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## “Help Is the Sunny Side of Control”: The Medical Model of Gambling and Social Context Evidence in Canadian Personal Bankruptcy Law

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## **“Help Is the Sunny Side of Control”: The Medical Model of Gambling and Social Context Evidence in Canadian Personal Bankruptcy Law**

### **Abstract**

At the start of the twentieth century, people who gambled excessively were viewed as morally deviant. Now, they are viewed as suffering from a medical disorder. Legal actors incorporate this medical approach to gamblers into how they apply the law. This shift from a moral to a medical model reorients actors from punishing gamblers to helping them, and thus can be characterized as a positive, humane development. Yet the medical model has drawbacks too. The medical model can be used to justify paternalistic and potentially harmful interventions in the lives of individuals, and it obscures the social context in which individuals' behaviour occurs. The drawbacks of the medical model can be illustrated with the example of gamblers who undergo personal bankruptcy proceedings. Many of the legal actors practicing bankruptcy law have adopted a medical approach to gamblers. They have reoriented their practices to serve therapeutic ends. Yet, they may be inadvertently harming the bankrupts they are trying to help. The risk of harms created by the medical model can be mitigated by educating legal actors about the social context in which gambling occurs. This article synthesizes research on the social context of gambling in Canada and illustrates how it can inform the practices of legal actors who implement Canadian personal bankruptcy law. The example of Canadian personal bankruptcy law underlines the importance of incorporating social context evidence into the practice law, especially when a legal issue has been medicalized.

### **Cover Page Footnote**

The author wishes to thank Fiona Nicoll, Ubaka Ogbogu, Garry Smith, Gail Henderson and the participants at Emory University's workshop on "Legal Transitions and the Vulnerable Subject" for their helpful feedback on earlier drafts of this article, and Arooj Shah, Isis Tse and David Adie for their valuable research and editorial support.

# “Help Is the Sunny Side of Control”: The Medical Model of Gambling and Social Context Evidence in Canadian Personal Bankruptcy Law<sup>1</sup>

ANNA J. LUND\*

At the start of the twentieth century, people who gambled excessively were viewed as morally deviant. Now, they are viewed as suffering from a medical disorder. Legal actors incorporate this medical approach to gamblers into how they apply the law. This shift from a moral to a medical model reorients actors from punishing gamblers to helping them, and thus can be characterized as a positive, humane development. Yet the medical model has drawbacks too. The medical model can be used to justify paternalistic and potentially harmful interventions in the lives of individuals, and it obscures the social context in which individuals' behaviour occurs.

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\* Assistant Professor, University of Alberta. The author wishes to thank Fiona Nicoll, Ubaka Ogbogu, Garry Smith, Gail Henderson and the participants at Emory University's workshop on “Legal Transitions and the Vulnerable Subject” for their helpful feedback on earlier drafts of this article, and Arooj Shah, Isis Tse and David Adie for their valuable research and editorial support.

1. The title of this article is taken from Anne Lamott, “12 Truths I Learned from Life and Writing” (April 2017), online: *Ted2017* <[www.ted.com/talks/anne\\_lamott\\_12\\_truths\\_i\\_learned\\_from\\_life\\_and\\_writing/transcript](http://www.ted.com/talks/anne_lamott_12_truths_i_learned_from_life_and_writing/transcript)>. In her TED Talk, Lamott reflects on twelve things that she believes to be true. The third item on her list relates to our limited ability to help other people. Lamott says, “we can't arrange peace or lasting improvement for the people we love most in the world. They have to find their own ways, their own answers. ... You have to release them. It's disrespectful not to. And if it's someone else's problem, you probably don't have the answer, anyway. Our help is usually not very helpful. Our help is often toxic. And help is the sunny side of control. Stop helping so much.”

The drawbacks of the medical model can be illustrated with the example of gamblers who undergo personal bankruptcy proceedings. Many of the legal actors practicing bankruptcy law have adopted a medical approach to gamblers. They have reoriented their practices to serve therapeutic ends. Yet, they may be inadvertently harming the bankrupts they are trying to help.

The risk of harms created by the medical model can be mitigated by educating legal actors about the social context in which gambling occurs. This article synthesizes research on the social context of gambling in Canada and illustrates how it can inform the practices of legal actors who implement Canadian personal bankruptcy law. The example of Canadian personal bankruptcy law underlines the importance of incorporating social context evidence into the practice law, especially when a legal issue has been medicalized.

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**BETWEEN 1 AND 6 PER CENT** of Canadians have a gambling disorder.<sup>2</sup> For many people, excessive gambling leads to excessive gambling debt.<sup>3</sup> Once an individual's gambling losses exceed their income and savings, the individual may fund their play with credit—advances on credit cards or lines of credit, money borrowed from friends or family, cash raised by purchasing items on store credit

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2. See Alberta Gambling Research Institute, "Prevalence – Canada Provincial Studies" (last modified 17 June 2016), online: *Alberta Gambling Research Institute* <abgamblinginstitute.ca/resources/reference-sources/prevalence-canada-provincial-studies>.

3. See e.g., Carolyn Downs & Ryan Woolrych, "Gambling and Debt: The Hidden Impacts on Family and Work Life" (2010) 13 *Community, Work & Family* 311 at 315; Carolyn Downs & Ryan Woolrych, *Gambling and Debt Pathfinder Study* (Manchester Metropolitan University, 2009); Erika Langham et al, "Understanding Gambling Related Harm: A Proposed Definition, Conceptual Framework & Taxonomy of Harms" (2016) 16 *BMC Public Health* 1 at 6.

and immediately reselling them at a discounted price.<sup>4</sup> These gambling-related debts may become unmanageable, and the individual may turn to the debt relief options available in Canada's personal insolvency system, including bankruptcy. Research on Canadian gamblers suggests that they declare bankruptcy at a disproportionate rate compared to non-gamblers.<sup>5</sup> Research on Canadian bankrupts suggests that gambling is an underreported, yet significant cause of financial distress.<sup>6</sup> Researchers estimate that gambling plays a role in anywhere from 1 to 20 per cent of Canadian bankruptcies.<sup>7</sup>

Bankruptcy aims to provide indebted individuals with a financial fresh start by releasing their debts, but the legislation that governs Canadian personal bankruptcy, the *Bankruptcy and Insolvency Act*, restricts gamblers from accessing debt relief. This punitive provision dates back to 1919—a time when most forms

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4. In a study of how gamblers use credit, the researchers found that they move from those sources of credit that are most liquid and invisible to their friends and family (e.g., their salary, lump sum payments) towards those sources that are more illiquid and visible (e.g., funds in joint accounts, pawning property, borrowing from friends and family). See Michael O'Neil, Nicola Chandler & Anthony Kosturjak, *Problem Gamblers and the Role of the Financial Sector* (The South Australian Centre for Economic Studies, 2010).
  5. In a study of Alberta gamblers, the researchers estimated that approximately 1,950 problem gamblers declare bankruptcy annually, and that 10-20 per cent of bankruptcies in the province are attributable to excessive gambling. See Robert Williams, Yale Belanger & Jennifer Arthur, "Gambling in Alberta: History, Current Status and Socio Economic Impact" in *Final Report to the Alberta Gaming Research Institute* (2011) at 178, 181.
  6. In a study of seniors in insolvency, Janis Sarra found that in 2.44 per cent of cases, individuals identified gambling as the primary cause of their bankruptcy in their paperwork, but that number increased to 8 per cent of cases when bankrupts were interviewed by telephone. See Janis Sarra, "Growing Old Gracefully: An Empirical Investigation into Elderly Bankrupt Canadians" in Janis Sarra, ed, *Annual Review of Insolvency Law 2006* (Thomson Reuters Canada Limited, 2007) 783 at 807, 810. In a survey of 521 Canadians who started insolvency proceedings between 1 August 2008 and 1 July 2010, 4.2 per cent cited gambling as a contributing cause to their financial difficulty. See David U Himmelstein et al, "Health Issues and Health Care Expenses in Canadian Bankruptcies and Insolvencies" (2014) 44 *Intl J Health Services* 7 at 12. Andrew Diamond, a judicial officer from Ontario, reports that gambling is cited as a cause of financial distress by 5 per cent of the people appearing in bankruptcy court in Toronto. See Andrew M. Diamond, "What to do with a Drunken Sailor and Other Bankrupts with Addictions or What Are Appropriate Conditions to Impose on the Discharges for Bankrupts Suffering from Addiction and Mental Illness? Section 173 Voluntary vs. Involuntary" (2008) 36 *CBR* (5th) 167 at 170-71.
  7. See Anna J Lund, "Gambling Debt in Personal Insolvency Proceedings: The Approach of Insolvency Trustees and Judicial Officers" in Janis Sarra & Hon Barbara Romaine, eds, *Annual Review of Insolvency Law 2016* (Toronto: Carswell, 2017) 515 at 549-53 [Lund, "Gambling Debt"]; Williams, Belanger & Arthur, *supra* note 5; Sarra, *supra* note 6; Himmelstein, *supra* note 6, Diamond, *supra* note 6.

of gambling were criminalized in Canada and gambling was viewed as a moral problem: “a vice that [was] given in to by largely deviant individuals.”<sup>8</sup> Under this moral model, excessive gambling constituted a form of willful misconduct, which attracted punitive responses.<sup>9</sup> In the century that has elapsed since the *Bankruptcy and Insolvency Act* was first adopted, gambling has been recast as a legitimate form of leisure and excessive gambling has been reframed as a medical problem—a type of addiction. Many of the legal actors practicing bankruptcy law have adopted a medicalized approach to gamblers. They have reoriented their practices to serve therapeutic ends. Yet, they may be inadvertently harming the bankrupts they are trying to help. This article argues that the case of the bankrupt gamblers can be used to illustrate the drawbacks of the medical model and the importance of incorporating social context evidence into the practice of law.

