacks empathy: is unwilling to recognize or identify with the feelings and needs of others.
8. Is often envious of others or believes that others are envious of him or her.
9. Shows arrogant, haughty behaviors or attitudes.<sup>63</sup>

Individuals with NPD believe they are superior to others and that others should recognize that perceived superiority.<sup>64</sup> Their preoccupation with how they are perceived by others is often manifested as a need for “constant attention and admiration,” and when their expectations of favorable treatment are not met, individuals with NPD may act “puzzled or furious.”<sup>65</sup> Individuals with NPD often lack empathy and “have difficulty recognizing the desires, subjective experiences, and feelings of others.”<sup>66</sup> A sense of entitlement and their lack of empathy towards others may cause the “conscious or unwitting exploitation of others.”<sup>67</sup>

Despite their feelings of superiority, individuals with NPD have “very fragile” self-esteem.<sup>68</sup> The deficiencies in self-esteem make individuals with NPD especially vulnerable to criticism, and when they suffer from criticism, they may feel “humiliated, degraded, hollow, and empty.”<sup>69</sup> Not only do individuals with NPD feel especially targeted by criticism, but they may also “react with disdain, rage, or defiant counterattack” to such criticism.<sup>70</sup> At the same time, individuals with NPD can be distinguished from other Cluster B disorders in that NPD itself does not necessarily include characteristics of impulsivity, aggression, and deceit.<sup>71</sup>

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63. *Id.* at 669–70 (“A pervasive pattern of grandiosity (in fantasy or behavior), need for admiration, and lack of empathy, beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following . . .”).

64. *Id.* at 670.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 671.

70. *Id.*

71. *Id.* at 672.

It is unknown what causes NPD.<sup>72</sup> There are a number of potential factors, however, that may be linked to it.<sup>73</sup> In particular, there may be a link between environmental factors and NPD.<sup>74</sup> Specifically, overly critical or overly pampering parenting<sup>75</sup> or exceedingly high expectations for children may also contribute to the development of NPD.<sup>76</sup> Other early childhood factors like trauma, abuse, or neglect may also be related.<sup>77</sup> Genetics and other neurobiological conditions may also be contributing factors.<sup>78</sup>

It is important to note two things about these factors: first, despite the existence of these potential factors, they are just that—potential. It remains unclear what actually causes NPD.<sup>79</sup> Second, even though it is unclear what causes NPD, what is relatively clear is that none of the potential factors that have been identified are factors within with individual's control.<sup>80</sup> An individual cannot control how his or her parents raise them, nor can an individual predetermine his or her genetics. In other words, NPD is a condition that arises regardless of any action or inaction taken by an individual. Those who develop NPD do not do so willingly.

#### D. *Narcissistic Personality Disorder and Violence*

As discussed above, even though the DSM recognizes that individuals with NPD may often be exploitative and lack empathy, the DSM distinguishes NPD from other Cluster B disorders because individuals with NPD are not necessarily aggressive.<sup>81</sup> Indeed, there is limited empirical evidence that correlates NPD with violence.<sup>82</sup> But despite the apparent limited empirical evidence linking the disorder to violence, a number of studies have found such a link.<sup>83</sup>

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72. *Causes of Narcissistic Personality Disorder (NPD)*, HEALTHDIRECT, <https://www.healthdirect.gov.au/causes-of-npd> (last updated Dec. 2018); *Narcissistic Personality Disorder*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/9742-narcissistic-personality-disorder> (last updated June 19, 2020); *Narcissistic Personality Disorder*, MAYO CLINIC (NOV. 18, 2017), <https://www.mayoclinic.org/diseases-conditions/narcissistic-personality-disorder/symptoms-causes/syc-20366662>.

73. See sources cited *supra* note 72.

74. See sources cited *supra* note 72.

75. See sources cited *supra* note 72.

76. *Causes of Narcissistic Personality Disorder (NPD)*, *supra* note 72.

77. *Id.*

78. *Id.*

79. See *supra* note 72 and accompanying text.

80. See *supra* notes 74–78 and accompanying text. None of the potential factors identified are factors brought about by the individual who has NPD.

81. DSM, *supra* note 50, at 672.

82. Joe Lowenstein, Charlotte Purvis & Katie Rose, *A Systematic Review on the Relationship Between Antisocial, Borderline and Narcissistic Personality Disorder Diagnostic Traits and Risk of Violence to Others in a Clinical and Forensic Sample*, 3 BORDERLINE PERSONALITY DISORDER & EMOTION Deregulation, 2016, at 3–4.

83. See Richard Howard, *Personality Disorders and Violence: What Is the Link?*, 2 BORDERLINE PERSONALITY DISORDER & EMOTION Deregulation, Sept. 2015, at 7; Paul G. Nestor, *Mental Disorder and Violence: Personality Dimensions and Clinical Features*, 159 AM. J. PSYCHIATRY 1973, 1975 (2002); Warren et al., *supra* note 46, at 503.

One such study analyzed Cluster B disorders—including NPD—and links to violence by surveying female prison inmates convicted of felonies.<sup>84</sup> For convicted female felons in this study, correlations between NPD and violence were considerably distinct from the correlations of other Cluster B disorders:

In marked contrast to the lack of a predictive relationship between general Cluster B personality disorders and violent crime, NPD predicted current incarceration for any violent crime including murder and for any violent crime excluding murder, with odds ratios of 7.57 and 4.92, respectively. Unlike the other Cluster B diagnoses, these results suggest a powerful relationship between this particular PD and violent behavior among incarcerated women.<sup>85</sup>

Importantly, this study found that these results showed that the traits found in individuals with NPD—“sense of entitlement, grandiosity, interpersonal exploitativeness, lack of empathy, and envy”—may help explain the correlation with violent behavior among those women with NPD.<sup>86</sup>

Other studies have found that, as a whole, NPD has been “strongly related to causing pain and suffering in others,” even when controlling for the effects of other Cluster B disorders.<sup>87</sup> The link between violent behavior and NPD symptoms has also been demonstrated in case reports of men<sup>88</sup> with NPD: “case reports of men with narcissistic PD suggest their violence is triggered by a slight or insult and is motivated by a desire for vengeance.”<sup>89</sup> This potential motivation is paralleled by a number of NPD symptoms, like the feelings of fury when admiration is not received, the profound sense of entitlement, and the inability to take criticism without often resorting to “defiant counterattack.”<sup>90</sup> Although the DSM itself indicates aggressive behavior is not necessarily inherent in individuals with NPD, the symptoms associated with NPD may directly lead to violent and aggressive behavior.<sup>91</sup>

Because of this potential link between NPD and aggressive behavior, and the way the symptoms themselves may cause an individual with NPD to interact with others, reconsidering how individuals with NPD are treated during criminal sentencing is important. This is especially true because NPD is a disorder most likely caused by factors beyond the individual’s control.<sup>92</sup>

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84. Warren et al., *supra* note 46, at 503.

85. *Id.* at 508.

86. *Id.*

87. Howard, *supra* note 83, at 7.

88. This is especially important because 50–75% of those diagnoses with NPD are male. DSM, *supra* note 50, at 671.

89. Howard, *supra* note 83, at 7.

90. DSM, *supra* note 50, at 671.

91. *Id.* at 671–72.

92. See sources cited *supra* note 72.

## III. ANALYSIS

Part III will first generally discuss a court's consideration of mitigating factors during sentencing. Part III will then discuss how narcissistic personality has been assessed in select capital cases. Part III will go on to examine some selected state sentencing statutes and assess the degree to which these statutes allow for NPD to be considered as a mitigating factor.

