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SICKNESSES AND SANCTIONS:

THE EXCLUSION OF PATHOLOGICAL GAMBLING UNDER THE AMERICANS WITH DISABILITIES ACT

Christian E. Hardigree

Bo J. Bernhard

Shannon Bybee

University of Nevada Las Vegas

*This discussion examines the specific exclusion of pathological gambling from the Americans with Disabilities Act (*ADA) *of 1990. Although the field of pathological gambling studies is still relatively young, the field has evolved significantly since the ADA*'s *adoption in 1990. During this same period, legalized gambling has spread dramatically, making legal gambling readily available to virtually all Americans. While gambling has generated substantial benefits for communities across the nation, almost all parties – including the gaming industry – agree that appropriate measures must be taken to address the downside. Because of these developments, the authors argue that the ADA*'s *pathological gambling exclusion merits a re-examination informed by research advances and mental health experts.*

KEYWORDS: Americans with Disabilities Act, pathological gambling, problem gambling, addictions, mental health

Professional and lay interpretations of those who engage in excessive drinking, drug taking, and gambling have changed substantially over the years. Not too long ago, religious institutions were largely responsible for identifying, labeling, and even prescribing an appropriate "treatment" for those who "sinned" in these ways. Today, we assign these diagnostic and remedial tasks to experts in the medical and legal fields (Bernhard, 2003).

The meeting of medicine and law has not always been a harmonious one. This disharmony is perhaps at its most apparent when deciding if psychological afflictions are severe enough to be considered as "disabilities" alongside more obvious physical impairments, such as blindness, deafness, or ambulatory problems. These are hardly trifling issues: at stake are possible protections in the workplace for gambling-addicted employees under a federal law, specifically the Americans with Disabilities Act (ADA). This paper will examine some of these social and medico-legal issues by studying the dynamic phenomenon of pathological gambling and its status under the Americans with Disabilities Act.

It is not overstating the case to say that gambling has swept the American social, political, and recreational scene. Currently, forty-seven of 50 states allow some form of legalized gambling (a forty-eighth, Tennessee, recently voted for a state lottery, leaving only Utah and Hawaii as potential holdouts). According to an analysis in a recent *Forbes* magazine article, Americans now lose more money gambling than they spend on movie tickets, spectator sports, theme parks, and video games – combined (Morais, 2002). In short, "gaming" (the euphemistic term for gambling) is a rapidly evolving and major force in American life.

While supporters of gaming generally point to its associated economic benefits of new jobs and added state revenue through gaming taxes and fees, a body of research has simultaneously begun

to examine its downside. The federal National Gambling Impact Study Commission sponsored research that placed the national rates of pathological gambling at 1.2 percent of the adult population (National Opinion Research Center, 1999). In real terms, this study estimated that about 2.5 million Americans are pathological gamblers. Because individuals with gambling problems can lose their jobs, their families, and their friends, one could easily surmise that significantly (or even exponentially) larger numbers of Americans are ultimately affected by this pathological gambling.

The American Psychiatric Association publishes the Diagnostic and Statistical Manual of Mental Disorders (DSM) as a sort of diagnostic bible for practitioners who interact with mentally ill populations. The term "pathological gambling" was first included in the DSM in 1980 -- long before the most recent era of gambling expansion. Each subsequent revision of the DSM (1987, 1994, 2000) has amended the diagnostic criteria for pathological gambling. The DSM claims that this evolution is informed by a careful examination of current clinical experience and research (American Psychological Association, 1980, 1987, 1994, 2000).

Despite changes in the understanding and acceptance of pathological gambling as a legitimate psychiatric disorder, legal protection for pathological gamblers has remained somewhat limited. Under the Americans with Disabilities Act of 1990, individuals suffering from "compulsive gambling"1[1] are specifically excluded from the list of mental disorders that identify an employee as being "disabled." As a result, employers are not obligated to make reasonable accommodations for employees who are in treatment for pathological gambling.

