3-1-2003

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Diminished Capacity Departures for Compulsive Gambling: Punishing the Pathological or Pardoning the Common Criminal?

I. INTRODUCTION

A grandmother from New York City was sentenced yesterday to 31 months in federal prison and ordered to pay back the nearly $4.9 million she embezzled from her former employer to feed her gambling habit in Atlantic City.

... From the judge, she asked for mercy.

To some extent, mercy had already been shown.

Checoura could have received substantially more prison time, but [the judge] agreed last month to apply a sparingly used portion of federal law to reduce her sentence. Her compulsive-gambling disorder, he ruled, “significantly impaired her ability to control her wrongful behavior.”¹

In 1998, the Federal Sentencing Guidelines (“Sentencing Guidelines” or “Guidelines”) were amended to explicitly include volitional impairments within the diminished capacity guideline.² Thus, the Sentencing Commission endorsed leniency for those defendants who, like Checoura, although fully capable of discerning right from wrong, are perceived as having an impaired ability to conform their behavior to the law. The compulsion is perceived as so great that it overpowers the will. Yet, mitigating punishment because of a perceived volitional impairment raises all the same concerns that led Congress to reject a volitional insanity defense,³ the primary concern being that it could not be “reliably administered... because of inherent problems with distinguishing those unable to conform to

This Comment will focus on that concern in the context of compulsive gambling as a factor for downward departure under the Sentencing Guidelines. Does a gambling addiction significantly reduce a person’s capacity to obey the law? Where does one draw the line between an inability to obey the law and failure to obey the law, between an irresistible impulse and an impulse not resisted?

Section II will give a brief account of the Guidelines and the rationale for the departure guideline. Section III will discuss the correlation between compulsive gambling and crime. The evidence shows that compulsive gamblers commit crimes (particularly theft crimes) at higher rates than the general population. Thus, as greater access to gambling begets greater numbers of compulsive gamblers, how sentencing courts will treat compulsive gambling becomes more important. Section IV will discuss the different ways in which the diminished capacity guideline has been interpreted regarding volitional impairments and will suggest that a compromise approach fashioned by the Seventh Circuit should be followed. Section V will discuss the difficulties in measuring volitional impairments in general and compulsive gambling in particular and propose that the evidence shows that compulsive gambling does not in fact cause a diminished ability to obey the law. Finally, section VI will discuss the incompatibility of downward departures based on compulsive gambling with the Guidelines’ treatment of other factors, particularly drug and alcohol use and addiction.

The conclusion of this Comment is that requests for downward departures based on compulsive gambling should not be granted. The reasons are twofold. First, there is little evidence that compulsive gambling causes diminished capacity and there is no reliable way of measuring it even if it does. Second, departures based on compulsive


5. The American Psychiatric Association describes pathological gambling as “[p]ersistent and recurrent maladaptive gambling behavior that disrupts personal, family, or vocational pursuits. The gambling pattern may be regular or episodic, and the course of the disorder is typically chronic.” AM. PSYCHIATRIC ASS’N., Diagnostic and Statistical Manual of Mental Disorders 312.31 (4th ed. 1994) [hereinafter DSM-IV], http://www.behavenet.com/capsules/disorders/pathgambledis.htm. This Comment uses the terms “pathological gambling,” “compulsive gambling,” and “gambling addiction” interchangeably, as does the case law.
gambling are inconsistent with the Guidelines’ policy goals and create a discrepancy with several Guidelines factors. Hopefully this Comment will call attention to serious problems, both in public policy toward gambling and in the difficult issues raised in punishing compulsive gamblers. Ultimately the goal is to neither punish the pathological nor pardon the common criminal.

II. THE SENTENCING GUIDELINES: UNIFORMITY WITH FLEXIBILITY

The Sentencing Reform Act of 1984 (“SRA” or “Act”) grew out of a serious concern over “an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.” The Act created a Sentencing Commission to establish sentencing guidelines to be followed by federal district court judges. The Guidelines’ goal was to create general uniformity while allowing flexibility for extraordinary circumstances. Thus, included in the SRA was a provision allowing judges to depart from the Guidelines under certain circumstances. “[T]he scope of the departure provision serves as the key battleground between those urging greater uniformity and those urging greater flexibility” in sentencing.

9. Michael S. Gelacak et al., Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis, 81 MINN. L. REV. 299, 318 (1996). The Sentencing Guidelines have been somewhat successful in creating uniformity within each appellate circuit, but the disparity between circuits is growing. In 2000, the Ninth Circuit departed downward in 37.9% of all cases while the Fourth Circuit departed downward in only 5.0% of all cases (both numbers exclude downward departures based on substantial assistance to the government). U.S. SENTENCING COMM’N 2000 DATAFILE, http://www.ussc.gov/ANNRPT/2000/table26.pdf (last visited Feb. 15, 2003). Judge Alex Kozinski of the Ninth Circuit has expressed concern that “[d]epartures are coming to be the norm rather than the exception. . . . It looks to me like we are inching toward a system very similar to the one in existence prior to the Guidelines, with broad sentencing discretion vested in the district court, and relatively little appellate review.” Alex Kozinski, Carthage Must be Destroyed, 12 FED. SENTENCING REP. 67, 67 (1999). It is natural for Judge Kozinski to feel this way, given that the Ninth Circuit is his perspective point; the Ninth Circuit has by far the highest rate of downward departure. “The goal of sentencing consistency cannot be well served when a defendant in the Ninth Circuit is nearly ten times more likely to benefit from a downward departure than a defendant in the Fourth Circuit.” Douglas A. Berman, Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines, 76 NOTRE DAME L. REV. 21, 83–84 (2000).
Judges were not left without guidance in deciding when a departure might be appropriate. The Guidelines identify four categories of factors that might affect a departure decision. First, there are those few factors of which the Commission has forbidden consideration, including race, sex, national origin, creed, religion, socioeconomic status, lack of guidance as a youth, drug or alcohol dependence, and economic hardship.

Second, certain factors are discouraged as “not ordinarily relevant.” Discouraged factors include a defendant’s family ties and responsibilities, education and vocational skills, and military, civic, charitable, or public service record. Courts are also discouraged from departing downward based upon the defendant’s “mental and emotional conditions.” Discouraged factors should only be considered in “exceptional cases.”

Third, there are factors that the Commission encourages courts to consider. For example, downward departure is encouraged for victim provocation while upward departure is encouraged for disrupting a governmental function. Diminished capacity is listed among the encouraged factors, which are those the Commission “has not been able to take into account fully in formulating the guidelines.”

10. As a general matter, departures are to serve the “basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.” U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(2) (2001).
11. Id. § 5H1.10.
12. Id. § 5H1.2.
13. Id. § 5H1.4.
14. Id. § 5K2.12.
15. Id. ch. 5, pt. H, introductory cmt.
16. Id. § 5H1.6.
17. Id. § 5H1.2.
18. Id. § 5H1.11.
19. Id. § 5H1.3 (states that section 5H1.3 does not apply to factors that fall under chapter 5 part K, which includes diminished capacity departures).
21. Id. § 5K2.0.
22. Id. § 5K2.10.
23. Id. § 5K2.7. In some instances, the relevant guideline will already have taken the encouraged factor into account, in which case it would be inappropriate to double count the factor unless it “is present to a degree substantially in excess of that which ordinarily is involved in the offense.” Id. § 5K2.0.
24. Id. § 5K2.0.
Finally, because the Sentencing Commission lacked perfect prospicience there are countless unmentioned factors which the sentencing court may take into account but only while considering the “structure and theory of both relevant individual guidelines and the Guidelines taken as a whole.”25 The Commission expected that departures based on grounds not mentioned in the Guidelines would be “highly infrequent.”26

Compulsive gambling presents a particularly complex situation because it can implicate all four categories of departure factors. Compulsive gambling is unmentioned in the Guidelines and departures based on unmentioned factors were expected to be “highly infrequent.”27 Furthermore, compulsive gambling is considered an “emotional or mental condition[ ]” and thus could be a discouraged factor.28 Often times, those who commit crimes because they are compulsive gamblers do so because of personal financial difficulties, a forbidden factor.29 But, if compulsive gambling does in fact cause diminished capacity, it becomes an encouraged factor for downward departure.30 With all four departure factors implicated, courts are free to characterize compulsive gambling as they wish and either grant or deny the departure.31

26. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(b). The Guidelines also allow for the possibility of an “extraordinary case that, because of a combination of . . . characteristics or circumstances, differs significantly from the ‘heartland’ cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case.” Id. § 5K2.0, cmt. Such cases, however, should be “extremely rare.” Id. Notwithstanding the Guidelines’ admonition that departures should be “highly infrequent,” the “overall national departure rate has been creeping steadily upward.” Frank O. Bowman, III, Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines, 44 ST. LOUIS U. L.J. 299, 341 (2000). While uniformity has improved within federal circuits, there is less and less uniformity from circuit to circuit. Id. at 349.
28. Id. § 5H1.3 (“Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, except as provided in Chapter Five, Part K, Subpart 2 [which includes diminished capacity].”).
29. Id. § 5K2.12 (“The Commission considered the relevance of economic hardship and determined that personal financial difficulties . . . do not warrant a decrease in sentence.”).
30. Id. § 5K2.13 (“A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity.”). However, diminished capacity departures are forbidden if the offense was caused by voluntary use of drugs or alcohol, the defendant has a violent criminal history, or the crime involved violence or the threat of violence. Id.
31. Several departure factors involve similar contradictions. The Supreme Court in Koon
III. COMPULSIVE GAMBLING AND CRIME: CREATING A NEW CLASS OF CRIMINAL

Widespread gambling is creating a new kind of criminal, as seen in newspaper stories across the country. For example, in Wisconsin, a fifty-seven-year-old grandmother was convicted for embezzling $1.2 million from her employer over four years to pay for her gambling. In Detroit, a twenty-seven-year-old elementary school teacher turned to bank robbery after she and her boyfriend contracted huge gambling debts at local casinos. The police said the teacher is one of a growing number of criminals turning to theft because of casino gambling debts. In New York City, a sixty-six-year-old

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32. Woman Accused of $1.2 Million Theft From Employer Sentenced to Three Years in Prison, ASSOCIATED PRESS, Nov. 13, 2001. Some of the money was used for non-gambling purposes, such as purchasing a Harley-Davidson motorcycle. Id.

33. David Shepardson, Casino Losers Rob Banks, DETROIT NEWS, July 15, 2002, at A1. The teacher was sentenced to ten years in prison. Id.

34. Id. “We have seen an increase in the number of people who are robbing banks to pay gambling debts at the casinos,” said Special Agent Terry Booth in Detroit.” Id. The newspaper story also reported on Samson Gemechu, who robbed two banks in Dearborn, Michigan, to pay for gambling losses; Richard Kozlow, a fifty-eight-year-old man who robbed eleven banks in ten states in a string of crimes authorities believe were gambling motivated;
grandmother embezzled $4.9 million from her employer to finance her gambling. Commenting on the case, Edward Looney of the Council on Compulsive Gambling of New Jersey stated that white-collar crimes “run rampant because of compulsive gambling,” and that these criminals are generally “otherwise principled people, with good families, who have not been in trouble with the law before.”

A quick search reveals scores of similar stories.

Rita Radcliffe, who robbed a bank to gamble at a casino in Connecticut; Robert Kennedy, who robbed a bank and then fed the bills, covered with red dye from an anti-theft device, into a slot machine in Las Vegas; and Kimberly Carter, who robbed a bank in Michigan before going to a Detroit casino. It is appropriate to note that none of these suspects would have been eligible for a downward departure because their crimes involved violence or the threat of violence. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.13.

The casinos deserve some of the blame. After realizing that Checoura was a big spender the casinos catered to her with free drinks and free meals along with free hotel rooms and credit and other enticements, even sending limousines all the way to New York City to pick her up for gambling trips and then taking her home for work the next day after gambling all night. Id. Checoura's case also demonstrates the social impact of gambling. “In court yesterday, Norman Schoenfeld, president of S&S X-Ray, said Checoura's theft had been 'a major cause' of the company's closing its Brooklyn office. . . . [A]bout 190 employees had lost jobs.” Id. In fact, casinos and states receive large portions of their gambling revenues from compulsive gamblers. See infra note 46 and accompanying text.

57. See, e.g., Olwen Dudgeon, Trusted Friend Jailed For Stealing Estate, YORKSHIRE POST, June 27, 2002 (“A family friend, trusted to administer the estates of a widow and her son after they died, stole more than £38,000 and gambled the money away, a court heard. Much of the money was intended for charity.”); Stephen Hunt, Compulsive Gambler is Jailed for Theft, SALT LAKE TRIB., Dec. 30, 1997, at B3 (“Mark Madsen’s descent from respected Salt Lake lawyer to convicted criminal dramatizes how addictions can ruin lives. Hooked on blackjack, Madsen stole more than $250,000 to repay debts to Nevada casinos.”); Heather Ratcliffe et al., Cashier for County Office is Accused of Stealing from Title Company, ST. LOUIS POST-DISPATCH, Nov. 29, 2001, at A1 (“The head cashier for the St. Louis County recorder of deeds office was charged Wednesday with using her job to steal as much as $863,000 . . . . Investigators found evidence that King had several large gambling debts at casinos.”); Neil Roland, Medical Firm Sued Over Fraud Charge: SEC Targets Lauderdale Company, S. FLA. SUN-SENTINEL, June 8, 2001, at 1D (“A Florida medical company defrauded thousands of physicians and other investors of $52 million . . . . William J. Tishman, former principal owner . . . used $18 million of investor funds to pay gambling debts and personal expenses, the SEC’s lawsuit contended.”); Gambler Jailed for Swindling Sawmill, CHI. TRIB., July 25, 2001, at 8 (“A man who said he was a gambling addict was sentenced to 2 to 10 years in prison for defrauding a sawmill out of $1.2 million by selling phony lumber contracts for forest land he did not own or control.”); Lawyer Faced up to Nine Years, S.D. UNION-TRIB., Aug. 18, 2001, at A3 (“A lawyer once disbarred for stealing more than $260,000 from clients faces up to nine years in prison for cheating again . . . . [His wife] cooperated with prosecutors and told them that Basinger used the stolen money to pay gambling debts.”); Man Charged in Holdup of Gas Station, MILWAUKEE J. SENTINEL, June 6, 2001, at 2B (“A man allegedly robbed a Waukesha gas station at knifepoint to help pay off a $20,000 gambling debt . . . . Police arrested Cagle later that morning at his job at a Milwaukee restaurant.”); School Embezzler Sent to Jail,
A. The Growing Prevalence of Compulsive Gambling

Access to gambling is growing at an alarming rate. Between 1975 and 1998, gambling industry gross revenues increased nearly 1600%, reaching $50 billion. This $50 billion figure accounts only for legal gambling revenues. All but two states now have some forms of legalized gambling.

As legalized gambling grows, so does the scourge of compulsive gambling. For example, in Minnesota probable pathological and problem gamblers increased from 2.5% of the adult population of the state in 1990 to 4.4% in 1994, nearly one in every twenty adults in the state. In Iowa, 1.7% of adults in the state were estimated as

BOSTON HERALD, Jan. 10, 2002, at 26 (“A former school assistant business manager who was convicted of stealing $135,000 in merchandise from the school department to pay his gambling debts has been sent to jail for probation violations.”).

38. REPORT OF THE NATIONAL GAMBLING IMPACT STUDY COMMISSION 1 [hereinafter NGISC], delivered to Congress June 18, 1999, available at http://www.npr.gov/ngisc/. Gross revenues are measured by taking the total amount of money spent on gambling and subtracting the amount paid out. In other words, it is the amount of money lost by gamblers.

39. Sports gambling is still illegal in every state but Nevada (and Oregon under a state-run program for betting on National Football League games), but some estimate that as much as $25 billion to $100 billion a year is being illegally wagered. Lawrence S. Lustberg, Sentencing the Sick: Compulsive Gambling as the Basis for a Downward Departure Under the Federal Sentencing Guidelines, 2 SETON HALL J. SPORT L. 51, 51–52 (1992) (citing Special Report: Gambling, The Biggest Game in Town, SPORTS ILLUSTRATED, Mar. 10, 1986, at 30, 32.) Internet gambling is also illegal, but Christiansen Capital Advisors, an industry specialist, estimated that Internet gambling revenue increased from $300 million in 1997 to over $1.1 billion in 1999. John M. Barron et al., The Impact of Casino Gambling on Personal Bankruptcy Filing Rates, CONTEMP. ECON. POL’Y, Oct. 1, 2002. Current estimates put industry profits at $5 billion. Liz Benston, Officials Debate Internet Gambling, LAS VEGAS SUN, June 28, 2002, at 3. Several major credit card companies have ceased allowing use of the cards on Internet gambling sites in response to lawsuits of people who maxed out credit cards and then refused to pay arguing that the credit card company should never have allowed them to use the cards for illegal activity. See, e.g., Citibank Has Agreed to Block Online Gambling Transactions, L.A. TIMES, June 15, 2002, at C2.