This article is the third in a trilogy of articles on bankrupt gamblers. The first article examined the practices of insolvency trustees and judicial officers, who are tasked with applying the punitive provision of the *Bankruptcy and Insolvency Act* to insolvent gamblers. That article reported that trustees and judicial officers adopt a range of approaches. Some continue to apply it in a way that is primarily punitive, while others embrace a medical model of gambling and have repurposed the provision to impose therapeutic interventions on the bankrupt gambler, such as counselling and gambling venue exclusion orders.<sup>10</sup>

The second article sought to provide insolvency trustees with guidance about how to identify and assist bankrupt gamblers by synthesizing literature from the interdisciplinary field of gambling studies. The article identified financial and behavioural red flags, which may indicate that someone has a gambling problem,

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8. Brian Castellani, *Pathological Gambling: The Making of a Medical Problem* (State University of New York Press, 2000) at 133. This tension—between medical and moral approaches to gambling—is not unique to bankruptcy law. See I Nelson Rose, “Compulsive Gambling: From Sin to Vice to Disease” (1988) 4 J Gambling Behav 240. Rose examines the incomplete shift towards a medical model of gambling in a number of areas of American law including criminal, family, and debt collection.

9. See T Cameron Wild et al, “Attitudes towards Compulsory Substance Abuse Treatment: A Comparison of the Public, Counselors, Probationers & Judges’ Views” (2001) 8 Drugs 33 at 42 citing David J Pittman, “The New Temperance Movement” in David J Pittman & Helene Raskin White, eds, *Society, Culture and Drinking Patterns Reexamined* (Rutgers Center of Alcohol Studies) 775.

10. See Lund, “Gambling Debt,” *supra* note 7.

and canvassed the evidence about the efficacy of therapeutic interventions for disordered gamblers.<sup>11</sup>

This third article uses the example of personal bankruptcy law to illustrate the drawbacks of legal actors using a medical model. The medical model can be compared favourably to the moral one, because actors who use it are inclined to adopt a therapeutic, helpful orientation, as opposed to a punitive one. But, as the title of this article suggests, being helpful is a fraught undertaking.<sup>12</sup> This article argues that when legal actors adopt a medicalized approach towards bankrupt gamblers, they may inadvertently harm those gamblers, but that the risk of harms can be mitigated by incorporating social context evidence into their practices.

Thinking through the downsides of the medical model of gambling is important. When legal actors adopt a medical approach towards individuals who gamble, it can have significant impacts on those individuals. These impacts are diffuse because an individual's gambling disorder can be relevant to a wide range of legal questions, in criminal law, family law, and civil litigation, to name a few. Gamblers are an important case study for a second reason, because a number of behaviours—such as compulsive shopping, sex and eating—are being recast as medical disorders, and the law's response to these behaviours raises questions similar to those raised by the medicalization of excessive gambling.<sup>13</sup>

The balance of this article is organized into three parts. Part I describes the process by which gambling has been medicalized and briefly outlines some of the benefits and drawbacks of adopting a medical model of gambling. It then supplements the medical model of gambling with evidence about how a person's social context shapes their gambling. Part II illustrates the downsides of the medical model and the importance of social context evidence, using the example of gamblers who apply for bankruptcy protection. It analyzes two factual scenarios: where an individual has contributed to their bankruptcy by gambling, and where an individual bankrupt has committed an additional bad act because of their gambling. Part III concludes by reflecting on the broader implications of this article. Social context education may be important for many

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11. See Anna J Lund & Arooj Shah, "Bankrupt Gamblers: Research Informed Practice for Insolvency Trustees" in Janis P Sarra & Barbara Romaine, eds, *Annual Review of Insolvency Law 2018* (Thomson Reuters, 2019) 313.

12. See Lamott, *supra* note 1.

13. See Marcelo Piquet Pessoa et al, "DSM-5 & the Decision Not to Include Sex, Shopping or Stealing as Addictions" (2014) 1 *Current Addiction Rep* 172; Adrian Meule & Ashley N Gearhardt, "Food Addiction in the Light of DSM-5" (2014) 6 *Nutrients* 3653; JM Farré et al, "Sex Addiction and Gambling Disorder: Similarities and Differences" (2015) 56 *Comprehensive Psych* 59.

different legal actors, including those who encounter gamblers in other areas of the law and those who encounter other medicalized behaviours. By refocusing our attention on the “social,” social context education may also be an impetus for broader social change.

## I. GAMBLING: MEDICAL MODEL AND SOCIAL CONTEXT

### A. MEDICALIZATION OF GAMBLING

The medical model identifies human problems as having a biological cause. When the medical model is used to explain deviant behaviour, it attributes the individual’s misconduct to a defect in the brain or the body, or the introduction of a foreign agent that has led the brain or body to malfunction.<sup>14</sup> The model seeks to identify the cause of the malfunctioning and to “cure” or “treat” it. Medicalization is a process whereby human conditions or problems become understood in terms of the medical model.<sup>15</sup>

Excessive gambling underwent a process of medicalization in the twentieth century; it was recast from being caused by individual immorality and instead became understood as the result of a malfunctioning brain.<sup>16</sup> Sociologist John Rosecrance traces the medicalization process to the early part of the century, when psychoanalysts started to study gambling.<sup>17</sup> The psychoanalyst Sigmund Freud authored a ground-breaking study in which he tried to explain the author Fyodor Dostoyevsky’s gambling in terms of the Oedipal complex.<sup>18</sup> The psychoanalyst

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14. See Peter Conrad & Joseph Schneider, *Deviance and Medicalization: From Badness to Sickness* (CV Mosby, 1980) at 35.

15. See Peter Conrad, *The Medicalization of Society: On the Transformation of Human Conditions into Treatable Disorders* (John Hopkins University Press, 2007) at 4-5.

16. For a review of nineteenth-century psychiatry and the absence of gambling from this literature, see Alan F Collins, “The Pathological Gambler and the Government of Gambling” in James F Cosgrave, ed, *The Sociology of Risk and Gambling Reader* (Routledge, 2006) 355. Dave Dixon notes that in the twentieth century, religious groups opposed to gambling reframed their arguments in nonreligious terms. See Dave Dixon, “The Discovery of the Compulsive Gambler” in Zenon Bankowski & Geoff Mungham, eds, *Essays in Law and Society* (Routledge & Keegan Paul, 1980) 157; Colin S Campbell & Garry J Smith, “Gambling in Canada—From Vice to Disease to Responsibility: A Negotiated History” (2003) 20 *Can Bull Med Hist* 121 at 138.

17. See John Rosecrance, “Compulsive Gambling and the Medicalization of Deviance” (1985) 32 *Soc Probs* 275 at 276; Castellani, *supra* note 8 at 24-25.

18. See Sigmund Freud, “Dostoevsky and Parricide,” translated by DF Tait, in James Strachey, ed, *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, vol 21 (Hogarth Press, 1961) 177.

Edmund Bergler published an article in 1943, and then a book in 1957 in which he identified the compulsive gambler as a “type.”<sup>19</sup> The news magazine *Maclean’s* introduced Bergler’s work to Canadians with an article entitled “Mad About Gambling.”<sup>20</sup>

In 1957, the same year that Bergler published his treatise on gamblers, the first chapter of Gamblers Anonymous (“GA”) was founded in Los Angeles. The first Canadian GA meeting was held in Toronto in 1964.<sup>21</sup> The establishment and growth of GA has been linked to the medical model because GA, modeled on Alcoholics Anonymous, adopted the view that compulsive gamblers suffer from a medical disorder.<sup>22</sup> Attendance at GA is often prescribed to people suffering from excessive gambling. Practitioners developed other treatment options during the medicalization process. In 1972, the first in-patient treatment program specifically for gamblers was opened in Ohio.<sup>23</sup> More recently, researchers have tested the efficacy of cognitive behavioural therapy and pharmaceuticals as treatment methods.<sup>24</sup>

In 1980, the American Psychiatrist’s Association added gambling to their influential reference work on mental disorders—the Diagnostic and Statistical Manual of Mental Disorders (“DSM”)—as an impulse control disorder.<sup>25</sup> In 2013, it was renamed “gambling disorder” and was included alongside substance use

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19. See Edmund Bergler, “The Gambler: A Misunderstood Neurotic” in *Selected Papers of Edmund Bergler, M.D.* (New York: Grune and Stratton, 1969) 687; Edmund Bergler, *The Psychology of Gambling* (International Universities Press, 1970) at 6-7. Rosecrance, *supra* note 17 at 276. See also Edmund Bergler, “Zur Psychologie des Hasardspielers” (1936) 22 *Imago* 409. Edmund Bergler is also associated with the medicalization of homosexuality. See Conrad, *supra* note 15 at 98.
  20. See George Kisker, “Mad About Gambling” (1 September 1948), online: *Maclean’s* <archive.macleans.ca/article/1948/9/1/mad-about-gambling>.
  21. See Campbell & Smith, *supra* note 16 at 130.
  22. See David C Hodgins, Jonathan Stea & John E Grant, “Gambling Disorders” (2011) 378 *Lancet* 1874 at 1881, n 111 citing Gamblers Anonymous, “Gamblers Anonymous International Directory”, online: <www.gamblersanonymous.org/ga/addresses>.
  23. See Rosecrance, *supra* note 17 at 278.
  24. See David C Hodgins & Alice Holub, “Treatment of Problem Gambling” in Garry Smith, David C Hodgins & Robert J Williams, eds, *Research and Measurement Issues in Gambling Studies* (Elsevier, 2007) 371; Lund & Shah, *supra* note 11.
  25. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 3rd ed (American Psychiatric Association, 1980); Rosecrance, *supra* note 17 at 279. See also Castellani, *supra* note 8 at 20-23 (discussing the medicalization of gambling leading to recognition in the DSM). For those in Britain, an important step in the medicalization process was the inclusion of gambling in the ICD-10. See World Health Organization, *The ICD-10 Classification of Mental and Behavioral Disorders: Clinical Descriptions and Diagnostic Guidelines* (World Health Organization, 1992). See also Collins, *supra* note 16 at 358.