Interestingly, the ADA status of pathological gamblers differs from the status given to alcoholics and drug addicts – both of whom enjoy certain protections from the ADA . This is no small consideration. For instance, if an employee is a recovering alcoholic or drug addict and wishes to attend an Alcoholics Anonymous meeting, a Narcotics Anonymous meeting, or a professional treatment program, covered employers are required to make reasonable accommodations for those employees (perhaps by adjusting work schedules to allow employees to attend 12-step meetings or professional counseling). If the same employee wishes to attend a Gamblers Anonymous meeting or a professional pathological gambling treatment program, the employer has no legal obligation to make a reasonable accommodation.

Given our evolving understanding of addictions in general and pathological gambling in particular, is there reason to support such an exclusion? Has there been a change in the understanding of pathological gambling that would warrant reconsideration as to whether it should qualify as a "disability" under the ADA ? In order to properly address these complex issues, we need to examine the origins and current statuses of both the Americans with Disabilities Act and the field of pathological gambling.

THE ADA : A BRIEF HISTORY AND RATIONALE

On July 26, 1990 , President George Bush signed into law the Americans with Disabilities Act of 1990, a comprehensive piece of legislation designed to protect disabled persons from discrimination in the workplace (Pub. L. No. 101-336, 104 Stat. 327, 1990). The model for the ADA was the Vocational Rehabilitation Act of 1973, which applies only to federal agencies, federal contractors and recipients of federal funding (29 U.S.C.A. Ch. 16 §701-7961, 2002). As recipients of federal funding, state and local government employees are protected under the Vocational Rehabilitation Act of 1973, as well as many state enacted statutes (29 U.S.C.A.). The purpose of that act was to "empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society" (29 U.S.C.A. Ch. 16 §701, 2002). Those laudable goals were subsequently extended to both private and government employment with the adoption of the ADA . The ADA 's employment discrimination provisions apply to federal, state, local, and private sector employers (42 U.S.C.A. Ch. 126, et seq., 2002).

Under the ADA, an "employer" is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year" (42 U.S.C.A. Ch. 126 §12111, 2002). Employers with less than fifteen employees are not covered under the ADA ; however, some states have enacted state discrimination laws that cover employers with smaller numbers of employees (Hagglund, Weimer, Speidel, & Whitman, 1998).

The term "disability" is defined by the ADA with respect to a qualified individual who has: a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; b) a record of such an impairment; or c) been regarded as having such an impairment (42 U.S.C.A. Ch. 126 §12102, 2002). The Equal Employment Opportunity Commission (EEOC) and the courts have been challenged to define what "substantially limits" one or more of the "major life activities" of an individual. While a comprehensive exploration of these definitions and legal interpretations is impractical within the confines of this paper, the courts have generally accepted that major life activities include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working (U.S. Equal Employment Opportunity Commission, 2003).

The ADA uses the same enforcement procedures as Title VII of the Civil Rights Act of 1964, which requires that individuals with allegations of discrimination under the ADA must file an administrative complaint to the EEOC within 180 days of the alleged unlawful employment practice. In states where a state agency exists to deal with discrimination claims, that time frame is extended to 300 days for a filing with the EEOC (assuming the complaining party files with the state agency within 180 days of the discriminatory act) (U.S. Equal Employment Opportunity Commission, 2003).

The ADA provides for coverage for employees who are recovered or recovering alcoholics or drug addicts (42 U.S.C.A. Ch. 126 §12114, 2002). Employees are not excluded on the basis of current alcoholism, but an employer has the right to ban intoxication during work hours (42 U.S.C.A.). Similarly, if an individual is currently engaged in or has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, he or she is protected (29 C.F.R. §1630.3(b). 2002). Individuals who are recreational drug users or who are currently engaged in drug use are not protected by the ADA (42 U.S.C.A.; 29 C.F.R.).

Finally, the ADA also specifically excludes homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, kleptomania, pyromania and compulsive gambling (42 U.S.C.A. Ch. 126 §12211 (a)-(b), 2002).

