

CHALLENGING THE EXCLUSION OF GAMBLING DISORDER AS A DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT

KATHLEEN V. WADE[†]

ABSTRACT

The Americans with Disabilities Act explicitly excludes “compulsive gambling” from its definition of disability, thus denying gambling addicts protection from employer discrimination based on their disorder. Since the enactment of the ADA, however, scientific understandings of gambling disorder have evolved to view the condition as an addiction, rather than as a compulsion or impulse-control disorder. This move is mirrored in the DSM-5’s reclassification of gambling disorder under the category of “substance-related and other addictive disorders.”

This Note contends that gambling disorder would qualify as a “disability” under the ADA, were it not for the disorder’s current statutory exclusion. This Note therefore recommends that the ADA be amended to bring gambling disorder within its coverage. Such a change would not only reflect recent developments in the field of addiction psychology, but would also further the ADA’s underlying purpose—to protect individuals with disabilities from workplace discrimination.

INTRODUCTION

By 2005, John Trammell was \$30,000 in debt to the Las Vegas Stardust Hotel and Casino.¹ Although he “had gambled all his life,” Trammell’s habits grew more pronounced and “aggressive[]” as his

Copyright © 2015 Kathleen V. Wade.

[†] Duke University School of Law, J.D./LL.M. expected 2015; Furman University, B.A. 2012. Thanks to Professor Trina Jones for her insights and helpful edits; to the editors and staff of the *Duke Law Journal* for their hard work and unparalleled patience; and to my family for their unconditional support.

1. Steve Green, *Gamblers Strike Out in Suits Tied to Las Vegas Casino Markers*, LAS VEGAS SUN (Feb. 4, 2011, 2:05 AM), <http://www.lasvegassun.com/news/2011/feb/04/gamblers-strike-out-suits-over-las-vegas-casino-ma>.

marriage ended and his depression worsened.² In 2007, while investigating a serious car accident involving Trammell, Arizona police discovered a warrant for Trammell's arrest arising from his unpaid debts to the Stardust.³ At the time, Trammell was employed as a senior manager by the Raytheon Company, an American defense contractor and weapons manufacturer.⁴ When he returned to work after his arrest, Trammell met with Raytheon's human-resources department to discuss his gambling problem.⁵ Initially, Raytheon's human-resources personnel offered Trammell professional counseling.⁶ At a meeting just a few days later, Raytheon fired Trammell despite his expressed willingness to seek help.⁷

John Trammell's story is not unique; he is only one of an estimated six to eight million Americans with problematic gambling habits.⁸ Whether they wager on roulette, horse races, or lottery scratch cards,⁹ "problem gamblers" are individuals whose betting habits cause disruptions in their lives.¹⁰ When problematic gambling habits become "persistent and recurrent" and "lead[] to clinically significant impairment or distress," they rise to the level of "gambling disorder," a diagnosable addiction listed in the most recent edition of the *Diagnostic and Statistical Manual (DSM-5)*.¹¹

2. Trammell v. Raytheon Missile Sys., 721 F. Supp. 2d 876, 876–77 (D. Ariz. 2010).

3. *Id.* at 877.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. See *Help & Treatment FAQ*, NAT'L COUNCIL ON PROBLEM GAMBLING, <http://www.ncpgambling.org/help-treatment/faq> (last visited Jan. 23, 2015) (estimating populations of four to six million adults with problematic gambling habits and another two million adults whose gambling patterns are sufficiently severe to meet the criteria for pathological gambling disorder). For autobiographical accounts of other gambling addicts, see SAM SKOLNIK, *HIGH STAKES: THE RISING COST OF AMERICA'S GAMBLING ADDICTION* i–xxvi (2011); see generally MARY SOJOURNER, *SHE BETS HER LIFE: A TRUE STORY OF GAMBLING ADDICTION* (2010).

9. The meaning of "gambling," as used in this Note, generally adheres to a broad range of any activities in which money is risked. See BLACK'S LAW DICTIONARY 793 (10th ed. 2014) (defining gambling as "[t]he act of risking something of value, esp. money, for a chance to win a prize").

10. *Help & Treatment FAQ*, *supra* note 8.

11. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 585 (5th ed. 2013) [hereinafter *DSM-5*]. Although previous editions of the *DSM* had been enumerated with Roman numerals, the switch to Arabic numbers in the fifth edition was a deliberate move by the American Psychiatric Association (APA) to allow for incremental updates to the manual to be designated with decimals. AM. PSYCHIATRIC ASS'N, *Frequently*

Just as Trammell saw a significant increase in the frequency of his gambling during a period of stress, people with gambling disorder often use betting as a way to cope with negative feelings of stress, anxiety, guilt, and depression.¹² Continued reliance on gambling as a coping mechanism can magnify the addiction: once a preoccupation with gambling places a strain on a person's finances, relationships, or job, the stress resulting from that strain may drive that person to gamble even more frequently.¹³ In fact, excessive-gambling behavior is associated with higher rates of divorce, bankruptcy, homelessness, and suicide.¹⁴ Due to the circular nature of gambling addicts' dependence, efforts by gambling addicts to quit or reduce their gambling often prove unsuccessful, leaving the gamblers, like Trammell, out of luck.¹⁵

The individual gambler is not the only person harmed by gambling disorder. Gambling addictions also impose large costs on society.¹⁶ According to a 2004 calculation, the estimated social costs associated with gambling in the United States range from \$32.4 billion

Asked Questions, DSM-5 DEV., <http://www.dsm5.org/about/Pages/faq.aspx> (last visited Jan. 23, 2015).

12. See Brian Castellani, *Is Pathological Gambling Really a Problem? You Bet!*, PSYCHIATRIC TIMES, (Feb. 1, 2001), available at <http://www.psychiatristimes.com/articles/pathological-gambling-really-problem-you-bet> ("Gambling becomes a coping mechanism, a way of dealing with the world. For these people, gambling provides an opportunity to 'be in action,' 'numb out' and escape their problems."); Richard A. McCormick, *The Importance of Coping Skill Enhancement in the Treatment of the Pathological Gambler*, 10 J. GAMBLING STUD. 77, 78 (1994) (discussing gambling as "an escape avoidance coping response" to a triggering event that produces "sadness, frustration and perhaps anxiety").

13. See Castellani, *supra* note 12 (noting that problem gamblers "get trapped in a vicious cycle of gambling to cope and coping to gamble. Now, not only are they suffering from the problems that started them gambling in the first place . . . , but they are also dealing with the negative consequences of their gambling").

14. NAT'L COUNCIL ON PROBLEM GAMBLING, PROBLEM GAMBLERS AND THEIR FINANCES 6 (2000), available at http://www.ncpgambling.org/files/public/problem_gamblers_finances.pdf.

15. See *Gambling Disorders Fact Sheet*, AM. GAMING ASS'N, <http://www.americangaming.org/industry-resources/research/fact-sheets/gambling-disorders> (last visited Jan. 23, 2015) (estimating that two-thirds of gambling addicts are unable to recover without seeking or accepting formal treatment).

16. Looking solely at illicit drug, alcohol, and tobacco addictions, addictions cost society over \$500 billion annually. *Addiction Science: From Molecules to Managed Care*, NAT'L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/addiction-science-molecules-to-managed-care/introduction/drug-abuse-costs-united-states-economy-hundreds-billions-dollars-in-increased-health> (last updated July, 2008).

to \$53.8 billion annually.¹⁷ A portion of this can be directly attributed to problematic gambling habits.¹⁸ Gambling addictions result in a less productive workforce—gambling addicts frequently lose their jobs, and employed gambling addicts are more often absent from work than their unafflicted peers.¹⁹ Gambling addictions also burden social-services systems through unemployment, put social and financial pressure on the addicts' families, and increase the rates of certain crimes.²⁰ These high costs demonstrate that society has a strong interest in rehabilitating individuals with gambling disorder.

But controversy may arise when gambling addicts' attempts to receive treatment for their condition come into conflict with their employment obligations. The inpatient and residential treatment programs recommended to many gambling addicts require substantial time spent away from work.²¹ Group-therapy meetings like Gamblers Anonymous may require flexible work scheduling.²² Aside from scheduling difficulties, gambling addicts may be reluctant to reveal their problems at work, fearing a potential backlash from their employers and fellow employees. When individuals with other addictive disorders face these difficulties, the Americans with Disabilities Act (ADA)²³ offers them protections.

After losing his job, John Trammell sued his employer for wrongful termination under the ADA.²⁴ In his complaint, Trammell claimed depression as a disability,²⁵ but made no attempt to claim his

17. EARL L. GRINOLS, *GAMBLING IN AMERICA: COSTS AND BENEFITS* 176 (2004). These social costs outweigh the benefits of the gambling industry "by a factor of about 3 to 1." Earl L. Grinols, *Too Many Negative Side Effects to Online Gambling*, N.Y. TIMES (July 29, 2010, 3:28 P.M.), <http://www.nytimes.com/roomfordebate/2010/07/29/should-internet-gambling-be-legalized/too-many-negative-side-effects-to-online-gambling>.

18. See generally Douglas M. Walker & A.H. Barnett, *The Social Costs of Gambling: An Economic Perspective*, 15 J. GAMBLING STUD. 181 (1999) (aggregating several different estimates of the social costs imposed by pathological gamblers).

19. GRINOLS, *supra* note 17, at 176.

20. *Id.*

21. See HANDBOOK OF ADDICTIVE DISORDERS 182–86 (Robert H. Coombs ed., 2004) (discussing the risks and benefits of inpatient treatment for gambling problems and the circumstances that require inpatient treatment).

22. Gamblers Anonymous meetings are frequently scheduled in the evenings and on weekends to accommodate traditional work schedules. However, not all gambling addicts will have traditional work schedules. See *U.S. Meetings*, GAMBLERS ANONYMOUS, <http://www.gamblersanonymous.org/ga/locations> (last visited Jan. 23, 2015).

23. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012).

24. Complaint at 4, *Trammell v. Raytheon Missile Sys.*, 721 F. Supp. 2d 876 (D. Ariz. 2010) (No. 4:08-cv-338).

25. *Id.* at 2.

gambling disorder as a disability²⁶ even though he had received a formal diagnosis of pathological gambling in September 2007.²⁷ This glaring gap in his pleadings likely did not result from an oversight, but reflects the reality that such a claim is currently untenable because the ADA explicitly excludes “compulsive gambling” from its definition of disability.²⁸ Even though Trammell’s employer had knowledge of his gambling problems, because he had no provable knowledge of his depression, Trammell could not establish a prima facie case for discrimination.²⁹ Therefore, his claim failed at the summary-judgment stage.³⁰

In the twenty-four years since the enactment of the ADA, the scientific understanding of excessive gambling as a mental disorder has greatly evolved. Changes in its name and psychiatric classification mirror a new understanding that excessive gambling can be viewed as an addiction, instead of a compulsion.³¹ This is not merely a difference of semantics, but a significant alteration in how clinicians understand the manifestation and persistence of excessive-gambling habits as a mental disorder. Therefore, although the language of the ADA specifically refers to “compulsive gambling,”³² and many older sources refer to “pathological gambling,”³³ this Note will use the modern diagnostic language of “gambling disorder” and “gambling addiction,” and will refer to individuals with a gambling disorder as “gambling addicts.” The terms “problem gambling” and “excessive gambling” used in this Note refer to a broader spectrum of gambling behaviors that encompasses, but is not limited to, full-blown gambling disorder.³⁴

26. *See id.* at 2–4 (alleging depression, mental illness, emotional distress, anxiety, and stress, but not problem gambling).

27. Affidavit of Bradley R. Johnson, M.D. at 2, *Trammell*, 721 F. Supp. 2d 876 (No. 4:08-cv-338).

28. 42 U.S.C. § 12211(b)(2) (2012).

29. *Trammell*, 721 F. Supp. 2d at 882–83.

30. *Id.*

31. For a discussion of the evolving scientific understanding of gambling disorder, see *infra* Part II.

32. 42 U.S.C. § 12211.

33. *See generally* CHRISTINE REILLY & NATHAN SMITH, THE EVOLVING DEFINITION OF PATHOLOGICAL GAMBLING IN THE DSM-5 (2013), available at http://www.ncrg.org/sites/default/files/uploads/docs/white_papers/ncrg_wpdsm5_may2013.pdf (discussing the shift in preferred nomenclature for gambling disorder).

34. *See supra* notes 10–11 and accompanying text.

Despite the changes to the scientific understanding of excessive-gambling behaviors, the ADA's exclusion of compulsive gambling remains the law. This exclusion deprives individuals with gambling disorder of the same protections that the ADA affords to individuals with psychiatrically similar addictions like alcoholism and drug dependency.³⁵ Because the ADA's definition of disability serves a gatekeeping role in courts' determination of disability-discrimination claims, this Note calls for an amendment to the ADA eliminating the exclusion of compulsive gambling.

This Note proceeds in five parts. Part I provides a summary of the provisions and history of the ADA. Part II details the psychological underpinnings of addiction theory and recent developments in the psychiatric and psychological research of excessive-gambling behaviors. Part III discusses problems with the exclusion of compulsive gambling as a legally cognizable disability under the ADA. Part IV addresses potential challenges to recognition of addictive-gambling disorder as a disability. Part V analyzes how John Trammel's case would have been decided if the ADA had allowed a gambling-based disability. This Note concludes by advocating for an amendment to the ADA to remove the current exclusion of compulsive gambling and to allow for the recognition of addictive-gambling disorder as a disability.