disorders as a type of addiction.<sup>26</sup> It is the first non-substance-related impulsive behaviour to be characterized as an addiction in the DSM. A key reason for this change in categorization is that there is a growing body of “research findings that gambling disorder is similar to substance-related disorders in clinical expression, brain origin, comorbidity, physiology, and treatment.”<sup>27</sup>

The medical model of gambling has many benefits over the moral model. It reduces the stigma otherwise experienced by individual gamblers and emphasizes humanitarian responses as opposed to punitive ones, because having a medical condition can operate as a form of excuse.<sup>28</sup> An individual’s bad behaviour can be pardoned if the individual establishes that the behaviour was related to a medical condition. The sociologist Talcott Parsons formulated the concept of the “sick role” in the 1950s to explain the exculpatory potential of a medical diagnosis. According to Parsons, individuals are exempted from normal social obligations when they identify as sick because the manifestations of the illness are beyond their control; however, they must accept that their illness is undesirable and seek treatment.<sup>29</sup> This concept is reflected across a range of areas of law. For example, the *Criminal Code* directs that no person shall be found guilty for a crime if at the time they committed it they were suffering from a mental disorder that prevented them from comprehending the wrongness of the act.<sup>30</sup> In employment law, an employer may be required to give a second chance

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26. See *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (American Psychiatric Association, 2013).

27. American Psychiatric Association, “Substance Related and Addictive Disorders—Fact Sheet” (2013), online: <[www.dsm5.org/documents/substance%20use%20disorder%20fact%20sheet.pdf](http://www.dsm5.org/documents/substance%20use%20disorder%20fact%20sheet.pdf)>[www.dsm5.org/documents/substance%20use%20disorder%20fact%20sheet.pdf](http://www.dsm5.org/documents/substance%20use%20disorder%20fact%20sheet.pdf).

28. See Castellani, *supra* note 8 at 104; Conrad & Schneider, *supra* note 14 at 246; Jackson Toby, “Medicalizing Temptation” (1998) 130 *Pub Interest* 64 at 64.

29. See Talcott Parsons, “Social Structure and Dynamic Process: The Case of Modern Medical Practice” in *The Social System* (Free Press, 1951) 428 at 436-37; Conrad & Schneider, *supra* note 14 at 247. Talcott Parsons’s theory of the sick role has been described as “outdated,” and yet it remains useful for considering how legal actors think about gambling in the bankruptcy system. See Annemarie Mol, *The Body Multiple* (Duke University Press, 2002) at 7.

30. See *Criminal Code*, RSC 1985 c C-46, s 16 [*Criminal Code*]; see e.g., *R v Harding*, 2006 SKCA 118 at paras 15 and 16 (affirming that pathological gambling disorder may be relevant to moral culpability).

to an employee who misbehaved at work, if a medical condition contributed to the employee's misconduct.<sup>31</sup>

A second benefit available to individuals who can cast their gambling in medical terms is that they may be able to access a greater range of entitlements. Certain programs are only available to individuals who can establish that they are "sick." For example, Canadians are entitled to temporary paid leave if they are unable to work due to an illness or injury.<sup>32</sup> Because their condition has been recast as a medical problem as opposed to a moral one, disordered gamblers can now argue that they should be afforded the excuses and given access to the entitlements that are available to other sick Canadians.

It is not always beneficial for an individual to cast their gambling in medical terms. The law's response to sick individuals has often been interventionist. Consider the long history of committing mentally-ill individuals to asylums. When an individual's gambling is characterized as a medical disorder, it opens them up to paternalistic interventions. Paternalistic interventions are not necessarily bad; however, situations inviting paternalistic interventions need to be approached by potential interveners with healthy doses of humility and caution. One does not need to look far for instances of individuals being subject to serious violations of their dignity, security of the person, liberty, and even life by others who were trying to help. Many of these "helpful" interventions were justified using medical science.<sup>33</sup>

The move toward the medical model of gambling reinforces a power dynamic that privileges the expert helper and disempowers the problem gambler. Medical expertise is required to identify which individuals are genuinely sick and not merely malingering. Medical expertise is also used to identify and implement an appropriate treatment regime. Conversely, an individual may be disempowered by the medicalization of their problem, because they now require expert intervention to diagnose and treat the problem. By privileging medical expertise,

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31. See e.g., *British Columbia Public Service Agency v BC Government and Service Employees' Union*, 2003 CarswellBC 3284 (LRB) (WL Can) at para 5 [*BC Public Service*]. See also *Toronto Transit Commission v Canadian Union of Public Employees, Local 2*, 2011 CanLII 49050 (ON LA).

32. See *Employment Insurance Act*, SC 1996 c 23, s 12(3)(c).

33. Conrad and Schneider use eugenics as an example of harmful interventions justified on the basis of medical science. See *supra* note 14 at 222. Eugenics programs were also active in Canada, for example in Alberta from 1928 to 1972. See *The Sexual Sterilization Act*, RSA 1942, c 194. The Alberta Act was repealed by *The Sexual Sterilization Repeal Act*, SA 1972, c 87.

the medical model invites paternalistic interventions by those who have access to such expertise, or who can frame their actions in medical terms.

The risk of paternalistic interventions is acute when the medical model is applied to addictions. A commonly held belief—part of the public conception of addiction as disease—is that denial is a symptom of the addiction. According to this line of thinking, addicted individuals deceive themselves and others about the true state of their health. Others need to intervene to help addicted individuals to see the truth of their situations and get treatment for their disorders.<sup>34</sup> This manner of thinking justifies coercive practices. Any objections from the addicted individual are answered with the rejoinders that the addicted individual does not grasp the truth of their situation and everything is being done for their own good.<sup>35</sup>

Medicalizing a condition like problem gambling can destigmatize it and invite humane responses, but those humane responses risk veering into paternalistic, and even harmful territory. Like any model, the medical one oversimplifies reality by illuminating some aspects, while at the same time obscuring others.<sup>36</sup> One can better understand and mitigate the risks of the medical model by intentionally shifting one's focus to take account of those aspects of reality obscured by the medical model. One way of shifting one's focus is to look beyond the question of individual malfunction to the individual's social context.

## B. THE SOCIAL CONTEXT OF GAMBLING

When legal actors characterize gambling as a medical condition, it may lead them to focus on an individual gambler. People without medical training often take a simplistic view of the medical model, assuming that it attributes illness solely to individual biology.<sup>37</sup> This focus on biological causes can obscure the social context in which an individual develops a medical condition. This emphasis

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34. For a discussion of this trope in the discourse of addiction, see Helen Keane, *What's Wrong with Addiction* (Melbourne University Press, 2002) at 72-77, 191. See also Fiona Nicoll, "Subjects in a State: Cultural Economies of Gambling" in Sytze F Kingma, ed, *Global Gambling: Cultural Perspectives on Gambling Organizations* (Routledge, 2010) 211 at 223: "the problem gambler is above all an individual who must be protected from him or herself."

35. See e.g., Arthur Caplan, "Denying Autonomy in Order to Create It: The Paradox of Forcing Treatment upon Addicts" (2008) 103 *Addiction* 1919 at 1920. Caplan argues that "the moral basis for mandatory treatment is for the good of the patient by rebirthing autonomy."

36. See Peter Ferentzy & Nigel E Turner, "Morals, Medicine, Metaphors and the History of the Disease Model of Problem Gambling" (2012) 27 *J Gambling Iss* 1 at 8.

37. See Rachel Volberg & Matt Wray, "Legal Gambling and Problem Gambling as Mechanisms of Social Domination" (2007) 51 *Am Behav Sci* 56 at 67.

on the individual—as the locus of the disorder—fits with and is reinforced by influential ideologies including the Protestant work ethic and neoliberalism.<sup>38</sup>

The lay perspective of what causes a medical condition can be more individualized than the perspectives of those who study the condition. Gambling researchers acknowledge that an individual's chances of succumbing to a gambling disorder are impacted by the environment in which an individual lives. Some have adopted a public health approach to gambling, which emphasizes how one's social environment contributes to one's wellness.<sup>39</sup> Others use a "biopsychosocial" model, which reflects the idea that many different factors can contribute to an individual developing a gambling disorder, including social experiences.<sup>40</sup> These researchers have identified several aspects of an individual's social context that shape gambling behaviour. This article considers two: (i) gambling opportunities have become more accessible and this increased accessibility impacts the prevalence of gambling related harm, and (ii) members of socially marginalized groups are disproportionately diagnosed as having gambling problems. The following two subsections synthesize the current research on these aspects of gambling's social context.

