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Pathological Gambling and Criminal Responsibility

REFERENCE: Rachlin, S., Halpern, A. L., and Portnow, S. L., **"Pathological Gambling and Criminal Responsibility,"** *Journal of Forensic Sciences*, JFSCA, Vol. 31, No. 1, Jan. 1986, pp. 235-240.

ABSTRACT: There exists significant interdisciplinary support for eliminating the volitional component of the insanity defense. Somewhat in contrast to this trend is the presentation of pathological gambling as a potentially exculpatory condition in criminal trials. The authors discuss three federal appellate court decisions on this attempted inappropriate usage of psychiatric diagnostic nomenclature. All have upheld convictions, and thereby rejected contentions that such an impulse disorder can form the basis for a valid plea of lack of criminal responsibility. It is suggested that the public interest will be served by statutorily making disturbances of behavioral control insufficient to raise a defense of insanity.

KEYWORDS: jurisprudence, psychiatry, insanity defense, gambling

In support of the position of the American Psychiatric Association [*1*] and the American Bar Association [*2*] advocating the elimination of the volitional prong of the insanity defense, we have gone beyond Bonnie [*3*], and proposed another definition of exculpatory mental illness: those severely abnormal disorders of thought, mood, orientation, or memory that grossly and demonstrably impair a person's perception or understanding of reality [*4*]. Conditions resulting from the voluntary ingestion of psychoactive substances are excluded. In our article, we expressed the opinion that disturbances of volition or behavior or both, such as personality disorders, impulse disorders, substance use disorders, and psychosexual disorders, should, as a matter of statute, be insufficient for assertion of a plea of not guilty by reason of insanity.

What conditions qualify as mental diseases or defects in the eyes of courts has been an open question for some time. Nowhere has this been more apparent than in the instance of pathological gambling. Early cases, including insanity acquittals, were reported by McGarry [*5*]. In a previous paper [*4*], we devoted a section to pathological gambling, attempting to distinguish between impulsive and compulsive behaviors. Events have moved quickly, and we now expand our discussion and report several more recent decisions. While all have gone against allowing pathological gambling to form the basis of an insanity defense, the courts have, at least potentially, also invited continued abuse by suggesting that other symptoms

Received for publication 8 Feb. 1985; accepted for publication 1 April 1985.

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associated with the primary disorder may be introduced in evidence. Psychiatric illness rarely, if ever, occurs in pure culture.

Evolving Case Law

The earliest known federal appellate decision relative to pathological gambling was that of *United States v. Gilliss* [6]. In this litigation, the court ruled that the government sustained its burden of proving sanity with expert testimony to the effect that this condition is an impulse disorder but not a mental disease or defect, an argument accepted by the jury. A refusal by the trial court to modify its insanity defense instruction to include the specific disorder was held not to be error.

A further step was taken by a district court in *United States v. Lewellyn* [7], wherein the prosecutor's motion to exclude evidence of alleged insanity based on pathological gambling was granted. Chief Judge Stuart considered the defense claim to be an unwarranted and unprecedented extension of the insanity defense, noting the possible consequences of sanctioning an impulse disorder as exculpatory for the crime of embezzlement. With full knowledge of the matters addressed in *Gilliss*, his conclusion was that, in this particular factual situation, the court could and should decide that the plea of not guilty by reason of insanity not be submitted to a jury.[4]

On 21 Dec. 1983, this decision was upheld by the Eighth Circuit [8]. It was determined that Lewellyn had failed to make the threshold showing of insanity, in the absence of proof that there is general acceptance in the fields of psychiatry and psychology that at least some pathological gamblers do not have the capacity to conform their behavior to the requirements of law. A central issue was felt to be the lack of a link between gambling and the offense charged. Noting that the diagnostic nomenclature speaks only of the frequent association between criminal activity and pathological gambling, and that little scientific attention has been given to this disorder, the court reasoned that the "required minimum showing of insanity" had not been made. Left deliberately undecided was whether this condition could ever be grounds for an insanity defense, and whether there should be a modification of the American Law Institute test in the circuit, the latter because establishment of a rule of law should be addressed by the court *en banc*.