*A. The Requirement to Consider Mitigating Factors in Capital Cases*

In *Lockett v. Ohio*, the Supreme Court considered the constitutionality of a death penalty scheme that limited the sentencer's discretion to consider mitigating factors.<sup>93</sup> The Ohio statute the Court analyzed precluded the death penalty only when

considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a [preponderance] of the evidence: (1) The victim of the offense induced or facilitated it. (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation. (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.<sup>94</sup>

Even though this statute had been construed liberally to favor the defendant, it only allowed the consideration of the three specified mitigation factors to preclude the death penalty.<sup>95</sup> The Court held that limiting a judge's consideration to just these factors was "incompatible with the *Eighth* and *Fourteenth* Amendments."<sup>96</sup>

It is worth noting at the outset that death penalty sentencing may be distinguished from general criminal sentencing on the grounds that the death penalty itself raises unique constitutional issues.<sup>97</sup> Prison sentences, for the very reason that they do not involve the state-sanctioned killing of an individual, do not raise the same constitutional requirements to consider mitigating circumstances.<sup>98</sup> But

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93. *Lockett v. Ohio*, 438 U.S. 586, 589 (1978).

94. *Id.* at 612–13.

95. *Id.* at 608.

96. *Id.*

97. *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) ("[I]n capital cases the fundamental respect for humanity underlying the *Eighth Amendment* . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. . . . [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.") (emphasis added).

98. *Lockett*, 438 U.S. at 604–05 ("We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. . . . The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.").

any punishment an individual receives should *always* be “sufficient, but not greater than necessary.”<sup>99</sup> Even though death is fundamentally different than imprisonment, if a death penalty statute’s failure to allow for individualized consideration of a defendant renders that statute unconstitutional entirely, then there is a recognized and profound importance in ensuring that individual factors be considered in all sentencing cases in pursuance of justice.<sup>100</sup>

Though the consideration of such factors may be a constitutional requirement in capital cases and based only on “public policy” in noncapital cases,<sup>101</sup> fair and appropriate sentencing is a laudable goal for the criminal justice system. In all criminal cases—both capital and noncapital cases—the life and liberty of a criminal defendant is at stake.<sup>102</sup> Though certain constitutional concerns may not underpin the consideration of mitigating factors in noncapital cases, it is nonetheless critical that all criminal defendants receive an appropriate sentence. And when certain mitigating factors and circumstances impact individual culpability, the importance of considering such circumstances for all criminal defendants is even more evident. Thus, for purposes of this Note, the distinction between sentencing schemes in capital cases and schemes in noncapital cases is inconsequential: narcissistic personality disorder should be specifically considered as a mitigating factor for *any* crime.

### B. *Narcissistic Personality Disorder Offenders: Case Analysis*

#### I. *State v. Fox*

The difficulty of presenting narcissistic personality disorder evidence is illustrated by *State v. Fox*.<sup>103</sup> On September 14, 1989, Leslie Keckler applied for a job at an Ohio restaurant.<sup>104</sup> Richard Fox,<sup>105</sup> an employee at the restaurant, convinced the restaurant manager to show him Keckler’s phone number.<sup>106</sup> On Sep-

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99. 18 U.S.C. § 3553(a) (2018).

100. *See Lockett*, 438 U.S. at 605 (holding that statutes that prevent judges from considering factors that might weigh in favor of a lesser sentence—when the death penalty is on the table—are unconstitutional).

101. *See id.* at 604–05 (explaining that consideration of mitigating factors in capital cases is a constitutional requirement while consideration of such factors in noncapital cases is merely based on “public policy enacted into statutes”).

102. *See* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634–46 (discussing collateral consequences and their effects).

103. *State v. Fox*, 631 N.E.2d 124, 124–29 (Ohio 1994). Ohio Supreme Court cases may contain relevant introductory material, such as facts, before the opinion begins. *See* SUPREME COURT OF OHIO, SUPREME COURT RULES FOR THE REPORTING OF OPINIONS § 2.4 (2012), <http://www.supremecourt.ohio.gov/LegalResources/rules/reporting/Report.pdf>.

104. *Fox*, 631 N.E.2d at 125.

105. Fox has since been executed. James Drew & Jim Provance, *Man Executed for Killing College Student*, BLADE (Feb. 12, 2003, 12:03 PM), <https://www.toledoblade.com/local/2003/02/12/Man-executed-for-killing-college-student/stories/200302120015>.

106. *Fox*, 631 N.E.2d at 125.

tember 26, Keckler, believing she would be attending a job interview at a Holiday Inn, went missing.<sup>107</sup> Four days later, her body was found in a drainage ditch.<sup>108</sup> She was brutally beaten, stabbed six times, and strangled.<sup>109</sup> On October 2, Fox confessed to killing Keckler after she denied his sexual advances and called him an “asshole.”<sup>110</sup> Fox waived a jury and was instead tried by a three-judge panel.<sup>111</sup> Fox was found guilty of both kidnapping and murder.<sup>112</sup> At the sentencing phase, Fox presented several pieces of mitigating evidence relating to his character and his mental condition.<sup>113</sup> Importantly, Fox presented significant evidence of his NPD.<sup>114</sup>

Two clinical psychologists and a psychiatrist testified about Fox’s mental condition, explaining that he “suffered from a severe, lifelong, ‘narcissistic personality’ disorder.”<sup>115</sup> For example, these witnesses testified that Fox had “trouble understanding human relationships and processing ideas and thoughts” and had “‘extreme feelings of inferiority,’ [and] ‘grandiose fantasies.’”<sup>116</sup> They testified that due to his internal lack of self-worth, he created mental fantasies to shield himself.<sup>117</sup> One of these witnesses testified that when Keckler called him an asshole, it “stripped away Mr. Fox’s ability to deceive himself,” which resulted in his “‘impulsive’ murder” of Keckler.<sup>118</sup> The other witnesses corroborated this assessment: a second witness testified that Fox was “extremely bitter, envious of others, and prone to rationalizations and grandiose fantasies to compensate for a lack of self-esteem.”<sup>119</sup> A third witness described Fox as “suffering from a delusional sense of self-importance.”<sup>120</sup> Despite this evidence, the court sentenced Fox to death.<sup>121</sup> The sentence was affirmed at the intermediate appellate court.<sup>122</sup>

Fox challenged his sentence on a number of grounds.<sup>123</sup> But as is relevant for the purposes of the Note, he challenged it on the grounds that the panel: (1) “failed to consider mitigating factors and explain why the aggravating circumstances outweighed mitigating factors;”<sup>124</sup> that (2) the panel of judges erred

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 127.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 128.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 129.

122. *Id.*

123. *Id.*

124. *Id.* at 130.

in determining his personality disorder did not amount to “substantial impairment of capacity” to be considered a statutory mitigating factor,<sup>125</sup> and (3) that the panel of judges incorrectly weighed certain mitigating evidence and evidence about his background.<sup>126</sup>

The ways in which the Ohio Supreme Court addressed these arguments highlights the need for sentencing schemes that specifically list NPD as a mitigating factor. The court held that there is recognized “importance of a trial court’s reasoning in choosing the death penalty,”<sup>127</sup> and that the trial court gave “due weight” to the evidence regarding Fox’s personality issues.<sup>128</sup> Despite the strong evidence Fox presented that tended to show he was unstable because of NPD,<sup>129</sup> the trial court nonetheless imposed the death penalty.<sup>130</sup> But such mental health issues are precisely the kind of information that should give a court pause before it sentences a defendant.<sup>131</sup> If the mental health of a criminal defendant negates the *mens rea* of the crime, as with insanity, no crime is committed.<sup>132</sup> Likewise, when the mental health of a criminal defendant *lessens* the *mens rea*, the sentence should reflect the lessened culpability. This principle of lesser *mens rea* culpability is reflected in the current criminal justice system: individuals may be convicted of manslaughter instead of murder.<sup>133</sup> In a typical first-degree murder case, an individual is guilty of murder if he intentionally causes the death of another.<sup>134</sup> The necessary *mens rea* is intent.<sup>135</sup> But when that individual intentionally kills someone but does so in the heat of passion, that person may be found guilty of manslaughter.<sup>136</sup> In this way, the justice system reflects the general principle that not all crimes are equal; not every murder is planned and cold-hearted, so not every murderer should be charged with, convicted of, or sentenced for the same general type of crime.<sup>137</sup>

As *State v. Fox* demonstrates, this principle has its limits when individuals with NPD are convicted and later sentenced. Fox’s witnesses discussed at length

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125. *Id.* at 131.