## 1. DISORDERED BEHAVIOUR AND THE ACCESSIBILITY OF GAMBLING VENUES

Informed by a public health model, gambling researchers have long posited that as gambling becomes more accessible in a community, more people will participate in gambling resulting in more gambling-related harm, including more disordered

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38. Conrad & Schneider suggest that the medical model's emphasis on the individual is highly compatible with the Protestant work ethic. See *supra* note 14 at 57. On the dominant role of the individual in neoliberal conceptions of society, see Wendy Brown, "Neoliberalism and the End of Liberal Democracy," in *Edgework: Critical Essays on Knowledge and Politics* (Princeton University Press, 2005) 37 at 42-44.

39. See Ferentzy & Turner, *supra* note 36 at 12-14; Howard J Shaffer, Richard A LaBrie & Debi Plante, "Laying the Foundation for Quantifying Regional Exposure to Social Phenomena: Considering the Case of Legalized Gambling as a Public Health Toxin" (2004) 18 *Psychol Addictive Behav* 40; David A Korn & Howard J Shaffer, "Gambling and the Health of the Public: Adoption of a Public Health Perspective" (1999) 15 *J Gambling Stud* 289; Rachel A Volberg, "The Prevalence and Demographics of Pathological Gamblers: Implications for Public Health" (1994) 84 *Am J Pub Health* 237 [Volberg, "Pathological Gamblers"].

40. See Hodgins, Stea & Grant, *supra* note 22 at 1878.

gambling.<sup>41</sup> This proposition is called the accessibility hypothesis. Testing the accessibility hypothesis has proven to be complex because there are many different dimensions to accessibility.<sup>42</sup> Accessibility has physical dimensions, which refer to the number and location of gambling venues, the number of games in each venue, hours of operation, and conditions of entry.<sup>43</sup> Accessibility has social dimensions, which refer to how inviting a venue is to participants and how socially acceptable gambling is to their friends and families.<sup>44</sup> Accessibility has cognitive dimensions, which refer to whether individuals understand how to use a gambling product, *e.g.*, do they know the rules of a table game or how to operate a machine game?<sup>45</sup>

Researchers studying accessibility have focused on its physical dimensions, and some of this research has found a correlation between accessibility of gambling and the prevalence of problem gambling. Interjurisdictional comparisons have shown that problem gambling rates are higher where there are more gambling venues<sup>46</sup> or where gambling has been legal for longer.<sup>47</sup> Meta-studies suggest that adding new gambling venues or formats leads to an increase in prevalence rates

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41. See Max Abbott, "Gambling and Gambling harm in New Zealand: A 28 Year Case Study" (2017) 15 Intl J Mental Health Addiction 1221 at 1231; Shaffer, LaBrie & Plante, *supra* note 39 at 42. Whereas previously, much research on the impacts of gambling focused on the prevalence of gambling disorders, researchers in gambling studies are now studying a broader range of gambling related harm. See Langham et al, *supra* note 3.
  42. See Nerilee Hing & John Haw, "The Development of a Multi-Dimensional Gambling Accessibility Scale" (2009) 25 J Gambling Stud 569 at 570; see also Productivity Commission, *Australia's gambling industries: Report No. 10* (AusInfo, 1999) at 8.4 [Productivity Commission].
  43. See Hing & Haw, *ibid* at 570.
  44. See *ibid* at 572; Lorne Tepperman et al, *The Dostoevsky Effect* (Oxford University Press, 2013) at 224-227 (arguing that people are more likely to turn to gambling when it has been "normalized").
  45. See Hing & Haw, *supra* note 42 at 575.
  46. See Brian J Cox et al, "A National Survey of Gambling Problems in Canada" (2005) 50 Can J Psychiatry 213 at 216 (finding higher rates of problem gambling in provinces with a high concentration of video lottery terminals and casinos).
  47. See Volberg, "Pathological Gamblers," *supra* note 39 at 239. Researchers have found no relationship between the number of different formats of gambling available in a jurisdiction and the prevalence rates of problem gambling. See Simon Planzer, Heather M Gray & Howard Schaffer, "Associations Between National Gambling Policies and Disordered Gambling Prevalence Rates Within Europe" (2014) 37 Intl JL & Psychiatry 217.

of problem gambling.<sup>48</sup> There is research to suggest that individuals living near to gambling venues are more likely to suffer from gambling disorders as compared to those who live farther away.<sup>49</sup>

Other researchers argue that the relationship between accessibility, gambling, and gambling related harm is more complex than the accessibility hypothesis suggests. Some have advanced an “adaptation hypothesis,” that “over time novelty wears off and this and other factors lead to reduced participation, increased resilience and a decrease in problems and harm, even when availability increases.”<sup>50</sup> These “other” protective factors can include “increased awareness of problem gambling, development of informal social controls, expansion of treatment and mutual help and regulatory changes.”<sup>51</sup> Some research supports the adaptation hypothesis. Researchers studying a new casino in Gatineau, Quebec, found that one year after it opened, the rate at which people living in the region played casino games and the amounts of money they lost in a day of gambling increased significantly when this group was compared to people living elsewhere in Quebec.<sup>52</sup> However, these differences faded over time.<sup>53</sup> Moreover, the introduction of the casino in Gatineau did not result in higher

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48. See John Storer, Max Abbott & Judith Stubbs, “Access or Adaptation? A meta-analysis of surveys of problem gambling prevalence in Australia and New Zealand With Respect to the Concentration of Electronic Gaming Machines” (2009) 9 Intl Gambling Stud 225 at 238 (finding that increases in EGM density correlate with increases in problem gambling prevalence). See also Productivity Commission, *supra* note 42 at 8.31 (the strongest evidence relates to a connection between the increased number of electronic gambling machines and increased prevalence of problem gambling).

49. Henry Tong & David Chim reviewed the literature in 2013 and found eleven studies looking at the relationship between proximity to a casino and prevalence rates for gambling disorder; seven found a link between the two. See Tong and Chim, “The relationship between casino proximity and problem gambling” (2013) 3 Asian J Gambling Iss & Pub Health 1; New Zealand Ministry of Health, “Raising the Odds? Gambling Behavior & Neighbourhood Access to Gambling Venues in New Zealand” (2 May 2008), online: <[www.health.govt.nz/system/files/documents/publications/raising-the-odds-may08.pdf](http://www.health.govt.nz/system/files/documents/publications/raising-the-odds-may08.pdf)>.

50. Abbott, *supra* note 41 at 1232.

51. Storer, Abbott & Stubbs, *supra* note 48 at 227.

52. See Robert Ladouceur, Francine Ferland & Christian Jacques, “Impact of Availability on Gambling: A Longitudinal Study” (2000) 45 Can J Psychiatry 810.

53. See Christian Jacques & Robert Ladouceur, “A Prospective Study of the Impact of Opening a Casino on Gambling Behaviors” (2006) 51 Can J Psychiatry 764.

rates of gambling disorder amongst nearby residents as compared to others in the province.<sup>54</sup> Researchers report similar findings in other jurisdictions.<sup>55</sup>

Some of the research on problem gambling indicates that neither the availability nor the adaptation hypothesis fully captures the relationship between accessibility, gambling, and gambling related harm. In 2017, researchers analyzing twenty-eight years of data from New Zealand found that as legal gambling opportunities increased, overall participation rates have decreased, supporting the adaptation hypothesis, but problem gambling rates have been much stickier, suggesting that they are not subject to adaptation.<sup>56</sup>

Based on the available evidence, one can conclude that the accessibility of gambling does impact the rate of gambling related harm in a community, including the prevalence of disordered gambling, but the relationship is complex and subject to some degree of adaptation.

The history of gambling in Canada is a history of growing accessibility. Before 1969, most forms of gambling were criminal in Canada, with the exception of games of chance at religious bazaars and agricultural fairs, private betting in groups of ten or less, and horse racing.<sup>57</sup> Starting in 1969 and through to 1985, the federal government relaxed the criminal prohibitions on gambling.<sup>58</sup> As a result of these amendments to the *Criminal Code*, many additional forms of gambling—lotteries, casinos, bingo halls, EGM, and online gambling—are now legal in Canada as long as they are either conducted or managed by a provincial government.<sup>59</sup>

Decriminalizing gambling made it more accessible in at least two ways. First, gambling is more socially acceptable because one can gamble legally. Second, opportunities for legal gambling have proliferated across the country as provincial

54. See Jacques & Ladouceur, *supra* note 53 at 770. However, more individuals in the Gatineau region reported having a family member with a gambling disorder.

55. See Rachel Volberg, “Has There Been a Feminization of Gambling and Problem Gambling in the United States?” (2003) 8 J Gambling Issues, online: <jgi.camh.net/jgi/index.php/jgi/article/view/3619/3579> [Volberg, “Feminization of Gambling”] (reporting declining participation rates after the introduction of legalized gambling in Montana, Oregon and Washington).

56. See Abbott, *supra* note 41 at 1233-34; see also Storer, Abbott & Stubbs, *supra* note 48 at 238-39 (finding results supporting both adaptation and accessibility).

57. See Suzanne Morton, *At Odds: Gambling and Canadians 1919–1969* (University of Toronto Press, 2003) at 10-11.

58. See Colin S Campbell, Timothy F Hartnagel & Garry J Smith, “The Legalization of Gambling in Canada” in Janet Mosher & Joan Brockman, eds, *Constructing Crime: Contemporary Processes of Criminalization* (UBC Press, 2010) 153.