I. THE AMERICANS WITH DISABILITIES ACT

A. *The ADA's Enactment and Purpose*

Congress enacted the ADA in 1990³⁶ to eliminate discrimination against individuals with disabilities.³⁷ Although the Rehabilitation Act³⁸ had been passed previously to prohibit discrimination on the basis of disability in the employment practices of federal agencies and certain federal contractors, the ADA expanded these protections into the private arena. Lawmakers were focused on the "isolate[d]" and

35. See *infra* Part III.C.

36. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)). Despite the fanfare accompanying its passage, the ADA was not the first piece of federal legislation intended to protect the rights of people with disabilities. See, e.g., Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796 (2012) (prohibiting federal agencies, federal contractors, and recipients of federal funds from discriminating against people with disabilities).

37. 42 U.S.C. § 12101(b)(1) (2012).

38. 29 U.S.C. §§ 701–796 (2012).

“segregate[d]” social positions occupied by people with disabilities that cause them to be “severely disadvantaged socially, vocationally, economically, and educationally.”³⁹ In light of the lawmakers’ voiced rationale, the ADA was touted as an “emancipation proclamation for the disabled.”⁴⁰

One of the driving goals behind the legislation was to combat the “barriers of ignorance, prejudice, and inaccessibility” that prevent people with disabilities from entering the labor pool.⁴¹ To this end, Title I of the ADA⁴² establishes rules for employers’ treatment of individuals with disabilities that “make it possible for [them] to lead productive lives.”⁴³ Title I prohibits covered employers from discriminating against “qualified individuals”⁴⁴ on the basis of disability.⁴⁵ The provisions of Title I not only limit the scope of allowable employer actions, but also impose an affirmative obligation on employers to provide “reasonable accommodations” to employees with disabilities.⁴⁶ This reasonable-accommodation requirement was intended to create employment opportunities that would have been

39. 42 U.S.C. § 12101(a)(2), (6) (2012).

40. 135 CONG. REC. 19,888 (1989) (statement of Sen. Kennedy); *see also* 136 CONG. REC. 17,369 (1990) (statement of Sen. Harkin) (arguing that the ADA is “an emancipation proclamation for persons with disabilities”).

41. 135 CONG. REC. H5065 (1989) (statement of Rep. Hoyer). This goal was not purely rights-focused, but also financially motivated. *See id.* (“[T]he Federal Government currently spends up to \$75 billion . . . much of the money being spent supporting people who want to work.”).

42. 42 U.S.C. §§ 12111–12117 (2012).

43. 135 CONG. REC. H5065 (2007) (statement of Rep. Hoyer).

44. “Qualified individual” is defined as “an individual who, with or without reasonable accommodation, can perform the essential functions” of his desired job. 42 U.S.C. § 12111(8).

45. 42 U.S.C. § 12112(a). The statute provides: “No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” *Id.*

46. 42 U.S.C. § 12112(b)(5)(A). Examples of “reasonable accommodations” include adjustments to existing facilities to make them accessible and usable, modified work schedules, reassignment, and adjustment of training material or policies. 42 U.S.C. § 12111(9). The affirmative obligation to provide reasonable accommodation distinguishes the ADA from other employment-discrimination statutes, with the exception of Title VII’s prohibition of discrimination based on religion. *Compare id.* (providing a list of accommodations that employers can make for individuals with disability that fall within the definition of “reasonable accommodation”), *with* 42 U.S.C. § 2000e(j) (2012) (allowing employers to claim that they are “unable to reasonably accommodate an employee’s religious observance and practice” without “undue hardship on the . . . employer’s business”).

otherwise unavailable to individuals with disabilities⁴⁷ and to facilitate the productivity of employed individuals with disabilities by tailoring work environments to their needs.⁴⁸

B. Establishing a Disability and Bringing a Claim Under the ADA

The ADA's definition of disability plays a critical gatekeeping role in determining the scope of Title I's protection. Before seeking any remedy for adverse employment actions under the ADA, individuals must first establish that they are covered under the Act by alleging that they have a recognized disability. Lawmakers decided against the creation of any conditions that would automatically qualify as disabilities under the ADA,⁴⁹ so courts must examine claims of disability on a case-by-case basis.⁵⁰ Under the ADA, claimants must establish a disability by satisfying one of three conditions: first, alleging "a physical or mental impairment that substantially limits one or more major life activities of such individual,"⁵¹ second, demonstrating "a record of such an impairment,"⁵² or third, "being

47. See 135 CONG. REC. S10,713 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin) ("The ADA gives power to individuals with disabilities to make choices, to decide for themselves what kind of life they want to lead, and provides a meaningful and effective opportunity to become independent and productive members of our society.").

48. See, e.g., 154 CONG. REC. 19,436 (daily ed. Sept. 17, 2008) (statement of Rep. Rob Andrews) ("There was a man who got a job with a major retail corporation . . . , and he's diabetic. When he first started work, his supervisor understood that . . . he needed a special lunch break . . . so he could deal with his blood sugar needs and stay healthy and be productive.").

49. See S. REP. NO. 101-116, at 20 (1989) ("It is not possible to include . . . all the specific conditions . . . that would constitute physical or mental impairments . . . , particularly in light of the fact that new disorders may develop in the future."). More recently, the Equal Employment Opportunity Commission (EEOC) revised its proposed regulations, which had originally included a list of impairments that would "consistently," "sometimes," or "usually not" constitute disabilities under the ADA, in response to criticism that the list would effectively create per se disabilities. *Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm (last visited Jan. 23, 2015). However, the list did include a select group of conditions that "virtually always constitute a disability," like HIV, cancer, and diabetes. *Id.*

50. See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 641-42 (1998) (deciding not to address the second question presented of whether HIV is a per se disability under the ADA).

51. 42 U.S.C. § 12102(1)(A) (2012).

52. 42 U.S.C. § 12102(1)(B). The second "record of" prong applies when an individual "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k)(1) (2015).

regarded as having such an impairment.”⁵³ This Note focuses on the first (or “actual disability”)⁵⁴ prong, and how both Congress and the courts have shaped its terms. Though the disability requirement is only one of the many hurdles prospective plaintiffs must clear, the definition of disability is one area where courts exercise great control over the scope of the ADA’s protections by drawing the boundary lines of this provision.⁵⁵ Therefore, the threshold disability requirement has often proved to be the determinative factor in many employees’ claims for relief.

The “actual disability” prong encompasses both physical and mental impairments.⁵⁶ Physical impairments can range from “cosmetic disfigurement” to physiological disorders affecting multiple body systems,⁵⁷ and “[a]ny mental or psychological disorder”—including learning disabilities and mental illnesses—can qualify as a mental impairment.⁵⁸ An impairment alone, however, is not sufficient to establish a disability, unless it also “substantially limit[s] a major life activity.”⁵⁹ The ADA defines major life activities to include not only “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing,

53. 42 U.S.C. § 12102(1)(C). The third “regarded as” prong addresses employer perceptions of disability. 29 C.F.R. § 1630.2(l). A person falls under the third prong of disability if her employer treats her as having an impairment, even if she does not. *Id.*

54. Although the ADA’s implementing regulations refer to conditions that satisfy the first prong of the ADA’s definition of disability as “actual” disabilities, that terminology was selected for ease of reference. Individuals with conditions meeting any of the three prongs are equally protected under the ADA. Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16,978 (proposed Mar. 25, 2011) (codified at 29 C.F.R. § 1630 (2015)).

55. For an example of how courts may narrow the scope of the ADA, consider the series of cases—now largely defunct—incorporating mitigating measures into courts’ determinations of disabilities. *See* *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999) (recognizing visual compensation as a mitigating measure for monocular vision), and *Murphy v. United Parcel Serv.*, 527 U.S. 516, 521 (1999) (recognizing medication as a mitigating measure for blood pressure); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488–89 (1999) (recognizing glasses as a mitigating measure for myopia). For an example of boundary enlarging, see *Bragdon*, 524 U.S. at 641 (holding that asymptomatic HIV infection is a disability); *see also* Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights*, 31 *BERKELEY J. EMP. & LAB. L.* 203, 206 (2010) (“The story of lower courts striking down the claims of people with significant medical impairments under the [ADA] because they are not ‘disabled’ is a familiar one in legal scholarship.”).

56. 42 U.S.C. § 12102(1)(A).

57. 29 C.F.R. § 1630.2(h)(1) (2015).

58. 29 C.F.R. § 1630.2(h)(2).

59. 42 U.S.C. § 12102(1)(A).

learning, reading, concentrating, thinking, communicating, and working” but also maintaining “major bodily functions.”⁶⁰

Consider a woman with a form of muscular dystrophy who has lost the use of her legs and thus requires the use of a wheelchair. Although her use of a wheelchair alone does not establish that she has a disability within the meaning of the ADA, courts applying the ADA would almost certainly recognize the woman’s physical condition as a disability because muscular dystrophy is a physical impairment affecting her muscular system, and her impairment substantially limits a major life activity—namely, her ability to walk.⁶¹

The ADA’s definition of disability is not limited to physical conditions, but also explicitly states that mental impairments *can* qualify as disabilities.⁶² A number of cases have recognized depression, generalized-anxiety disorder, and other mental conditions as disabilities.⁶³ Among the potentially covered mental impairments contemplated by lawmakers at the time the ADA was passed, alcoholism and drug addiction were openly discussed and included in the statutory language.⁶⁴ The legislative discussion and statutory inclusion support the contention that they meet the requirements of a disability. Even though both conditions qualify under the ADA, Congress has noted that both substance-abuse disorders are subject to special restrictions.⁶⁵

60. 42 U.S.C. § 12102(2)(A)–(B).

61. *See supra* note 60 and accompanying text.

62. 42 U.S.C. § 12102(1)(A); *see* EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES, NO. 915.002, at 2–3 (1997) (listing as examples of emotional or mental illness “major depression, bipolar disorder, [and] anxiety disorders”).

63. *See, e.g.*, *Whalen v. City of Syracuse*, No. 5:11-cv-794, 2014 WL 3529976, at *6 (N.D.N.Y. July 15, 2014) (“Here, Plaintiff’s anxiety and depression clearly satisfy the actual disability prong under the ADAAA.”); *Owens v. City of Barnsdell*, No. 13-cv-749, 2014 WL 2197798, at *3 (N.D. Okla. May 27, 2014) (finding it “plausible that Plaintiff’s depression and anxiety could limit a major life activity”); *Cody v. Cnty. Nassau*, 577 F. Supp. 2d 623, 638 (E.D.N.Y. 2008) (acknowledging that generalized-anxiety disorder has been recognized as an impairment under the ADA (citing *Reeves v. Johnson Controls*, 140 F.3d 298, 312 (2d Cir. 1999))).

64. *See, e.g.*, 135 CONG. REC. S19,900 (1989) (emphasizing Congressional intent “to protect applicants and employees who have overcome or are successfully being treated for drug or alcohol problems.”); S. REP. NO. 101-116, at 20–21 (1989) (“The term [mental impairment] includes . . . drug addiction and alcoholism.”).

65. 42 U.S.C. § 12114 (2012). For a discussion of these special restrictions, see *infra* Part IV.B.

Although the ADA does not designate any conditions as per se disabilities,⁶⁶ it does include several per se *exclusions* of conditions as recognized disabilities. In 42 U.S.C. § 12211, the ADA specifically excludes from coverage compulsive gambling as well as homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender-identity disorders, other sexual-behavior disorders, kleptomania, pyromania, and psychoactive-substance-abuse disorders resulting from the illegal use of drugs.⁶⁷ Commenting on the potential inclusion of conditions like compulsive gambling in the ADA's coverage, one senator argued:

A diagnosis of certain types of mental illness is frequently made on the basis of a pattern of socially unacceptable behavior and lacks any physiological basis. In short, we are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition, admittedly for reasons we do not fully understand. . . . In principle, I agree with the concept that the mentally ill should be protected from invidious discrimination just as the physically handicapped should be. However, people must bear some responsibility for the consequences of their own actions.⁶⁸

The above commentary and others like it evidence the moralistic nature of § 12211's exclusions,⁶⁹ colloquially referred to as the "sin exceptions."⁷⁰

Due to the exclusion of compulsive gambling, an employee is unable to seek protection from unlawful termination and cannot request workplace accommodations under the ADA on the basis of his gambling condition. This is true regardless of whether the

66. See *supra* notes 49–50 and accompanying text.

67. 42 U.S.C. § 12211 (2012). This Note's argument to legitimize gambling disorder as a disability does not extend to all other items listed in § 12211. In fact, to characterize those listed items bearing on sexual orientation and gender identity as "disabilities" would be not only inaccurate, but offensive. However, their reference in the statutory language reflects the moralistic undertone of the § 12211 exclusions. For further discussion of the ADA's treatment of sexual and gender identity, see generally Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 *YALE HUM. RTS. & DEV. L.J.* 1 (2013).

68. 135 CONG. REC. S19,896 (1989).

69. See 135 CONG. REC. S19,853 (1989) ("I could not imagine the sponsors would want to provide a protected legal status to somebody who has such [mental] disorders, particularly those [that] might have a moral content to them or which in the opinion of some people might have a moral content.").

