Pathological Gambling: A New Insanity Defense

A. LOUIS McGARRY, MD

The diagnosis of Pathological Gambling was officially established by the American Psychiatric Association in January 1980 (DSM III) and was quickly echoed in ICD-9, thus achieving international status. In the brief history surrounding its formal establishment there has been the perhaps surprising development that it has provided a basis for insanity pleas at the trial court level in at least several states and two Federal jurisdictions (New York,[1] Connecticut,[2] New Jersey,[3] and the Federal District Courts in Buffalo,[4] and Las Vegas,[5]) within the personal knowledge of the writer.* Even more surprising is that the plea has led to insanity acquittals in two states (Connecticut and New Jersey), a hung jury (with a guilty plea on retrial) in the Las Vegas, Nevada, Federal District Court, and a hung jury in New York State. These developments have taken place despite the *caveat* in the introduction to DSM III that "the use of this manual for nonclinical purposes, such as the determination of legal responsibility . . . must be critically examined in each instance within the appropriate institutional context."[6] As we shall see in at least one instance, psychiatric expert testimony has offered the diagnosis as exculpatory *per se* for a criminal offense committed in order to acquire money to pursue gambling. The offenses for which the defense has been offered, as would be expected, have included embezzlement and forgery but in one case involved the armed robbery of a bank in Nevada.[5] This article describes the recent development of this concept and attempts to place it in perspective.

Diagnosis and Classification

According to DSM III the diagnosis of Pathological Gambling may be made when "*A*. The individual is chronically and progressively unable to resist impulses to gamble. *B*. Gambling compromises, disrupts, or damages family, personal, and vocational pursuits, as indicated by at least three of the following:

(1) Arrest for forgery, fraud, embezzlement, or income tax evasion due to attempts to obtain money for gambling.
(2) Default on debts or other financial responsibilities.
(3) Disrupted family or spouse relationships due to gambling.
(4) Borrowing of money from illegal source (loan sharks).
(5) Inability to account for loss of money or to produce evidence of winning money, if this is claimed.
(6) Loss of work due to absenteeism in order to pursue gambling activity.
(7) Necessity for another person to provide money in order to relieve a desperate financial situation.

Dr. McGarry is Medical Director of Forensic Services, Nassau County Department of Mental Health and Professor of Clinical Psychiatry at SUNY, Stony Brook.
*The assistance of Brian Rosner, JD, Assistant District Attorney of New York County (Manhattan), in acquiring trial transcripts is gratefully acknowledged.

and C. The gambling is not due to Antisocial Personality Disorder."

Purists might argue that the numbered social and behavioral criteria in section *B* of this definition do not represent discrete clinical entities but one or more may reasonably be expected to flow from another. But a more serious source of confusion is the inconsistency of the accompanying text that provides the descriptive language, "The essential features of Pathological Gambling are a chronic and progressive *failure to resist* impulses to gamble," in contradistinction to the language of the definition that requires that the individual is "*unable to resist* impulses to gamble" (emphases added). In the context of litigation around the insanity defense the distinction between the two volitional versions of the Pathological Gambling impulse is more than quibbling; it is indeed crucial. I am informed by one member of the committee that formulated the language quoted, that although there was disputation about the exact language intended by the committee, in fact the "unable to resist" language was intended.[7]

Pathological Gambling is classified in DSM III among the large and loosely related groups of the Impulse Disorders. It is noteworthy that the same committee that formulated the entity of Pathological Gambling applied the language of "failure to resist" to the related disorders of Pyromania and Kleptomania. Presumably the latter diagnoses represent disorders in which individuals are regarded as having a choice about whether to resist their impulses. Volitional considerations in the Impulse Disorders, in any case, represent clinical and moral dilemmas that could keep generations of Talmudic scholars busy. But the draftsmen of the several committees involved in describing the disorders of impulse control did not shrink from the attempted articulation of degrees of volition.