59. See *Criminal Code*, *supra* note 30, s 207(1)(a).

governments have promoted gambling as a legitimate form of entertainment.<sup>60</sup> There are over 35,000 gambling venues in Canada, including almost 30,000 lottery ticket outlets, over 4,800 venues with electronic gambling machines (“EGMs”), 195 bingo halls, and seventy-seven casinos.<sup>61</sup> This proliferation of gambling venues has been lucrative for the public purse: gambling generates nearly fourteen billion dollars in annual net revenue for governments across Canada.<sup>62</sup>

Provincial governments not only promote gambling as a legitimate form of entertainment, they also allow for gambling to be provided in formats that increase the risk of addiction. There is a significant, though not universal, consensus amongst researchers that EGMs, such as video lottery terminals, are associated with a heightened risk of disordered gambling.<sup>63</sup> In Canada, individuals who play EGMs lose significantly more money every year than people who play other gambling formats.<sup>64</sup> Amongst individuals seeking help for their

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60. See James F Cosgrave, “Governing the Gambling Citizen: The State, Consumption and Risk” in James F Cosgrave & Thomas R Klassen, eds, *Casino State: Legalized Gambling in Canada* (University of Toronto Press, 2009) 46 at 55 (arguing that the state has a financial interest in producing more gamblers and gambling markets in Canada).
61. See Canadian Partnership for Responsible Gambling, “Gaming Venues and/or Designated Areas” (2018), online: <cprg.ca/Digests/ViewMainCards?yearId=507db81e-e5bf-e611-b52a-1abbb38a3094> [Canadian Partnership for Responsible Gambling].
62. In 2009, the net revenue to governments from provincial government-run lotteries, video lottery terminals (VLTs), casinos and slot machines not in casinos was \$13.8 billion. See Statistics Canada, *Canada Yearbook 2011* (Minister of Industry, 2011) at 224. In 2013–14, revenue “measured as wagers less prize payouts, before operating expenses deducted” remained at \$13.7 billion. See Canadian Partnership for Responsible Gambling, *Canadian Gambling Digest 2013–14* (2015) at 6, online: <www.responsiblegambling.org/docs/default-source/default-document-library/cprg\_canadian-gambling-digest\_2013-14.pdf>.
63. See Murat Yücel et al, “Neuroscience in Gambling: Policy and Treatment” (2017) 4 *Lancet Psychiatry* 501 at 503. Conversely, see Alex Blaszczynski, “A Critical Examination of the Link Between Gaming Machines and Gambling Related Harm” (2013) 7 *J Gambling Bus & Econ* 55. See also Nicki Dowling, David Smith & Trang Thomas, “Electronic Gambling Machines: Are They the Crack Cocaine of Addiction” (2004) 100 *Addiction* 33. While Yücel et al state that EGMs are the “source of the greatest harm in gambling,” Blaszczynski and Dowling et al argue that the research on the relative addictiveness of electronic gambling machines remains inconclusive.
64. See Vance Victor MacLaren, “Video Lottery is the Most Harmful Form of Gambling in Canada” (2016) 32 *J Gambling Stud* 459 at 469. Canadians lost \$2,067.15 per year for individuals playing electronic gambling machines outside of dedicated gambling venues (e.g., casinos) and \$1,449.22/year for individuals playing them in casinos, compared to \$400.85/year on horse racing and \$196.35/year on lotteries. These average losses are derived from statistics spanning the period from 2002 to 2012.

gambling problems, the most frequently reported activity is playing EGMs.<sup>65</sup> Treatment-seeking gamblers report progressing from gambling involvement to disordered gambling more quickly when their primary form of gambling is on machines.<sup>66</sup> The prevalence rate of problem gambling is higher amongst people who play EGMs, as opposed to other gambling formats.<sup>67</sup> The prevalence rate of problem gambling in a community increases when EGMs are added,<sup>68</sup> and decreases when they are banned.<sup>69</sup> A person is more likely to be a problem gambler if they live near an EGM.<sup>70</sup>

EGMs are especially addictive because they are engineered to include design features that “impair [a player’s ability] to make rational choices.”<sup>71</sup> For example, EGMs often “disguise” losses as wins, meaning that when a player has won some money, but less than the initial bet, the machine celebrates the outcome with sounds and lights.<sup>72</sup> In other words, the machine provides positive reinforcement

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65. See Karen A Urbanoski & Brian R Rush, “The Characteristics of People Seeking Treatment for Problem Gambling in Ontario: Trends from 1998 to 2002” (2006) 16 J Gambling Iss, online: <jgi.camh.net/index.php/jgi/article/view/3720/3680>, at Table 5 (slots became the most frequently reported problem over the period studied); Robert B Breen & Mark Zimmerman, “The Rapid Onset of Pathological Gambling in Machine Gamblers” (2002) 18 J Gambling Stud 31 at 33; Nancy M Petry, “A Comparison of Treatment Seeking Pathological Gamblers Based on Preferred Gambling Activity” (2003) 98 Addiction 645 at 648.

66. See Breen & Zimmerman, *supra* note 65 at 34.

67. See Yücel, *supra* note 63 at 501; MacLaren, *supra* note 64 at 473; Tracie O Afifi et al, “The Relation Between Types and Frequency of Gambling Activities and Problem Gambling Among Women in Canada” (2010) 55 Can J Psychiatry 21; JP Doiron & Richard M Nicki, “Epidemiology of Problem Gambling in Prince Edward Island” (2001) 46 Can J Psychiatry 413. Debi A La Plante et al found that the relationship between gambling format and prevalence rates of problem gambling largely disappeared once they controlled for an individual’s level of involvement (*i.e.*, number of times played per year), although even once involvement was controlled for, individuals playing virtual gambling machines were still more likely to be problem gamblers than individuals engaged in other gambling formats. See “Disordered Gambling, Type of Gambling and Gambling Involvement in the British Prevalence Survey” (2011) 21 Eur J Pub Health 532. DC Hodgins et al found that high frequency gamblers were more likely to have a problem gambling disorder if they played electronic gambling machines. See “Disordered Gambling Amongst High Frequency Gamblers” (2012) 42 Psychol Med 2433 at 2442.

68. See Storer, Abbott & Stubbs, *supra* note 48 at 238.

69. See Ingeborg Lund, “Gambling Behavior and the Prevalence of Gambling Problems in EGM Gamblers When EGMs are Banned. A Natural Experiment” (2009) 25 J Gambling Stud 215.

70. See New Zealand Ministry of Health, *supra* note 49.

71. Yücel et al, *supra* note 63 at 503.

72. See Yücel et al, *supra* note 63 at 503. See also MacLaren, *supra* note 64 at 463-64.

to players, even when they are in the process of losing money.<sup>73</sup> The machines may also be designed to provide a higher number of “near misses,” which refers to an outcome of a game that appears close to a win but is still a loss.<sup>74</sup> Near misses cause gamblers to overestimate their chances of winning and to play games longer, leading to higher losses.<sup>75</sup> Additionally, it has been observed that the machines’ capacity for “uninterrupted fast and continuous play ... may facilitate immersive states and escapist gambling.”<sup>76</sup>

Despite the research indicating that EGMs are problematic, they are readily available in Canada.<sup>77</sup> TABLE 1 sets out the total number of EGMs, as well as the number of EGMs for every thousand adults (fifteen or older) in each province, demonstrating this ready availability. Some provinces have attempted to regulate the design of EGMs to address some of the machines’ risky design features.<sup>78</sup> However, EGM manufacturers have proven capable of innovating around such regulations.<sup>79</sup>

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73. See Mike J Dixon et al, “Losses Disguised as Wins in Modern Multi-Line Video Slot Machines” (2010) 105 *Addiction* 1819 (finding individuals had similar physiological responses to wins as to losses disguised as wins).
74. See Kevin A Harrigan, “Slot Machine Structural Characteristics: Creating Near Misses Using High Award Symbol Ratios” (2008) 6 *Intl J Mental Health Addiction* 353 at 361-64.
75. See Harrigan, *supra* note 74 at 365-66. See also Luke Clark et al, “Physiological Responses to Near Miss Outcomes and Personal Control During Stimulated Gambling” (2012) 21 *J Gambling Stud* 123; Mike J Dixon et al, “Psychophysiological Arousal Signatures of Near Misses in Slot-Machine Play” (2011) 11 *Intl J Gambling Stud* 393; Guillaume Sescousse et al, “Amplified Striatal Responses to Near-Miss Outcomes in Pathological Gamblers” (2016) 41 *Neuropsychopharmacology* 2614; Kevin Harrigan et al, “Games of Chance or Masters of Illusion: Multiline Slots Design may Promote Cognitive Distortions” (2014) 14 *Intl Gambling Stud* 301 (suggesting that multi-line slot machines may promote cognitive distortions by giving players a false sense of control).
76. MacLaren, *supra* note 64 at 463; see also Spencer Murch, Stephanie WM Chu & Luke Clark, “Measuring the Slot Machines Zone with Attentional Dual Tasks and Respiratory Sinus Arrhythmia” (2017) 31 *Psychol Addictive Behav* 375.
77. See Ray MacNeil, “Government as Gambling Regulator and Operator: The Case of Electronic Gambling Machines” in Cosgrove & Klassen, *supra* note 60, 140 at 142 (making this claim with respect to Nova Scotia).
78. See *Electronic Gaming Systems Minimal Technical Standards* (Alcohol and Gaming Commission of Ontario, 2017) at 34-35 (regulating near misses by prohibiting machines from auto-initiating extended play features).
79. See Harrigan, *supra* note 74 at 361-64 (discussing EGM programming and near misses).