70. Zachary Busey, *Breaking Brackets: Is Gambling on March Madness Illegal?*, BAKER DONELSON (Mar. 25, 2014, 1:49 PM), http://www.bakerdonelson.com/l_e_compass/blog.aspx?entry=482.

employee can demonstrate that his gambling condition would otherwise qualify under the ADA criteria as a mental impairment that substantially limits a major life activity and that he is, with or without reasonable accommodation, qualified for the job. Section 12211 effectively bars any argument that compulsive gambling could be recognized by a court as a disability under the ADA. Although an argument could conceivably be made that compulsive gambling and gambling disorder are two different conditions,⁷¹ thereby removing gambling disorder from the realm of § 12211, present and historical usage of “compulsive gambling” as an equivalent for gambling disorder⁷² would likely render this argument unsuccessful.

II. GAMBLING AS AN ADDICTIVE BEHAVIOR

This Part explains the development of the current scientific understanding of gambling as an addictive behavior. This Part first presents the idea of behavioral addictions in general, and then tracks how gambling disorder came to be considered a behavioral addiction through the various editions of the *Diagnostic and Statistical Manual of Mental Disorders*. Lastly, this Part examines how gambling disorder comports with a current understanding of addiction.

A. *The Idea of Behavioral Addictions*

The concept of addiction is particularly nebulous. Despite the term’s long lineage,⁷³ there is still no medical or legal consensus on what it means to be addicted.⁷⁴ The *Black’s Law Dictionary* definition of addiction adheres to the traditional substance-based notion of addiction,⁷⁵ but the increasingly accepted view considers substance-

71. For a discussion of the shift in DSM-5 classification that distances gambling disorder from compulsive gambling, see *infra* Part II.B.

72. *E.g., Diseases and Conditions: Compulsive Gambling*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/compulsive-gambling/basics/definition/con-20023242> (last visited Jan. 23, 2015) (“Compulsive gambling, also called gambling disorder . . .”).

73. The term “addiction” was used to reference the state of being dependent on a drug as early as 1779. *Addiction*, OXFORD ENGLISH DICTIONARY 143 (2d ed. 1989).

74. *Definitions Related to the Use of Opioids for the Treatment of Pain*, AM. PAIN SOC’Y 1 (2001), available at https://www.erowid.org/psychoactives/addiction/addiction_definitions1.pdf (“Scientists, clinicians, regulators, and the lay public use disparate definitions of terms related to addiction.”) For example, because the above source focuses on opioid abuse, the definition of addiction it recommends focuses on “impaired control over drug use.” *Id.* at 2.

75. BLACK’S LAW DICTIONARY 43 (9th ed. 2009) (defining addiction as “[t]he habitual and intemperate use of a substance, esp. a potentially harmful one such as a narcotic drug.”).

based addictions as only one subclass of a broader field,⁷⁶ which now includes gambling-based addictions.⁷⁷

Specifically, gambling disorder is part of a growing group of behavioral addictions—addictions based on an individual’s dependence on certain activities rather than on certain substances.⁷⁸ As with alcoholics or drug addicts, individuals with behavioral addictions often begin their activity of choice voluntarily, but as the addicts repeatedly engage in the behavior associated with the activity, they experience biological, psychological, and behavioral changes that form an addiction to the behavior, thereby inhibiting them from stopping.⁷⁹ Because behavioral addiction and traditional addiction are distinguished principally by the absence of an external chemical, some have called behavioral addictions like gambling disorder “pure addiction[s].”⁸⁰

76. JIM ORFORD, *AN UNSAFE BET?* 45 (2011).

77. *Id.*

78. Although other “behavioral addictions” have been identified and studied, this Note is arguing only for the inclusion of gambling disorder in the ADA’s coverage because gambling disorder is the only carve-out with enough scientific research to solidly support its classification as an addictive disorder. *See* DSM-5, *supra* note 11, at 481 (“Other excessive behavioral patterns . . . have also been described, but the research on these and other behavioral syndromes is less clear. Thus [other behavioral addictions] are not included [in DSM-5] because . . . there is insufficient peer-reviewed evidence to establish the diagnostic criteria and course descriptions needed to identify these . . . as mental disorders.”). Additionally, this Note will not address whether any of the other items listed in § 12211, or any of the other conditions listed in the DSM-IV’s “impulse-control disorders not otherwise classified” category, should be considered behavioral disorders. *See* Jon E. Grant, Marc N. Potenza, Aviv Weinstein & David A. Gorelick, *Introduction to Behavioral Addictions*, 36 *AM. J. DRUG & ALCOHOL ABUSE* 233, 233–34 (2010) (“Not all impulse control disorders, or disorders characterized by impulsivity, should be considered behavioral addictions.”). Ultimately, this Note neither supports nor forecloses the future possibility of other conditions excluded under § 12211 entering ADA coverage.

79. *See* Alan I. Leshner, *Addiction is a Brain Disease*, 17 *ISSUES IN SCI. & TECH. ONLINE* 75, 76 (2001) (“[T]he recognition that addiction is a brain disease . . . explain[s] why an addict cannot simply stop using drugs by sheer force of will alone.”).

80. Joseph W. Ciarrochi, Neil M. Kirschner & Fred Fallik, *Personality Dimensions of Male Pathological Gamblers, Alcoholics, and Dually Addicted Gamblers*, 7 *J. GAMBLING STUD.* 133, 134 (1991); *see* PETER FERENTZY & NIGEL E. TURNER, *THE HISTORY OF PROBLEM GAMBLING* 37 (2013) (noting that the phrase “pure addiction” is used “because of the absence of a potentially harmful substance or any brain damage that might occur from the drug,” and that “the changes seen in a person [with gambling addiction] are the result of the addiction and not a side effect of the substance itself”); Alex Blaszczynski & Lia Nower, *Research and Measurement Issues in Gambling Studies: Etiological Models*, in *RESEARCH AND MEASUREMENT ISSUES IN GAMBLING STUDIES* 323, 335 (Garry Smith, David C. Hodgins & Robert J. Williams eds., 2007) (noting that gambling addiction is “an addiction without [a] drug”).

B. The Treatment of Excessive Gambling as a Mental Disorder in the DSM

1. *Gambling as an Impulse-Control Disorder in DSM-III and DSM-IV.* The act of gambling has not always been considered an addictive behavior.⁸¹ In fact, excessive gambling was more likely considered to fall outside the realm of behaviors that could be attributed to mental disorders.⁸² The scientific community significantly changed its approach toward recognizing excessive gambling as a potential mental disorder in 1980 when pathological gambling was listed in DSM-III as an “impulse control disorder.”⁸³ This inclusion spurred a sudden growth in the amount of scientific research on gambling disorder and introduced the issue to the general public.⁸⁴

Even after pathological gambling was first listed as a disorder in the DSM-III, academics continued to debate whether the disorder should be designated as an impulse-control disorder or as an

81. See ALAN F. COLLINS, *The Pathological Gamblers and the Government of Gambling*, in THE SOCIOLOGY OF RISK AND GAMBLING READER 355, 355 (James F. Cosgrove ed., 2006) (“One does not have to look back far for the picture to be very different: in the psychiatric and psychological writings of the 1970s . . . and before, the pathological gambler was a rare figure and one almost always denied the recognition afforded by an entry in the nosologies of mental illness.”).

82. *Id.*

83. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) [hereinafter DSM-III]. The DSM plays a significant role in dictating the academically accepted list of mental disorders. See Douglas A. Hass, *Could the American Psychiatric Association Cause You Headaches? The Dangerous Interaction Between the DSM-5 and Employment Law*, 44 LOY. U. CHI. L.J. 683 (2013) (“[The DSM] has long served as the primary reference for mental health disorders not only for medical practitioners, but also for state and federal courts and government agencies like the Social Security Administration and Veterans Administration.”).

84. See Henry R. Lesieur & Richard J. Rosenthal, *Pathological Gambling: A Review of the Literature*, 7 J. GAMBLING STUD. 5, 6 (1991) (“The 1980s have produced a burgeoning of interest in research into compulsive gambling.”). For a discussion of some of the earlier research, see John B. Murray, *Review of Research on Pathological Gambling*, 72 PSYCHOL. REP. 791, 803 (1993) (noting that “the term pathological gambler took on definite meaning only recently through the DSM-III” and that “studies of pathological gambling, especially those that put compulsive gambling together with alcoholism and substance abuse, suggest that gambling may be related to other psychiatric and medical disorders”). The DSM’s inclusion is probably not the only factor contributing to the dramatic surge in gambling-disorder research: it should come as no surprise that the growth of gambling research has run alongside significant expansions in the gambling industry, as legalization has increased both the variety and availability of gambling activity. Howard J. Shaffer & David A. Korn, *Gambling and Related Mental Disorders: A Public Health Analysis*, 23 ANN. REV. PUB. HEALTH 171, 171, 174–75 (2002).

addiction.⁸⁵ Both the DSM-III and its successor, the DSM-IV, did not label pathological gambling as an addictive mental disorder, but classified the condition in a general category of “impulse control disorders not elsewhere classified.”⁸⁶ In addition to gambling disorder, this catchall category included kleptomania,⁸⁷ intermittent explosive disorder,⁸⁸ pyromania,⁸⁹ and trichotillomania.⁹⁰ Like the DSM-III, the DSM-IV grouped all of these listed impulse-control disorders by a common “failure to resist an impulse . . . to perform an act that is harmful to the person or to others.”⁹¹ The DSM-IV distinguished these impulses to act—which result from the “increasing sense of tension or arousal” preceding the performance of a compulsive act—from the “pleasure, gratification, or relief” experienced by an individual after acting on that impulse.⁹² The DSM-IV classified pathological gambling by its essential diagnostic feature of “persistent and recurrent maladaptive gambling behavior . . . that disrupts personal, family, or vocational pursuits.”⁹³

2. *Reclassification of Gambling as an Addictive Disorder Under the DSM-5.* Critics of the classification of compulsive gambling under the DSM-III and DSM-IV claimed that “compulsive gambling” was a misnomer and that the categorization of pathological gambling as an impulse-control disorder—that is, as a compulsion—was a misconception.⁹⁴ Although addictions often involve compulsive

85. See, e.g., Michael Walker, *The Medicalisation of Gambling as an “Addiction”*, in *GAMBLING CULTURES: STUDIES IN HISTORY AND INTERPRETATION* 223, 223 (Jan McMillen ed., 1996) (arguing that the understanding of “heavy gambling [as] pathological is recent in origin . . . , that a pathology of gambling as an addiction has not been demonstrated, and that the similarities between drug addiction and heavy gambling are overstated”).

86. See AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 671 (4th ed. 2000) [hereinafter *DSM-IV*]; *DSM-III*, *supra* note 83.

87. Kleptomania manifests in an individual stealing things. *DSM-IV*, *supra* note 86, at 667.

88. Intermittent explosive disorder manifests in frequent emotional outbursts of anger or rage. *Id.* at 663.

89. Pyromania manifests in an individual setting fires. *Id.* at 669.

90. Trichotillomania manifests in an individual pulling his or her own hair out. *Id.* at 674.

91. *Id.* at 663.

92. *Id.*

93. *Id.* at 671.

94. Lesieur & Rosenthal, *supra* note 84, at 6–7; see NAT’L RESEARCH COUNCIL, COMM. ON THE SOC. & ECON. IMPACT OF PATHOLOGICAL GAMBLING, *PATHOLOGICAL GAMBLING: A CRITICAL REVIEW* 11–12, 20, 23–24 (1999), available at <http://www.ncbi.nlm.nih.gov/books/NBK230630/pdf/TOC.pdf> (“[F]or most researchers and many clinicians, the notion of compulsive gambling as a description of pathological gamblers is a technical misnomer.” (citation omitted)).

behaviors,⁹⁵ they can be distinguished from purely compulsive disorders.⁹⁶

Under the DSM-5, compulsions are defined as “repetitive behaviors or mental acts that an individual feels driven to perform in response to an obsession or according to rules that must be applied rigidly.”⁹⁷ Compulsive behaviors are not only involuntary, but are also “ego-dystonic,” meaning that the afflicted individual views her behavior as alien or foreign.⁹⁸ For example, an individual with obsessive-compulsive disorder may be driven to frequently wash his hands with a precise number of strokes each time.⁹⁹ Though performing this hand-washing ritual provides relief from his psychological discomfort, it does not provide pleasure, and can be ultimately construed as “unwilling.”¹⁰⁰ This can be directly contrasted with the “ego-syntonic” and even pleasure-producing natures of addictive behaviors.¹⁰¹

Diagnostically speaking, impulse-control disorders—the category that until recently included pathological gambling—can be even further differentiated from addiction.¹⁰² Impulse-control disorders not only feature compulsive behaviors, but do so in a specific context. Under the DSM-5, impulse-control disorders are “unique” due to their tendency to “manifest[] in behaviors that violate the rights of others . . . and/or bring the individual into significant conflict with

95. See Edmund Henden, Hans Olav Melberg & Ole Jørgen Røgeberg, *Addiction: Choice or Compulsion?*, 4 FRONTIERS IN PSYCHIATRY, Aug. 2013, at 9 (applying a dual-process analysis of compulsion in addiction); Nora D. Volkow & Joanna S. Fowler, *Addiction, a Disease of Compulsion and Drive: Involvement of the Orbitofrontal Cortex*, 10 CEREBRAL CORTEX 318, 318 (2000) (proposing that in addition to disrupting traditional reward circuits, “the addictive state also involves disruption of circuits involved with compulsive behaviors and with drive”).

96. See Grant et al., *supra* note 78, at 234 (contrasting addiction with obsessive-compulsive disorder).

97. DSM-5, *supra* note 11, at 235.

98. NAT’L RESEARCH COUNCIL, COMM. ON THE SOC. & ECON. IMPACT OF PATHOLOGICAL GAMBLING, *supra* note 94, at 24; Grant et al., *supra* note 78, at 234.