Thus the Impulse Disorders, are broadly regarded as involving a "Failure to resist an impulse, drive, or temptation to perform some act that is harmful to the individual or others. There may or may not be conscious resistance to the impulse. The act may or may not be premeditated or planned." In the large subclass of the sexual perversions or Paraphilias it is written that "The essential feature of disorders in this class is that unusual or bizarre imagery or acts are *necessary* for sexual excitement. Such imagery or acts *tend* to be *insistently* or involuntarily repetitive" (emphases added). If this language in the Paraphilias *tends* to be equivocal, the lack of voluntarism in the Substance Abuse Disorders is not so equivocal. Thus in Alcohol abuse there is an "inability to cut down or stop" as is the case in barbiturate or similarly acting sedative or hypnotic abuse, opioid abuse, cocaine abuse, amphetamine abuse, and hallucinogen abuse. Dependence on these substances, on the other hand, requires only a "need for" them, which implies a degree of choice. It is well to remember that the framers of these volitional nuances did not have jurisprudential purposes in mind. But since the proposition has been advanced that the inability to resist Pathological Gambling exculpates, then like thinking would find the abuse of alcohol, opioids, cocaine, and hallucinogens exculpatory as well.

Diagnostically, much of the behavior required of the individual to qualify

for the diagnosis of Pathological Gambling is of a criminal or quasi-criminal nature. I suggest that the logic of requiring such behavior in order to make the diagnosis in order then to be exculpated for the same behavior is circular.

Writing from a psychodynamic perspective (and the reader will note that the diagnostic criteria do not include intrapsychic clinical factors), Greenberg has published an excellent discussion in his recent review of Pathological Gambling.[8] Psychoanalytic speculations have involved mechanisms such as Oedipal, displaced libido, multiple pregenital and Oedipal, omnipotence, compulsive neurotic with latent homosexual, transformed childhood masturbatory, incestuous and parricidal, narcissistic, an overhwelming desire to lose resulting from inordinate guilt and an intense need for punishment secondary to aggression directed against parental deprivers of infantile omnipotence determinants, and so on. In sum, no consistent or persuasive psychoanalytic formulation appears to have emerged.

Epidemiology

Custer, in a book cited in 1980 as being "in press" that has not at this writing been published, speculated that there are at least one million compulsive gamblers (this older term appears to be interchangeable with Pathological Gambling in the published materials I have seen) in the United States and estimates go as high as three million.[8] If these figures are taken literally and there does not seem to be any qualification of degrees of severity in the diagnosis, then a forensic exculpatory umbrella for such gamblers is truly a staggering social and economic issue. Surely the Pathologic Gambler meeting the full criteria in DSM III in fact is a small percentage of the large class of abnormal gamblers in this country. This does not diminish the great seriousness of the problem of abnormal gambling. Legal gambling increased by an estimated 400 percent in the decade of the 1970s. Taken with the much greater extent of illegal gambling, yearly totals as high as forty billion to seventy-five billion dollars (rivaling the annual national debt) are estimated. What cannot be estimated is the truly enormous destructive impact on the lives and fortunes not only of the pathological gambler but also on his or her family and other relationships, and on the integrity of corporate, pension, and other such institutions.

Testimonial Evolution of the Exculpatory Concept

This paper is not intended to be *ad hominem*. But it is difficult to entirely escape this allegation since the testimony quoted below is that of one man, and I acknowledge being an expert witness (in the New York case) on the other side from Robert L. Custer, MD. It is inescapable, if one is to deal with this issue at all, since Dr. Custer has unquestionably been the pioneer and dominant thinker in the development of the diagnosis and in treatment programs for Pathological Gamblers; he was active on the committee that formulated the diagnosis in DSM III, and from its inception has been the Medical Adviser of Gamblers Anonymous, a growing national organization

(currently about 700 members) devoted to the amelioration and treatment of Pathological Gambling. He has been an eloquent spokesman for the plight and needs of those afflicted with this illness, and his forensic achievements, as noted, have been remarkably successful in a brief time in the exculpation of Pathological Gamblers in our criminal courts.