40. Hawaii and Utah still ban all forms of gambling. However, for residents of Utah, easy access to gambling is found just across the border in cities such as Wendover, Nevada , and Mesquite, Nevada. Furthermore, the problem is not limited to the United States. “The expansion of gambling is a worldwide phenomenon. The establishment of lotteries, casinos and . . . electronic gambling devices are occurring on all continents. . . . Legal gambling issues, such as the resulting tax revenue and unforeseen social costs, are now common issues facing governments throughout the world.” MONTANA GAMBLING IN A NATIONAL AND GLOBAL CONTEXT 4 (Nov. 1998) [hereinafter 1998 MONT. GAMBLING STUDY], http://leg.state.mt.us/reports/reference/past_interim/gsc98.html.

41. Id. Problem and pathological gamblers are determined by the South Oaks Gambling Screen (“SOGS”) which assigns points based on answers to gambling-related questions and

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pathological gamblers in 1989 prior to the legalization of riverboat casinos, but that had increased to 5.4% by 1995.\textsuperscript{42} Other states that have conducted repeat studies have reached similar results.\textsuperscript{43} Researchers in 1997 estimated that nationwide between 2.5 to 3.2 million adults qualify as pathological gamblers at some point during their lifetime and 1.7 to 2.6 million qualified during the previous year.\textsuperscript{44} Among adolescents between ages twelve and eighteen, the number of pathological gamblers was estimated at 1.1 million.\textsuperscript{45} Sadly, as budget deficits grow and the economy shrinks, gambling becomes a tempting source of revenue for legislators not wanting to raise taxes. As such, it is likely to expand even further.\textsuperscript{46}

then labels gamblers with scores above a certain threshold as probable problem gamblers or probable pathological gamblers. \textit{Id.} at 21.

\textsuperscript{42} Joseph P. Shapiro et al., \textit{America’s Gambling Fever}, U.S. NEWS & WORLD REP., Jan. 15, 1996, at 57.

\textsuperscript{43} The number of pathological gamblers in Montana increased from 2.2% of the adult population in 1992 to 3.6% in 1998. In Texas, the number increased from 2.5% in 1992 to 3.0% in 1995. Of the states included in the study only South Dakota showed a drop—from 1.4% in 1991 to 1.2% in 1993. Different states have conducted studies in different years with the highs ranging from 4.9% for probable problem and pathological gamblers in Mississippi in 1996 to a low of 1.2% in South Dakota in 1993. 1998 MONT. GAMBLING STUDY, supra note 40, at 22.

\textsuperscript{44} NGISC, \textit{supra} note 38, at 8.

\textsuperscript{45} \textit{Id.} Research also reveals that men and women gamble at about the same rate and wager at the same levels. 1998 MONT. GAMBLING STUDY, supra note 40, at 7 (citing J. Hrabra & G. Lee, \textit{Gender, Gambling and Problem Gambling}, 12 J. GAMBLING STUD. 83 (1996)).

\textsuperscript{46} The growth in state lotteries is the best example of this phenomenon. See Valerie C. Lorenz, \textit{State Lotteries & Compulsive Gambling}, 6 J. GAMBLING STUD. 383 (1990), cited in Lustberg, \textit{supra} note 39, at 51 n.3. Just as alcohol and marijuana are often considered gateway drugs leading to more serious drug use, lotteries are often a gateway to more serious gambling problems. Many pathological gamblers first discover gambling through the lottery. See Lawrence Viele, \textit{State Lottery Has Cost Some Players Plenty}, AUGUSTA CHRON., June 21, 1998, http://www.augustachronicle.com/stories/062198/met_lot2.shtml (Government is “benefiting from frivolous spending by the poor, and worse, making gambling for addicts as easy as buying a loaf of bread. . . . Some members [of Gamblers Anonymous] don’t blame the lottery for their addiction but say the game made it easier to gamble.”). Nevertheless, gambling is a tempting source of revenue for state governments because they are able to tax it at higher rates than other activities without overcoming the political pressure of raising taxes on consumers. However, gambling revenues are not the economic panacea that many believe. Lotteries are expensive to operate and, as the NGISC reported, they are highly regressive:

Players with household incomes under $10,000 bet nearly three times as much on lotteries as those with incomes over $50,000 . . . And, since money is fungible and regular taxes are unpopular, research indicates that lotteries fall far short of their promise of extra spending for desirable programs. Close studies of spending in such areas as education and senior citizens’ programs suggest no increase due to the existence of lotteries.
B. Compulsive Gambling and Crime

As gambling spreads and the number of compulsive gamblers grows, the number of crimes committed by compulsive gamblers will logically grow. In fact, research demonstrates that there is a clear connection between compulsive gambling and crime.47

Gambling addicts often steal to support their habit or to pay off gambling debts. Thus, in diagnosing a compulsive gambling disorder, the Diagnostic and Statistical Manual of Mental Disorders 4th edition (“DSM-IV”), known as the “standard text of the American Psychiatric Association,” looks at whether the person “has committed illegal acts such as forgery, fraud, theft, or embezzlement to finance gambling.”48 Gamblers Anonymous asks twenty questions to determine if someone is a problem gambler, including “[h]ave you ever committed, or considered committing, an illegal act to finance gambling?”49

NGISC, supra note 38, at 14. Richard C. Leone, a member of the National Gambling Impact Study Commission wrote:

Lotteries, especially, seem to bring out the worst in politicians. They are heavily and misleadingly advertised; they pay back to bettors the smallest share of the take of any legal game; and they are an extremely regressive form of taxation, hitting hardest those with least ability to pay. Yet, lotteries have proven to be catnip for elected officials who fear taxation.

Id. at 57.

Further, most gambling simply transfers money from one sector of a state’s economy to another. The exceptions are those states, like Nevada and New Jersey, with “destination casinos” where tourists come to gamble. This of course damages the economy of states where such money might otherwise be spent and places pressure on them to allow destination casinos. It is in many ways a race to the bottom.

47. See, e.g., Lustberg, supra note 39, at 54 (citing Henry R. Lesieur & Richard J. Rosenthal, Pathological Gambling: A Review of the Literature Prepared for the American Psychological Association Task Force on DSM-IV Committee on Disorders of Impulse Control Not Elsewhere Classified, 7 J. OF GAMBLING STUD. 5, 24 (1991) (collecting studies regarding criminal activity among compulsive gamblers)) (“numerous studies have revealed the link between compulsive gambling and crime”). The Detroit News reports

[a] seven-city research project by University of Nevada-Reno . . . found that each city had sharp increases in theft, domestic abuse and drug crimes after the opening of casinos. The cities also had an increase in personal bankruptcies.

A separate study by University of Illinois economist Earl Grinols suggests that higher crime rates begin to appear three years after casinos open, perhaps because it takes chronic gamblers that long to exhaust their resources.

Shepardson, supra note 33, at A1.

48. DSM-IV, supra note 5, at 312.31.

Prof. Henry R. Lesieur, a leading expert on the problems of pathological gambling, has done studies revealing that pathological gamblers commit crimes, including embezzlement and insurance fraud, far more often than non-gamblers. His 1995 survey of Gamblers Anonymous members in Illinois found that 46% admitted to some illegal act, including writing bad checks, stealing, or embezzling from their employer. A similar study in Wisconsin revealed that 49% had stolen to finance gambling and 39% had been arrested. In fact, the “American Insurance Institute has called gambling the main cause of white-collar crime.”

The “Gambling Impact and Behavior Study” commissioned by Congress through the National Gambling Impact Study Commission (“NGISC”) also showed a clear correlation between gambling addiction and crime. The study showed that “those with more gambling symptoms have much higher rates of lifetime arrests and imprisonment.” The study revealed, “Pathological and problem gamblers in treatment populations often reveal that they have stolen money or other valuables in order to gamble or pay for gambling debts.” A similar study commissioned by the State of Montana concluded that “pathological gamblers are more likely to be involved in crime and are more likely to be handled by the criminal justice system.” It is possible that the same factors in a person’s life that

(last visited February 10, 2003).


51. Id.

52. Id.

53. Wisbar, Resources for Wisconsin Attorneys and the Public, Gambling Addiction, http://www.wisbar.org/bar/gambling.html (last visited February 13, 2002). In Minnesota, for example, a growth in financial crimes has attended the explosion of gambling in the state: “[E]mployers are losing hundreds of thousands of dollars a year to gambling-related thefts by employees.” Dennis J. McGrath & Chris Ison, Gambling Spawns a New Breed of Criminal, Star Trib., Dec 4, 1995, at 1A. Judges and prosecutors in Michigan have reported an increase “in theft and embezzlement cases, many arising from problem gambling.” Rising Crime Blamed on Gambling, Associated Press, Nov. 1, 2000. A U.S. News & World Report analysis found that crime rates in casino cities are 84% higher than the national average, and that while crime rates dropped nationally in 1994, in thirty-one communities that introduced casinos crime increased by 7.7%. Shapiro, supra note 42, at 58.