An examination of historical documents reveals much about the relevant rationales and controversies surrounding the ADA 's adoption. For instance, Congress recognized that determining what constituted a "physical or mental impairment that substantially affects one or more major life activities" might prove a difficult task for judges and triers of fact. In its report, the Senate Committee on Labor and Human Resources stated that a "physical or mental impairment means….any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities" (S. Rpt. No. 101-116, 1989). The Committee further stated that "[i]t [was] not possible to include in the legislation a list of all the specific conditions, diseases or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future" (S. Rpt. No. 101-116).

In light of the Committee's refusal to define a "mental impairment" as anything more than a "mental or psychological disorder," the Senate recognized that the DSM would serve as a tool to assist judges in determining what qualified as a valid "mental impairment" under the definition of "disability" (Reams, McGovern, & Schultz, 1992). At the time, the 1987 third edition of the DSM (DSM-III) provided the most recent comprehensive listing of mental disorders. The Senate further

noted that possible future changes might be made within subsequent DSM editions that may affect what would be considered a "disability" under the ADA (Reams et al.).

During discussions of the proposed ADA, Senator William L. Armstrong of Colorado stated that "…a statute that protects all mental impairments that substantially limit a major life activity [would] have the most far-reaching and potentially disruptive effects on private decision-makers" (Reams, McGovern, & Schultz, 1992). The amendment he proposed sought to exclude certain disorders (including pathological gambling) because they constituted "some of the mental disorders that would have created the more egregious lawsuits" (Reams et al.). Armstrong stated that without his proposed amendment, the private sector would be "swamped with mental disability litigation" following the implementation of the ADA (Reams et al.).

Senator Armstrong proceeded to cite a list of legal cases in which federal workers sought a remedy under the Vocational Rehabilitation Act based on various mental impairments. Presumably, Senator Armstrong felt that the outcome in those cases was improper and predicted that similar egregious outcomes were possible under the proposed ADA unless the act was modified.

In developing his arguments, Armstrong specifically cited the legal case *Rezza v. U.S. Dept. of Justice*, a case which attempted to address pathological gambling. In *Rezza*, a former FBI agent took government money he received as part of an undercover operation and gambled it away in Atlantic City (*Rezza v. U.S. Dept. of Justice*, 1988). These actions resulted in the agent's termination. He subsequently sued, claiming that he was discriminated against based on his "compulsive gambling." Although the agent's claim fell under the Vocational Rehabilitation Act of 1973, which extended protection to federal employees who were "handicapped," there was discussion that a similar outcome was possible under the ADA without specifically excluding compulsive gamblers. The judge heard motions for summary judgment from both sides and refused to rule in favor of either party, saying there were issues of fact to be further developed at trial. Apparently neither party wanted to predict what would occur at the trial level, so the case was ultimately settled under terms of confidentiality. Senator Armstrong stated in his comments that the judge "gave every indication…of being ready to hold that compulsive gambling was a covered disability." He cited this as an example of an egregious legal outcome that necessitated the specific exclusion of compulsive gambling from the ADA (Reams, McGovern, & Schultz, 1992).

Congress passed the ADA as amended, and it was signed into law on July 26, 1990 . As the law stands today, "compulsive gambling" is specifically excluded from the definition of "disability," making it clear that an individual suffering from this addiction would not be a covered employee and would not enjoy protection under the law (42 U.S.C.A. Ch. 126 §12211, 2002; 29 C.F.R. §1630.3(d)(2), 2002).

The ADA is not without its critics, of course. While some academics have understandably criticized the "medicalization" of an increasing number of psychological disorders (Conrad & Schneider, 1985; Hendershott, 2002), it is important to recognize that psychological impairments (no matter how they are defined or who defines them) can be traumatizing, and that professional interventions by those who have devoted their careers to alleviating this suffering can be humane and effective.