In *United States v. McGee*[5] in the Federal District Court in Las Vegas, Nevada, late in 1978, the following testimony, in part, was offered (hung jury with a guilty plea on retrial):

THE COURT: Let me follow up with the last question, Doctor.

Under the law of this Circuit, the defendant is insane as a matter of law if at the time of the bank robbery on July 14th of this year (1978), as a result of mental disease or defect, he lacked substantial capacity either to appreciate the moral wrongfulness of his conduct or to conform his conduct to the requirements of the law.

Would you answer in terms of that text?

WITNESS: Yes. James McGee knows the difference between right and wrong, there's no question in my mind to the first one.

THE COURT: In other words, he does appreciate the . . . he had substantial capacity in your mind to appreciate the moral wrongfulness of his conduct?

WITNESS: Yes.

THE COURT: In robbing the bank?

WITNESS: Yes, he knows that it is wrong.

THE COURT: But you say he didn't have the capacity to conform his conduct to the requirements of the law?

WITNESS: That's right.

This trial took place in 1978 before the establishment of the official diagnosis of Pathological Gambling. Noteworthy is the focus on the volitional "lack of substantial capacity . . . to conform his conduct" rather than the concept of the "right-wrong" test.

Similar testimony was offered in 1980 in *United States v. Bertolene*[4] in the Federal District Court in Buffalo in which the volitional "capacity to conform" standard was applicable. This case resulted in a finding of guilty.

Q. Does the person who has this mental disease know the difference between right and wrong?

A. I think there is no question that the pathological gambler knows the difference between right and wrong.

Q. Is the person who has this disease able to stop himself?

A. No, I don't think so.

In *State v. Campanaro*,[3] however, the law of that state provides only for a traditional cognitive M'Naghten "right-wrong" test and not for the volitional concept. Here we see an expansion of the exculpatory scope of the Pathological Gambling diagnosis. This testimony by the same witness is dated May 5, 1981, and the trial resulted in an insanity acquittal:

Q. Doctor, is he by virtue of the condition under which he labored at the time he drew the specific checks before you (sic) incapable of distinguishing right from wrong as regards that check?

A. Well, here's a man who was a law enforcement officer who knows the law well, who knows about right and wrong but a man who is in a desperate strait. He is under tremendous amount of stress at that point, does not consider right and wrong. I don't think that becomes part of his thinking process. His process then is to survive. He's losing his job, his family, his children, his reputation, everything is going down. So he functions this way, in an irrational way to which his judgment is that impaired.
Q. You say, Doctor, that he does not consider right from wrong. Can he consider the distinction between right and wrong at that juncture?
A. I think he's on automatic at this point. I don't think thinking becomes a process. The man is acting only on impulse. His impulse control is totally gone. He functions. He reacts. He does not use the thinking process to enter into it so a valued judgment is not placed at that point.
Q. Is he capable of making a value judgment at that point?
A. No.

In *People v. Dube*[1] the New York statute also does not provide insanity exculpation on the basis of lack of "capacity to conform" but only on the basis of "lacks substantial capacity to know or appreciate either: (a) The nature and consequence of such conduct or (b) That such conduct was wrong."[10]

Q. Is it a fact that once you diagnose someone as a pathological gambler there is nothing that that gambler could have done during the time he was stealing for you to reach the conclusion that he knew and appreciated that his conduct was wrong?
A. For those who were stealing? Yes.

*****

Q. I am going to ask you, I am asking you if the clinical diagnosis is dispositive regarding the application of the New York State law and you are stating it is?
A. Yes, it is.

Thus, the concept of exculpation of the Pathological Gambler has come to its fullest exposition and breadth in this testimony. The diagnosis *per se* is tantamount to an insanity acquittal in this thinking and at least part of the jury apparently agreed in a jury deadlock mistrial.