54. Nat’l Opinion Research Ctr., supra note 50, at 47.

55. Id.

lead to gambling may also lead to crime, but whatever factors lead them there, compulsive gamblers commit crimes far more often than do others.57

However, while compulsive gamblers commit crimes more frequently than the population as a whole, this fact does not answer the question whether the gambling addiction in fact decreases their ability to obey the law or merely gives them a more powerful motive to steal. That is a question that psychologists have been unable to answer clearly, but much evidence suggests that compulsive gamblers do not lose their ability to obey the law.58

With this backdrop, the rest of this Comment will analyze three issues: (1) whether a proper interpretation of the Guidelines permits compulsive gambling to be a factor for departure when the crime committed is not a gambling-related offense, and if so, what the link must be between the gambling addiction and the crime; (2) whether the difficulty in diagnosing and measuring compulsive gambling mitigates against its use as a factor for downward departure; and (3) whether downward departures based on compulsive gambling are consistent with the Guidelines’ treatment of other factors.

IV. THE DIMINISHED CAPACITY GUIDELINE

The diminished capacity guideline states that a sentence below the applicable guideline range may be appropriate “if the defendant committed the offense while suffering from a significantly reduced mental capacity.”59 If the judge finds that departure is appropriate, “the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.”60 However, departure is not allowed if: (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the crime involved violence or a serious threat of violence; or (3) the criminal history of the offender reveals that

57. The social impacts of gambling are not limited to crime. “Such costs include unemployment benefits, welfare benefits, physical and mental health problems, theft, embezzlement, bankruptcy, suicide, domestic violence, and child abuse and neglect.” NGISC, supra note 38, at 16.

58. See infra Part V.A–B.

59. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2001). Diminished capacity departures are an exception to the rule that “mental and emotional conditions are not ordinarily relevant” to determining a sentencing departure. Id. § 5H1.3.

60. Id. § 5K2.13.
there is a need for incarceration to protect the public. The purpose of this guideline is to make punishment comport with culpability—mitigating punishment for defendants who, while not legally insane, deserve less punishment because of some condition that society views as making the defendant less culpable.

Before the diminished capacity guideline was amended in 1998, some courts had held that “significantly reduced mental capacity” included a volitional as well as a cognitive prong. In 1998, the Sentencing Commission, recognizing this split, amended the guideline to recognize volitional impairments. In the amendment, the Commission defined significantly reduced mental capacity as a “significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.” Definition (A) covers cognitive impairments and gives a defendant the excuse that he did not understand that the criminal act he was committing was wrong. Definition (B) covers volitional impairments and allows the defendant to argue that while he knew the behavior was wrong, he was unable to control his actions. This Comment is concerned only with Definition (B). Section A below

61. Id.

62. The Sentencing Commission adopted the definition of significantly reduced mental capacity that the Third Circuit Court of Appeals promulgated in United States v. McBroom, 124 F.3d. 533 (3d Cir. 1997). Originally, in United States v. Hamilton, 949 F.2d 190, 193 (6th Cir. 1991), the court rejected a downward departure based on a gambling addiction, noting that the defendant “was able to absorb information in the usual way and to exercise the power of reason,” thereby rejecting the notion that the diminished capacity guideline included volitional impairments. In McBroom, however, the Third Circuit overturned similar reasoning by the district court and found that the phrase “reduced mental capacity” included an inability to conform one’s actions to the requirements of the law. 124 F.3d at 546. This debate is not a new one. M’Naghten’s Rule was criticized because it did not allow for a volitional element but was limited to cognitive impairments. See ANDRE A. MOENNSSENS ET AL., CRIMINAL LAW 970 (6th ed. 1998). The Model Penal Code included a volitional prong to supplement M’Naghten’s Rule: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.” Id. at 544. However, in the Insanity Defense Reform Act of 1984, Congress “deleted the ‘volitional prong’ of the insanity defense.” Id. at 545 (citing 18 U.S.C. § 17 (1984)).


64. The amendment became effective on November 1, 1998. The original guideline read:

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants,
will discuss the interpretations that have been given to the diminished capacity guideline, including some of the concerns with each interpretation. Section B will briefly argue that the compromise interpretation is most in conformity with the purpose of the volitional impairment guideline.

A. Interpreting the Diminished Capacity Guideline

Three different approaches have been taken toward the diminished capacity guideline for volitional impairments. First, some assert that the language of the guideline requires that for a volitional impairment to be an appropriate factor for departure, the defendant must have an inability to control the behavior constituting the offense. In other words, for compulsive gambling to be a factor for departure, the underlying crime would have to be a gambling offense, not collateral behavior that enables the gambling. Compulsive gambling, this argument proposes, creates an uncontrollable urge to gamble, not to steal. A second interpretation requires merely that the gambling addiction provide a motive for the offense. As long as the crime is explained by the compulsive gambling, a sort of but-for test, the defendant can be granted a downward departure. The third interpretation focuses on whether the volitional impairment actually impaired the defendant’s ability to resist the crime in question rather than merely provided a motive for the crime, though the crime does not necessarily have to be directly related to gambling or be a gambling offense. In other words, merely establishing that a person embezzled money because he was a compulsive gambler is not enough. Expert testimony would have to

a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant’s criminal history does not indicate a need for incarceration to protect the public.


65. See, e.g., United States v. Carucci, 33 F. Supp. 2d 302, 302–03 (S.D.N.Y. 1999) (rejecting request for downward departure based on gambling addiction and stating that “a compulsive gambler is not, a fortiori, a compulsive illegal trader”).

66. See, e.g., United States v. Sadolsky, 234 F.3d 938, 943 (6th Cir. 2000) (granting a departure based on compulsive gambling and holding that the guideline does not distinguish between diminished capacity “that explain[s] the behavior that constituted the crime . . . [or] that explain[s] the behavior that motivated the crime”).

67. See, e.g., United States v. Roach, 296 F.3d 565 (7th Cir. 2002) (denying downward departure based on addiction to shopping where defendant did not show diminished ability to obey the law).
establish that the compulsive gambling significantly impaired the defendant’s ability to act within the law. There is no clear majority approach.

1. Interpreting the guideline to require a direct link

The most rigid reading of the diminished capacity guideline would disallow a court from departing downward based on a gambling addiction when the underlying crime was not a gambling offense. This approach seems to have been the controlling construction in United States v. Carucci, where the defendant, a floor broker at the New York Stock Exchange, had engaged in illegal trading to support his compulsive gambling disorder. The court rejected his request for downward departure stating that if his crime were unlawful gambling he would have a colorable argument, but “a compulsive gambler is not, a fortiori, a compulsive illegal trader.”

This interpretation is arguably required by the Guidelines’ definition of significantly reduced mental capacity. The definition reads

“Significantly reduced mental capacity” means the defendant, although convicted, has a significantly impaired ability to (A)
understand the wrongfulness of the behavior *comprising the offense*
or to exercise the power of reason [(cognitive)]; or (B) controlbehavior that the defendant knows is wrongful [(volitional)].\(^7\)

Cognitive impairment departures are explicitly limited to cases in which the defendant’s impairment prevents him from understanding the wrongfulness of the behavior “comprising the offense.”\(^7\) The volitional impairment clause uses the same words, “wrongful” and “behavior.”\(^7\) There is no indication that the Sentencing Commission intended wrongful behavior to be limited to the behavior constituting the offense for cognitive impairments but did not intend the same for volitional impairments. After all, the definition comprises a single sentence. It is an axiom of judicial interpretation that the same or similar language used in close proximity is construed to mean the same thing.\(^7\)

However, the opposite could also be the correct construction. The fact that the Commission used such explicit language respecting cognitive impairments but did not repeat the restriction in the subsequent clause defining volitional impairments could indicate that the Commission did not desire to inhibit volitional impairments in the same manner as cognitive impairments. Limiting cognitive impairments in this manner but not volitional impairments makes sense considering the nature of the impairments. If the defendant understands the wrongfulness of the behavior comprising the offense, mitigation based on a cognitive impairment would be inappropriate because the defendant was not cognitively impaired. However, it is possible that a defendant with a volitional impairment, such as compulsive gambling, may have an impaired ability to control behavior collateral to gambling which nonetheless enables his gambling.