126. *Id.* at 132–33.

127. *Id.* at 131.

128. *Id.* at 129.

129. *Id.* at 131.

130. *Id.* at 129.

131. See John M. Fabian, *Death Penalty Mitigation and the Role of the Forensic Psychologist*, 27 L. & PSYCH. REV. 73, 78 (2003) (“When considering mitigation of sentencing in a capital case, mitigating factors usually concern mental health issues . . .”).

132. See generally Robert Kinscherff, *Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act*, 38 J.L. MED. & ETHICS 745 (2010) (discussing how mental health may impact the *mens rea* of a crime).

133. See MODEL PENAL CODE § 210.3(1) (AM. LAW. INST. 2019) (noting how homicide is manslaughter when it is “committed recklessly or when it is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”).

134. See Kinscherff, *supra* note 132, at 745 (“For example, a person who kills another person intentionally is typically guilty of murder . . .”).

135. See *id.*

136. See *id.* (“[W]hile a person who kills recklessly or in the heat of passion in response to provocation may be guilty of manslaughter . . .”).

137. See MODEL PENAL CODE § 210.3 (AM. LAW. INST. 2019).



how his NPD caused him to create an emotional fantasy for himself that, when stripped away by reality, resulted in his loss of control and violent outburst.<sup>138</sup> Such a theory comports with the diagnostic traits of narcissistic personality disorder: individuals with NPD build fantasies for themselves, feel a sense of great self-importance, and may react with disdain, rage, or defiant counterattack when they have been “injured” through “criticism or defeat.”<sup>139</sup> Fox himself indicated that Keckler’s romantic refusal was what directly led to his attack.<sup>140</sup> In Fox’s view, and in the view of his witnesses, he was provoked by Keckler.<sup>141</sup> But despite Fox’s narcissistic personality disorder making him more sensitive to perceived injuries and slights, he was nonetheless sentenced to death.<sup>142</sup> This is not to say that a murder victim is responsible for his or her own death. Nor is this to excuse hyper masculinity and the threat it often poses to women.<sup>143</sup> This Note does not argue that misogynistic violence against women should ever be justified or excused simply because a man was “provoked.” The societal lenience given to men who commit violent crimes against women is well-documented.<sup>144</sup> But considering the *Fox* case is relevant because it illustrates how NPD may manifest itself and how evidence of NPD may be used in mitigation. Thus, considering how Fox was “provoked” serves to illustrate how his *disorder* made him perceive Keckler’s response as a provocation that shattered his narcissistic image and contributed to the crime he committed.<sup>145</sup>

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138. *State v. Fox*, 631 N.E.2d 124, 124–29 (Ohio 1994).

139. *DSM supra* note 50, at 671.

140. *Fox*, 631 N.E.2d at 124–29.

141. *Id.*

142. *Id.*

143. Donna Coker & Ahjané D. Macquoid, *Reimagining Mobilization, Action, and Pedagogy: Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement*, 5 U. MIA. RACE & SOC. JUST. L. REV. 585, 614 (2015) (“As we describe above, prison culture reinforces a destructive masculinity that creates a violent place ‘inside’ and likely increases in violence against women ‘outside.’”); Meghan N. Schmid, Comment, *Combating A Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 491–93, 494 n.103 (2010) (discussing hyper-masculinity and sexual violence in the military); Maya Salam, *What is Toxic Masculinity?*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/us/toxic-masculinity.html> (discussing the basic concept of toxic masculinity and how its traits have been linked to aggression and violence); Lisa Wade, *The Hypermasculine Violence of Omar Mateen and Brock Turner*, NEW REPUBLIC (June 14, 2016), <https://newrepublic.com/article/134270/hypermasculine-violence-omar-mateen-brock-turner> (discussing hyper-masculinity and violence).

144. BONNIE ET AL., *supra* note 2, at 809–10; Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women’s Syndrome, and Violence as Male Privilege*, 68 U. MIA. L. REV. 1099, 1103 (2014) (“Male violence is not only tolerated, but celebrated, whereas women’s violence is not only discouraged, but stigmatized. Invoking the image of vulnerable women to promote aggressive self-defense rhetoric serves to distract from the reality that violence remains chiefly a male privilege. The sharp contrast between the treatment of George Zimmerman, who avoided arrest for six weeks after shooting an unarmed teenager to death and who was eventually acquitted of all charges, and that of Marissa Alexander, who was immediately arrested after firing what she described as a warning shot at her abusive ex-husband and sentenced to twenty years for aggravated assault with a firearm, offers a compelling illustration of these principles.”); Lisa M. Saccomano, *Defining the Proper Role of “Offender Characteristics” in Sentencing Decisions: A Critical Race Theory Perspective*, 56 AM. CRIM. L. REV. 1693, 1698 n.36 (2019) (citing and discussing literature documenting the leniency given to men charged with sexually violent crimes).

145. *See DSM supra* note 50, at 671.

While the three panel judges indicated they gave NPD evidence appropriate weight,<sup>146</sup> Fox was ultimately sentenced to death despite evidence of his symptoms.<sup>147</sup> If the judges had given such evidence due weight, it is difficult to see how Fox could be distinguished from a “typical” manslaughter defendant—someone who killed because he flew into an emotional rage.<sup>148</sup> This is especially true when one considers the ways in which the criminal law, and the manslaughter charge, is biased in favor of male defendants.<sup>149</sup>

The *Fox* case was not unanimous.<sup>150</sup> The dissent adopted the opinion of the lower appellate court.<sup>151</sup> An important element of that opinion was the weight that was given to Fox’s personality disorder. While the appellate court and the Ohio Supreme Court both agreed that the personality disorder was not a mitigating factor in that it was not a mental disease or defect that affected Fox’s capacity, the dissenting opinion made clear that evidence of Fox’s NPD should be given “substantial weight” as an “other” mitigating factor.<sup>152</sup>

Fox’s witnesses testified he had “severe” NPD, which caused him to develop extreme self-esteem problems and ultimately lash out at Keckler when his grandiose self-image was threatened.<sup>153</sup> In other words, the evidence presented suggested that Fox was not someone who had necessarily planned to kill or did so with calculated and malicious intent. Rather, Fox killed because he “lost control.”<sup>154</sup> Just as the law recognizes a distinction between manslaughter and murder,<sup>155</sup> the law should recognize that individuals with NPD might commit a crime not because they desire to act violently, but because their fragile self-image may make them more likely to violently harm others.<sup>156</sup> A statutory mitigating scheme that specifically recognizes NPD as a mitigating factor would take into consideration the fact that an individual with NPD may react violently *because* of his NPD.<sup>157</sup>

Regardless of his NPD, Fox violently killed a young woman.<sup>158</sup> And while he may have “lost control,” he was in full control when he tricked her into meeting him for an imaginary job interview.<sup>159</sup> Allowing NPD to be expressly considered as a mitigating factor may risk missing an important purpose of criminal

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146. *Fox*, 631 N.E.2d at 130–31.

147. *Id.* at 124–29.

148. BONNIE ET AL., *supra* note 2, at 809–10.

149. *Id.* (discussing the academic debate over manslaughter and its bias in favor over heterosexual men).

150. *Fox*, 631 N.E.2d at 134.

151. *Id.* (Wright, J. dissenting).

152. *Id.* at 137 (Wright, J. dissenting) (“In my view, the evidence clearly established that appellant suffered from a personality disorder that altered his perception of reality and led directly to the commission of this murder. I agree with the majority and the trial court that this condition is not within the scope of R.C. 2929.04(B)(3) despite the testimony that appellant was ‘unable’ to control his rage. However, I consider it to be of substantial weight as an ‘other’ mitigating factor under R.C. 2929.04(B)(7).”) (internal quotations omitted).

153. *Id.* at 128.

154. *Id.*

155. See MODEL PENAL CODE § 210.3 (AM. LAW. INST. 2019) (discussing manslaughter).

156. See Howard, *supra* note 83, at 7; Nestor, *supra* note 83, at 1975; Warren, *supra* note 46, at 508.

157. *Fox*, 631 N.E.2d at 130.