Jurisprudential Considerations

This article does not deal extensively with the threshold question of whether the diagnosis of Pathological Gambling should be regarded as a "mental disease or defect" for exculpatory legal purposes. The definition of mental illness for statutory as well as case law purposes is unfinished business in forensic psychiatry or rather a continuing business. The leading case here would appear still to be *McDonald v. United States* 312 F. 2d 847 (D.C. Cir. 1962) in which the court took the view that juries should not be bound by the expert as to what constituted mental illness and that "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls" may be con-

sidered in the context of the insanity defense. Suffice to say that judges and juries have regularly found it acceptable to view Pathological Gambling as a basis for an insanity defense.

If the reader carries nothing else from this paper than what follows in this paragraph, this author will be gratified. I refer to what I regard as a fundamental misconception that the postulated lack of volitional control over the act of gambling *per se* has somehow been permitted at the trial level to encompass lack of volitional control over *all acts* including criminal acts, in the service of the impulse to gamble. This is not logical. If it were, then the criminal acts of the heroin addict who is "unable to control" his abuse of heroin should be exculpated under the cruel and compelling physiological need that drives him to criminal behavior to acquire the money to feed his habit. Nowhere else in jurisprudence does this author find any such concept. Perhaps remotely apposite here would be *Robinson v. California*, 370 U.S. 660/1962 in which the United States Supreme Court found it unconstitutional to prosecute an individual for his "status" as a narcotic addict. This decision did not obviously affect the constitutional criminality of the possession or use of illegal drugs nor analagously illegal gambling. It could not possibly be construed as suggesting that criminal acts in the pursuit of the use of narcotics or in the pursuit of gambling may not be prosecuted, regardless of whether the related but separate act of the use of drugs or the act of gambling is or is not voluntary.

The idea that "psychopathy" might be a basis for an insanity defense, put forth in *United States v. Currens*, 290 F.2d 75 (3d Cir. 1961), would appear to be irrelevant to Pathological Gambling in that the Antisocial Personality Disorder is specifically excluded in making the diagnosis.

More closely, if still remotely, analogous is the line of cases relating to the proposal of the disease of alcoholism as an illness exculpatory to the charge of drunkenness. Here the Supreme Court in *Powell v. Texas*, 392 U.S. 514 (1968) did not go even so far as *Robinson v. California* when it rejected such a defense, that is, that the status of chronic alcoholism could not be prosecuted when manifested as public drunkenness. Of course the exculpation of stealing or other criminal acts in pursuit of alcoholism is not remotely considered in this decision. Should Pathological Gambling reach appellate court review as an insanity defense, and to my knowledge it has not done so, it seems most likely that it would be struck down in view of the very narrow exculpatory limits set down in *Robinson*. In the testimony cited above in the New York case, it would appear that reverse logic is at play in that the status or diagnosis of Pathological Gambler is held forth as exculpating criminal acts. Such a proposition would appear to have no support in American jurisprudence.

Conclusion

This author has no serious quarrel with the inclusion of Pathological Gambling as a legitimate diagnostic entity. Although it is a departure from

traditional Kraepelinian nosology, it is no more so than many diagnoses that have been accepted and been useful in psychiatry for many decades. Certainly there is great anguish and suffering for those caught in the spiraling destructiveness of an out-of-control need to gamble and its inevitable disasters for the gambler and those close to him or her who are so deeply hurt as well.

But it is questionable that the purpose of the amelioration or treatment of this entity is well served by the exculpation of antisocial acts performed in the service of the need to gamble. Such exculpation holds its advocates and their purpose up to ridicule and the erosion of their credibility. The psychiatrists who successfully so advocate may well be achieving more harm than good.