\(^7\) U.S. SENTENCING GUIDELINES MANUAL § 5K2.13, cmt. n.1 (2001) (emphasis added).
\(^7\) Id.
\(^7\) Id. at n.1(B).
\(^7\) See Reves v. Ernst & Young, 507 U.S. 170, 177 (1993) (When a word is used twice in the same phrase it is “reasonable to give each use a similar construction.”).
2. Behavior that motivates the crime

The strict interpretation above was rejected in United States v. Sadolsky. Sadolsky was a regional manager for Sears Roebuck who, over a period of six months, credited returned merchandise to his own credit card (collateral behavior) in order to pay gambling debts in the amount of $30,000. At sentencing, Sadolsky’s request for a downward departure under section 5K2.13 due to his gambling addiction was granted. On appeal, the government argued that the departure was improper because the underlying crime was not a gambling offense. The Sixth Circuit rejected the government’s argument stating, “[s]ection 5K2.13 does not distinguish between [volitional impairments] that explain the behavior that constituted the crime charged and [volitional impairments] that explain the behavior that motivated the crime. . . . 5K2.13 does not require a direct causal link between the [volitional impairment] and the crime charged.” The court offered little justification for this cursory statement. More troubling, the court never addressed whether Sadolsky’s gambling problem in fact impaired his ability to obey the law, a different question from whether the gambling problem

75. 234 F.3d 938 (6th Cir. 2000).
76. Id. at 940.
77. Id.
78. Id. at 942–43.
79. Id. at 943. Other than this cursory statement, the court never addressed the government’s proposed interpretation of the Guidelines or why the Commission would limit cognitive impairments to behavior “comprising the offense” but not do the same with respect to volitional impairments. Nor did the court determine what “behavior that the defendant knows is wrongful,” U.S. Sentencing Guidelines Manual § 5K2.13, cmt. n.1 (2001), would be if it is not the behavior constituting the offense. The court in Sadolsky cites United States v. Harris, 1994 WL 683429 (S.D.N.Y. 1994), a case decided before the amendment was added to the Guidelines defining significantly reduced mental capacity. In Harris, the judge specifically refused to address the question of causation because he found that the defendant failed to prove he had a pathological gambling disorder. Sadolsky also cited McBroom for the proposition that section 5K2.13 does not distinguish between behavior that constitutes the crime and behavior that motivates the crime. However, in McBroom, the volitional impairment (an addiction to all manner of pornography) was directly related to the crime (possession of child pornography). United States v. McBroom, 124 F.3d 533 (3d Cir. 1997). Finally, the court in Sadolsky also cites United States v. Cantu, 12 F.3d 1506, 1515 (9th Cir. 1993), for the proposition that a significantly reduced mental capacity need only be a contributing cause and not the sole or but-for cause of the crime. However, this begs the question whether the volitional impairment was directly related to the offense and lends nothing to an interpretation of the diminished capacity guideline. Cantu was also decided five years before the guideline was amended.
motivated the crime. Nevertheless, Sadolsky has been followed by other courts.

The Sixth Circuit also believed the strict interpretation could lead to arbitrary results. For example, the Sixth Circuit noted that under the government’s proposed interpretation “if someone with an eating disorder stole food, he or she would be entitled to a downward departure. . . . If, however, that same person stole money to buy food, he or she would not be entitled to a downward departure.” This analogy at least partially misses the point of the strict interpretation. The proffered interpretation would in fact prohibit departures where the defendant either stole food or stole money to buy food. An inability to resist the desire to eat does not automatically lead to an inability to resist the desire to steal food or to steal money to buy food. Many people with compulsions would nonetheless refuse to steal even if necessary to support their habit. It may be that those who do steal under such circumstances simply have fewer compunctions about doing so, not that their compulsion to eat is any greater than those who refuse to steal. The difference could be one of morality, not compulsion.

80. One of the inherent difficulties with volitional impairments is the lack of clear standards for determining when they exist. Sadolsky’s behavior occurred over several months and involved detailed planning, yet the court accepted the proposition that, because of a compulsive gambling disorder, Sadolsky could not help himself. Further, Sadolsky did not steal the money to gamble but rather stole it to pay off his gambling debts. The court never addressed how its decision could be squared with the Guidelines’ prohibition of departures based on economic hardship. U.S. SENTENCING GUIDELINES MANUAL § 5K2.12.


82. Sadolsky, 234 F.3d at 943.

83. The court in United States v. Davis, 772 F.2d 1339, 1347 (7th Cir. 1985), said: [I]t does not seem to us enough to show that gambling is compulsive, . . . money is necessary for gambling and therefore the stealing of money is equally “compulsive.” The stealing may follow as a matter of logic or means-end reasoning but this in itself should not necessarily result in a psychiatric characterization of the act of stealing as “compulsive.”

84. In fact, as the statistics cited in Part III above demonstrate, a large number of compulsive gamblers have resisted the compulsion to steal to continue their gambling habit, many by choosing to get professional help instead. A classic criminal law case perhaps illustrates this point. Four men are stranded on a boat with nothing to eat; they are starving and near death. There is little doubt that if food were placed before them they could hardly resist its temptation. Three of the men decide to cast lots to see which of the men will be killed for the...
This is not the first time these issues have been raised. Numerous defendants attempted to use compulsive gambling as an insanity defense in cases where the underlying offense was not gambling related but was motivated by a gambling disorder. The volitional insanity cases unanimously rejected testimony of compulsive gambling under the volitional prong of the insanity defense where the underlying crime was not a gambling offense. These cases generally state, for example, that “there does not exist the requisite nexus between compulsive gambling and non-gambling offenses generally. . . for a compulsive gambling disorder to serve as the basis of an insanity defense to such offenses.”

However, the purpose of the diminished capacity guideline is to mitigate punishment, not eliminate it. Thus, the guideline provides that the reduction in sentence should reflect the degree to which the volitional impairment contributed to the commission of the offense. That the volitional impairment motivated the offense should not be enough, nor should it matter if the behavior was collateral to the volitional impairment. The critical issue is whether the volitional impairment in fact diminished the defendant’s ability to control his behavior, whether collateral or not. This is not to say that whether or not the offense behavior was a gambling-related offense is irrelevant. As the volitional insanity compulsive gambling cases demonstrate, “a compulsion to gamble, even if a mental disease or defect, is not, \textit{ipso facto}, relevant to the issue whether the

other to eat so that the others may survive. The fourth man, whose compulsion to eat is just as great as the others; refuses to participate because of moral qualms the others do not share to the same degree. The difference between the men is not one of compulsion, but of morality. See Lon Fuller, \textit{The Case of the Speluncean Explorers}, 62 HARV. L. REV. 616 (1949).

85. United States v. Carmel, 801 F.2d 997, 999 (7th Cir. 1986); \textit{see also} United States v. Davis, 772 F. 2d 1339, 1347 (7th Cir. 1985) (refusing to allow evidence of compulsive gambling where defendant had failed to show acceptance among scientific community that “compulsive gambling involves in some persons the inability to conform their conduct to the laws prohibiting check forgery” and noting that the district court would have allowed the evidence if the offense charged was a gambling offense); United States v. Gould, 741 F. 2d 45, 48 (4th Cir. 1984) (agreeing with \textit{Lewellyn} and \textit{Torniero} in rejecting compulsive gambling “as the basis for an insanity defense to criminal offenses collateral to gambling”); United States v. Torniero, 735 F.2d 725, 732 (2d Cir. 1984) (“[A] compulsion to gamble, even if a mental disease or defect, is not, \textit{ipso facto}, relevant to the issue whether the defendant was unable to restrain himself from non-gambling offenses such as transporting stolen property.”); United States v. Lewellyn, 723 F. 2d 615, 619 (8th Cir. 1983) (rejecting testimony of compulsive gambling where defendant failed to show general acceptance of the theory that “pathological gamblers lack substantial capacity to refrain from committing embezzlement”).

86. \textit{U.S. SENTENCING GUIDELINES MANUAL} § 5K2.13.
defendant was unable to restrain himself from non-gambling offenses.\textsuperscript{87} Thus, courts should be wary of requests for downward departure when the offense behavior is not directly related to the pathological problem.

3. The Roach approach

An intermediate approach was fashioned in \textit{United States v. Roach}\textsuperscript{88} when the court agreed with \textit{Sadolsky} that the diminished capacity guideline does not distinguish between direct and indirect causes but also noted that “understanding the defendant’s motive does not necessarily reveal anything about the defendant’s mental capacity at the time of the offense.”\textsuperscript{89} This approach is a much more fact-specific inquiry, as the analysis in \textit{Roach} demonstrates.