Another landmark proceeding, *United States v. Torniero* [9–12], which throws the issues into clearer perspective, involved a defendant, the manager of a jewelry store, who was indicted by the federal government on ten counts of interstate transportation of stolen property, the total value of which was approximately three quarters of a million dollars. He was alleged to have altered his employer's business records in order to conceal his actions and, both by himself and acting through others, to have taken the merchandise from Connecticut to New York. State charges were also pending.

The next month, the accused filed notice of his intent to rely on the defense of insanity because of his pathological gambling disorder. After several preliminaries from both sides, the prosecution, in May 1983, moved to have the court reconsider the law on insanity or, alternatively, to exclude expert testimony relative to this particular mental condition. A voluminous "Brandeis Brief," including works published by one of us (A. L. H.), was submitted, and a total of eleven witnesses, including A. L. H. and S. R., were presented by both sides to the court at the end of June.

After a summer's deliberation, the court issued its opinion [9]. Judge Cabranes, in an extensive discussion, declined to abolish the insanity defense. He found questionable whether a disorder characterized mainly by repeated engagement in one particular activity

[4]In other prosecutions, Lewellyn is said to have misappropriated almost $9 million in securities, leading to the insolvency of the Humboldt Bank in Iowa (*Securities Exchange Commission v. Lewellyn*, 82 Civ. 2102 (S.D.N.Y. 1982); *Federal Deposit Insurance Corporation v. Lewellyn*, 82 Civ. 2311 (S.D.N.Y. 1982)).

amounts to mental disease as understood by the law. The judge called the relationship between the disorder and the offense tangential, and the connection between the two, tenuous. Considering the charges against Torniero, the court felt that to allow an insanity defense would be a drastic expansion of the concept, which might then spread to attempted exculpation for a wide variety of crimes based on any of several mental conditions not traditionally allowed to negate responsibility. Expert testimony specifically concerning pathological gambling was excluded after it was reasoned that even if the impulse to gamble could not be resisted, it would follow only that the defendant would have enormous debts, not that it was necessary for him to resort to interstate transportation of stolen goods. In other words, his mental condition had no direct bearing on the acts with which he was charged. In a footnote, the court commented that mental health definitions of certain conduct as disorder do not perforce make that conduct a mental disease forming the basis for a defense of insanity.

At trial, the prosecutor dismissed two of the counts, and Torniero attempted an insanity defense based on his reported paranoia, depression, and narcissistic personality combining to render him unable to conform his conduct to the requirements of the law over the two-year period during which the crimes were committed. Also introduced was testimony relative to his "good character." It took the jury less than an hour to reject this line of reasoning and to convict him.

This decision was appealed by the defendant to the Second Circuit, only on the issue of the exclusion of expert testimony. In a lengthy brief [*10*], the defense claimed that pathological gambling is a mental disease or defect within the meaning of the American Law Institute (ALI) rule, and that the jury should have been allowed to decide, as a question of fact, if the legal definition of insanity had been met. As anticipated, much was made of the assertion that the inability to control the gambling behavior essentially causes the proscribed conduct. As if to excuse certain behavior, it was noted that the crimes involved are usually nonviolent. Their expert witnesses considered mental disorder synonymous with mental disease or defect, and also said that pathological gambling is, at least potentially, a severe condition, despite admitting that this latter position is not widely held. The opinions of those who work with the disorder were suggested to be more determinative on this issue.

Some of the comments made by the defense's experts at the pretrial hearings were used to buttress their contentions, but are felt by us to illustrate nothing more than a distortion of generally accepted facts. For example, the statement that pathological gamblers do not think clearly was taken as indicative of a thought disorder; the observation that gambling is a central focus of these individuals' lives to be denotative of poor contact with reality and therefore akin to psychosis; and, finally, the belief that they can and will win, thereby recouping their losses, to reflect a delusion. Seriousness was also inferred, in part, from the known difficulty in treating persons with this condition.