99. See DSM-5, *supra* note 11, at 237 (listing “[r]epetitive behaviors (e.g. hand washing . . .) or mental acts (e.g. . . . counting . . .)” as one of the diagnostic criteria of obsessive-compulsive disorder).

100. NAT’L RESEARCH COUNCIL, COMM. ON THE SOC. & ECON. IMPACT OF PATHOLOGICAL GAMBLING, *supra* note 94, at 24.

101. *Id.*; see FERENTZY & TURNER, *supra* note 80, at 39 (“Drugs, alcohol, and gambling all provide a person with an opportunity for pleasure, so a pleasure principle is likely involved in the addiction.”). This is not to say that addicts experience pleasure at every stage of the addiction, but only that the original motivation can be pleasure-seeking.

102. See DSM-5, *supra* note 11, at 461.

societal norms or authority figures.”¹⁰³ Furthermore, impulse-control disorders are believed to be tied to the personality dimension of disinhibition and most frequently emerge during childhood.¹⁰⁴

In contrast to impulse-control disorders, gambling disorder closely resembles addictive disorders like alcoholism and drug abuse.¹⁰⁵ The DSM-5 reflects this characterization, removing pathological gambling from the group of impulse-control disorders.¹⁰⁶ In place of pathological gambling, the DSM-5 creates a newly named “gambling disorder,” which is located in a new category of “Substance-Related and Addictive Disorders.”¹⁰⁷ This new category combines all of the conditions previously classified as “substance-related disorders,” such as alcohol and drug dependency, with addiction-based disorders, such as gambling disorder.¹⁰⁸ The American Psychiatric Association’s (APA’s) decision to craft this new category was a significant step in recognizing gambling disorder not as a compulsion or an impulse-control disorder, but as an addiction.¹⁰⁹ As the APA explained, this change “reflects the increasing and consistent evidence that . . . gambling . . . activate[s] the brain reward system with effects similar to those of drugs of abuse” and that the symptoms of gambling disorder and substance-use disorders are similar in nature.¹¹⁰

103. *Id.*

104. *Id.* at 461–62.

105. *Id.* at 481.

106. *See id.* at 461–80 (describing the category of “[d]isruptive, impulse-control, and conduct disorders” without including gambling-related conditions).

107. *Id.* at 585. It should be noted that the DSM-5’s reclassification of gambling disorder was met with some resistance. *See* Constance Holden, *Behavioral Addictions Debut in Proposed DSM-V*, 327 *SCIENCE* 935 (2010) (“[P]roposed revisions for [DSM-5] include for the first time ‘behavioral addictions’—a change some say is long overdue and others say is still premature.”). Critics of gambling addictions argue, among other things, that the view of gambling as an addiction relies on an incomplete account of the evidence, that the pathology of gambling addictions has not been demonstrated, and that similarities between drug addiction and heavy gambling are overstated. *See, e.g.,* Varpu Rantala & Pekka Sulkuinen, *Is Pathological Gambling Just a Big Problem or Also an Addiction?*, 20 *ADDICTION RES. & THEORY* 1, 1 (2012) (“The question is whether these new addictions are real psycho-social phenomena, or merely external social constructions to medicalise these problems.”).

108. DSM-5, *supra* note 11, at 481–82.

109. AM. PSYCHIATRIC ASS’N, HIGHLIGHTS OF CHANGES FROM DSM-IV-TR TO DSM-5, at 16 (2013), available at <http://www.dsm5.org/Documents/changes%20from%20dsm-iv-tr%20to%20dsm-5.pdf>.

110. *Id.*

C. *Gambling Disorder Under Scientific Addiction Models*

In order to understand how gambling disorder may operate as an addictive disorder, it is necessary to become familiar with the psychological field's prevailing models of addiction. Research on substance-related addiction has revealed a "cluster of cognitive, behavioral, and physiological symptoms" whose interaction helps explain how an addiction persists despite its detrimental effect on the life of the addict.¹¹¹ These physiological symptoms involve intricate neurological mechanisms that stimulate and reinforce addictive behavior. For example, the APA has noted an underlying change in the brain's circuitry that accompanies the development of a substance-related addiction,¹¹² and researchers using neuroimaging technology have found similarities in the neurocircuitry of individuals with behavioral addictions and those with substance-abuse disorders.¹¹³ Although scientists have backed away from using the classical neurobiological model—that is, that addiction is solely driven by neurotransmitted "rewards"—they believe that the "rewards" provided by chemical neurotransmitters like dopamine and serotonin nevertheless play an important role in dependence and withdrawal.¹¹⁴ Thus, although scientists still do not fully understand the neurological basis of gambling, new evidence suggests that the neurotransmitter activity of gambling addicts is similar to the kind observed in other addicts.¹¹⁵ At the end of the day, "as far as the brain is concerned, a reward's a reward, regardless of whether it comes from a chemical or an experience."¹¹⁶

Behavioral symptoms of an underlying gambling addiction are manifestations of the roles that operant conditioning¹¹⁷ and classical

111. DSM-5, *supra* note 11, at 483.

112. *Id.*

113. Grant et al., *supra* note 78, at 236.

114. Judson A. Brewer, Marc N. Potenza & Jon E. Grant, *The Neurobiology of Pathological Gambling*, in RESEARCH AND MEASUREMENT ISSUES IN GAMBLING STUDIES 345, 346–54 (Garry Smith, David C. Hodgins & Robert J. Williams eds., 2007).

115. See Grant et al., *supra* note 78, at 235 ("A growing body of literature implicates multiple neurotransmitter systems . . . [which] may contribute significantly to both sets of disorders."); see also Jakob Linnet, *Neurological Underpinnings of Reward Anticipation and Outcome Evaluation in Gambling Disorder*, 8 FRONTIERS BEHAV. NEUROSCIENCE, Mar. 2014, at 1 ("Gambling disorder is associated with dysfunctions in the dopamine system.").

116. Constance Holden, "Behavioral" Addictions: Do They Exist?, 294 SCIENCE 980, 980 (2001).

117. Operant conditioning, or instrumental learning, focuses on how behavior can be changed through the use of positive reinforcement and negative reinforcement delivered after a

conditioning¹¹⁸ play in forming addictions.¹¹⁹ Viewing gambling disorder through the lens of operant conditioning, gamblers are positively reinforced when they realize financial gains from their gambling,¹²⁰ and negatively reinforced when they continue to gamble as a coping mechanism to ignore negative feelings of stress, anxiety, guilt, and depression.¹²¹ From a classical perspective, environmental stimuli like the lights and sounds of a slot machine may create mental associations with gambling that reinforce participation.¹²² Therefore, as a result of classical conditioning, the slot-machine player, upon entering the casino and approaching the chosen slot machine, anticipates and begins to crave the rush he or she feels at each spin.¹²³ And while playing, as a result of operant conditioning, the slot-machine player's wins and losses provide enough of a reward to stimulate the player to continue playing in anticipation of a future reward.¹²⁴ The gambling addict's responses to both the visual stimuli

specific behavioral response. See J.E.R. Staddon & D.T. Cerutti, *Operant Conditioning*, 54 ANN. REV. PSYCHOL. 115, 116 (2003) (discussing the use of "reinforcement schedules" in operant conditioning).

118. Classical conditioning, also called Pavlovian conditioning, relies on the use of "neutral or arbitrary cues" over time to elicit certain behaviors, like the well-known story of the dog salivating when it hears a bell. Michael Domjan, *Pavlovian Conditioning: A Functional Perspective*, 56 ANN. REV. PSYCHOL. 179, 180 (2005).

119. See Amy L. Milton & Barry J. Everitt, *The Persistence of Maladaptive Memory: Addiction, Drug Memories and Anti-Relapse Treatments*, 36 NEUROSCIENCE & BIOBEHAVIORAL REVS. 1119, 1120–25 (2012) (discussing the Pavlovian and instrumental associations underlying drug addiction).

120. It may seem counterintuitive, but the sporadic nature of gambling wins may provide stronger reinforcement than steady wins over time. See Christopher D. Fiorillo, Philippe N. Tobler & Wolfram Schultz, *Discrete Coding of Reward Probability and Uncertainty by Dopamine Neurons*, 299 SCIENCE 1898, 1901 (2003) (finding that "sustained, uncertainty-induced increase in dopamine could act to reinforce risk-taking behavior"); Peter Shizgal & Andreas Arvanitogiannis, *Gambling on Dopamine*, 299 SCIENCE 1856, 1858 (2003) (examining the Fiorillo study, *supra*, and its potential implications for gambling-behavior theorists).

121. Contrary to popular misconception, "negative reinforcement" in the field of operant conditioning is not synonymous with "punishment." See Jack Michael, *Positive and Negative Reinforcement*, 3 BEHAVIORISM 33, 37–38 (1975) (discussing misinterpretations of Skinner's terminology). Instead, it refers to the removal of an aversive stimulus. *Id.* Therefore, negative reinforcement encourages the performed behavior by creating a positive result through the subtraction of a negative condition. *Id.*

122. See generally NATASHA DOW SCHÜLL, *ADDICTION BY DESIGN: MACHINE GAMBLING IN LAS VEGAS* (2012) (providing an in-depth look at how casinos design environmental stimuli to maximize time spent on a slot machine or other gambling device).

123. *Id.* at 49–50 (recounting one gambler's experience trying to avoid his regular slot machine in the casino).

124. See *supra* note 120 and accompanying text.

and the game's reinforcement mechanisms are behavioral symptoms of addiction.

Research indicates that gambling disorder and substance-abuse disorders may share certain cognitive features.¹²⁵ The primary—and unique—cognitive mechanism that drives gambling disorder, however, is the role that irrational belief plays in maintaining the addiction.¹²⁶ Gamblers' predominant irrational belief is the "illusion of control" present when the gambler believes that his skill plays a role in determining the outcome of a game of chance.¹²⁷ Therefore, even when the slot-machine player loses, he may analyze the patterns of slot-machine results to predict future wins or become reassured of a future win by the thought that he was "so close" to the jackpot.¹²⁸ Despite the objective reality that the player lacks control over the slot machine's draws, the player's irrational belief attributes a sort of logic and strategy to the game, even when neither exists.¹²⁹ Therefore, even after losing, he will continue to play, believing that winning will come soon based on his analysis of the patterns and perceived "near miss."¹³⁰

The interaction of these physiological, behavioral, and cognitive mechanisms can be demonstrated through different models of addiction. The simplest model of addiction is the traditional model, which has three elements: a form of dependence, a progression or

125. Grant et al., *supra* note 78, at 235 ("Both pathological gamblers and individuals with substance use disorders typically discount rewards rapidly and perform disadvantageously on decision-making tasks such as the Iowa Gambling Task, a paradigm that assesses risk-reward decision making." (footnotes omitted)).

126. Cristina Orgaz, Ana Estevez & Helena Matute, *Pathological Gamblers Are More Vulnerable to the Illusion of Control in a Standard Associative Learning Task*, 4 FRONTIERS PSYCHOL. 1, 1–2 (2013), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3683617/pdf/fpsyg-04-00306.pdf>.

127. *Id.*; see Luke Clark, Bettina Studer, Joel Bruss, Daniel Tranel & Antoine Bechara, *Damage to Insula Abolishes Cognitive Distortions During Simulated Gambling*, 111 PROC. NAT'L ACAD. SCI. 6098, 6100–02 (2014) (describing how the "gambler's fallacy" functions, and suggesting that the gambler's fallacy is attributable to activity in the brain's insular cortex).

128. R.L. Reid, *The Psychology of the Near Miss*, 2 J. GAMBLING STUD. 32, 32 (1986), available at http://www.stat.berkeley.edu/~aldous/157/Papers/near_miss.pdf.

129. See Chrisi Lambos & Paul Delfabbro, *Numerical Reasoning Ability and Irrational Beliefs in Problem Gambling*, 7 INT'L GAMBLING STUD. 157, 168 (finding through empirical analysis that an increase in levels of irrational belief corresponds to an increase in the frequency of gambling among participants more closely than to an increase in numerical reasoning abilities).

130. See Reid, *supra* note 128, at 32 ("In [gambling], the occurrence of a near miss may be taken as an encouraging sign, confirming the player's strategy and raising hopes for future success.").

increase in activity over time, and withdrawal symptoms during periods without the substance or behavior.¹³¹ A common illustration of the traditional model of addiction is the slot-machine player.¹³² An individual player may form a dependence on the activity of machine gambling.¹³³ Once this dependence has formed, the player's level of activity increases over time: the player may start to gamble more frequently, or the player may raise the stakes in play.¹³⁴ Withdrawal symptoms are evidenced when the player's attempts to cut back on gambling cause him or her to experience negative feelings like anxiety or irritability.¹³⁵

The slightly more nuanced "components" model of addiction has six elements: salience, mood modification, tolerance, withdrawal, conflict, and relapse.¹³⁶ There is significant overlap among the elements of the components model and the traditional model. The first element of the components model, salience, focuses on how important the behavior becomes to the individual, based on the notion that addictive behaviors often overshadow the importance of all other activities.¹³⁷ The hypothetical slot-machine player may begin to value his time gambling above all other areas of his life, including family, friends, employment, and personal well-being. The second element of the components model, mood modification, specifies the change in feelings an individual experiences when engaging in an

131. See COLLINS, *supra* note 81, at 358–59 (“[There are] three key requirements for an addiction: some form of dependence, progression, and withdrawal symptoms in the absence of the drug or behaviour.”).