Roach suffered from chronic depression and compulsively shopped to relieve her depression. She embezzled more than $240,000 from her employer by submitting false expense reports, not because she needed the money to shop, but to hide the shopping expenses from her husband.\textsuperscript{90} In fact, she had shopped compulsively for years without committing theft of any kind. The embezzlement began when Roach submitted an expense report for conference registration fees that she had placed on her personal credit card.\textsuperscript{91} When she was unable to attend the conference, the fees were refunded but not until after her employer had already reimbursed her.\textsuperscript{92} Roach continued to submit false expense reports until she was caught. After Roach pled guilty, the trial court, citing \textit{Sadolsky}, granted her a downward departure based on her compulsive shopping disorder.\textsuperscript{93}

\textsuperscript{87} Torniero, 735 F.2d at 732.
\textsuperscript{88} 296 F.3d 565 (7th Cir. 2002). \textit{Roach} is a compulsive shopping case, not a compulsive gambling case; however, the use of \textit{Roach} here is meant to demonstrate a proper interpretation of the diminished capacity volitional impairment guideline. Since compulsive shopping is a volitional impairment, the use of \textit{Roach} here seems appropriate.
\textsuperscript{89} Id. at 570. “We agree with the government that § 5K2.13 requires more than a connection between the impairment and the motive.” Id. at 569.
\textsuperscript{90} Id. at 566–67. In fact, she and her husband combined earned more than $300,000 a year.
\textsuperscript{91} Id at 567.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 567–68.
At the sentencing hearing, several psychiatrists testified as to Roach’s compulsive shopping, but none clearly established her inability to control her fraudulent “conduct at the time of her offense.” The first psychiatrist testified that compulsive shoppers often “commit illegal acts . . . to finance their illness.” The Seventh Circuit, in overturning the departure, rejected the testimony, noting that “missing from [the psychiatrist’s] statement is any conclusion that this aspect of the disorder even applies to Roach or, if it did, any assessment of the role it played at the time of her offense.”

The second psychiatrist testified that during her criminal activity Roach was “functioning in a dissociated state in which information about the legal, practical and moral consequences of her actions was not effectively available to her.” The appellate court also rejected this testimony because of “Roach’s own statements that she began the fraud after inadvertently discovering that she could” and not because of an overwhelming compulsion. Because of the “episodic nature of her impairment, and the fact that Roach had ‘self-medicated’ her depression and compulsively shopped for more than ten years without any criminal activity,” the court found a lack of evidence supporting a diminished capacity to control fraudulent behavior.

The third psychiatrist was similarly unhelpful. His “only observation about Roach’s offense conduct—that she defrauded her employer in an attempt to hide her behaviors—tends to undermine, rather than support, a finding that Roach had a significantly impaired capacity to control her conduct at the time of the offense.” In the end, the appellate court overturned the departure because the findings on Roach’s motives did not “establish the critical issue of her mental capacity at the time of the offense.” The court found that “the analytic leap from a shopping compulsion to a significantly impaired ability to control fraudulent conduct spanning three years is

94. Id. at 571–73.
95. Id. at 572.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id.
101. Id. at 573.
102. Id.
too great to make”\textsuperscript{103} where the defendant had clearly demonstrated the capacity for self-control.

Roach had suffered from compulsive shopping most of her adult life. She did not become a thief until the opportunity serendipitously presented itself and then she did so only to hide the activity from her husband—not because she could not help herself.\textsuperscript{104} Thus, while Roach almost certainly would not have stolen the money “but-for” her shopping compulsion, such a motive alone was not enough to overcome the fact that she had managed to avoid such criminal activity for years before turning to crime. The court focused on the critical question of the diminished capacity guideline, whether Roach’s ability to obey the law was significantly diminished because of her volitional impairment.

\textbf{B. Following the Roach Approach}

The approach taken by the Seventh Circuit in \textit{Roach} is the most consistent with the Guidelines. First, it focuses on the primary question of diminished capacity—whether the defendant in fact had a significantly impaired ability to resist his unlawful behavior. Second, it does not rely on the type of crime involved, as would the strict approach discussed above, but it does exercise caution towards a request for downward departure based on behavior collateral to the compulsion.

The \textit{Roach} approach is also most in line with the policy of the diminished capacity guideline to ease the punishment of those who lack substantial capacity to control their behavior and mete out punishment to reflect the level of culpability, regardless of the underlying crime. The \textit{Sadolsky} approach, on the other hand, is dangerous both to the goal of uniformity and to the policy of the Guidelines. Compulsive behavior motivates any number of crimes, and every sentencing judge “could have his or her own view of an unlimited array of pathologies as being the cause of the particular criminal behavior.”\textsuperscript{105} Furthermore, establishing motive does not

\textsuperscript{103}. \textit{Id.} at 572–73.

\textsuperscript{104}. The Seventh Circuit even hinted that such a holding otherwise might conflict with the Guidelines’ prohibition of departures based on personal financial difficulties and economic pressure but withheld judgment on that issue because it was not before the court. \textit{Id.} at 571 n.4 (citing United States v. Sadolsky, 234 F.3d 938 (6th Cir. 2000)).

clarify the critical question of culpability, whether the impulse was irresistible or just not resisted. 106

Roach also raises several questions that are appropriate in the compulsive gambling context. For example, the court may want to know whether the defendant had expended all of his own resources and had only turned to theft as a last resort and the only means of satisfying the compulsion to gamble. The court would also want to know the circumstances that led to the theft. Was it indeed the desperate act of a compulsive gambler or simply an opportunity that unexpectedly presented itself? Had the defendant demonstrated the capacity for self-control? Was the motive in committing the theft in fact to satisfy a compulsive need to gamble, or was it to hide the gambling from a spouse, or even to pay off a gambling debt? The court may also want to know whether the defendant had ever stolen before he began to gamble, suggesting he may simply be a thief who happens to have a gambling problem. Finally, the court would want to know how long the defendant gambled before committing the theft. The fact that the gambling had continued for some time without the defendant turning to crime may suggest that the defendant did in fact have the capacity to control his criminal behavior. 107 Most importantly, the court must determine whether compulsive gambling causes diminished capacity. As the next section makes clear, that is not an easy question.

V. COMPULSIVE GAMBLING AND DIMINISHED CAPACITY

The above section discussed the proper interpretation of the diminished capacity guideline for volitional impairments. However, “[a] court only gets to [the guideline] when it has determined that

106. For example, imagine a compulsive gambler sitting at a slot machine who sees a $100 bill hanging out of the pocket of the man sitting next to him. The compulsive gambler still has plenty of money of his own, and has never stolen before, but realizes that if he takes this money he can hide his gambling from his wife, so he takes it. The theft is clearly motivated by his gambling addiction, but was it uncontrollable? He would have been able to satisfy his need to gamble without the money. Or imagine that he took the money, not to gamble, but to buy groceries on the way home because he had gambled away the grocery money. Does the theft still satisfy a compulsive need to gamble?

107. However, it may also be true that while the defendant resisted the compulsion to steal to support his habit for quite some time, at some point the compulsion may have worsened to the point that resisting became more difficult. Thus, the fact that he was able to resist for a time does not fully answer the question of whether, at the time of the offense, the defendant was still fully capable of resisting.
the defendant suffers from a diminished capacity." A gambling addiction gives a defendant a powerful motive for the crime, but there is little evidence it creates a lack of willpower greater than that exhibited by most criminals. Section A below makes a comparison with the volitional insanity defense and notes that compulsive gambling was generally rejected as a volitional impairment for insanity purposes because of a lack of evidence that it weakened the will of the individual. Section B will discuss some of the psychiatric evidence associated with compulsive gambling.

A. Compulsive Gambling Under the Volitional Insanity Defense

Following the acquittal of John Hinckley in 1982 for the attempted murder of President Reagan, a movement began to modify the insanity defense. The American Psychiatric Association had called for removal of the “volitional prong” from the insanity defense. The American Bar Association also supported ridding the criminal law of volitional impairment insanity. In 1984, Congress passed legislation eliminating the volitional prong from the federal insanity defense. The primary reason for this was the impossibility of distinguishing between those “unable to conform to the law from those unwilling to do so.”

108. United States v. Walter, 256 F.3d 891, 895 n.5 (9th Cir. 2001).
111. Torniero, 735 F.2d at 727 n.4 (quoting AMERICAN BAR ASSOCIATION POLICY ON THE INSANITY DEFENSE (1983)).
112. The Insanity Defense Reform Act (IDRA), 18 U.S.C. § 17 (1984) states: It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality of the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense. The IDRA not only rejected volitional impairments but also placed the burden of proving insanity on the defendant. Id. An Oregon statute placing the burden on the defendant was challenged on due process grounds but was upheld by the Supreme Court in Leland v. Oregon, 343 U.S. 790 (1952). Leland also found that the “irresistible impulse” test is not “implicit in the concept of ordered liberty and thus not found in the due process clause.” Id. at 801.
113. Pelayo, supra note 4, at 735 n.29 (citing S. REP. NO. 98-225, at 228 (1983)).
Perhaps the greatest difficulty with volitional impairments is there is no established means of measuring them. The Fifth Circuit, in rejecting volitional insanity, noted that “a majority of psychiatrists now believe that they do not possess sufficient accurate scientific bases for measuring a person’s capacity for self-control or for calibrating the impairment of that capacity.”114 The American Psychiatric Association agreed: “The line between an irresistible impulse and an impulse not resisted is probably no sharper than between twilight and dusk.”