PATHOLOGICAL GAMBLING: A BRIEF HISTORY AND EVOLVING UNDERSTANDINGS

In 1980, the pioneering efforts of Dr. Robert Custer, the clinical "founding figure" in the pathological gambling field, resulted in the disorder's inclusion in the DSM-III. When invited to speak on this peculiar "new" affliction, Custer often pointed out that historically, alcoholics and drug addicts were vilified, and he noted that both public and professional audiences ridiculed their alleged "sicknesses." Custer would then note that these afflictions have since gained acceptance by health professionals and lay audiences alike. He liked to conclude with seemingly the most preposterous suggestion of all: some day, he opined, gambling problems would be publicly and professionally received in the same way that alcohol and drug problems were (Custer and Milt, 1985).

While Custer's thinking was revolutionary, he could hardly have imagined the developments that have taken place since his death in 1990. Since 1990, legalized gambling's wildfire expansion across the American scene has led to passionate debates over the gambling act – and over those who indulge it too often. In recent years, researchers from prestigious medical schools such as UCLA (Comings, 1998) and Harvard (Shaffer, Hall, & Vander Bilt, 1997) have deemed pathological gambling a scientifically measurable and robust disorder – so much so that they have devoted millions of dollars of research to explorations of its psychological, genetic, and chemical components.

On its face, a gambling "addiction" itself seems counterintuitive. After all, one cannot "ingest" video poker in quite the same way that one ingests heroin. Clinicians have begun to hypothesize, however, that addiction does not necessarily develop in a direct fashion – directly to a chemical, for instance – so much as addiction develops in an *in*direct fashion – to the "place that one goes" as a result of ingesting a chemical (or engaging in a certain behavior). According to this way of thinking, gambling addicts appear to get addicted to the "place that they go" as a result of their gambling – in much the same way that alcoholics get addicted to the place that they go when they drink.

Reputable research periodicals have also begun to contribute to the expert discourse on pathological gambling. Recently, a *Science* magazine article suggested that the cravings, highs, and tolerance levels of pathological gamblers are just as intense as they are with substance-based addictions (Holden, 2001). The article goes on to claim that "what's going on inside gamblers' heads looks like what goes on in addicts' heads," citing evidence from Yale and Mount Sinai researchers who compared pathological gamblers' brain activity to that of alcoholics and drug addicts (Holden: 980-981). When the brains of gambling addicts are observed via functional MRI imaging, the reactions in brain chemistry look similar to the reactions that occur when an alcoholic drinks or a drug addict shoots up. To the brain and body of an addict, researchers are suggesting that a reward is essentially a reward, regardless of whether it comes from an internal or an external source (Holden). While we cannot thoroughly discuss all of the ramifications of these developments here, in general these understandings allow for a substantially broader range of behaviors (including, of course, pathological gambling) to be considered within the traditional frameworks of addiction.

As more and more health professionals became involved with pathological gambling treatment, it is perhaps unsurprising that a number of different perspectives have developed on how to properly assist this population. For instance, some treatment experts feel that a pathological gambler can be "cured," while others, notably 12-step groups, subscribe to the "once a pathological gambler always a pathological gambler" theory, insisting that "recovery" is possible while cures are not (Gamblers Anonymous, 1997). Still others suggest that pathological gamblers can pass back and forth between problematic and healthy behavior multiple times and over extended periods (Shaffer & Hall, 2002).

THE ADA AND PATHOLOGICAL GAMBLING: INTERSECTIONS AND CHALLENGES

To return to our primary question: if other similar afflictions are currently covered by the ADA , do compelling reasons exist to continue to exclude pathological gambling? In an effort to clarify some of these issues, this section will address the key similarities and differences between drug and alcohol disorders and pathological gambling, the definition of "disability" under the ADA and its related application to pathological gambling, and some of the roles that the government has played in developing gambling and health policy.

As the pathological gambling field evolves, it continues to follow the lead of drug and alcohol studies in a number of different ways. For example, the DSM criteria for pathological gambling strongly parallel those for drug and alcohol pathologies. As Volberg (2001a:7) explains, "with the exception of 'chasing' and 'bailout,' all of the present diagnostic criteria for pathological gambling are derived from the characteristics that define alcohol, cocaine, heroin and other forms of drug dependence."