158. *Id.* at 125.

159. *Id.* at 125–26.

punishment: retribution. Fox killed someone and therefore deserved to be punished.<sup>160</sup> After all, Fox was morally culpable for his act and was not insane when he committed it, so he should be punished accordingly.<sup>161</sup> At the same time, conduct must be considered in full context: if a criminal defendant's "irrationality is the product of [an] extreme mental disorder, over which, to the best of our knowledge, the person has little control," then punishing him to the maximum degree would be improper.<sup>162</sup> Fox's witnesses testified to this point—they argued he had little control over how he responded to Keckler.<sup>163</sup> Fox's witnesses testified he had a fragile self-image *because of* NPD.<sup>164</sup> Fox no doubt made the choice to kill, but he did not choose his mental health. He did not choose to have NPD. Despite this, Fox was given the most extreme sentence possible: death. But Fox's condition made him less culpable because it was precisely his severe NPD that affected how he responded to the situation. Because his disorder made him less culpable, he was less deserving of punishment.<sup>165</sup> Sentencing schemes should consider personality disorders as mitigating factors to reflect this reality.

## 2. Reed v. Secretary of Florida Department of Corrections

Like *State v. Fox*, *Reed v. Secretary of Florida Department of Corrections* makes clear the need for specific consideration of mental illness and personality disorders during sentencing.<sup>166</sup> After moving with his girlfriend and children to Jacksonville, Florida, Grover Reed and his family were taken in by a Lutheran minister and his wife.<sup>167</sup> The couple asked Reed to leave after discovering drug paraphernalia but continued to provide him with monetary assistance.<sup>168</sup> After that assistance was discontinued, Reed raped and murdered the minister's wife—strangling her and repeatedly stabbing her in the throat.<sup>169</sup> A jury recommended the death penalty, and a state trial court imposed that sentence.<sup>170</sup> As is relevant

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160. Bailey Kuklin, *Public Requitals: Corrective, Retributive, and Distributive Justice*, 66. CLEV. ST. L. REV. 245, 267 (2018) ("Retributivism is the view that punishment is justified by the moral culpability of those who receive it. A retributivist punishes because, and only because, the offender deserves it.") (quoting Michael S. Moore, *The Moral Worth of Retribution*, in PUNISHMENT AND REHABILITATION 94, 94 (Jeffrie G. Murphy ed., 3d ed. 1995)).

161. Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 882 (2002) ("For example, Michael Moore maintains that morally culpable wrongdoers must be punished in accordance with their just deserts.") (citing Michael Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS, 179, 179 (Ferdinand Schoeman ed., 1987)).

162. See Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. 599, 669 (1989) ("Also, Professor Morse suggests a defendant should be excused if his or her 'irrationality is the product of [an] extreme mental disorder, over which, to the best of our knowledge, the person has little control.'") (quoting STEPHEN J. MORSE, *Justice, Mercy, and Crazyness*, 36 STAN. L. REV. 1485, 1490 (1984) (book review)).

163. *Fox*, 631 N.E.2d at 128.

164. *Id.*

165. See Kuklin, *supra* note 160, at 296.

166. *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217 (11th Cir. 2010).

167. *Id.* at 1220.

168. *Id.*

169. *Id.*

170. *Id.* at 1224–25.

to the analysis of this Note, the court found the following mitigating factors were not present:

“(1) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance . . . (3) the murder was committed while the defendant’s capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired.”<sup>171</sup>

The court concluded there was “no evidence offered to show that any” of the mitigating factors were present.<sup>172</sup> It ultimately found no evidence “to show the existence of any other factors which should be considered in mitigation.”<sup>173</sup>

Reed challenged this judgment on a number of grounds, including ineffective assistance of counsel.<sup>174</sup> His ineffective assistance of counsel claim was based on the alleged failure of his attorneys to provide sufficient mitigating evidence during the penalty phase of his proceedings.<sup>175</sup> As is relevant here, Reed relied on testimony from a clinical psychologist who had performed an evaluation of Reed and concluded that he had both narcissistic personality disorder and antisocial personality disorder.<sup>176</sup> The failure to use this testimony, Reed argued, amounted to ineffective counsel.<sup>177</sup> The Florida Supreme Court disagreed and affirmed Reed’s judgment.<sup>178</sup> On further habeas appeal to the Eleventh Circuit, the court denied Reed relief and found that he was unable to show error in the lower court’s determination that either his “counsel’s performance was deficient,” or the “deficient performance prejudiced” Reed, the two elements required to establish an ineffective assistance of counsel.<sup>179</sup>

Though the court found neither element of ineffective assistance of counsel was present, its analysis of how the lower court handled the prejudice prong is relevant to understand the role that an NPD diagnosis plays in sentencing and mitigation. The clinical psychologist who diagnosed Reed with NPD described Reed as “selfish, self-indulgent, hedonistic, and exploitative.”<sup>180</sup> In further testimony, the psychologist described anti-social personality disorder and agreed “anti-social behavior is what really underlies a sociopath.”<sup>181</sup> Consequently, the Eleventh Circuit held that the psychologist’s own testimony about NPD and antisocial personality disorder was “more harmful to Reed than mitigating.”<sup>182</sup> The court reasoned that when presenting mitigating evidence, the defendant runs the risk of alienating the jury and bringing information that harms rather than helps

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171. *Id.* at 1225.

172. *Id.* (emphasis added).

173. *Id.*

174. *Id.* at 1239.

175. *Id.* at 1241.

176. *Id.* at 1228.

177. *Id.* at 1241–42.

178. *Id.* at 1226.

179. *Id.* at 1239, 1245, 1248 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

180. *Id.* at 1248.

181. *Id.* at 1229.

182. *Id.* at 1248.

the defendant.<sup>183</sup> Thus, if the psychologist had taken the stand at trial, the prosecution would have used him to “reveal to the jury that Reed had an antisocial personality, was selfish, [and] was unconcerned with the rights of others . . . .”<sup>184</sup> Because such information would have been damaging to Reed, his counsel’s failure to introduce such evidence was not ineffective.<sup>185</sup>

The reality of this situation is a catch-22 for defendants who wish to present mitigating evidence of NPD: by presenting evidence of the disorder and its symptoms, the defendant risks presenting himself in such an unflattering light that the evidence is used for aggravation rather than in mitigation.<sup>186</sup> Conversely, if the defendant chooses not to present such evidence because of that precise risk, the defendant loses valuable evidence that sheds light on the defendant’s culpability.

Reed was diagnosed with NPD and characterized as “selfish, self-indulgent, hedonistic, and exploitative.”<sup>187</sup> Individuals with NPD are similarly characterized as having exploitative, un-empathetic, and self-absorbed personalities.<sup>188</sup> But unlike an individual without NPD, who may have those traits simply because he chooses to be self-serving, an individual with NPD did *not* develop those traits through choice.<sup>189</sup> NPD may be caused by childhood abuse, trauma, and neglect,<sup>190</sup> and Reed’s own childhood was marked by abuse and trauma: Reed’s mother killed his biological father while Reed and his siblings were in the home.<sup>191</sup> Additionally, Reed’s stepfather was often drunk, abusive, and consistently beat his stepchildren.<sup>192</sup> On one occasion, Reed’s stepfather forced his stepchildren to watch as he beat their mother.<sup>193</sup> Shortly after that, the children lived with their grandparents and “only heard from their mother about once a year.”<sup>194</sup> At their grandparents’ home, the children were seldom disciplined and their grandmother was “very indulgent” with Reed.<sup>195</sup> While on its face this may seem irrelevant to consideration of NPD, NPD may be caused not only by trauma and violence, but also by overly pampering parenting.<sup>196</sup> Reed’s upbringing was thus marked by multiple potential causes of his NPD: violence, abuse, and pampering.<sup>197</sup> Therefore, not only would Reed’s defense have presented evidence of an NPD diagnosis, but also could have presented evidence to help explain why and how Reed had developed NPD.<sup>198</sup> By explaining why and how Reed had

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183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. See DSM, *supra* note 50, at 669–70.