Criminals as a class have generally exhibited a lack of will power. This was noted in United States v. Jones,116 where the court rejected a motion for downward departure in an embezzlement case involving a bank teller who was a compulsive gambler and needed the money to support her habit.117 The court found little difference between her and other criminals. “Need, real or perceived, is at the root of many types of crimes, especially embezzlements.”118 When presented with the opportunity to steal

there will almost always be a need, “compulsive” or “pathological,” to steal so long as the teller has an attitude that tolerates theft or other criminal or antisocial behavior. If a defendant could qualify for a downward departure by showing that a compulsive disorder provided his motive, then virtually all embezzlements could be excused to some degree, as caused by a need for money to gamble, carry on an affair, or to live a more lavish lifestyle.119

Compulsive gambling consistently failed as an insanity claim.120 In fact, care was taken in defining compulsive gambling to ensure that it would not qualify as volitional insanity. Thus, the DSM-III, the first psychiatric manual to include compulsive gambling as an

114. United States v. Lyons, 731 F.2d 243, 248 (5th Cir. 1984); see also Pelayo, supra note 4, at 735 n.29 (“It seems clear from the legislative history that Congress’s main concern in passing the IDRA was that the volitional insanity defense cannot be reliably administered at trial, because of inherent problems with distinguishing those unable to conform to the law from those unwilling to do so.”).

115. Lyons, 731 F.2d at 248 (quoting AMERICAN PSYCHIATRIC ASSOCIATION STATEMENT ON THE INSANITY DEFENSE, supra note 110, at 11).


117. Id.

118. Id. at *2.

119. Id.

120. See infra note 121 and accompanying text.
impulse control disorder, purposely defined the disorder as a “failure to resist rather than an inability to resist.” This made it unlikely that compulsive gambling would qualify as insanity under the volitional prong of the American Law Institute (“ALI”) insanity test, the accepted test in most federal circuits at the time. In fact, numerous cases rejected compulsive gambling under the ALI volitional insanity test, noting the lack of acceptance among the scientific community that compulsive gamblers lack the capacity to conform their conduct to the requirements of the law. The simple conclusion to be drawn was that compulsive gambling, while perhaps making it more difficult to resist criminal behavior, was in no way thought to excuse it or cause it.

121. See United States v. Torniero, 735 F.2d 725, 731 (2d Cir. 1984).

122. Id. The ALI approach was adopted into the Model Penal Code and allowed volitional impairments as an insanity defense when the defendant “lacks substantial capacity . . . to conform his conduct to the requirements of the law.” MOENNSSENS ET AL., supra note 62, at 1002. This approach supplemented M’Naghten’s Rule—a cognitive test only. The ALI approach was adopted by nearly all of the federal circuits, though sometimes with minor modifications. See Gov’t of V.I. v. Fredericks, 578 F.2d 927 (3d Cir. 1978); United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972); Wade v. United States, 426 F.2d 64 (9th Cir. 1970); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); United States v. Leister, 393 F.2d 920 (4th Cir. 1968); United States v. Smith, 404 F.2d 720 (6th Cir. 1968); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); Pope v. United States, 372 F.2d 710 (8th Cir. 1967); United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); Wion v. United States, 325 F.2d 420 (10th Cir. 1963). The First Circuit also suggested use of the test in remanding a case in Beltran v. United States, 302 F.2d 48 (1st Cir. 1962). These cases were all overturned by the Insanity Defense Reform Act. See supra note 108. However, some circuits had already abandoned a volitional insanity test. See, e.g., United States v. Lyons, 731 F.2d 243 (5th Cir. 1984).

123. See, e.g., United States v. Carmel, 801 F.2d 997, 999 (7th Cir. 1986) (rejecting testimony of compulsive gambling under the Frye test as irrelevant when the underlying crime was not gambling); United States v. Davis, 772 F.2d 1339, 1347 (7th Cir. 1985) (defendant failed to show “necessary support among the relevant professional and medical community for the proposition that compulsive gambling involves in some persons the inability to conform their conduct” to the law); United States v. Gould, 741 F.2d 45, 49–51 (2d Cir. 1984) (defendant failed to meet a test of “foundational relevance” by showing “substantial acceptance” that “pathological gambling may deprive some persons of the capacity to conform their conduct to the requirements of the law” at least where a non-gambling offense is involved); United States v. Torniero, 735 F.2d 725, 731–32 (2d Cir. 1984) (no showing of substantial acceptance among respected authorities in the mental health profession that a compulsive gambler is unable to resist the impulse to steal); United States v. Lewellyn, 723 F.2d 615, 619 (8th Cir. 1983) (defendant failed to make “required minimum showing . . . that some pathological gamblers lack substantial capacity to conform their conduct to the requirements of laws . . .”).

124. The American Psychiatric Association wrote that “persons with antisocial personality disorders [such as compulsive gambling] should, at least for heuristic reasons, be
While the insanity cases were in the context of determining ultimate guilt rather than degree of punishment, the question is the same—whether compulsive gambling in some way overpowers the will of the individual. A gambling addiction may give a defendant a powerful motive for a crime but there is little evidence that it causes a loss of control beyond that exhibited by most people in prison. The Supreme Court noted,

Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for anti-social criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

B. Does Compulsive Gambling Cause Diminished Capacity?

There is serious debate about the effects of compulsive gambling on the individual. For treatment and clinical purposes, the DSM-IV terms “pathological gambling” as an Impulse Control Disorder.

held accountable for their behavior.” Torniero, 735 F.2d at 733 (quoting AMERICAN PSYCHIATRIC ASSOCIATION STATEMENT ON THE INSANITY DEFENSE, supra note 110, at 11).

125. It is not necessarily inconsistent for compulsive gambling to mitigate punishment while not completely excusing the crime:

That compulsive gambling may lessen a convicted defendant’s punishment, though it may not constitute a defense precluding his or her conviction, engenders no inconsistency whatsoever. The liability phase of a criminal trial determines whether the defendant has committed an offense and, if so, whether there is a justification or excuse that warrants withholding blame for his or her actions. The purpose of sentencing, on the other hand, is to impose a just punishment, in light of the nature and circumstances of the offense and the history and characteristics of the defendant. It is thus not surprising that, while a jurisdiction may reject a particular defense, it will allow the very same facts to provide a basis for the mitigation of sentence.

Lustberg, supra note 39, at 73. This view is supported by the language of the guideline stating that the extent of the departure should reflect the extent to which the diminished capacity contributed to the crime. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13. It is also supported by the policy that punishment should comport with culpability. However, this does not resolve the difficulties in measuring volitional impairments, nor the fact, as discussed below, that gambling addiction may not in fact cause a lack of control when it comes to criminal behavior.


127. DSM-IV, supra note 5, at 312.31. Other impulse control disorders include kleptomania, pyromania, and trichotillomania (pulling out one’s hair). Id. The DSM-IV offers
Under the DSM-IV criteria, pathological gambling is diagnosed in a person who exhibits any five or more of the following factors:

(1) is preoccupied with gambling . . . ;

(2) needs to gamble with increasing amounts of money in order to achieve the desired excitement;

(3) has repeated unsuccessful efforts to control, cut back, or stop gambling;

(4) is restless or irritable when attempting to cut down or stop gambling;

(5) gambles as a way of escaping from problems or of relieving a dysphoric mood . . . ;

(6) after losing money gambling, often returns another day to get even . . . ;

(7) lies to family members, therapist, or others to conceal the extent of involvement with gambling;

(8) has committed illegal acts such as forgery, fraud, theft, or embezzlement to finance gambling;

(9) has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling; or

(10) relies on others to provide money to relieve a desperate financial situation caused by gambling.\textsuperscript{128}

\textit{a word of caution as to its use in the legal field:}

[1] Inclusion here, for clinical and research purposes, of a diagnostic category such as Pathological Gambling does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder or mental disability. The clinical and scientific considerations involved in the categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination and competency.

\textit{Id.} at xxxvii.

\textsuperscript{128} \textit{Id} at 312.31. Numbers (2), (4), (5), and (9) suggest that gambling addiction is similar to drug and alcohol addiction, forbidden factors under the guidelines. \textit{See infra} Part V.C.

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Only number three indicates an impaired ability to control behavior that one knows is wrongful, and even it speaks only of “unsuccessful efforts,” not inability or even impaired ability. In fact, even though classified as an impulse control disorder, there is little evidence that loss of control is a distinctive feature of pathological gambling.129 Many authors believe that “pathological gamblers do not really experience irresistible impulses and that they retain control over their behaviour.”130 Some studies suggest that personality and social attachment are more the cause of crime among gamblers than a gambling addiction.131 This makes compulsive gamblers who steal little different from other criminals who also generally exhibit a lack of willpower and not a lack of control.