Although it is speculative, it would appear that the success of this exculpation, at least in those few cases reviewed here, are attributable to three factors: first, Dr. Custer (it would appear) is a very persuasive and eloquent expert witness; second, the authority of his experiential qualifications in dealing with many hundreds of abnormal gamblers, experience that cannot begin to be matched by anyone, is impressive; and finally Pathological Gamblers as a group, apart from their illness are in general hardworking, attractive, and non-criminal in their life-styles for whom punishment such as incarceration appears on an individual basis to have little point. Bankruptcy and restitution—or at least partial restitution of stolen money given the huge sums often involved—seems far more appropriate. From a general deterrent point of view, of course, exculpation is not constructive.

It seems likely that the exculpation of the Pathological Gambler from criminal activities will be short lived. One could predict that when this proposition goes beyond the fact-finding trial stage to the scrutiny of the Appellate Courts it will be rejected.

During the period between the presentation of this paper at the Annual Meeting of the American Academy of Psychiatry and the Law and its final draft for publication, there have been new relevant developments. In the *Dube* case on renewed prosecution a plea of guilty has been entered, and weekend incarceration for a two-year period was arrived at. Nationally, the House of Delegates of the American Bar Association in February 1983 officially approved "in principle" a formulation of "nonresponsibility for crime which focuses solely on whether the defendant, as a result of mental disease or defect, was unable to appreciate the wrongfulness of his or her conduct at the time of the offense charged" and thus rejected an insanity defense based on involuntarily impelled crimes.[11] Similarly, in June 1983 the American Psychiatric Association published its Statement on the Insanity Defense[12] and recommended the following standard:

> A person charged with a criminal offense should be found not guilty by reason of insanity if it is shown that as a result of mental disease or mental retardation he was unable to appreciate the wrongfulness of his conduct at the time of the offense.

> As used in this standard, the terms mental disease or retardation include only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception of reality and that are not attributable primarily to the voluntary ingestion of alcohol or other psychoactive substances.

Pathological Gambling would be excluded, presumably, on two grounds—as neither a "severely abnormal mental condition" nor criminality on the theory of lack of voluntarism. In its commentary on the APA standard, the "Insanity Defense Work Group" observed that "the line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk."

But it must be noted that these statements of the ABA and the APA are no more than hortatory; they state what ought to be—not what still exists legally. Presumably it will take legislative or case law changes to bring about the implementation of these recommendations. Indeed, in this continuing muddled matter of the insanity defense we have seen that even in jurisdictions such as New York State and New Jersey where there is no statutorily authorized "volitional" exculpation, Pathological Gambling nevertheless has been the basis of a successful insanity defense. Such vagaries probably will always be the case in both the legislation and litigation of human morality.

References

1. People v. Dube, No. 5260-80 (New York County)
2. State v. Lafferty, No. 44359 (Conn. Super. Ct., June 5, 1981)
3. State v. Campanaro, Union County Indictment No. 632-79, 1309-79, 1317-79, 514-80, 707-80 (Superior Court of New Jersey Criminal Division)
4. United States v. Bertolone, No. CR 80-67 (D.N.Y. Buffalo)
5. United States v. McGee, No. CR 78-80 (D. Nev.)
6. Diagnostic and Statistical Manual of Mental Disorders (Third Edition), The American Psychiatric Association, 1980, p. 12
7. Personal Communication, Nicholas Rizzo, MD, October 15, 1981
8. Greenberg HR. Psychology of gambling, in Comprehensive Textbook of Psychiatry, Third Ed. Kaplan HE, Freedman AM and Sadock BJ, eds. Baltimore/London, Williams and Wilkins, 1980
9. N.J. Rev. Stat. §2C:4-1 (1982)
10. N.Y. Penal Law §30.05 (McKinney 1975)
11. Report 100, a Resolution of the House of Delegates of the American Bar Association, February 1983
12. Roth L, et al: American Psychiatric Association Statement on the Insanity Defense, by the Insanity Defense Work Group. Am J Psychiatry 140:681-88, 1983 □