189. See *Causes of Narcissistic Personality Disorder (NPD)*, *supra* note 72.

190. *Id.*

191. *Reed*, 593 F.3d at 1229.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 1230.

196. *Narcissistic Personality Disorder*, *supra* note 72.

197. *Id.*

198. *Causes of Narcissistic Personality Disorder (NPD)*, *supra* note 72.

developed NPD, the defense could therefore explain why Reed was a selfish and exploitative person.<sup>199</sup> This, in turn, could have helped the defense explain why Reed committed the act of violence he did—it would have suggested he was less culpable because of his disorder. At the very least, such evidence would have helped show why an NPD diagnosis should have been an exclusively mitigating factor.

It is true that attorneys have discretion to develop and act on “sound trial strategy.”<sup>200</sup> Indeed, “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.”<sup>201</sup> Given the circumstances presented in *Reed*, avoiding discussion of Reed’s potential narcissistic personality disorder was a reasonable<sup>202</sup> decision and not legally ineffective.<sup>203</sup> Reed’s attorneys *could* have pursued a strategy that aggressively highlighted and discussed NPD, and so long as such a strategy was considered “sound,” they would not be ineffective for pursuing this theory<sup>204</sup> any more than the strategy they actually pursued at trial.<sup>205</sup>

But whether Reed’s attorneys were ineffective or could have reasonably pursued a strategy that aggressively discussed Reed’s NPD is irrelevant to the merits of a statutory scheme that highlights NPD as a mitigating factor. It is precisely because either course of action is acceptable that demonstrates why such a statutory mechanism is necessary. Rather than force attorneys to make a decision to present evidence that may have a 50-50 chance of prejudicing their client or resulting in substantial mitigation of a sentence,<sup>206</sup> a sentencing scheme that focuses judges on the mitigating nature of NPD will allow attorneys to best serve their clients by presenting a more complete picture of the defendant<sup>207</sup> and the nature of his crimes.

A sentencing scheme that highlights NPD as a specific mitigating factor may remedy this problem because it focuses the judge on the fact that NPD *should* be mitigating. In other words, even though NPD evidence may be simultaneously mitigating and aggravating, listing NPD as a statutory mitigating factor would function to remove the inadvertent aggravating factors that come with a

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199. *Reed*, 593 F.3d at 1248.

200. *Strickland v. Washington*, 446 U.S. 668, 690 (1984).

201. *Id.* at 689.

202. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 343 (1983) (“The actual unfolding of the course of a trial is highly uncertain and contingent, however, and a trial attorney often must make decisions based upon what she knows or believes at the time the decision must be made. Reasonable decisions between competing trial options, made under conditions of uncertainty, and possibly reflecting the attorney’s individual style, must generally be respected. The reasonableness of a trial attorney’s decisions and actions must be assessed on the basis of the information available to the attorney at the time of choice, not on the basis of perfect hindsight.”).

203. *Reed*, 593 F.3d at 1248.

204. See *Strickland*, 446 U.S. at 689.

205. *Reed*, 593 F.3d at 1248.

206. *United States v. Potoski*, 377 F. App’x 40, 41 (2d Cir. 2010) (“Here, even though the district court did not cite specifically to § 3553(a) the record makes clear that it considered Potoski’s history and background, including his mental illness, in imposing a sentence that was below the advisory Guidelines range.”).

207. This would support general sentencing standards that require consideration of “the nature and circumstances of the offense and the history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1) (2018).

discussion of NPD. Rather than have a judge determine that information was ultimately more “harmful than mitigating,” a statutory scheme defining an NPD diagnosis as mitigating removes the double-edged nature of NPD evidence.

*C. Fixing Something That Isn't Broken: The Apparent Adequacy of State Sentencing Statutes*

As discussed previously,<sup>208</sup> the federal sentencing statute generally allows for judicial discretion, so a judge could simply lump consideration of NPD with another listed factor.<sup>209</sup> State statutes similarly may facially suggest that listing NPD as a mitigating factor is simply redundant or unnecessary because the statutes already allow for NPD to be considered. Because state prison populations are so high,<sup>210</sup> discussing the role that states play in sentencing defendants is critically important. Sentencing statutes in Maine, Illinois, Ohio, Arizona, and Tennessee will be discussed. These states were selected because of their relative diversity of geography and their incarceration rates. Relative diversification of geography was important to limit ideological biases.<sup>211</sup> Incarceration rates were also an important factor. Selecting the states with the lowest or highest numbers incarceration would most likely bias the analysis because states with the highest incarceration rates are located in the South, while many of the lowest incarceration rates are located on the East Coast.<sup>212</sup> Moreover, sampling states with the highest or lowest incarceration rates would not fully reflect the nuances in the American criminal justice system.<sup>213</sup> None of the states considered here is an outlier state: none of them have the highest or lowest number of incarcerated individuals per 100,000 citizens.<sup>214</sup> Instead, they represent a relatively broad range of incarceration rates.<sup>215</sup> These states will be analyzed to determine how NPD could, or could not, fit into certain sentencing schemes as they exist today.

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208. See *supra* Section II.A.

209. See 18 U.S.C. § 3553(a)(1) (2018).

210. DEP'T JUST. OFF. BUREAU JUST. STAT., PRISONERS IN 2016 (2018), [https://www.bjs.gov/content/pub/pdf/p16\\_sum.pdf](https://www.bjs.gov/content/pub/pdf/p16_sum.pdf).

211. For example, selecting only Southern states or states on either coast might result in bias due to the general ideology of these geographic regions. See Ian Chipman, *Political Polarization's Geographic Roots Run Deep*, STAN. GRADUATE SCH. BUS. (May 2, 2017), <https://www.gsb.stanford.edu/insights/political-polarizations-geographic-roots-run-deep>.

212. See DANIELE KAEBLE & MARY COWHIG, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016 11–12, U.S. DEP'T JUST. BUREAU JUST. STAT. (2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>.

213. Because criminal justice is largely handled at a local level, states, and even counties within states, vary widely in terms of incarceration rates. See generally JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017) (discussing, among other things, the power of the prosecutor and the ways in which local conditions affect how prosecutors go about prosecuting crimes).

214. See KAEBLE & COWHIG, *supra* note 212.

215. In 2016, Maine had a rate of 380 individuals incarcerated per 100,000 people over the age of 18. Illinois had 620, Ohio 790, Tennessee had 930, and Arizona had 1030. See KAEBLE & COWHIG, *supra* note 212.

### 1. *Maine*

Maine employs a “three step process” when determining a term of imprisonment for various crimes, including murder.<sup>216</sup> The court must first consider the “particular nature and seriousness of the offense as committed by the offender.”<sup>217</sup> Next, the court is to consider all other sentencing factors, which include mitigating and aggravating factors.<sup>218</sup> The statute specifies that these sentences “include, but are not limited to, the character of the offender and the offender’s criminal history, the effect of the offense on the victim and the protection of the public interest.”<sup>219</sup> Finally, the court will consider any appropriate suspension of a criminal sentence.<sup>220</sup>

While this statute does not reference personality disorders or NPD specifically, a personality disorder diagnosis could certainly fall within “the character of the offender.” A personality disorder undoubtedly has relevant bearing on the defendant’s character.<sup>221</sup> In this way, the Maine statute may provide sufficient protection for individuals with NPD to present mitigating evidence.

### 2. *Illinois*

The Illinois mitigating factor statute<sup>222</sup> lists seventeen separate factors that a court should consider in determining a sufficient sentence.<sup>223</sup> None of these factors specifically lists narcissistic personality disorder as a mitigating factor.<sup>224</sup> There are a number of factors, however, in which NPD may be encompassed that would provide mitigation for individuals with NPD or other personality disorders. For example, one factor directs the court to consider “substantial grounds tending to excuse or justify the defendant’s criminal conduct, though failing to establish a defense.”<sup>225</sup> NPD could be argued to be a “substantial ground that may excuse or justify” the conduct. Thus, specifically listing NPD as a mitigating factor may be unnecessary under a statute like the one that exists in Illinois.