Furthermore, like drug and alcohol problems, pathological gambling can be directly and indirectly debilitating. Although there exist a number of controversies surrounding issues such as prevalence

and incidence of pathological gambling (Shaffer, Hall, & Vander Bilt, 1997; Volberg, 2001b), virtually all parties, including the gaming industry itself, readily acknowledge that for those who suffer from pathological gambling, the harm inflicted is substantial.

Finally, scientists are identifying a number of measurable parallels between drug, alcohol, and gambling afflictions. While a comprehensive discussion of all of these similarities is beyond the scope of this discussion, the rigor and importance of these recent studies dictate that we allow for the advances that have taken place since 1990 to inform our decisions on health policy.

At the same time, it should be noted that the differences between substance-oriented pathologies and gambling pathologies can serve to make these waters murkier. The simple fact that money is directly involved in pathological gambling can lead to a number of unique challenges. What if a business (or a legislator, for that matter) does not want pathological gamblers in certain occupations where they will have easy access to large amounts of money (e.g., cashiers, credit executives, accountants, casino pit bosses, or slot machine mechanics)? Would an individual be required to submit to a mandatory treatment program to continue employment, or would they be excluded from the job classification altogether?

Another key difference lies in the fact that at present, there exists no "drug test" equivalent that can determine with certainty whether an individual is currently "on gambling." This is especially important when determining whether an individual is to be considered a current addict or a recovering addict (an important consideration given that current drug abusers are not covered by the ADA , while those in recovery are covered).

Should some of these medical and legal issues be comprehensively clarified before a uniform application of a federal law is implemented? It is tempting to say yes, but once again, many (if not most) of these issues continue to challenge the fields of alcohol and drug studies, and yet these afflictions are covered under the ADA . More research needs to be conducted before these issues can be resolved, but in the meantime, enough research has already taken place to suggest that these new analyses need to be incorporated into ADA policy.

Ultimately, the inclusion or exclusion of pathological gambling under the ADA will hinge upon legal interpretations of the applicability of the act's definition of disability. Recall that the ADA defines the term disability as encompassing "a physical or mental impairment that substantially limits one or more of the major life activities," "a record of such an impairment," or "being regarded as having such an impairment." Arguably, new scientific and clinical understandings of pathological gambling incorporate each of these criteria to a significant degree. Pathological gambling can destroy work and family life, its diagnosis can be officially recorded in accord with the most recent medical and psychological protocols, and public and professional audiences alike increasingly recognize this impairment as a legitimate one.

For example, numerous job-related impacts associated with pathological gambling have been identified, including theft of company property, gambling on company time, poor concentration at work, irritability, lateness and absence from work, decreased efficiency, and loss of one's job due to gambling (Volberg, 2001a). These work-related costs alone would seem to indicate that some remedy is necessary. Of course, it should be noted that pathological gambling "costs" are not always easily quantified, as certain groups in society clearly benefit from the costs that problem gamblers incur. To cite just a few, employees of consumer credit counseling services, addiction counselors, pawn shop owners, law enforcement offices, and the gaming industry itself have all enjoyed benefits that result directly from these excessive gambling behaviors. On a macro level, then, certain "costs" may merely end up in the pockets of other entities. Once more, however, we might recall that certain groups benefit from drug and alcohol problems as well, and yet we still insist upon certain protections and rights for those afflicted with these disorders.

Family disruption is also common with pathological gamblers, as it is with alcoholics and drug addicts. In her recent summary of the pathological gambling literature, Volberg (2001a:12) reports that this population "inflicts substantial harm on their families, including spouses, children, parents, siblings, in-laws, and other relatives." More specifically, research has identified elevated levels of depression, stress, abuse, and suicide among family populations (Volberg). Clearly, pathological gambling can and does impede upon the "major life activities" associated with domestic and professional well-being.