132. The slot-machine player is an appropriate example to demonstrate addiction models because the models' predictions most likely mirror reality for a number of gambling addicts dependent on slot machines. See generally SCHÜLL, *supra* note 122 (discussing gambling addiction among gambling-machine players).

133. See *id.* at 190 (relating the story of gambling-machine addict Patsy: “[w]hen I wasn't playing . . . my whole being was directed to getting back into that zone”).

134. See *id.* at 107 (quoting a gambling-machine player: “I keep needing more intensity, and the machines keep matching me”).

135. See *id.* at 210 (quoting machine gambler Randall relating how he would “get disgusted with [himself] playing that little machine . . . but the fact is, I always went and played anyway.”); *id.* at 215 (quoting another machine gambler, Isabella, who tried to stop gambling, but would “get so bothered by the machines when [getting] baby formula at the store” that she would try to ignore them, “but it [didn't] always work”).

136. See generally Mark Griffiths, *A 'Components' Model of Addiction Within a Biopsychosocial Framework*, 10 J. SUBSTANCE USE 191 (2005) (offering what the author believes are components of addiction: “salience, mood modification, tolerance, withdrawal, conflict, and relapse”).

137. *Id.* at 193.

addictive behavior—colloquially referred to as a “rush” or a “high.”¹³⁸ The mood-modification element might indicate why the slot-machine player may have turned to gambling in the first place: playing the slots may provide the player with an escape from stress, sadness, and other negative feelings.¹³⁹

The tolerance element explains why a player feels he must increase or intensify his gameplay; as the player continues the activity over time, an increasing amount of the activity is needed to achieve the same mood-modification effect.¹⁴⁰ The component model’s withdrawal element closely adheres to the traditional model’s concept of withdrawal—where the gambler experiences negative symptoms during attempts to curb his behavior.¹⁴¹ Withdrawal symptoms range from the psychological—for example, moodiness and irritability—to the physiological—such as nausea, headaches, and insomnia.¹⁴² Conflict, an element added by the components model, refers to the “interpersonal conflict” that can occur as the player’s relationships become strained due to his diverted attention or increased stress, or as his finances dwindle due to the costs of significant game play.¹⁴³ The conflict element can also refer to “intrapsychic conflict” as the slot-machine player struggles internally about his behavior.¹⁴⁴ Finally, the negative feelings caused by attempts to quit or reduce the level of gambling might eventually lead to the final element of relapse—a return to the slot machines.¹⁴⁵

III. PROBLEMS WITH THE ADA’S EXCLUSION OF GAMBLING ADDICTION AS A DISABILITY

This Note proposes that Congress amend the ADA provision excluding compulsive gambling as a disability to allow the recognition of gambling disorder. First, inclusion of the newly classified gambling disorder is in line with the spirit of the ADA. Second, the exclusion of

138. *Id.*

139. See Richard T.A. Wood & Mark D. Griffiths, *A Qualitative Investigation of Problem Gambling as an Escape-Based Coping Strategy*, 80 *PSYCHOL. & PSYCHOTHERAPY* 107, 114 (“[A gambling] buzz could be perceived as relaxing by filling time, avoiding boredom and/or shifting focus away from life’s problems . . .”).

140. Griffiths, *supra* note 136, at 194.

141. *Id.* See *supra* note 135 and accompanying text.

142. Griffiths, *supra* note 136, at 194.

143. *Id.* at 195.

144. *Id.*

145. *Id.*

gambling disorder as a disability stymies the expected role that diagnostic and scientific texts like the DSM play in the legal process. Third, the exclusion as currently interpreted creates loopholes in cases of comorbidity that might make it harder for gambling addicts with other conditions protected under the ADA to succeed in employment-discrimination claims.

A. *The Spirit of the ADA*

Upon its enactment, the ADA was touted as a “comprehensive bill” that would “extend civil rights protections to 43 million disabled persons in the United States.”¹⁴⁶ Lawmakers went so far as to call the bill “an emancipation proclamation for persons with disabilities.”¹⁴⁷ The National Council on Disability, which had played a crucial role in the passage of the ADA, remarked that “[f]uture generations [would] look back on the passage of the ADA as a watershed public policy.”¹⁴⁸ It is indisputable that the ADA has achieved much in the way of integration and antidiscrimination for individuals with disabilities in the United States.¹⁴⁹

Despite its initial fanfare, however, the ADA has failed to completely live up to the expectations of its creators. Current critiques of the ADA can be divided into three categories: criticism that views the statute as “poorly written and structurally flawed,” criticism “that the ADA has been betrayed by judicial backlash,” and criticism “that disability-based workplace accommodations are inefficient and create disincentives to employing disabled persons.”¹⁵⁰ The problems presented by the ADA are likely caused by some combination of all three criticisms.¹⁵¹ Whatever the case may be, the

146. 135 CONG. REC. S17,559 (1989).

147. 136 CONG. REC. S17,369 (1990) (statement of Sen. Harkin).

148. NAT'L COUNCIL ON DISABILITY, *Foreword, July 26, 1997 to EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT (1997)*, available at http://www.ncd.gov/publications/1997/equality_of_Opportunity_The_Making_of_the_American_s_with_Disabilities_Act.

149. See, e.g., DEP'T OF JUSTICE, *Expanding Opportunity in the Community for People with Disabilities*, ADA.GOV, <http://www.ada.gov/disability-rights-accomplishments.htm> (last visited Jan. 23, 2015) (listing accomplishments in public accommodation, civic participation, and ADA enforcement by DOJ's Civil Rights Division from 2009–2012).

150. Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1659 (2010).

151. For a more in-depth discussion of the issue of judicial backlash to broad readings of the ADA, see *infra* Part IV.B.

scope of the ADA's coverage is dramatically narrower than lawmakers seem to have envisioned.¹⁵²

Although Congress received praise for passing what seemed like an evenhanded law, in the reality of the courtroom, plaintiffs bringing ADA claims face an uphill battle. Defendants have largely prevailed against ADA claims in the courts, winning dismissals, summary judgments, verdicts, and appeals at high rates.¹⁵³ Challengers bringing winning claims under the ADA remain a distinct minority. A 2006 study revealed a plaintiff success rate of less than 3 percent in all Title I claims.¹⁵⁴

These numbers are surely disappointing for lawmakers and the estimated forty-three million Americans with disabilities they sought to protect.¹⁵⁵ For these forty-three million individuals, the ADA was intended to “break down these barriers [to communicating, commuting, or entering the workplace] once and for all.”¹⁵⁶ Based on recent estimates, the number of Americans with a disability has grown to 56.7 million.¹⁵⁷ To be sure, not all individuals with disabilities have cause to seek remedy in the courts, so low plaintiff success rates alone do not show that the ADA has failed. But, as of 2007, the ADA's protections are estimated to cover fewer than 13.5 million

152. See S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 605 (2001) (“These laudable goals [of the ADA] have yet to be realized. Ten years after the enactment of the ADA, studies have shown that people with disabilities continue to see virtually the same disadvantages in the labor market that they experienced prior to the enactment of the ADA.”).

153. Eliza Kaiser, *The Americans with Disabilities Act: An Unfulfilled Promise for Employment Discrimination Plaintiffs*, 6 U. PA. J. LAB. & EMP. L. 735, 739 (2004). “[B]etween 1992 and 1998, plaintiffs won in only 6% of the cases at the trial court level.” *Id.*; see Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (“[D]efendants prevail in more than ninety-three percent of reported ADA employment discrimination cases”); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 277 (2001) (finding that as an empirical matter “defendants are much more likely than plaintiffs to prevail in appellate litigation”).

154. See Amy L. Albright, *2006 Employment Decisions Under the ADA Title I—Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (2007) (“Of the 218 [Title I] decisions [in 2006] that resolved the claim (and have not yet changed on appeal), 97.2 percent resulted in employer wins and 2.8 percent in employee wins.”).

155. 135 CONG. REC. S17,559 (1989).

156. *Id.*

157. MATTHEW W. BRAULT, AMERICANS WITH DISABILITIES: 2010, at 4 (2012), available at <http://www.census.gov/prod/2012pubs/p70-131.pdf>. This estimate, excluding institutionalized individuals, equals 18.7 percent of the civilian population. *Id.*

Americans.¹⁵⁸ Therefore, millions of disabled individuals, whom Congress described as “the real champions of [the ADA]” and instructed “to never allow their vigil to wane,”¹⁵⁹ have not realized the benefits that Congress promised in passing the ADA.

This shortcoming is no reason to throw out the entire ADA, which has accomplished or made great strides toward many of Congress’s original goals.¹⁶⁰ Rather, the underperformance should incite lawmakers to reexamine the ADA’s current coverage. Amending the ADA to remove the exclusion of compulsive gambling would be a significant improvement for individuals with gambling disorder because such a recognition of their condition would crack open, however slightly, the gate to the ADA, which is currently shut by the Act’s definition of disability.

B. The Role of the DSM-5

The DSM is not just a scientific text;¹⁶¹ it has also long been a “primary authority for the legal community.”¹⁶² Though the DSM’s authority is neither absolute nor incontrovertible,¹⁶³ the publication has been “elevated . . . to the level of de facto legal treatise” among employment lawyers.¹⁶⁴ Even though the DSM-5 adds a cautionary statement that “[i]n most situations, the clinical diagnosis of a DSM-5 mental disorder . . . does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard,”¹⁶⁵ diagnoses based on the DSM frequently

158. Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 7 (2007). And in Colker’s estimation, “those [13.5 million] individuals [are] typically . . . so disabled that they are not qualified to work even with reasonable accommodations.” *Id.*

159. 136 CONG. REC. 9684-03 (daily ed. July 13, 1990) (statement of Sen. John McCain).

160. See generally U.S. DEP’T. OF JUSTICE, ENFORCING THE ADA: LOOKING BACK ON A DECADE OF PROGRESS (2000), available at <http://www.ada.gov/pubs/10thrpt.pdf> (highlighting the ADA’s achievements).

161. The DSM plays an important role in the medical and psychiatric communities, and its “criteria for diagnosis provide a common language among clinicians,” ensuring accuracy and consistency across practitioners. REILLY & SMITH, *supra* note 33, at 1.

162. Hass, *supra* note 83, at 683.

163. *Id.* at 689 (“[T]he DSM-IV is simply a consensus-built medical text with the attendant limits. It is not a psychiatric ‘bible.’” (footnotes omitted)).

164. *Id.* at 685.

165. DSM-5, *supra* note 11, at 25; see *Osika v. Bd. of Educ.*, No. 98 C 5953, 1999 WL 1044838, at *4 (N.D. Ill. Nov. 16, 1999) (“The issue is not whether depression and other mental and emotional disorders are ‘impairments’ within the purview of the ADA. They certainly are. . . . Suffering from a medical condition that is listed in the Diagnostic and Statistical Manual

play a role in the legal determination of the existence of a mental disorder,¹⁶⁶ such as the establishment of disability in ADA cases.¹⁶⁷ In fact, the federal Equal Employment Opportunity Commission (EEOC) has pointed to the DSM as a source that can be used in identifying the types of mental disorders cognizable under the ADA.¹⁶⁸ Notwithstanding the uncertainty surrounding the possible effects of a new edition, as courts begin to hear testimony from experts relying on the DSM-5, the DSM-5's extensive revisions have the potential to drive parallel changes in several areas of the law, including employment discrimination.¹⁶⁹

The changes from previous editions in the DSM-5 would support the ADA's recognition of gambling addiction as a disability. The original categorization of compulsive gambling in the ADA's list of excluded conditions mirrors the DSM-IV's list of "impulse control disorders not elsewhere classified."¹⁷⁰ In both the ADA and the DSM-IV, gambling sits alongside its familiar bedfellows, pyromania and kleptomania.¹⁷¹ In the DSM-5, however, gambling disorder is distanced from those conditions¹⁷² through the use of different diagnostic criteria and is associated instead with substance-related disorders that currently fall squarely under the protection of the

(DSM), however, is not dispositive to the legal inquiry of whether a plaintiff is protected by the ADA.").

166. RALPH SLOVENKO, *PSYCHIATRY IN LAW/LAW IN PSYCHIATRY* 161 (2d ed. 2009).

167. Jules L. Smith, *Understanding How To Apply the DSM-IV to a Case Under the ADA*, 17 LAB. LAW. 449, 455 (2002); see also *Schwartz v. Comex*, No. 96 CIV. 3386 LAP, 1997 WL 187353, at *2 (S.D.N.Y. Apr. 15, 1997) (noting that the DSM "offers some guidance" on what the plaintiff's claimed disability of paranoid-thought disorder was). Note that the DSM's diagnostic criteria do not always support the ADA's definition of disability. See *Brown v. N. Trust Bank*, No. 95 C 7559, 1997 WL 543098, at *4 (N.D. Ill. Sept. 2, 1997) (holding that because the plaintiff's DSM diagnosis was a *single* episode of depression, her impairment was temporary, and thus not a disability under the ADA).

168. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 62, at 2-3 (recognizing the DSM "as an important reference by courts . . . widely used by American mental health professionals").

169. For an example of how changes in previous editions of the DSM have changed courts' construction of existing law, see Alan Stone, *Post Traumatic Stress Disorder and the Law: Critical Review of the New Frontier*, 21 BULL. AM. ACAD. PSYCHIATRY L. 23, 23 (1993) ("No diagnosis in the history of American psychiatry has had a more dramatic and pervasive impact on law and social justice than PTSD.").