TABLE 1: NUMBER OF EGMS, BY PROVINCE

Provinces	Total Number of EGMs	Gambling Machines per 1000 Adults (15 or older)
British Columbia	12,949	3.2
Alberta	20,273	6.0
Saskatchewan	7,130	7.8
Manitoba	10,070	9.5
Ontario	22,981	2.0
Quebec	17,468	2.5
New Brunswick	2,740	4.2
Nova Scotia	3,517	4.3
Prince Edward Island	494	4.0
Newfoundland	1,896	4.2

SOURCES: Canadian Partnership for Responsible Gambling, *supra* note 61; Statistics Canada, "Population by broad age groups and sex, for both sexes, Canada, by Statistical Area Classification, 2016 Census – 100% Data" online: <[www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/as/Table.cfm?Lang=E&T=21](http://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/as/Table.cfm?Lang=E&T=21)>.

Canadians with gambling disorders have not developed these disorders in a vacuum. Gambling is readily accessible in Canada because the federal government legalized it and provincial governments promote many different forms of it, including highly addictive EGMs. By making gambling more accessible, these political decisions have contributed to the rate at which Canadians experience disordered gambling. These political decisions have also proven to be very lucrative for governments. Canadians profit off an activity that proves harmful for a minority of participants. Moreover, evidence suggests that gambling disproportionately harms some socio-demographic groups.

## 2. DISORDERED GAMBLING AND SOCIAL MARGINALITY

Gambling harm is not evenly distributed throughout the population. People from marginalized socio-economic groups—racialized peoples, Indigenous

peoples, and people with a low socio-economic status—are at a higher risk of having a diagnosable gambling disorder.<sup>80</sup>

Researchers have offered different explanations for the higher prevalence of diagnosable gambling problems amongst marginalized groups. Members of these groups may be more likely to develop a gambling disorder as a result of their social context. Gambling opportunities may be more accessible to these groups because there is a higher concentration of gambling venues in their neighbourhoods or because the people in their social networks are more accepting of gambling. If gambling is accessible and normalized, individuals will use it as a coping mechanism when faced with stressors, especially if they have not had the opportunity to learn other, less risky coping mechanisms.<sup>81</sup> Alternatively, individuals from marginalized socio-economic groups may use gambling as a mechanism for “acquiring capital and building wealth” —especially when they feel excluded from more mainstream methods of wealth creation.<sup>82</sup> Gambling can also provide an opportunity for marginalized individuals to “get some action, beat the system, demonstrate control over their lives or gain prestige amongst their friends.”<sup>83</sup>

A second explanation for the higher rates of diagnosable gambling disorders amongst these marginalized groups is that the members of these groups are more likely to have their gambling activities pathologized, *i.e.*, they may be more likely to be diagnosed with a gambling disorder. For starters, many of the gambling-like activities that wealthy individuals engage in—such as speculating on real estate or

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80. Many researchers have studied racialized peoples and low socio-economic status. See for instance Hodgins, Stea & Grant, *supra* note 22 at 1876; see also Heather Wardel et al, *British Gambling Prevalence Survey 2010* (National Centre for Social Research, 2011) at 89-90; Volberg & Wray, *supra* note 37 at 69-77; Volberg, “Feminization of Gambling,” *supra* note 55 (finding higher problem gambling prevalence rates amongst non-whites in Washington, New York, Oregon and Montana); Nancy M Petry & Carlos Blanco, “National Gambling Experiences in the United States: Will History Repeat Itself” (2013) 108 *Addiction* 1032 at 1033; John W Welte et al, “Risk Factors for Pathological Gambling” (2004) 29 *Addictive Behav* 323 at 332; Abbott, *supra* note 41 at 1237. Indigenous peoples have also been the focus of particular attention. See *e.g.* Abbott, *supra* note 41 at 1237; Rachel A Volberg & Max W Abbott, “Gambling & Problem Gambling Among Indigenous Peoples” (1997) 32 *Substance Use & Misuse* 1525. Not all research has found a higher rate amongst Indigenous peoples. See Kathryn Gill et al, “The Social and Psychological Impacts of Gambling in the Cree Communities of Northern Quebec” (2016) 32 *J Gambling Stud* 441 at 453.

81. See Tepperman et al, *supra* note 44 at 106-107.

82. See Volberg & Wray, *supra* note 37 at 77. See also Welte et al, *supra* note 80 at 334.

83. Volberg & Abbott, *supra* note 80 at 1534 citing Rachel A Volberg, Donald C Reitzes & Jacqueline Boles, “Exploring the Link Between Gambling, Problem Gambling, and Self Esteem” (1997) 18 *Deviant Behav* 321 at 336.

corporate stocks—are not classified as gambling.<sup>84</sup> Additionally, the tools used for diagnosing problem gambling may shield some groups from detection, such as “whites with wealth.”<sup>85</sup> For example, the Canadian Problem Gambling Severity Index is a commonly used diagnostic tool for identifying individuals with gambling disorders. It contains nine questions, such as, “Have you bet more than you could really afford to lose?” and “Has your gambling caused any financial problems for you or your household?”<sup>86</sup> Individuals from marginalized groups tend to be less financially secure, meaning that they can more quickly overspend or run into financial problems as compared to wealthier individuals.<sup>87</sup> Their lack of wealth makes these individuals more likely to trigger the diagnostic criteria for having a gambling disorder.<sup>88</sup>

The disparate prevalence of diagnosable gambling disorders amongst socially marginalized groups points to several problems. If people from socially marginalized groups are gambling to excess more than other members of a community, it means the government-conducted gambling activities are having a disproportionately harmful impact on already marginalized groups. Because gambling is a significant source of revenue, some commentators contend that gambling is “ser[ving] a role similar to a voluntary regressive tax for low income and vulnerable groups.”<sup>89</sup> If members of marginalized groups are more likely to have their gambling activities pathologized, it means they are more likely to be subject to medical control and paternalistic interventions. Canada has a history of enforcing facially neutral gambling laws in a racially biased manner. For example, the criminal prohibitions on gambling were disproportionately enforced against Chinese individuals.<sup>90</sup> There is a risk that the medicalization of gambling might enable this racially disparate social control to continue, but in terms that are cast as therapeutic as opposed to punitive.

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84. See Korn & Shaffer, *supra* note 39 at 292 (arguing that day trading and transactions on the commodity and futures markets should be defined as gambling); Harry Glasbeek, *Class Privilege: How Law Shelters Shareholders and Coddles Capitalism* (Between the Lines, 2017) at 52-53 (comparing shareholders and gamblers). See also Morton, *supra* note 57 at 28.

85. See Volberg & Wray, *supra* note 37 at 74-75.

86. See, for instance, Centre for Addiction and Mental Health, “Gambling Quiz,” online (pdf): <[learn.problemgambling.ca/PDF%20library/assessment-pgsi-en.pdf](http://learn.problemgambling.ca/PDF%20library/assessment-pgsi-en.pdf)>.

87. See Volberg & Wray, *supra* note 37 at 77.

88. See Welte et al, *supra* note 80 at 334.

89. Korn & Shaffer, *supra* note 39 at 314.

90. See Morton, *supra* note 57 at 120-24.

## II. THE MEDICAL MODEL AND SOCIAL CONTEXT EVIDENCE IN CANADIAN PERSONAL BANKRUPTCY LAW

Social context evidence is relevant to personal bankruptcy practice because it can shift how a legal actor thinks about whether an individual is deserving of debt relief. People working in the bankruptcy system perform such assessments in two types of situations: (i) where someone has contributed to their financial difficulties by gambling and (ii) where someone has engaged in other conduct, which bankruptcy law deems to be culpable, because of a gambling disorder. In both of these situations, legal actors using the medical model may inadvertently harm individual bankrupts. In both situations, the risk of harm can be mitigated by incorporating social context evidence into the practices of legal actors. When an individual has contributed to their financial difficulties by gambling, social context evidence supports two shifts in practice: to stop delaying their discharge and to stop subjecting them to compulsory gambling treatment. When an individual has committed an additional culpable act and attributes their misfeasance to their gambling, social context evidence adds nuance to a legal actor's assessment of the individual's culpability.

This section starts by providing a backgrounder on how individuals access debt relief in the Canadian personal bankruptcy system. It explains how legal actors, namely insolvency trustees and judicial officers, can impede an individual from accessing debt relief if the legal actors determine that the individual is undeserving. The section then analyzes the two scenarios where gambling can be relevant to a legal actor's assessment of debtor deservingness. For each scenario, the section identifies the harms that can result from using the medical model and how incorporating social context evidence reduces the risk of harm.

### A. A BACKGROUNDER ON CANADIAN PERSONAL BANKRUPTCY LAW

In Canada, personal bankruptcy is a matter of federal jurisdiction and governed by the *Bankruptcy and Insolvency Act*.<sup>91</sup> Individuals file for bankruptcy when they have debts they cannot pay and need relief. Individuals start the bankruptcy process by signing up with an insolvency trustee. Insolvency trustees are private sector professionals who administer bankruptcies. During bankruptcy, a trustee collects the individuals' property, realizes its value by selling assets and liquidating investments, and distributes that value amongst the creditors.

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91. See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(21), reprinted in RSC 1985, Appendix II, No 5; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA].