In its brief [*11*], the government argued that pathological gambling is indeed not a mental disease or defect for the purpose of determining criminal responsibility. The testimony of one of us (S. R.) was cited in support of the propositions that this condition does not fall within the ALI rubric, and that exculpatory illnesses should generally be of the severity of a psychosis, the American Psychiatric Association's suggested standard. The district court's exclusion of testimony concerning pathological gambling as an insanity defense was supported fully. The appellate decision in *Lewellyn*, discussed above, was cited, and the lack of a demonstrable direct causal connection between this disorder and the crimes emphasized. Evidence of other characterological problems was allowed.

In May 1984, the Second Circuit rendered its decision, affirming the determination of the trial court [*12*]. The only issue raised on appeal was the propriety of the trial judge's refusal to permit an insanity defense based on pathological gambling to go to the jury, and so the opinion was devoted to a discussion of whether or not such a condition was consistent with the ALI definitions previously adopted. Holding that relevance is the threshold requirement

and a question of law to be decided by a judge, the panel stated that the proposed defense would qualify only if pathological gambling were a mental disease or defect capable of rendering Torniero unable to counter the urge to steal. There must also be a showing that the hypothesis has substantial acceptance; that is, that "respected authorities" agree that the mental disorder could have made the accused incapable of resisting the misbehavior or of appreciating the wrongfulness of his conduct. Even assuming that the ALI standard had been met, the court concluded that relevance also required direct bearing by the psychopathology on the illegal acts: "In sum, a compulsion to gamble, even if a mental disease or defect, is not, *ipso facto*, relevant to the issue of whether the defendant was unable to restrain himself from non-gambling offenses such as transporting stolen property." No expert witness, the appeals court continued, testified that there was significant professional agreement with the proposition that, for the purposes of an insanity defense, a connection between gambling and stealing exists, and therefore, without such a link, that line of "evidence" could properly be excluded. Leaving their options available, the judges did not ". . . foreclose admissibility of compulsive gambling in all circumstances. . . ."

Shortly after the announcement of the Court of Appeals conclusion, Torniero's attorney was quoted as saying that, while he had successfully used compulsive gambling as a defense in three state trials, it was the weakest insanity defense in terms of both psychiatric and judicial acceptance [*13*]. He maintained his position, however, that it was a question of fact that should be submitted to a jury. More recently, the leading medical witness (in this and several other cases) in support of absolving the pathological gambler from criminal responsibility has substantially revised his position in favor of restitution, probation, and treatment.[5]

The Fourth Circuit, in August 1984, ruled similarly to its sister federal appellate courts in deciding *United States v. Gould* [*14*]. The defendant was charged with illegal entry into a bank with intent to commit robbery and larceny. Testimony relative to pathological gambling as Gould's insanity defense was presented to the jury at trial, but excluded from their consideration by the judge. In affirming this action, it was held that such evidence did not meet the test of foundational relevance—there was not substantial professional acceptance of the hypothesis that this disorder deprives one of the ability to refrain from attempting to steal from a bank.

Before the 12 Oct. 1984 signing of the Insanity Defense Reform Act (Public Law 98-473), in a federal court, outside the District of Columbia, one found not guilty by reason of insanity was freed from custody. This was not true in most states. The results can best be illustrated by a Connecticut case which thrice reached its Supreme Court. A defendant successfully pleaded insanity, based on pathological gambling, to a charge of embezzlement, and was sent to the state psychiatric hospital. At a release hearing, the trial court decided that he was entitled to be discharged because he did not constitute a danger to himself or others. The state immediately appealed, contending that danger includes property. In its first decision [*15*], the case was remanded for a determination of whether the acquittee was in fact a danger to property and a statement as to the basis for the conclusion that he was not dangerous to himself or others.

The lower court replied that expert testimony was the rationale for the release decision, indicating that he was not felt to be dangerous in the physical sense. The judge went on to say that the standard for confinement did not encompass danger to property and, even if it did, only substantial destruction would be relevant. The state Supreme Court found this answer to be nonresponsive [*16*], and reremanded for clarification if, as a matter of fact, he is dangerous to property, defined as likely to commit crimes against property. Given the tenor of the earlier decisions in this case, plus the intervening United States Supreme Court

[5]R. L. Custer, M.D., personal communication, Aug. 1984.

comments in *Jones v. United States* [*17*] relative to dangerousness not being equivalent to violence, the final outcome of all of this could have been predicted, but was not settled until the 3 April 1984 ruling [*18*]. It was therein held that, as a matter of statutory construction, "danger" includes nonviolent offenses involving financial loss and that commitment of the defendant in this case was consistent with the law.