Hence, plausible arguments could be made that pathological gambling substantially limits a person's ability to work and take care of him or herself. At the very least, it seems that these limitations can impede upon an individual's abilities in ways similar to drug and alcohol addictions.

A notable challenge in the gambling landscape lies in the potentially conflicting roles that state governments play in determining gambling policy. It is notable that in contrast to the challenges facing drug and alcohol policy decisions, state governments stand to generate enormous direct revenues from the "sale" of the gambling "product." These revenues may be generated directly through state lottery revenues or indirectly through taxation or fees. As a result, gambling policy debates are often informed and profoundly influenced by the self-interest of the states themselves.

The role of the courts cannot be neglected in determining whether inclusion of pathological gambling under the ADA is appropriate. While we might fear a consequent flood of addiction claims on everything from golf addiction to sex addiction to shopping addiction to internet addiction, once again the research in this area is telling. The aforementioned *Science* article argues that the science on pathological gambling is uniquely convincing at this historical juncture. In an examination of the research conducted on all of these "other" addictions, the article concludes that "in a class of its own as the disorder that most resembles drug addiction is pathological gambling" (Holden 2001:980). It seems, then, that medical and research communities are endorsing similarities which the law has not yet embraced – at least via the mechanisms currently present in the ADA.

The surge in new lawsuits argument might also be countered by noting that alcoholism and drug addiction have been covered under the ADA , and yet there does not appear to have been a surge in litigation for claims in those areas. In the twelve years following the enactment of the ADA, only 432 EEOC complaints (1.3% of the total complaints filed with the EEOC) resulted in merit factor resolutions on the basis of alcoholism, and 206 EEOC complaints (.6% of total complaints) resulted in merit factor resolutions relating to drug addiction (U. S. Equal Employment Opportunity Commission, 2003). Despite gambling's rapid spread, it is not nearly as widely available as alcohol is, and hence it is reasonable to expect that we will not see more gambling claims than alcohol claims.

Historically, gambling policy in the United States has been treated as a "states' rights" issue: "The Congress finds that…the states should have the primary responsibility for determining what forms of gambling may legally take place within their borders [and]…the Federal government should prevent interference by one state with the gambling policies of another" (15 U.S.C. Section 3001(a)(1)-(2), 1994).

However, the principle underlying the Americans with Disabilities Act (i.e., protecting disabled persons from discrimination in the workplace), is well-served through its extension to disabilities where our scientific knowledge has evolved – as is the case currently with pathological gambling. Federal recognition of pathological gambling as a disability under the ADA furthers that underlying principle, without intruding on the traditional treatment of gambling itself as an issue better left to state-by-state regulation.

While debates over these issues are ongoing (as is to be expected in any nascent field of legal and psychological study), it is becoming less clear why "compulsive" gambling is specifically excluded by the ADA . As the psychological and medical community increasingly embraces pathological gambling

as a legitimate and potentially devastating disorder, it seems that we would be wise to allow ADA mechanisms to respond accordingly. The time has come for a thoughtful and scientifically informed re-evaluation of pathological gambling's ADA status.

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Refereed Anonymously

Christian E. Hardigree, J.D. (e-mail: christian.hardigree@ccmail.nevada.edu), is an assistant professor in the William F. Harrah College of Hotel Administration at the University of Nevada Las Vegas. **Bo J. Bernhard**, Ph.D. (e-mail: bo.bernhard@ccmail.nevada.edu) is the director of gambling research and an assistant professor in the William F. Harrah College of Hotel Administration at the University of Nevada Las Vegas (4505 Maryland Parkway, Las Vegas, NV 89154). **Shannon Bybee**, J.D. (e-mail: sbybee@ccmail.nevada.edu), is an associate professor and the director of the UNLV International Gaming Institute.

2[1] While “compulsive gambling” is popular in common usage and used in the ADA, most clinicians in fact object to its usage. It is not clear, for instance, that pathological gamblers gamble in the same way that “compulsive” individuals wash their hands or engage in excessive counting behaviors. The DSM term “pathological gambling” will hence be used in this discussion.