In sum, there are inherent dangers of misdiagnosis with volitional impairments, and there is serious disagreement as to whether compulsive gambling actually results in a loss of self-control. Because of this, courts should be wary of claims that compulsive gambling seriously impaired the gambler defendant’s ability to obey the law. Compulsive gamblers are worthy of sympathy, especially in light of the fact that the state often compounds their problem by promoting gambling. However, unless they can demonstrate more than a failure of will, they should not be granted a downward departure. Certain punishment may provide a counterbalancing effect to the otherwise powerful pull of pathological behavior.

VI. INCOMPATIBILITY WITH OTHER GUIDELINE FACTORS

This Comment argues that downward departures based on compulsive gambling should not be granted. This argument is partially based on the difficulty of diagnosing and measuring compulsive gambling disorders. There is at least one more reason to make such departures rare. Downward departures based on compulsive gambling are inconsistent with several other provisions of


130. Id.

the Guidelines. Several of the other guidelines bear on departures based on compulsive gambling. Downward departures for diminished capacity are the exceptions to the rule that “[m]ental and emotional conditions are not ordinarily relevant” in determining sentencing departures. Allowing downward departures based on gambling addiction would also create severe conflict with the Guidelines’ treatment of drug and alcohol addiction. Finally, several of the gambling addicts who have received downward departures stole to pay off gambling debts, a seeming conflict with the Guidelines’ prohibition of departures based on economic need.

A. Similarity to Drug and Alcohol Addiction

Pathological gambling is an inappropriate factor for consideration because of its similarity to drug and alcohol addiction—forbidden factors under the Guidelines. One commentator has noted that the Guidelines’ requirement “that the defendant’s ‘reduced mental capacity’ not be caused by the ‘voluntary use of drugs or other intoxicants’ [suggests] . . . that the drafters specifically sought to limit application of the [diminished capacity] provision to those who could not be deemed ‘responsible’ for their mental state.” If this is true then it applies equally to gambling addiction.

“Pathological gambling, clinically speaking, is generally considered analogous to alcoholism and substance abuse as they are often present in the same people, as well as in the same families.” Pathological gambling is often treated successfully in treatment programs with substance abusers. Clearly, gambling is different than substance abuse; however,

133. Id. § 5K2.12; see, e.g., United States v. Sadolsky, 234 F.3d 938 (6th Cir. 2000).
134. U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 (2001); see Langewisch & Frisch, supra note 129 (citing S.B. Blume, Compulsive Gambling and the Medical Model, 3 J. GAMBLING BEHAVIOR 237 (1987)).
137. Langewisch & Frisch, supra note 129.
what gamblers often describe as the sensation they experience while gambling is similar to the sensation substance abusers describe when using drugs or alcohol. Gambling, similar to drug and alcohol abuse, are [sic] all characterized by increases in tolerance, cravings and a consistent need to continue to take the drug or indulge in the behavior.\footnote{Id.}{138}

At least one circuit court, while refusing to review the district court’s discretionary decision not to depart downward, agreed with the district court that the “general purpose of deterrence would be ill served by discounting appellant’s sentence” on the basis of a gambling addiction because “such a dependence would be akin to drug or alcohol addiction.”\footnote{United States v. Harotunian, 920 F.2d 1040, 1047 (1st Cir. 1990).}{139}

To distinguish between drug and alcohol addiction and gambling addiction does not serve a primary goal of the Sentencing Guidelines—uniformity.\footnote{U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2001).}{140} Drug and alcohol dependence are forbidden factors at least partly because “[s]ubstance abuse is highly correlated to an increased propensity to commit crime.”\footnote{Id. § 5H1.4.}{141} Further, drug and alcohol use cannot be used to argue diminished capacity because it is “voluntary.”\footnote{Id. § 5K2.13.}{142} Both reasons apply equally, if not more forcefully, to gambling addiction. In United States v. Katzenstein,\footnote{No. 90 CR 272 (KNW), 1991 WL 24386 (S.D.N.Y. 1991).}{143} the court refused to grant a downward departure based on a gambling addiction and rejected the defendant’s contention that gambling addiction should be distinguished from drug and alcohol addiction. The court stated:

The Sentencing Guidelines’ rationale for distinguishing between significantly reduced mental capacity (1) resulting from voluntary use of drugs or other intoxicants, and (2) resulting from other causes, is opaque. The only two clues to the rationale found in the Sentencing Guidelines are, first, the reference to the use of intoxicants as ‘voluntary,’ and, second, the statement that substance abuse is highly correlated to an increased propensity to commit crime.

\footnote{Id.}{138}
\footnote{United States v. Harotunian, 920 F.2d 1040, 1047 (1st Cir. 1990).}{139}
\footnote{U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2001).}{140}
\footnote{Id. § 5H1.4.}{141}
\footnote{Id. § 5K2.13.}{142}
\footnote{No. 90 CR 272 (KNW), 1991 WL 24386 (S.D.N.Y. 1991).}{143}
Defendant[ ] . . . has not convinced the court that compulsive gambling disorder can be distinguished in any [principled] way from abuse of drugs or alcohol.144

The decision to gamble is as voluntary as the decision to use alcohol or drugs and both lead to an increased propensity to commit crime.145 As such, the reasons the Sentencing Commission has given for forbidding diminished capacity departures based on the voluntary use of intoxicants and for forbidding all departures based on drug and alcohol addiction apply just as forcefully to compulsive gambling. Unlike drug and alcohol use, there is no mental impairment associated with gambling addiction and, as discussed above, it is not clear that gambling addiction causes a loss of self-control with respect to the resultant crime.146 Stealing to support a gambling habit is hardly distinguishable from stealing to support a drug or alcohol habit. To reward the gambling addict, who may in fact suffer from neither volitional nor cognitive impairment, while ignoring the chemical addict who often suffers from both, creates its own unwarranted disparity by making gambling addiction an encouraged factor for departure while leaving drug and alcohol addiction as forbidden factors.

B. Contradiction with Other Guidelines Factors

Departures based on gambling addiction conflict with at least two other provisions of the Guidelines. Downward departures based on mental and emotional conditions147 are discouraged while departures based on economic hardship148 are forbidden. Often times, compulsive

144. Id. at *2. But see Lustberg, supra note 39, at 68: [T]he fact that the Commission specifically barred the “voluntary use of drugs or other intoxicants” from contributing to the “significantly reduced mental capacity” . . . but did not treat gambling in the same manner, indicates its intention that gambling may be treated differently. That the Commission has not modified the Guidelines to explicitly account for compulsive gambling, as it has in light of other court decisions bearing upon the appropriateness of departure, is also indicative of the Commission’s acceptance of compulsive gambling as a potential basis for departure.

145. See supra Part III.B.

146. Even with drug addiction “there is an element of reasoned choice when an addict knowingly acquires and uses drugs; he could instead have participated in an addiction treatment program.” United States v. Lyons, 731 F.2d 243, 245 (5th Cir. 1984).

147. U.S. SENTENCING GUIDELINES MANUAL § 5H1.3.

148. Id. § 5K2.12.
gamblers steal money not to gamble but to pay off gambling debts. The motive in such cases is economic need, not a compulsive need. For example, in United States v. Rosen, the trial court rejected a request for downward departure where the defendant committed theft in order to pay off a home equity loan. The loan was taken out to pay off gambling debts but the court noted that the Sentencing Commission prohibited departures based on personal financial difficulties. A need for money is hardly a novel motive, even if a more powerful one because of the addiction.

In sum, one of the primary goals of the Guidelines was to promote uniformity and fairness. Downward departures based on gambling addictions undermine this goal. To make gambling addiction an encouraged factor for departure creates an unprincipled distinction between it and the Guidelines’ treatment of drug and alcohol use, economic need, and mental and emotional conditions.

VII. CONCLUSION

Gambling addictions are real and tragic, and current social policy only encourages this dreadful phenomenon while doing little to treat it. However, punishment should comport with culpability. The evidence suggests that compulsive gamblers do not have an impaired ability to obey the law. Thus, when a judge grants a downward departure to a pathological gambler he may be simply pardoning the common criminal who simply has a powerful motive to steal. A “more compelling motive . . . is not the kind of direct causation

149. 896 F.2d 789 (3d Cir. 1990), overruled on other grounds, United States v. Askari, 140 F.3d 536 (3d Cir. 1998).
150. Id. at 790.
151. The trial court also found that “there was no link between compulsive gambling and criminal behavior.” Rosen, 896 F.2d at 791 n.2. The court in Roach also noted the conflict between the diminished capacity guideline and the prohibition of departures based on economic need when defendants steal money to satisfy a compulsion, but the Roach court did not resolve the issue since it was not raised. United States v. Roach, 296 F.3d 565, 571 n.4 (7th Cir. 2002).
152. Koon v. United States, 518 U.S. 81, 92 (1996); see supra note 6 and accompanying text.
between mental capacity and commission of the offense envisioned” by the diminished capacity guideline.153

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