### 3. *Ohio*

Ohio lists several “seriousness” and “recidivism” factors that a judge shall consider when determining a sentence for a felony.<sup>226</sup> None of the listed factors discussing how a crime may be *less* serious, however, specifically cover mental

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216. ME. STAT. tit. 17-A, § 1602 (2019).

217. *Id.* § 1602(1)(A).

218. *Id.* § 1602(1)(B).

219. *Id.*

220. *Id.* § 1602(1)(C).

221. DSM, *supra* note 50, at 647.

222. See 730 ILL. COMP. STAT. 5/5-5-3.1 (2018).

223. *Id.* § 5/5-5-3.1(a).

224. *See id.*

225. *Id.* § 5/5-5-3.1(a)(4).

226. OHIO REV. CODE. ANN. § 2929.12(A) (LexisNexis 2014).



illness or a personality disorder.<sup>227</sup> Instead, the closest a listed factor comes to discussing the mental health of the defendant is the fourth factor: “there are substantial grounds to mitigate the offender’s conduct, although the grounds are not enough to constitute a defense.”<sup>228</sup> The broad scope of this subsection may permit sufficient leeway to argue for consideration of NPD because the statute requires judges to consider any listed factor *and* “any other relevant factor, as indicating that the offender’s conduct is less serious than conduct normally constituting the offense.”<sup>229</sup> Thus, if the fourth factor does not cover NPD, certainly the mandate to consider “any other relevant factor,” would allow the consideration of NPD.

#### 4. *Tennessee*

Tennessee’s criminal code lists a number of mitigating factors, none of which include any specific reference to a “personality disorder.”<sup>230</sup> The specific listed factors, however, may be sufficiently encompassing to argue for an NPD diagnosis to be considered a statutory mitigating factor. For example, Tennessee lists as a statutory mitigating factor any “[s]ubstantial grounds exist tending to excuse or justify the defendant’s criminal conduct, though failing to establish a defense.”<sup>231</sup> NPD could therefore be considered as a statutory mitigating factor under the Tennessee code if it was effectively argued to be “[s]ubstantial grounds” that tended to “excuse or justify” the criminal conduct.<sup>232</sup> The Tennessee code also lists as a factor whether “[t]he Defendant was suffering from a mental or physical condition that significantly reduced the defendant’s culpability for the offense.”<sup>233</sup> If NPD is found to be a sufficient “mental condition,” it could be considered a statutory mitigating factor under this provision. Like other statutes, Tennessee contains familiar language indicating that “[a]ny other factor consistent with the purposes of this chapter,” can be considered a mitigating factor.<sup>234</sup> If NPD did not fall under any other category, it could therefore fall under this category as a mitigating factor. Tennessee also contains a provision that declares it to be mitigating if “[t]he defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct.”<sup>235</sup> In other words, if it were found that the circumstances of a criminal defendant’s NPD were so “unusual” and did not manifest a “sustained intent to violate the law,”<sup>236</sup> an NPD diagnosis could be considered as a mitigating factor under this provision.

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227. *Id.* § 2929.12(C).

228. *Id.* § 2929.12(C)(4).

229. *Id.* § 2929.12(C).

230. *See* TENN. CODE ANN. § 40-35-113 (West 2010).

231. *Id.* § 40-35-113(3).

232. *See id.*

233. *Id.* § 40-35-113(8).

234. *Id.* § 40-35-113(13).

235. *Id.* § 40-35-113(11).

236. *See id.*

## 5. *Arizona*

Arizona's felony imprisonment statute does not specifically list any personality disorder as a mitigating factor,<sup>237</sup> but there are a number of listed mitigating factors that could encompass a diagnosis of NPD. Like the other statutes that have been examined in this Note, Arizona requires the consideration of "[a]ny other factor that is relevant to the defendant's character or background or to the nature or circumstances of the crime and that the court finds to be mitigating."<sup>238</sup> Thus, NPD, as part of a defendant's character or background, could still be considered a statutory mitigating factor. Arizona's code also allows for mitigation if the "defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."<sup>239</sup> In this way, if a defendant's NPD were successfully argued to have so significantly impaired a defendant's ability to comprehend that his conduct was unlawful, the Arizona statute would allow NPD to be considered as a mitigating factor.

A number of state statutes therefore seem to provide sufficient leeway for NPD to be considered as a mitigating factor.

### *D. Mitigation is in the Eye of the Beholder: The Insufficiency of Current Statutes*

On their face, the statutes discussed above may seem to provide sufficient mitigation opportunities for individuals with NPD. But by failing to specifically list NPD, a defendant may lose the ability to introduce potential mitigating evidence. The Note has previously discussed the link between NPD and violence,<sup>240</sup> and this link is important in understanding why the statutes analyzed above do not provide adequate mitigation for those with NPD.

The importance of this link is clear when another mitigating factor, like age, is considered. Age also has a strong correlation with violence.<sup>241</sup> Younger individuals are more likely to commit crimes.<sup>242</sup> A young man who commits a crime may have done so because he was young—his brain is not fully developed and he lacks the same type of controls an adult may have.<sup>243</sup> Indeed, the Supreme Court has outlawed the death penalty for individuals under 18 years old,<sup>244</sup> and

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237. ARIZ. REV. STAT. ANN. § 13-701(E) (2018).

238. *Id.* § 13-701(E)(6).

239. *Id.* § 13-701(E)(2).

240. *See supra* Section II.C.

241. *See* Jeffrey T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, in *THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY* 377, 378 (Kevin M. Beaver et al. eds., 2014).

242. *Id.*

243. *See* Malcolm Ritter, *Experts Link Teen Brains' Immaturity, Juvenile Crime*, ABC NEWS (Dec. 3, 2007, 1:01AM), <https://abcnews.go.com/Technology/story?id=3943187&page=1>.

244. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

states have listed age as a specific statutory mitigating factor for sentencing.<sup>245</sup> Using age as a mitigating factor makes sense: young people are *different*.

But people with NPD are different as well. An individual with NPD experiences serious personality defects that affect his perception of the world.<sup>246</sup> A person with NPD is more likely to engage in violent crime *because* of his NPD,<sup>247</sup> much like a young individual is more likely to engage in crime because of his youth.<sup>248</sup> The state statutes above, while technically permitting NPD to be considered, also allow for NPD to be completely neglected. Listing NPD as a mitigating factor would prevent this problem. A judge will likely not forget or neglect a defendant's age when she is sentencing the defendant, and a judge should not forget or neglect an individual's NPD during sentencing.

Merely considering NPD as an "other" factor is also insufficient. Judges ought to have discretion, but considering NPD only as an "other" factor may allow judges to more easily dismiss the disorder's impact on an individual's circumstances.<sup>249</sup> This is precisely what happened in *Fox*: the dissent believed NPD should be given "substantial" weight as an "other" factor.<sup>250</sup> The majority, in contrast, simply proclaimed they already had given sufficient weight to evidence of NPD.<sup>251</sup> While discretion in sentencing would still allow judges to disagree about the weight NPD should be given, listing it as a mitigating factor would, at the very least, inform judges that NPD ought to be *per se* mitigating. This would avoid the problem presented in *Reed*, in which what was supposed to be mitigating evidence of NPD turned out to hurt the defendant more than it benefitted him.<sup>252</sup> Moreover, the fact that NPD or other personality disorders are not listed as mitigating factors implicitly suggests that evidence of such disorders is not compelling or especially relevant. Thus, when evidence of NPD is presented merely as some "other" mitigating factor, the NPD evidence loses some of its force as mitigating evidence. Ultimately, listing NPD as a mitigating factor would help ensure fairer sentencing.

#### IV. RECOMMENDATION

Listing mental disorders, and in particular NPD, as specific mitigating factors would be beneficial given the law's understanding of culpability and punishment.<sup>253</sup> Indeed, the Model Penal Code *requires* at least some kind of culpability before punishment is rendered.<sup>254</sup> Listing NPD would put attorneys and

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245. See, e.g., TENN. CODE ANN. § 40-35-113 (West 2010).