170. DSM-IV, *supra* note 86, at 671.

171. *Compare id.* (recognizing pathological gambling, kleptomania, and pyromania as impulse control disorders), with 42 U.S.C. § 12211(b)(2) (2012) (excluding "compulsive gambling, kleptomania, or pyromania" from ADA coverage).

172. *Compare* DSM-5, *supra* note 11, at 476, 478 (listing diagnostic criteria for pyromania and kleptomania, respectively), with *id.* at 585 (listing diagnostic criteria for gambling disorder).

ADA.¹⁷³ Therefore, it seems arbitrary to exclude one DSM-classified addiction from ADA coverage but allow ADA protection for the others.

Changes to the DSM classification of gambling disorder, however, are not enough to bring gambling disorder under the ADA's protections. Compulsive gambling is *explicitly* excluded from coverage in the ADA, and without a statutory amendment, the newly branded gambling disorder is almost certainly excluded as well. The DSM-5's classification of gambling disorder as an addiction cannot simply be judicially incorporated into the ADA because judges, no matter how creative, are limited in their powers of statutory interpretation. The court's inability to recognize gambling disorder as a disability cuts against the drafters' concern that the ADA's definition of disability must be flexible enough to encompass "new disorders [that] may develop in the future."¹⁷⁴ Given the weight of the DSM's authority in proving mental disorders in conjunction with the DSM's newly recognized gambling disorder, the ADA should be amended to remove its outdated exclusion of "compulsive gambling."

C. Comorbidity Loopholes

The current exclusion creates further potential problems in ADA cases involving comorbid conditions that in some circumstances create loopholes for employers to discriminate against individuals with both ADA-recognized disabilities and ADA-excluded comorbid conditions. Comorbidity occurs in individuals who have two or more coexisting medical conditions.¹⁷⁵ Comorbid conditions in an individual might be causally linked or otherwise associated, or they might be

173. See *Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435, 439 (8th Cir. 2007) ("Drug addiction that substantially limits one or more major life activities is a recognized disability under the ADA."); *Thompson v. Davis*, 295 F.3d 890, 896 (9th Cir. 2002) (same); *Bailey v. Ga-Pac. Corp.*, 306 F.3d 1162, 1167 (1st Cir. 2002) ("There is no question that alcoholism is an impairment for the purposes of the first prong of analysis under the ADA.").

174. S. REP. NO. 101-116, at 20 (1989).

175. See Carrie N. Klabunde, Joan L. Warren & Julie M. Legler, *Assessing Comorbidity Using Claims Data*, 40 MED. CARE IV-26, IV-26 (2002) ("Comorbidities are additional diseases beyond the condition under study."); Ismene L. Petrakis, Gerardo Gonzalez, Robert Rosenheck & John H. Krystal, *Comorbidity of Alcoholism and Psychiatric Disorders*, 2 ALCOHOL RES. & HEALTH 81, 81 (2002), available at <http://pubs.niaaa.nih.gov/publications/arh26-2/81-89.pdf> (defining comorbidity as a "dual diagnosis").

entirely unrelated; all that is required for conditions to be considered comorbid is that an individual have both at the same time.¹⁷⁶

Comorbidity rates are especially high in cases involving gambling disorder, meaning that individuals with a gambling disorder are likely to also have other physical or mental conditions.¹⁷⁷ Separate studies have found comorbidity overlap between gambling disorder and sleep disorders,¹⁷⁸ substance abuse and alcoholism,¹⁷⁹ and depression,¹⁸⁰ as was the case for John Trammell.¹⁸¹ Though comorbidity rates do not necessarily indicate any causal links between gambling disorder and the other conditions, they do demonstrate an appreciable chance that an individual diagnosed with gambling disorder might have another medical condition.¹⁸² And, unlike gambling disorder, the potential

176. See M. Grabicki, H. Parysek, H. Batura-Gabryel & I. Brodnicka, *Comorbidities as an Element of Multidimensional Prognostic Assessment of Patients with Chronic Obstructive Pulmonary Disease*, 59 J. PHYSIOLOGY & PHARMACOLOGY 297, 298 (2008) (dividing discussed comorbidities into categories including “comorbid diseases with a common pathophysiology,” “conditions that arise as a complication” of the primary condition, and “co-incidental comorbidities with unrelated pathogenesis”).

177. See Angela Ibáñez, Carlos Blanco, Elizabeth Donahue, Henry R. Lesieur, Igancio Pérez de Castro, José Fernández-Piqueras & Jerónimo Sáiz-Ruiz, *Psychiatric Comorbidity in Pathological Gamblers Seeking Treatment*, 158 AM. J. PSYCHIATRY 1733, 1734 (2001) (finding a “high rate and wide range of comorbid psychiatric disorders” among diagnosed pathological gamblers seeking treatment).

178. Iman Parhami, Aaron Siani, Richard J. Rosenthal & Timothy W. Fong, *Pathological Gambling, Problem Gambling and Sleep Complaints: An Analysis of the National Comorbidity Survey*, 29 J. GAMBLING STUD. 241, 248–50 (2013).

179. See Renee M. Cunningham-Williams, Linda B. Cotter, Wilson M. Compton III & Edward L. Spitznagel, *Taking Chances: Problem Gamblers and Mental Health Disorders—Results from the St. Louis Epidemiologic Catchment Area Study*, 88 AM. J. PUB. HEALTH 1093, 1093 (1998) (finding problem gamblers “at an increased risk for several psychiatric diagnoses, especially . . . alcoholism[] and tobacco dependence”); Gladys W. Hall, Nicholas J. Carriero, Ruby Y. Takushi, Ivan D. Montoya, Kenzie L. Preston & David A. Gorelick, *Pathological Gambling Among Cocaine-Dependent Outpatients*, 157 AM. J. PSYCHIATRY 1127, 1127 (2000) (finding a higher prevalence of pathological gamblers among cocaine-dependent outpatients as compared with the general population); Tony Toneatto & Judy Brennan, *Pathological Gambling in Treatment-Seeking Substance Abusers*, 27 ADDICTIVE BEHAV. 465, 465 (2002) (finding high rates of gambling problems among treatment-seeking substance abusers); see also NANCY M. PETRY, *PATHOLOGICAL GAMBLING: ETIOLOGY, COMORBIDITY, AND TREATMENT* 21, 86 (2005) (summarizing a number of studies, including those listed above).

180. See Sidney H. Kennedy et al., *Frequency and Correlates of Gambling Problems in Outpatients with Major Depressive Disorder and Bipolar Disorder*, 55 CAN. J. PSYCHIATRY 568, 568 (2010) (finding that people with depression have higher rates of gambling).

181. See *Trammell v. Raytheon Missile Sys.*, 721 F. Supp. 2d 876, 882–83 (D. Ariz. 2010).

182. *Comorbidity and Gambling Disorders Fact Sheet*, NAT’L CTR. FOR RESPONSIBLE GAMING, http://www.ncrg.org/sites/default/files/oec/pdfs/ncrg_fact_sheet_comorbidity.pdf (last visited Jan. 23, 2015) (citing survey data finding that “96.3 percent of the lifetime pathological gamblers also met lifetime criteria for one or more other psychiatric disorders”).

comorbid conditions have been found by courts in some cases to qualify as disabilities under the ADA.¹⁸³

Serious legal complications can arise when an individual bringing a case for disability discrimination under the ADA suffers from a mix of potentially cognizable conditions, like depression, and certainly excluded conditions, like gambling disorder. John Trammell's case serves as a stark illustration of these complexities. Although Trammell's depression could meet the requirements of a disability, his claim on that basis was ultimately rejected.¹⁸⁴ A prima facie case under Title I requires employer knowledge of the condition.¹⁸⁵ Because his employer, Raytheon, had no knowledge of his depression, Trammell's depression claim hit a fatal stumbling block.¹⁸⁶ On the other hand, Raytheon undoubtedly had knowledge of Trammell's gambling problems because Trammell had discussed them with the human-resources department. But Trammell was barred from bringing such a claim under the ADA.¹⁸⁷ Instead, Trammell was forced to take a roundabout approach, arguing that his gambling addiction was a manifestation of his depression—an allowable underlying disability.¹⁸⁸ This argument was summarily rejected.¹⁸⁹ If Trammell's gambling disorder could have been a cognizable disability under the ADA, the result might have been different.¹⁹⁰

Comorbidity rates among gambling addicts provide potential loopholes, making it easier for employers to discriminate against individuals with disabilities. Taking the illustration a step beyond the facts of the Trammell case, what if the employer had knowledge that an employee was suffering from both depression and gambling disorder? Because gambling-disorder claims are excluded, the employer might have been able to fire the doubly afflicted employee for the explicitly stated reason that the employee was a gambling

183. See, e.g., *Duggins v. Appoquinimink Sch. Dist.*, 921 F. Supp. 2d 283, 290 (D. Del. 2013) (recognizing that the plaintiff's severe depression qualified as a disability under the ADA).

184. *Trammell*, 721 F. Supp. 2d at 882–83.

185. See AMS. WITH DISABILITIES: PRACTICE & COMPLIANCE MANUAL § 7:391 (2014) (“Consistent with the requirement to show or suggest that the adverse employment action was taken for prohibited reasons, an employee making a prima facie case must show that the employer knew, or should have known, of the disability.”).

186. *Trammell*, 721 F. Supp. 2d at 877.

187. *Id.* at 882–83.

188. Complaint, *supra* note 24, at 2.

189. *Trammell*, 721 F. Supp. 2d at 877.

190. For a further discussion, see *infra* Part V.

addict. Even if the employee's protected disability played a role in the termination decision, the employer could potentially use the excluded gambling disorder as a defensive bar to defeat the employee's claim.

The size and significance of this identified loophole depends heavily on whether mixed-motive analysis applies to ADA Title I claims. Mixed-motive analysis excuses defendants from liability for employment decisions in which discrimination against a protected status played a motivating part only if the defendant can prove that it would have made the same decision in the absence of the plaintiff's protected status.¹⁹¹ This would effectively allow the aforementioned doubly afflicted employees to argue that their employers terminated them for their (unprotected) gambling addiction *and* their other protected disability. But currently, the question of whether mixed-motive analysis applies in the ADA context is unresolved. Mixed-motive claims are allowed in Title VII discrimination cases.¹⁹² Claims under the Age Discrimination in Employment Act, however, are not subject to mixed-motive analysis.¹⁹³ Based on *Gross*, some courts have determined that mixed-motive analysis does not apply to ADA claims.¹⁹⁴ Nevertheless, mixed-motive analysis is not an easy hurdle to clear. Therefore, whatever the status of mixed-motive analysis, the current ADA exclusion of gambling disorder either makes it extremely difficult or virtually impossible for gambling addicts to bring *any* otherwise-winning claim under the ADA.

IV. POTENTIAL DIFFICULTIES IN RECOGNIZING GAMBLING ADDICTION AS A DISABILITY

Even if the disability status of gambling addicts under the ADA is reexamined, several factors pose challenges to the likelihood of reform. This Part first discusses how social moralism and the marginalization of addiction may prevent widespread popular acceptance—and perhaps more relevantly, lawmakers' acceptance—of gambling addiction as a “real” mental disorder. Next, it examines how courts have demonstrated a willingness to impose a narrow view of the definition of disability under the ADA. Finally, this Part considers how the proposed amendment can address employer

191. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

192. *Id.*

193. Gross v. FBL Fin. Servs. Inc., 557 U.S. 167, 172 (2009).

194. Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 318 (6th Cir. 2012) (en banc); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010).

concerns about potential risks and burdens imposed by protecting gambling addicts in the workplace.

A. Social Moralism and the Marginalization of Addiction

The concepts of disease and disability are normative, meaning that both can be defined as deviations from the social mean.¹⁹⁵ But in the determination of what deviations count as “disabilities” under the ADA, public opinion and social values play a large role in categorization.¹⁹⁶ Therefore, the ADA (and this Note’s proposed amendment) serves not only as a reflection of shifting social norms, but also as an embodiment of what society deems worthy of protecting.¹⁹⁷ As Senator Harkin stated:

There is a wellspring of fears and unfounded prejudices about people with disabilities, unfounded fears, whether people have mental disorders, whether they are manic depressives or schizophrenia or paranoia, or unfounded fears and prejudices based upon physical disabilities. The point of the bill is to start breaking down those barriers of fear and prejudice and unfounded fears, to get past that point so that people begin to look at people based on their abilities, not first looking at their disability.¹⁹⁸

Though the ADA was intended to fight myths and stereotypes associated with disability,¹⁹⁹ its strategy for accomplishing this goal was selective. Instead of putting forth a welcome mat to all people with disabilities, the ADA underlined the bias society has toward those with mental disorders listed as sin exceptions,²⁰⁰ “carv[ing] out a new class of untouchables” defined by their socially repugnant behavior, like excessive gambling.²⁰¹

195. Adrienne L. Hiegel, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1451 (1994).

196. *Id.*

197. *Id.* at 1452.

198. 135 CONG. REC. 19,866 (1989).

199. See *supra* notes 40–47 and accompanying text.

200. See 42 U.S.C. § 12211 (2012) (listing compulsive gambling and other “conditions” like homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender-identity disorders, other sexual-behavior disorders, kleptomania, pyromania, and psychoactive-substance-abuse disorders resulting from the illegal use of drugs).