Upon filing for bankruptcy, individuals are automatically protected by a stay, which temporarily prevents creditors from trying to collect their debts.<sup>92</sup> When individuals complete the bankruptcy process, their debts are released.<sup>93</sup> Released debts still exist, but creditors are permanently barred from trying to collect them.<sup>94</sup> This release of debts is called a discharge. Most individuals who file for bankruptcy will receive a discharge automatically after a set period of time (varying from nine to thirty-six months) has elapsed.<sup>95</sup>

A small number of debtors, roughly 10 per cent, do not receive an automatic discharge of their debts.<sup>96</sup> Instead, these individuals must attend a court hearing and satisfy the presiding judicial officer that they deserve to receive a discharge.<sup>97</sup> A court hearing is required in some situations—for example, if a debtor has been bankrupt more than two times already, or if the individual is using bankruptcy primarily to release personal income tax debt.<sup>98</sup> Alternatively, a court hearing may be triggered if someone files paperwork opposing a debtor's automatic discharge. Three different parties can file an opposition: a creditor, an analyst working for the agency of the federal government that oversees bankruptcies, or an insolvency trustee.<sup>99</sup> Insolvency trustees file the overwhelming majority of oppositions.<sup>100</sup>

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92. See *BIA*, *ibid*, s 69.3.

93. See *ibid*, s 178(2).

94. See *Schreyer v. Schreyer*, 2011 SCC 35 at para 21.

95. See *BIA*, *supra* note 91, s 168.1

96. See Anna J Lund, *Discretionary Decision-Making by Trustees in Canada's Personal Bankruptcy System* (PhD Thesis, University of British Columbia, 2015) [unpublished] at 2 [Lund, *Discretionary Decision-making*]; see also Anna J Lund, *Trustees at Work: Financial Pressures, Emotional Labour and Canadian Bankruptcy Law* (UBC Press, 2019) at 29 [Lund, *Trustees at Work*].

97. In his study of bankruptcies filed in Toronto in 1994, Iain Ramsay found that oppositions were lodged in 14 per cent of all cases. See Iain DC Ramsay, "Individual Bankruptcy: Preliminary Findings of a Socio-Legal Analysis" (1999) 37 *Osgoode Hall LJ* 15 at 69. The Office of the Superintendent of Bankruptcy's 2012 records indicate that 74,731 new bankruptcies were commenced. See Office of the Superintendent of Bankruptcy Canada, "Insolvency Statistics in Canada" (last modified 24 March 2015), online: <[www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03063.html](http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03063.html)>. Oppositions were filed in 7,012 cases in 2012 [statistics provided by the Office of the Superintendent of Bankruptcy on file with the author].

98. The personal income tax debtor section, which came into force in 2009, stipulates that an individual will not receive an automatic discharge if the individual has at least \$200,000 in income tax debt, and income tax debt makes up 75 per cent or more of the individuals total, unsecured debt load. See *BIA*, *supra* note 91, s 172.1.

99. See *ibid*, s 168.2.

100. See Lund, *Discretionary Decision-Making*, *supra* note 96 at Table 1.1. See also Lund, *Trustees at Work*, *supra* note 96 at Table 3.

Trustees file oppositions in two situations: when a debtor misbehaved before filing for bankruptcy, or when a debtor fails to cooperate during the bankruptcy process. Trustees file most of their oppositions in response to a debtor's non-cooperation during the bankruptcy process.<sup>101</sup> Debtors have a number of duties that they must complete during the bankruptcy, such as filing monthly budgets, attending counselling, and making monthly payments to the trustee. When debtors do not complete their duties, the trustee can oppose their discharge. Trustees file a smaller number of oppositions in response to the debtor's pre-bankruptcy misconduct. The misconduct may relate to how a debtor's debts were incurred or how their affairs were managed. For example, trustees will often oppose if there is evidence that the debtor strategically organized their affairs to protect their property from creditors.<sup>102</sup>

If a discharge hearing is triggered, either because it is required by law or because someone filed an opposition, the presiding judicial officer has five options for disposing of the matter:<sup>103</sup> (1) An absolute discharge: If a judicial officer grants an absolute discharge, the discharge takes effect immediately. (2) A suspended discharge: If a judicial officer suspends the discharge, the discharge will take effect at a later date. Suspensions can range from a few days to a number of years.<sup>104</sup> (3) A conditional discharge: The judicial officer can make the discharge contingent on the debtor fulfilling one or more conditions. Commonly, judicial officers require debtors to make further payments to their trustees. (4) A refused discharge: If a judicial officer refuses the discharge application, the individual remains in bankruptcy until some future time when a judicial officer is satisfied that the individual is now deserving of a discharge. (5) Adjourn the hearing:<sup>105</sup> If a debtor has disappeared (*i.e.*, stopped communicating with their trustee), the judicial officer might adjourn the hearing indefinitely. When the debtor re-appears, they must then take steps to have the matter brought back before a judicial officer.

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101. See Lund, *Discretionary Decision-Making*, *supra* note 96 at Table 4.1. See also Lund, *Trustees at Work*, *supra* note 96 at Table 5.

102. See Roderick Wood, *Bankruptcy and Insolvency Law*, 2nd ed (Irwin Law, 2015) at 310-11.

103. See *BIA*, *supra* note 91, s 172.

104. A review of suspended discharge orders granted to bankrupt gamblers found suspensions ranging from one month to fifteen years in length. See Lund, "Gambling Debt," *supra* note 7 at 556.

105. See *e.g.*, Resolution Services, "Making an Application for a Discharge from Bankruptcy" (2017) at 14, online: <[www.alberta.ca/assets/documents/rcas-making-an-application-for-a-discharge-from-bankruptcy.pdf](http://www.alberta.ca/assets/documents/rcas-making-an-application-for-a-discharge-from-bankruptcy.pdf)>.

Judicial officers have significant discretion in crafting discharge orders; however, the legislation does place one limit on their discretion. The legislation includes a list of behaviours, and if it is established that the debtor engaged in any of these behaviours, the court cannot grant an absolute discharge.<sup>106</sup> One of the behaviours included in this legislated list is gambling: This is the provision that can be used to deny gamblers access to debt relief.<sup>107</sup> This provision has been part of the *Bankruptcy and Insolvency Act* since the federal government enacted its precursor in 1919, and the language of the provision is borrowed from England's *Bankruptcy Act, 1914*.<sup>108</sup>

Trustees, creditors, and federal government analysts will often justify opposing a debtor's discharge using the categories of behaviour set out in the legislation. For example, they could oppose because an individual incurred gambling-related debts. However, the legislated list is neither exhaustive nor mandatory for potential opponents. Parties can file oppositions on grounds other than the ones included in the list, and they are not required to file an opposition when one of the listed grounds exists. In other words, trustees may oppose because a bankrupt has gambled, but they are not required to do so. In most cases, if a trustee does not file an opposition, the debtor will receive an automatic discharge.

When an individual goes bankrupt, the insolvency trustee must decide whether or not to trigger a discharge hearing. When a hearing is triggered, the judicial officer must decide what type of order to grant. These decisions are shaped by whether the trustees and judicial officers view bankrupt individuals as deserving. Gambling can be relevant to the legal actors' assessments of deservingness in at least two situations—where an individual's gambling contributed to their financial difficulties and where an individual has committed some other culpable act, claiming they were driven to it by their gambling.

## B. WHEN GAMBLING CAUSES BANKRUPTCY

Individuals may file for bankruptcy in a situation where their gambling has caused or aggravated their financial distress. These individuals will have more difficulty accessing debt relief than non-gamblers and may be compelled to

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106. See *BIA*, *supra* note 91, ss 172(2), 173.

107. See *ibid*, s 173(1)(e): "the bankrupt has brought on, or contributed to, the bankruptcy ... by gambling."

108. See *Bankruptcy Act*, RSC 1927, c 11, s 143(e); see also *Bankruptcy Act, 1914*, 4 & 5 Geo 5, c 59, s 26(3)(f).

attend treatment for their gambling as a condition of getting a discharge.<sup>109</sup> When viewed through the lens of the social context evidence presented in section I.B, it becomes evident that both of these outcomes are problematic.

Consider the case of *Re Donaldson*.<sup>110</sup> A married couple, aged sixty-five and seventy-three, filed for bankruptcy. It was their fourth bankruptcy filing in thirty-six years. The three previous bankruptcies had been precipitated by job losses and business failures, but the fourth resulted from the couple “succumb[ing] to the siren’s call of the VLT [Video Lottery Terminal, a type of EGM], financed by credit cards and payday loans.”<sup>111</sup> They did not receive an automatic discharge because they were fourth time bankrupts; instead they appeared before a judicial officer. At the hearing the judicial officer was precluded from granting an absolute discharge because gambling is a listed ground in the *Bankruptcy and Insolvency Act*. The judicial officer had to craft a discharge order that took account of the couple’s multiple bankruptcies and their gambling. The judicial officer imposed a number of conditions on the bankrupt couple’s discharge, including attending counselling for gambling and enrolling in a voluntary exclusion program.<sup>112</sup> Additionally, the judicial officer directed that the debtors would need to reapply for a discharge, but could only make such an application once they had complied with the conditions for a period of five years.<sup>113</sup>

The Donaldsons had their access to a discharge delayed, a fate suffered by many bankrupt gamblers. A trustee creates delays by opposing a debtor’s automatic discharge. Whenever a hearing is triggered, the debtor loses the benefit of an automatic discharge and will remain undischarged until, at the very earliest, a hearing is scheduled. This can extend a bankruptcy by a matter of weeks, or more often months. At the hearing, the judicial officer may grant an absolute discharge, or further delay the debt relief by suspending the discharge to a future date or imposing conditions on the debtor.<sup>114</sup>

Delaying a bankrupt’s discharge has serious, potentially negative consequences for a bankrupt because undischarged bankrupts are subject to many restrictions.