246. DSM, *supra* note 50, at 669–70.

247. See sources cited *supra* note 83 and accompanying text.

248. See Ritter, *supra* note 243.

249. See *State v. Fox*, 631 N.E.2d 124, 137 (Ohio 1994) (Wright, J. dissenting).

250. *Id.*

251. *Id.* at 132.

252. See *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1248 (11th Cir. 2010).

253. See BONNIE ET AL., *supra* note 2; John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY, 653, 667–94 (2012) (discussing the shift in Supreme Court jurisprudence that led to the Court's "enforcement of the culpability principle").

254. MODEL PENAL CODE § 2.02(1) (AM. LAW. INST. 2019).

judges on notice as to the importance of mental disorders and how they affect behavior. This will help avoid the potential shortcomings of simply requiring judges to consider the “nature and circumstances” of a criminal defendant, because its presence as a listed factor would focus judges on highly relevant and pertinent issues.

Given the potential link between violence and NPD,<sup>255</sup> a sentencing scheme that specifically lists NPD as a mitigating factor is especially important because culpability should directly relate to the severity of a sentence imposed.<sup>256</sup> The less culpable a criminal defendant, the less severe any criminal sentence imposed should be.<sup>257</sup> An individual’s mental condition, and in turn any disorder that affects that mental condition, can bear directly on the individual’s culpability for a crime.<sup>258</sup> Thus, sentencing schemes should particularly emphasize personality disorders like NPD because of their relationship to culpability. This is especially true when one considers NPD symptoms and causes. Individuals who develop NPD may react harshly when they feel they’ve been “injured” and consciously or even unwittingly engage in exploitative behavior.<sup>259</sup> Importantly, NPD does not develop through any fault of the individual him or herself; individuals do not take active steps in order to develop NPD.<sup>260</sup> In other words, individuals with NPD may become exploitative or lash out because of a disorder that is beyond their control.

That individuals should be punished according to their moral culpability is a basic theory underlying a retributivist view of punishment and the theory that (generally speaking) underlies this Note.<sup>261</sup> An individual is culpable when “he chooses to do wrong in circumstances when that choice is freely made.”<sup>262</sup> The “choice to act as one did at a given point in time creates a culpability, the degree of which depends on the manner in which the wrongful action entered into the chain of reasons motivating one’s act.”<sup>263</sup> Thus, an individual who kills because he is “[a]iming at evil in [his] particular choices” is more culpable.<sup>264</sup> This “sliding scale” of culpability can be illustrated by comparing two killers who complete the same action but have different beliefs about their actions.<sup>265</sup> The killer who kills another knowing that the victim is planning to kill innocent people is “not culpable at all.”<sup>266</sup> But the individual who kills knowing “no facts exist to justify such an action is highly culpable.”<sup>267</sup> Ultimately, the “more likely the actor believes that his act will be a prima facie wrong, the more likely he must

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255. See sources cited *supra* note 83 and accompanying text.

256. See Kuklin, *supra* note 160.

257. See *id.*

258. See Kinscherff, *supra* note 132, at 1.

259. DSM, *supra* note 50, at 670.

260. See *Narcissistic Personality Disorder*, *supra* note 72.

261. Michael Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 320, 324 (1996).

262. *Id.* at 320.

263. *Id.* at 324.

264. *Id.*

265. *Id.* at 325.

266. *Id.*

267. *Id.*

believe justifying circumstances to exist; otherwise, culpability increases.”<sup>268</sup> Because individuals with NPD may be more likely to commit crimes because of their disorder—irrespective of any belief as to the justification of their choices and, if any belief exists, a distorted belief *because* of their personality disorder—they are less culpable and should be punished less severely.<sup>269</sup>

A. *The Purpose of Punishment: Theoretical Limitations to This Note*

Before analyzing how to reform and improve sentencing statutes so that they can reflect NPD as a mitigating factor, it is worth considering some limitations to this Note. First, as discussed above, this Note is broadly guided by a straightforward view of the purpose of the criminal justice system and criminal punishment: offenders who are more culpable of their crimes are more deserving of punishment and should be punished more severely.<sup>270</sup> Individuals who are less culpable of the crime they commit should be punished less severely.<sup>271</sup> Thus, as discussed, because individuals with NPD have a disorder—through no fault of their own<sup>272</sup>—that may make them more likely to commit crimes,<sup>273</sup> they are less culpable and so less deserving of punishment.<sup>274</sup>

But it is far from clear that punishment should be primarily based on punishing according to an individual’s culpability. A justice system in which the purpose of punishment is primarily deterrence would have very little need for leniency when sentencing those with NPD.<sup>275</sup> It is unlikely a sentencing scheme that mitigates NPD would have any sort of general deterrent effect because of the unique circumstances of individuals who have NPD and commit crimes.<sup>276</sup> It is difficult to imagine how more lenient sentences for offenders with NPD would do anything to deter the general public. In fact, *harsher* sentences might be best to deter the specific individual who committed the crime.<sup>277</sup> In this way, a system that values deterrence as a purpose of punishment would have little use for mitigating sentences with NPD evidence—general deterrence would be difficult to achieve and specific deterrence would likely be better served with harsher punishment.<sup>278</sup>

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268. *Id.*

269. See Kuklin, *supra* note 160; see generally Moore, *supra* note 261, at 322–27 (explaining generally the concept of moral culpability).

270. See Kinscherff, *supra* note 132; Kuklin, *supra* note 160.

271. See Kinscherff, *supra* note 132; Kuklin, *supra* note 160.

272. See sources cited *supra* note 72.

273. See Lowenstein et al., *supra* note 82; sources cited *supra* note 83 and accompanying text.

274. See sources cited *supra* note 269.

275. See Christopher, *supra* note 161, at 857 (“To achieve general deterrence, the appearance or publicity of punishment is crucial. Actual punishment, without society’s awareness, generates no general deterrent effect; but apparent punishment, even if without actual punishment, does provide general deterrence.”).

276. See Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000) (noting that deterrence operates by employing punishment as a threat to deter others from committing a crime).

277. *Id.* (discussing how the experience of punishment can dissuade a particular offender from reoffending).

278. See *id.*

A system that valued incapacitation would also have little use for NPD evidence as a mitigating factor in sentencing.<sup>279</sup> As with specific deterrence, the opposite is probably true.<sup>280</sup> After all, if individuals with NPD are more likely to commit violent crimes because of their disorders, then sentencing them in prison for *longer* periods of time would be better to incapacitate these individuals and protect the public.<sup>281</sup> Under such a system, NPD would warrant increased punishment.<sup>282</sup>

In contrast, a justice system in which rehabilitation is the main goal of punishment would likely view offenders with NPD as the precise offenders who need to be rehabilitated most.<sup>283</sup> The purpose of such a system would be to rehabilitate offenders with NPD such that they can return to society with lower risk of reoffending.<sup>284</sup> Individuals with NPD would therefore be institutionalized or sentenced to facilities in which there is strong mental health treatment.<sup>285</sup> The goal would not simply be to punish the offender less severely, but to focus the “punishment” on helping the offender improve.<sup>286</sup>

Despite these conflicting goals of punishment, and regardless of what ultimate goal punishment ought to achieve, it should be uncontroversial that punishment should be as fair as possible. In this way, punishing an individual for a crime is “fair” only up and until the point where the individual’s culpability suggests further punishment is improper.<sup>287</sup> Ultimately, sentencing statutes should reflect this view: individuals should be punished for crimes based in part on their

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279. *Id.* (“*Incapacitation* uses imprisonment to remove the offender from society to protect it from the danger he poses.”) (emphasis original).

280. *Id.* at 1318 (explaining that incapacitation is most effective with “longer terms of incapacitation for dangerous and likely-to-be-repeated violent crimes”).

281. *Id.*

282. *Id.*

283. *Id.* at 1316 (“*Rehabilitation* calls for the improvement of the criminal for his or her own benefit and to reduce the probability that he will offend again.”) (emphasis original).