Presumably in response to this litigation, the Connecticut legislature added to that jurisdiction's ALI standard the disclaimer that mental disease or defect does not include pathological or compulsive gambling [*19*]. Approved 30 June 1983, this represents, to our knowledge, the first such specific action. Somewhat more broadly, beginning 1 Jan. 1984, in Oregon, mental disease or defect does not include ". . . any abnormality constituting solely a personality disorder" [*20*]. That term is not given any further definition. By the same statute, incidentally, Oregon created the verdict of "guilty except for insanity."

Discussion and Conclusions

Our profession has produced a diagnostic nomenclature to enable us to treat, study, and communicate about mental disorders. The *Diagnostic and Statistical Manual of Mental Disorders* (DSM III) [*21*] specifies that its use for such purposes as determination of criminal responsibility must be critically examined in the particular context. The inclusion, for the first time, of pathological gambling as a recognized entity had led to its use as an insanity defense, often based on the statement that the person with this condition is "unable to resist" impulses to gamble. Quite certainly, none of this was intended by the framers of DSM III, and the revised edition will replace the foregoing phrase with the more proper "failure to resist."[6]

While, as we have demonstrated, the judicial (and legislative) response to recent events may indeed be retrenchment, as a further metamorphosis in the evolution of the insanity defense, careful attention was paid in written opinions to keeping open the admissibility of other circumstances. Especially where reference is made to "associated conditions," disorders "standing alone," and "solely constituting," there is room for expansion where at first glance it might have appeared that a portion of the spectrum was eliminated.

In a report of compulsive gambling as an insanity defense, Bonnie [*22*] laments the ". . . collective judicial failure to develop a jurisprudence of mental disease." A lengthy article by Slovenko [*23*] examines the issue of what illnesses qualify to meet legal criteria of disease. Raising more questions than answers, he concludes that the determination rests on a sense of justice and the protection of society, and is, in the final analysis, a policy decision.

Courts have repeatedly said that they will not be bound by our medical definitions of mental illness for the purposes of a not guilty by reason of insanity plea. We cannot afford to perpetuate the confusion likely to be generated, for example, by Custer's remarks that the behavior of compulsive gamblers borders on the psychotic and that, while they may not be insane, they are crazy [*24*].

In striving toward rationality in the administration of the insanity defense, our work has led us to several conclusions. First, the seriousness of a disorder should be determined psychopathologically, not by its social consequences. Thus, that which may be introduced as exculpatory should, as the American Psychiatric Association (APA) suggests [*1*], be of the severity of a psychosis, if not actually such. It is clinically consistent to recommend that no less a degree of illness should be required for an insanity defense than for involuntary civil commitment, and we should probably seek more. Finally, certain classifications can legitimately be excluded from a plea of insanity. There is a long tradition of this, as exemplified by the caveat concerning repeated antisocial conduct in the ALI standard. The

[6]R. L. Spitzer, M.D., written communication, Sept. 1983.

disturbances of volition or behavior or both, as spelled out in our introductory remarks, need to be handled in this fashion.[7]

We agree that it is society's task to make the final resolution of what types of mental illness should qualify for the insanity defense. It is psychiatry's job, however, to take the lead in advising legislative bodies to enact statutes eliminating as potentially exculpatory those diagnostic entities which should not be sufficient even to raise the issue. Failing this, the quagmire can only deepen, leaving us to grapple with the unfortunate, but foreseeable, consequences, principal among which is the misuse of psychiatrists in postacquittal confinement, by mandating inpatient treatment of persons we may not see as sick and in need of such care.

Although the exclusion of these disorders is urged as long as the insanity defense is retained, full abolition of the exculpatory insanity rule continues to be favored by one of us (A.L.H.). (See, for example, Ref *25*.)

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