201. Hiegel, *supra* note 195, at 1453.

Today, gambling addicts continue to face multiple layers of social stigma: stigma against disabilities,²⁰² stigma against mental illnesses,²⁰³ and stigma against gambling itself. Gambling has been called a “classic vice[]”—an activity traditionally viewed as morally condemnable that has undergone some level of legalization in our society.²⁰⁴ Gambling is often seen as a personal moral failing whose blame lies solely on the individual: “Within western cultures, useful employment, family life and the acquisition of material wealth are central goals of the sociali[z]ation process. The heavy gambler is seen as a failure by these standards.”²⁰⁵

Before the development of modern psychiatry, gambling-related problems were often classified as a form of “moral insanity.”²⁰⁶ Despite the removal of “moral insanity” from the psychiatric lexicon,²⁰⁷ morality-based objections to excessive gambling persist.²⁰⁸ Not only has this stigma slowed widespread social acceptance of gambling addiction as a legitimate mental disorder, but it has also played a role in slowing scientific research into the topic.²⁰⁹ Thus, although the scientific community changed its conception of gambling from “gambling as sin” to “gambling as sick,” alongside its acceptance of the psychoanalytic perspective on human nature,²¹⁰ societal acceptance still lags behind. The persistent lack of public acceptance

202. See, e.g., Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 401 (2000) (noting that individuals with disabilities tend to experience social disadvantages and deprivation of opportunities).

203. See also Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 AM. J. COMP. L. 205, 208 (2012) (“When the conversation turns to people with cognitive or psychosocial (psychiatric) disabilities, however, then the whole person is tainted, discredited . . .”).

204. John Dombrink, *Gambling and the Legalisation of Vice: Social Movements, Public Health, and Public Policy in the United States*, in *GAMBLING CULTURES*, *supra* note 85, at 43. The other “classic vices” listed include “abortion, homosexuality, drug use, pornography, and prostitution.” *Id.*

205. *Id.*

206. COLLINS, *supra* note 81, at 366–71.

207. Lucy Ozarin, *Moral Insanity: A Brief History*, PSYCHIATRIC NEWS (May 18, 2001), <http://psychnews.psychiatryonline.org/newsArticle.aspx?articleid=103040>.

208. One author has even argued that the diagnostic criteria of pathological gambling in the DSM-IV themselves represented a medicalization of researchers’ previous moral objections to gambling behavior. Bo J. Bernhard, *The Voices of Vices: Sociological Perspectives on the Pathological Gambling Entry in the Diagnostic and Statistical Manual of Mental Disorders*, 51 AM. BEHAV. SCIENTIST 8, 9 (2007).

209. *Id.* at 11 (“[C]onservative moral forces have exerted subtle but powerful influences over academic inquiry.”).

210. Walker, *supra* note 85, at 223–24.

has kept gambling disorder in the shadows, and can affect lawmakers to the extent that they share these same views or that the lack of public acceptance obscures the issue as one requiring legal protection.

Amidst the fight against the forces of social moralism, the growing marginalization of the very idea of addiction presents another barrier to ADA recognition of gambling addiction. In his examination of addiction, Jim Orford recognized “the danger of trivializ[ing] the debate about addiction if the concept is extended too far.”²¹¹ Addiction has been absorbed into the popular vernacular as a term meant to refer to nothing more than frequent use or enjoyable habits.²¹² The boundaries between conceptions of noncompelled frequent use and true addiction are easily blurred in the public eye. The difficulties of separating these conceptions of “addiction” arise because behavioral addictions involve problems of self-control, which are well within the dimension of normal human functioning.²¹³ By contrast, true addicts experience impaired self-control at a level beyond what an average person might experience.²¹⁴ What might seem to external viewers as a voluntary, and therefore blameworthy, activity is in fact the result of a mental disorder.²¹⁵

References, often made tongue-in-cheek, to addictions to shoes,²¹⁶ Netflix,²¹⁷ and Diet Coke²¹⁸ appear to contribute to the marginalization of gambling addiction by creating the perception that

211. JIM ORFORD, *EXCESSIVE APPETITES: A PSYCHOLOGICAL VIEW OF THE ADDICTIONS* 5 (2d ed. 2001). In a broader vein, we might even encounter the argument against including addictions under ADA coverage—that doing so would trivialize and overextend the concept of disabilities.

212. See *infra* notes 216–18 and accompanying text.

213. MARK DICKERSON & JOHN O’CONNOR, *GAMBLING AS AN ADDICTIVE BEHAVIOUR: IMPAIRED CONTROL, HARM MINIMISATION, TREATMENT AND PREVENTION* 22 (2006); see FERENTZY & TURNER, *supra* note 80, at 39 (“It is helpful . . . to view addictions as extensions of normal human behaviors and aspirations—natural functions gone awry.”).

214. See DICKERSON & O’CONNOR, *supra* note 213, at 22.

215. Though the author was describing a narcotics user, this quote from William S. Burroughs’s novel *Junky* seems illustrative: “The question is frequently asked: Why does a man become a drug addict? The answer is that he usually does not intend to become an addict. You don’t wake up in the morning and decide to be a drug addict.” WILLIAM S. BURROUGHS, *JUNKY* 4–5 (1952).

216. Rachel Holmes & Malgorzata Stankiewicz, *Shoe Addiction, What’s the Cure?*, *GUARDIAN* (Apr. 15, 2010, 6:26 PM), <http://www.theguardian.com/lifeandstyle/2010/apr/15/shoe-addiction-cure>.

217. Felice Shapiro, *Confessions of a Netflix Addict*, *HUFFINGTON POST* (Oct. 18, 2013, 7:52 PM), http://www.huffingtonpost.com/felice-shapiro/netflix_b_4112820.html.

218. Arielle Calderon, *25 Signs You’re Addicted to Diet Coke*, *BUZZFEED* (Apr. 30, 2013, 3:44 PM), <http://www.buzzfeed.com/ariellecalderon/signs-youre-addicted-to-diet-coke>.

addictions are banal peccadilloes, rather than serious psychiatric disorders. This marginalization is especially disastrous to the credibility of behavioral addictions, which already run against the norm of substance-based addictions. Instead of expanding society's conception of the varied types of addictions, these references would likely fall into what Orford would consider "too far,"²¹⁹ and increase the risk that excessive-gambling behavior will be associated with overindulgences in shoes or Netflix, rather than understood as a true addiction.

B. Courts' Narrow Interpretation of the ADA

The courts' narrow interpretation of the ADA is widely acknowledged.²²⁰ Congress likely intended the ADA to incorporate the relevant case law developed under its predecessor, the Rehabilitation Act.²²¹ This hope failed to materialize in subsequent court decisions.²²² Instead, the Supreme Court interpreted the ADA's definition of disability in a way that, according to critics, was contrary to the ADA's intent.²²³ These cases, most notably *Sutton v. United Air Lines, Inc.*²²⁴ and *Toyota Motor Manufacturing, Kentucky, Inc. v.*

219. ORFORD, *supra* note 211, at 5.

220. See Barry, *supra* note 55, at 206 ("In fact, the narrowing of coverage under the ADA is used in law schools across the country as a textbook example of how language intended by Congress to mean one thing can be interpreted by courts to mean something completely different.").

221. Rehabilitation Act of 1973, 29 U.S.C. § 701–718 (2012); 29 C.F.R. § 1630, app. (2015); see 154 CONG. REC. S18,517 (2008) (statement of Sen. Tom Harkin) ("When Congress passed the ADA . . . it adopted the functional definition of disability from [] Section 504 of the Rehabilitation Act of 1973 Within this framework, with its generous and inclusive definition of disability, courts treated the determination of disability as a threshold issue but focused primarily on whether unlawful discrimination had occurred.").

222. See 29 C.F.R. § 1630, app. ("The holdings of several Supreme Court cases sharply narrowed the broad scope of protection Congress originally intended under the ADA, thus eliminating protection for many individuals whom Congress intended to protect.").

223. See, e.g., Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1815 (2005) ("This narrow construction of the definition of disability, commentators suggest, has contributed to plaintiffs' low success rates in ADA cases, which has in turn limited the ADA's effectiveness (particularly Title I). An undercurrent running through much of this scholarship is the sense among commentators that the judiciary is generally hostile to the ADA." (footnote omitted)); see also NAT'L COUNCIL ON DISABILITY, RIGHTING THE AMERICANS WITH DISABILITIES ACT 1 (2004), available at <http://www.ncd.gov/publications/2004/Dec12004> ("[T]he provisions of the ADA that have been narrowed by Court rulings currently do not provide the same scope of opportunities and protections expressed by those involved in the creation and passage of the ADA. Legislation is urgently needed to restore the ADA . . .").

224. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

Williams,²²⁵ significantly narrowed the protections of the ADA by setting stringent requirements for plaintiffs alleging disability. For example, the Court in *Sutton* considerably narrowed the meaning of “substantially limits.”²²⁶ Recall that the ADA’s definition of disability requires that the claimed impairment “substantially limit” a “major life activity.”²²⁷ In determining the meaning of “substantially limits,” the Court in *Sutton* required a plaintiff who claimed that her disability substantially limited her ability to work to demonstrate that she was “unable to work in a broad class of jobs,” rather than demonstrate that her condition substantially limited her ability to work in her particular job.²²⁸ Two years later in *Toyota Motor*, in determining what constituted a “major life activity,” the Court limited acceptable activities to those “tasks that are of central importance to most people’s daily lives,” rather than activities specific to the life of the individual claiming a disability.²²⁹ In doing so, the Court held that the terms “substantially” and “major” “need to be interpreted strictly to create a demanding standard for qualifying as disabled” under the ADA.²³⁰

The precedents that sprouted after the ADA’s enactment became so restrictive that Congress sought to reopen and broaden the statute by passing the ADA Amendments Act (ADAAA) in 2008.²³¹ The ADAAA was intended to “reinstat[e] a broad scope of protection under the ADA,”²³² partly by including rules of construction “in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.”²³³ In passing the ADAAA, Congress forcefully rejected the Court’s holdings in *Sutton* and *Toyota Motor*.²³⁴ In what appears to be a targeted response to courts’ narrowing of the ADA’s definition of disability, the ADAAA’s implementing regulations included a reminder that “the primary object of attention [in ADA cases] should be . . . whether

225. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2001).

226. *Sutton*, 527 U.S. at 491.

227. 42 U.S.C. § 12102(1)(A) (2012).

228. *Sutton*, 527 U.S. at 491.

229. *Toyota Motor Mfg.*, 534 U.S. at 187.

230. *Id.* at 197.

231. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2012) (codified at 42 U.S.C. §§ 12101–12213 (2012)).

232. 29 C.F.R. § 1630(c)(4) (2015).

233. 29 C.F.R. § 1630, app. (2015).

234. 42 U.S.C. § 12102(4)(A) (2012).

discrimination has occurred, not whether the individual meets the definition of disability.”²³⁵

The ADAAA became effective January 1, 2009,²³⁶ and the EEOC issued its final implementing regulations on March 25, 2011.²³⁷ But as of the date of this Note’s publication, the results of the ADAAA have not proven the legislation to be an effective solution to the ADA’s problems, and some scholars doubt that the ADAAA will have any effect on court decisions.²³⁸ At the heart of this criticism lies a fundamental shared assumption: despite their robes, judges are people, and the same social attitudes that stigmatize some disabilities can also play a role in judges’ rulings on the bench. As one commentator argues:

Attitudes to disability determined the fate of the ADA in the nearly twenty years between its passage and its restoration. It was largely attitudes—specifically, the gap between societal attitudes and the law’s demands—that led to the narrowing of the statute in the courts.²³⁹

The continued judicial contraction of the ADA’s application to plaintiffs with drug addictions and alcoholism has particularly problematic implications for gambling addiction. Some of this narrow interpretation derives from the terms of the statute itself. The statute does not protect any individual “currently engaging in the illegal use of drugs.”²⁴⁰ But an individual successfully rehabilitated and “no longer engaging in the illegal use of drugs” could arguably be a qualified individual with a disability.²⁴¹ In any case, employers are free

235. See 29 C.F.R. § 1630.1(c)(4) (“The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.”).

236. Americans with Disabilities Act Amendments Act of 2008, § 8.

237. Regulations To Implement the Equal Employment Provisions of the Americans with Disabilities Act Amendments Act, 76 Fed. Reg. 16,977 (Mar. 25, 2011) (codified at 29 C.F.R. § 1630).

238. See, e.g., Emens, *supra* note 203, at 207–08 (“What will happen as more courts interpret it? My guess is that attitudes to disability will largely determine the courts’ interpretations. . . . I suspect that courts will find new ways to narrow the statute . . .”).

239. *Id.* at 206.

240. 42 U.S.C. § 12114(a); see 29 C.F.R. § 1630.3 (2015) (“The term ‘currently engaging’ is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct.”).

241. 42 U.S.C. § 12114(b)(1). *But see* Tyson v. Or. Anesthesiology Grp., P.C., Civ. No. 03-1192, 2008 U.S. Dist. LEXIS 44992, at *19 (D. Or. June 6, 2008) (“ADA coverage [is] not

to prohibit their employees from using or being under the influence of illegal drugs and alcohol while at the workplace.²⁴² Even in such narrow circumstances, courts have been reluctant to allow ADA claims on the basis of alcoholism and drug addictions, relying on extremely narrow interpretations of the ADA.²⁴³ This trend is particularly troublesome for individuals with gambling disorder. Even if gambling disorder is recognized as an allowable disability under Title I, courts may prove similarly hesitant to allow ADA claims in gambling-disorder cases by setting high bars for the plaintiff to establish that his or her impairment substantially limited a major life activity.