284. *Id.*

285. *See id.* at 1316–17; Beatrice R. Maidman, Note, *The Legal Insanity Defense, Transforming The Legal Theory Into A Medical Standard*, 96 B.U. L. REV. 1831, 1841–42 (2016) (discussing how rehabilitation as a theory of punishment warrants that offenders—in particular mentally ill offenders—be committed to institutions that can provide effective treatment).

286. *See* Cotton, *supra* note 276. It should be noted that, although not a topic of specific discussion in this Note, alternative “punishments” for individuals with NPD may be more appropriate than prison sentences altogether. *See* JAMES AUSTIN ET AL., A GUIDELINES PROPOSAL: HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 23–30 (2016) (discussing various alternatives to imprisonment and their effectiveness); Cotton, *supra* note 276, at 1316–17 (discussing some examples of rehabilitative programs); Alan T. Harland & Phillip W. Harris, *Prison Crowding: Developing and Implementing Alternatives to Incarceration: A Problem of Planned Change in Criminal Justice*, 1984 U. ILL. L. REV. 319, 329 (1984) (discussing same); *Alternatives to Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/sentencing-reform/alternatives-incarceration> (last visited Aug. 4, 2020) (discussing alternatives to imprisonment). The validity or potential use of such punishments, however, is beyond the scope of this Note.

287. *See* Stephen Morse, *Preventive Detention: Mental Disorder and Criminal Law*, 101 CRIM. L. J. & CRIMINOLOGY, 885, 936–38 (2011) (discussing culpability and punishment and noting that “[f]airness and proportionality require that doctrinal mitigation should be available in all cases in which culpability is substantially reduced”).

culpability. Because NPD may broadly affect culpability,<sup>288</sup> sentencing statutes should reflect this fact.

### B. *Rehabilitating Sentencing Statutes*

Sentencing statutes should work to emphasize and specifically list personality disorders as factors to consider in mitigation of a criminal sentence. Society has made great strides in its understanding of mental illness,<sup>289</sup> and it is important that laws and the criminal process reflect a similar understanding. Though current sentencing schemes may technically allow for a mental disorder to be considered in mitigation,<sup>290</sup> these statutes are insufficient and speak in broad generalizations.

What might these new statutes look like? The federal sentencing statute and the Ohio death penalty statute will serve as examples. In applying the recommendation of this Note to United States Code, a revised statute may include the following:

*(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—*

*(1) the nature and circumstances of the offense and the history and characteristics of the defendant;*

*(2) evidence of any personality disorders the defendant may have, including Narcissistic Personality Disorder and any other personality disorder of which the defendant presents evidence . . . .<sup>291</sup>*

Alternatively, rather than list an entirely separate enumerated factor, personality disorders could be directly included into other mitigating factors as in the following example:

*(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—*

*(1) the nature and circumstances of the offense and the history and characteristics of the defendant, which includes evidence of Narcissistic Personality Disorder or any other personality disorder of which the defendant presents evidence . . . .<sup>292</sup>*

Similarly, adopting this recommendation and applying it to the Ohio death penalty sentencing statute<sup>293</sup> might yield the following structure:

*(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and*

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288. See *supra* Part II; *supra* Part III.

289. See Croteau, *supra* note 10.

290. See 18 U.S.C. § 3553 (2018).

291. The language taken for this section is borrowed directly from 18 U.S.C. § 3553 (2018).

292. The language taken for this section is borrowed directly from 18 U.S.C. § 3553 (2018).

293. OHIO REV. CODE ANN. § 2929.04 (LexisNexis 2016).

*proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:*

*(1) Whether the victim of the offense induced or facilitated it;*

*(2) Evidence of any personality disorders the defendant may have, including Narcissistic Personality Disorder and any other personality disorder of which the defendant presents evidence . . . .<sup>294</sup>*

As with the federal statute, rather than create an entirely new listed factor, evidence of a personality disorder could be included within another one of the already listed enumerated factors:

*(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified . . . the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors: . . . .*

*(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, which may include mental and emotional effects caused by a personality disorder, including Narcissistic Personality Disorder and any other personality disorder of which the defendant presents evidence, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;<sup>295</sup>*

Of course, language relating to evidence of a personality disorder and narcissistic personality disorder could be directly included in the "other factor" section as well:

*(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified . . . the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors: . . . .*

*(7) Any other factors that are relevant, which includes evidence of any personality disorders the defendant may have, including, but not lim-*

294. The language used in the model statute is taken directly from OHIO REV. CODE ANN. § 2929.04 (LexisNexis 2016).

295. The language used in the model statute is taken directly from OHIO REV. CODE ANN. § 2929.04 (LexisNexis 2016).



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*ited to, Narcissistic Personality Disorder, and any other personality disorder of which the defendant presents evidence, to the issue of whether the offender should be sentenced to death.*<sup>296</sup>

This final option therefore demonstrates how evidence of NPD, even though it would be considered among “other factors,” is relevant to the sentencing inquiry as a specifically listed mitigating factor. The value in each of the constructions listed above is that NPD is explicitly listed as *mitigating*.

These model statutes help eliminate the difficulties<sup>297</sup> inherent in presenting evidence of NPD because the model statutes themselves presuppose that evidence of NPD is mitigating evidence. Importantly, these statutes reflect principles about how punishment ought to reflect culpability<sup>298</sup> by specifically listing a condition that may directly impact an individual’s culpability. The culpability of an offender directly relates to the severity of the crime with which he is charged.<sup>299</sup> An individual with NPD, who commits a crime because of that NPD, is fundamentally different than a murderer who kills for the sake of killing.<sup>300</sup> The individual with NPD may not be able to control how his NPD affects him, and an individual’s crime ought to be considered in light of his NPD.<sup>301</sup> The model statutes described in this recommendation ultimately will help ensure a fairer and more just criminal justice system.

## V. CONCLUSION

Although current sentencing schemes at both the federal and state levels may technically allow for NPD to be considered, these statutes do not provide sufficient leeway for individuals who have NPD to be able to use evidence of their personality disorders in mitigation. The current statutes may provide some wiggle room to squeeze in evidence of NPD under some other listed factor, but the statutes themselves do not list personality disorders as mitigating factors in their own right. Thus, defendants may be unable to successfully present evidence of NPD as a mitigating factor. Under many current statutes, NPD would only be considered when it fits into a separate listed factor.

A sentencing statute that lists personality disorders generally and NPD in particular will focus judges on NPD. Rather than require judges to make additional determinations as to whether NPD can qualify under a separately listed mitigating factor, a sentencing scheme that specifically lists a personality disorder

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296. The language used in the model statute is taken directly from OHIO REV. CODE ANN. § 2929.04 (LexisNexis 2016).

297. These difficulties have been discussed at length in this Note. For example, a defendant may need to use the evidence to mitigate his sentence, but such evidence may actually have the opposite effect of hurting the defendant and making him seem even more culpable. *See Reed v. Sec’y, Fla. Dep’t of Corr.*, 593 F.3d 1217, 1248 (11th Cir. 2011).

298. *See BONNIE ET AL.*, *supra* note 2; Stinneford, *supra* note 253.

299. *See* MODEL PENAL CODE § 2.02(1) (AM. LAW. INST. 2019); § 210.3 (discussing manslaughter).

300. *See* Perlin, *supra* note 162; Moore, *supra* note 261, at 323–24 (describing the difference between a killer who kills for the sake of killing and a killer who kills for some other end).

301. Moore, *supra* note 261, at 323–24.

der as a statutory mitigating factor will make the mere fact of its existence mitigating. Such a statute will ensure that defendants are not forced to forego disclosing NPD evidence due to fear that the evidence will have an aggravating, instead of mitigating, effect.<sup>302</sup> Society should strive to ensure that all criminal defendants, even the most detestable, are treated fairly and justly at all levels of the criminal justice system. Adopting statutes that list NPD a mitigating factor would facilitate such a criminal justice system.

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302. See *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1248 (11th Cir. 2011).