C. *Employer Concerns*

Some employers may resist the recognition of gambling disorder as a cognizable disability because it might prevent those employers from exercising their discretion to create safe and dependable workforces. After all, the ADA imposes not only negative obligations on employers to refrain from discriminating based on disability,²⁴⁴ but also affirmative obligations to provide reasonable accommodation in the workplace.²⁴⁵ Therefore, employers might be worried about the difficulty of complying with a new requirement to provide reasonable accommodation to gambling addicts.²⁴⁶ Additionally, employers may present various reasons against the hiring of problematic gamblers, including unreliability and absenteeism caused by gambling binges

triggered automatically when plaintiff [is] released from his rehabilitation treatment” because “employers are also entitled to assurances that the employee is refraining from the continued illegal use of drugs and the impacts of that use.”). Even individuals whose drug-related disabilities qualify under this provision are subject to additional restrictions under 42 U.S.C. § 12114(c)(4) regarding their job performance.

242. 42 U.S.C. § 12114(c)(1)–(2).

243. See, e.g., *Shirley v. Precision Castparts Corp.*, 726 F.3d 675, 679 (5th Cir. 2013) (interpreting the ADA term “current use of drugs” to include drug use in preceding weeks and months); *Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1189 (10th Cir. 2011) (holding that the plaintiff, who had not used drugs for one month, was still a current drug user); *Bailey v. Ga.-Pac. Corp.*, 306 F.3d 1162, 1168–69 (1st Cir. 2002) (characterizing the plaintiff’s difficulties at work as “isolated problems” and rejecting his claim of alcoholism as a disability); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 315 (5th Cir. 1997) (finding that the plaintiff’s alcoholism did not impair any major life activity).

244. 42 U.S.C. § 12112(a) (2012).

245. *Id.* § 12112(b)(5)(A).

246. See generally *Carrie Griffin Basas, Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59 (2008) (advocating for the involvement of individuals with disabilities in the accommodation process).

and the potential of theft or embezzlement to pay off gambling debts.²⁴⁷ Finally, employers may fear that if gambling addiction is recognized as a disability, they might face lawsuits for refusing to employ individuals that they believe, based on the individuals' gambling activities, might pose a high risk to the employers' business interests.

At first glance, it may seem that the ADA's provisions offer no protection against these employers' concerns. However, employers have a number of protections under the ADA, the best known of which is the "direct threat" defense, which allows employers to fire or refuse to hire individuals if the employers determine that the individuals pose a threat to workplace safety and health.²⁴⁸ The dangers facing employers of gambling addicts largely fall outside the "direct threat" defense, however, as they generally do not involve the potential for physical harm and safety hazards that the defense envisions.²⁴⁹

Nevertheless, even if ADA cases involving gambling addiction are treated similarly to cases involving addictions recognized under ADA case law, current ADA provisions provide a potential remedy for many of the employers' concerns. First, although employers may worry about the types of reasonable accommodation the ADA would mandate they provide to employees with gambling addictions, reasonable accommodation is restricted according to its feasibility: the employee's request for accommodation must be "reasonable on its face."²⁵⁰ Furthermore, the employee—the potential plaintiff—bears the burden of demonstrating the reasonableness of his or her own

247. See Todd Etshman, *Employers Need To Know Warning Signs of Fraud*, ROCHESTER BUS. J., (May 2, 2014), available at <http://www.rbj.net/article.asp?aID=208286> ("The majority of frauds we investigate are because people have a gambling problem and steal from their employer to gamble.").

248. See 42 U.S.C. § 12113(b) (2012) ("The term 'qualification standards' [that an employee must meet] may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."); 29 C.F.R. § 1630.15(b)(2) (2015) (same).

249. See 29 C.F.R. § 1630.2(r) (2015) ("*Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm." (emphasis in original)).

250. See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 402 (2002) (holding that the plaintiff needed to demonstrate that the accommodation "seem[ed] reasonable on its face, *i.e.*, ordinarily or in the run of cases").

request.²⁵¹ In all cases, an employer is entitled to claim a defense of “undue hardship” when accommodation requests are too expensive or difficult to provide.²⁵² This determination of undue hardship takes into account considerations of the employer’s size, financial resources, and business needs.²⁵³ Therefore, despite employers’ bemoaning of the difficulty of designing accommodations for gambling addicts, actual accommodations would most likely include only flexible scheduling and time off from work to participate in rehabilitation (as is the case for alcoholics and drug addicts in recovery).

Furthermore, employers’ obligation under the ADA to provide reasonable accommodation has not proved especially burdensome. At the outset of the enforcement of the ADA, the EEOC projected that the reasonable-accommodation provision would create the lion’s share of employers’ expenses resulting from the statute.²⁵⁴ Still, initial estimates of those potential costs were quite low.²⁵⁵ Since then, the Job Accommodation Network (JAN), a service provided by the U.S. Department of Labor, has annually released findings on the costs and benefits of job accommodations under the ADA.²⁵⁶ In its most recent release, JAN reported its finding that “[m]ost employers report no cost or low cost for accommodating employees with disabilities.”²⁵⁷ The most likely accommodations sought by gambling addicts might be time off from work to enter into a rehabilitation program or flexible scheduling to allow attendance at group-therapy meetings, both of which already function as reasonable accommodation for other addictive disorders under the ADA.²⁵⁸ Therefore, employers’

251. *Id.*

252. 42 U.S.C. § 12112(B)(5)(A) (2012).

253. 42 U.S.C. § 12111(10)(B) (2012).

254. Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 8578, 8582 (Feb. 28, 1991).

255. *Id.* at 8582–84 (calculating that the mean for various estimates would be \$261).

256. For the most recent report, see generally JOB ACCOMMODATION NETWORK, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT (2013), available at <http://askjan.org/media/LostCostHighImpact.doc>.

257. *Id.* at 4. Of the employers providing information to JAN, 58 percent reported that the necessary accommodation for their employees cost nothing, and of those who did report some cost, the median cost of a one-time accommodation was \$500. *Id.*

258. See 42 U.S.C. § 12111(9) (“The term ‘reasonable accommodation’ may include . . . modified work schedules . . .”). This accommodation would be analogous to workplace accommodation sought by employees with other addictive disorders, like alcoholism. See *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 996 (D. Or. 1994) (holding that the employer must provide a leave of absence for an employee to obtain medical treatment for alcoholism).

concerns over the burden and expense of providing accommodations under the ADA seem largely overstated. Furthermore, employers are permitted to hold employees with drug or alcohol addictions to the same qualification and performance standards as nonaddicts.²⁵⁹ It is therefore plausible that employees with gambling disorder could be placed under the same standards as other employees or potential employees. For example, a gambling addict who frequently misses work to attend horseraces or go to the casino should not be able to claim an exemption from workplace-attendance policies by alleging that his addiction caused his absences.

Lawmakers should keep in mind, though, that employers' stated concerns are not always borne out by reality. Even though individuals struggling with gambling addiction may have personal problems, these problems do not always translate into poor job performance. For example, in John Trammell's case, despite the frequency of his habits and the severity of his casino debts, he received overwhelmingly positive employment reviews before his termination.²⁶⁰ Fundamentally, employers want a productive workforce, and even those individuals with gambling disorder, if given the right workplace accommodations to seek treatment, can ultimately become valuable employees.

V. WHAT COULD HAVE BEEN FOR JOHN TRAMMELL: A COUNTERFACTUAL CASE ANALYSIS

In light of these suggestions and considerations, one might consider how John Trammell's Title I discrimination claim might have played out in court if the ADA definition of disability had not excluded compulsive gambling. As Trammell attempted to show for his depression, he would have to present a *prima facie* case that he has a disability, he is a qualified individual, and he was subject to an adverse employment action by his employer because of his disability.²⁶¹

259. 42 U.S.C. § 12114(c)(4) (2012); *see Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3d Cir. 1998) (disallowing a Title I claim in which the plaintiff claimed that he was late to work and left work early due to his drug use); *see also Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 856–57 (5th Cir. 1999) (suggesting factors courts can examine, “including the level of responsibility entrusted to the employee; the employer’s applicable job and performance requirements, the level of competence ordinarily required to adequately perform the task in question, and the employee’s past performance record” (quotation marks omitted)).

260. Complaint, *supra* note 24, at 2.

261. AMS. WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL § 7:391 (2014).

A. *Establishing a Disability*

Under the first element of his prima facie case, Trammell would try to characterize his gambling disorder as a mental impairment under § 12102(1)(A).²⁶² Gambling disorder is diagnosable as a mental or psychological disorder under the DSM-5.²⁶³ Recall, however, that a mental impairment alone is not enough to establish a disability—the impairment must also “substantially limit[] one or more major life activities[.]”²⁶⁴ Trammell could conceivably make an argument that his gambling disorder substantially limited a number of the qualifying life activities listed in 42 U.S.C. § 12102(2), including sleeping, eating, thinking, and concentrating. This argument could have been supported by expert evidence from his psychiatrist, who prepared an affidavit attesting that Trammell’s impairment substantially limited major life activities because it caused “ongoing severe feelings of sadness, problems with insomnia, decreased appetite, decreased energy level, and severe anxiety regarding finances.”²⁶⁵

B. *Qualified Individual*

If Trammell cleared the initial hurdle of pleading a disability, he would next have to show he is a qualified individual—that is, “an individual who, with or without reasonable accommodation, can perform the essential functions” of his job.²⁶⁶ During his time at Raytheon as a senior manager,²⁶⁷ Trammell received overwhelmingly positive employment reviews before his termination.²⁶⁸ However, he had recently been confronted at work about his gambling problem and had been intending to ask for professional counseling at the time he was fired by Raytheon.²⁶⁹ Would seeking that treatment have

262. Although arguments could also be made for Trammell’s disability under the second and third prongs of the ADA’s definition of disability, because this Note has focused exclusively on the first prong, this hypothetical will likewise focus on how Trammell could bring his case under the first prong.

263. See *supra* note 107 and accompanying text. Even though Trammell was technically diagnosed with the definition of pathological gambling under the DSM-IV in place at the time of his case, this thought experiment will use the current diagnostic language and refer to gambling disorder. See Affidavit of Bradley R. Johnson, M.D., *supra* note 27, at 2 (diagnosing pathological gambling as a disorder).

264. 42 U.S.C. § 12102(1)(A) (2012).

265. Affidavit of Bradley R. Johnson, M.D., *supra* note 27, at 2.

266. 42 U.S.C. § 12111(8) (2012).

267. Complaint, *supra* note 24, at 2.

268. *Id.*

269. Trammell v. Raytheon Missile Sys., 721 F. Supp. 2d 876, 877 (D. Ariz. 2010).

transformed him into a “disqualified” individual? More likely than not, if Trammell had sought temporary inpatient treatment for a gambling disorder or outpatient meetings with a psychiatrist or counselor, his scheduling request would have fallen under Raytheon’s obligation to reasonably accommodate disabled employees.²⁷⁰

C. *Adverse Employment Action*

Under the third element, because Raytheon fired him, Trammell would have little difficulty proving the occurrence of an adverse employment action.²⁷¹ But the latter half of this element—whether he was fired because of his disability—would likely be the most difficult burden for Trammell’s prima facie case. Could Trammell prove that Raytheon’s decision to fire him was based on his disability? The advantage here, in contrast to Trammell’s real case, is that Trammell alleged that he informed Raytheon’s human-resources officer and security manager about his gambling habits.²⁷² In fact, it was the human-resources officer who asked Trammell if he needed professional counseling.²⁷³ Raytheon’s knowledge of Trammell’s condition removes the major stumbling block in his depression-based disability claim.²⁷⁴ Trammell would still have to jump through all the hoops of the typical plaintiff bringing a Title I claim under the ADA, but at least in this counterfactual, he has the same chance of getting his foot through the courtroom door as would a similarly situated person with a currently cognizable disability.

CONCLUSION

Although the ADA provision denying Title I coverage to employees claiming compulsive gambling as a disability remains the law, the underlying reasons for this exclusion are now in doubt. Changing scientific understandings have shaken the foundation upon which scientists have defined addiction, expanding the notion of addiction beyond the traditional realm of substance dependencies to

270. See 42 U.S.C. § 12111(9) (“The term ‘reasonable accommodation’ may include . . . modified work schedules . . .”); *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 996 (D. Or. 1994) (holding that the employer must provide a leave of absence for an employee to obtain medical treatment for alcoholism).

271. See 42 U.S.C. § 12112(a) (2012) (“No covered entity shall discriminate against a qualified individual on the basis of disability in regard to . . . discharge of employees . . .”).

272. *Trammell*, 721 F. Supp. 2d at 881.

273. *Id.*

274. *Id.* at 882.

encompass behavioral dependencies as well. If not for the explicit exclusion contained in the ADA, gambling addiction would seem to fit into the definition of disability that includes alcoholism and drug addiction. Nevertheless, although scientific development allows for evolving understandings, the legal standard of disability is stymied by the text of the ADA.

The recent inclusion of gambling disorder in the DSM-5 poses a ripe opportunity for the reevaluation of the ADA's exclusion of compulsive gambling as a disability. The evolving understanding of addiction, the ADA's recognized shortfalls, and the potential for employers to exploit loopholes caused by the exclusion of gambling disorder counsel in favor of such a reexamination. Amending the ADA would not be without challenges. Social attitudes, judicial resistance, and employers' reluctance all pose potential obstacles to the recognition of gambling disorder as a cognizable disability under Title I. Given the existing statutory barrier, any change in the legal status of gambling disorder as a disability ultimately requires an amendment of the ADA that eliminates its current categorical exclusion. Gathering the necessary legislative momentum to act, however, may prove the biggest challenge of all.