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109. See Lund, “Gambling Debt,” *supra* note 7 at 549-53, 557-58. Additionally, trustees may use the threat of an opposition to compel an individual to attend treatment.

110. 2019 NSSC 33.

111. *Ibid* at para 13.

112. See *ibid* at para 32.

113. See *ibid*.

114. See Lund, “Gambling Debt,” *supra* note 7 at 556-58 (summarizing the range of suspensions and conditions imposed on bankrupt gamblers).

They may have difficulty accessing credit.<sup>115</sup> Any property acquired while still a bankrupt becomes the property of the individual's estate and will be used by the trustee to pay off the creditors. For example, if an individual inherited money while still an undischarged bankrupt, that money must be paid to the trustee.<sup>116</sup> Undischarged bankrupts are barred from holding certain offices or working in certain jobs. For example, some jurisdictions prevent them from acting as directors of corporations,<sup>117</sup> or from holding some types of licences, such as an insurance agent's licence.<sup>118</sup> Being an undischarged bankrupt can prevent an individual from sponsoring family or friends who wish to immigrate to Canada.<sup>119</sup> While awaiting a discharge, individuals are denied the emotional reprieve of having their debts forgiven.<sup>120</sup> Keeping gamblers in bankruptcy past their automatic discharge date exposes them to all these potentially negative consequences for a longer period of time.

This differential treatment of gamblers who go bankrupt is problematic given the changing social context of bankruptcy. The provision in the *Bankruptcy and Insolvency Act* that singles out gamblers for harsh treatment dates back to a time when most forms of gambling were criminal and gambling was viewed as a vice, whereas now governments market gambling as a legal form of entertainment. Given this shifting social context, it is difficult to justify treating a bankrupt who spends money gambling differently from a bankrupt who spends money

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115. Undischarged bankrupts are required to disclose their status when applying for credit and face penalties under the *Bankruptcy and Insolvency Act* if they fail to do so. See *BIA*, *supra* note 91, s 199.

116. An inheritance received during bankruptcy is treated as property of the bankrupt estate as opposed to income of the bankrupt individual, the latter of which would be subject to the surplus income regime. See *ibid*, ss 67(1)(c), 68(2).

117. See *Canada Business Corporations Act*, RSC 1985, c C-44, s 105(1)(d). See also *Business Corporations Act*, RSO 1990, c B.16, s 118(1)(4). See also *Business Corporations Act*, RSA 2000, c B-9, s 105(1)(d).

118. See *Insurance Agents and Adjusters Regulation*, AR 122/2001, s 5(1)(e).

119. See *Immigration and Refugee Protection Regulations*, SOR 2002-227, s 133(1)(i).

120. See Margaret Howard, "A Theory of Discharge in Consumer Bankruptcy" (1987) 48 Ohio St LJ 1047 at 1060-61. Howard discusses how bankruptcy both provides emotional relief (by discharging debts) and is stigmatizing (because of the negative associations with bankruptcy). In the Canadian context, once a person has made an assignment into bankruptcy they have incurred the stigma of being bankrupt. The longer they remain in bankruptcy without a discharge, they are subjected to stigma of being bankrupt, but without the emotional reprieve of debt relief.

on other legal pursuits, such as playing golf.<sup>121</sup> Yet, bankruptcy law continues to treat gamblers as though they have committed a bad act, a fact which becomes evident when one asks what role gambling as a medical condition plays in the bankruptcy process.

Recall that a medical condition can be used to excuse culpable behaviour or secure access to an entitlement. Having a gambling disorder or other medical condition is not a prerequisite to getting a discharge, and therefore the question before judicial officers in cases like *Re Donaldson* is not about a medically-contingent entitlement. One might assume that a gambling disorder operated as an excuse in the discharge process. According to this line of reasoning, the debtors have committed an act which the *Bankruptcy and Insolvency Act* identifies as blameworthy (*i.e.*, gambling) and so the debtors are not entitled to a discharge unless they can show that their bad conduct should be excused because they engaged in it as the result of a medical condition (*i.e.*, a gambling disorder). But this line of reasoning requires one to accept that gambling constitutes bad behaviour, a conclusion that sits on shaky ground given that provincial governments across Canada promote gambling as a legitimate form of leisure.

A slightly different argument is that the culpable behavior in question is gambling *to the point of insolvency*. But again, it is unclear what basis exists for treating the individual who gambled beyond their means differently from the individual who overspent on a different legal pursuit. Canadian bankruptcy legal academic Roderick Wood has observed that the debt relief available in bankruptcy is no longer restricted to the honest, unfortunate debtor who suffers setbacks due to “external factors over which the debtor has no control.”<sup>122</sup> Debt relief is also available to “individuals whose financial distress is attributable to poor financial management.”<sup>123</sup> Treating individuals who have gambled beyond their means differently from other over spenders can only be justified with reference to a moral view of gambling as bad, a view that is inconsistent with the federal and provincial governments’ permissive regulatory approach to gambling.

It can even be argued that we should treat the gambler more leniently than other bankrupts. Governments across Canada use gambling as a source of public revenue even though, by making gambling more accessible, they

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121. See *Fast v PricewaterhouseCoopers Inc*, 2010 SKQB 217 (CanLII) at 8 (arguing that gambling should be treated the same as golfing). Master Farrington adopted this approach in *Re Mukadem*, 2019 ABQB 113 at para 11. She reasoned that she would consider gambling only in the context of whether or not there were any concerns about the debtor’s lifestyle being “extravagant.”

122. Wood, *supra* note 102 at 297.

123. *Ibid.*

create an environment that is conducive to disordered gambling. A principle in tort law is that a person will be held responsible if they introduce a risky, but profitable, activity into the public realm and the risk manifests itself causing harm.<sup>124</sup> Governments may someday be held liable for their role in conducting and managing gambling,<sup>125</sup> but even absent a finding of liability, the fact they are actively involved in the promotion of gambling should inform how gamblers are treated in the bankruptcy system. Tort law reflects a basic idea about fairness: that if we collectively derive a financial benefit from the governments' gambling ventures, we have a collective responsibility to support the individuals who are harmed by those ventures, including those individuals who develop gambling disorders. But instead of supporting problem gamblers as they re-establish themselves, legal actors can use the *Bankruptcy and Insolvency Act* to impede problem gamblers from accessing debt relief—debt relief that is readily available to other Canadians. The bankrupt's medical condition operates as neither an excuse nor a pre-requisite to an entitlement, but rather a rationale for adverse treatment. Yet, this effect is masked by the language of the medical model, which portrays the differential treatment as a beneficial, therapeutic intervention.

Trustees and judicial officers can comply with the *Bankruptcy and Insolvency Act* and still prevent gamblers from facing delays in the discharge process. Trustees are not required to oppose the discharge of an individual who has gambled, and absent an opposition from a trustee, most bankrupts will receive an automatic discharge. Once a discharge hearing is triggered, judicial officers are precluded from granting a gambler an absolute discharge order, but they can provide the gambler with ready debt relief by granting a discharge with a nominal suspension. By shifting their practices in these ways, trustees and judicial officers can ensure that bankruptcy law is responsive to the social context of financially distressed gamblers.

A second potential harm that gamblers may experience when they go bankrupt is that they may be compelled to undergo treatments against their wishes. In *Re Donaldson*, the judicial officer made the discharge conditional on the bankrupts attending gambling counselling, despite the husband indicating that he had tried counselling already and not found it useful.<sup>126</sup> Compulsory

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124. See Lewis N Klar & Cameron SG Jefferies, *Tort Law*, 6th ed (Thomson Reuters Canada, 2017) at 233-38.

125. See Rob Simpson, Erika Chamberlain & Garry Smith, "When Should Casinos Owe a Duty of Care Toward Their Patrons" (2019) 56 *Alta L Rev* 963 (arguing that gambling providers should be subject to liability as commercial hosts).

126. See *Re Donaldson*, *supra* note 110 at paras 15 & 32.

treatment is inconsistent with a fundamental principle of health care, that individuals should only receive medical treatment after giving their informed consent.<sup>127</sup> Speaking about compelled addiction treatment generally, the American bioethicist Arthur Caplan suggests that this departure from requiring informed consent can be justified if the result is to restore an individual's autonomy by ridding them of the addiction.<sup>128</sup> When interviewed, some trustees indicated that they were motivated to impose treatments on bankrupts because they believed that mandatory treatments would help the bankrupts overcome their gambling disorders.<sup>129</sup> But even the most effective treatments for disordered gambling have limited success rates, meaning the most that a gambler can be promised is the possibility that their condition *might* improve. Moreover, little research exists on whether forcing a person into treatment inhibits the effectiveness of the treatment.<sup>130</sup> One possibility is that forcing individuals to attend treatment undermines their sense of self-efficacy because it reinforces the idea that they require expert intervention to overcome their addiction.<sup>131</sup> In fact, many people overcome gambling problems without any outside intervention.<sup>132</sup> Individuals with strong feelings of self-efficacy are more likely to overcome their addiction.<sup>133</sup>

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127. See T Cameron Wild, "Social Control and Coercion in Addiction Treatment: Towards Evidence Based Policy & Practice" (2006) 101 *Addiction* 40 at 46.

128. See Caplan, *supra* note 35 at 1920.

129. See Lund, "Gambling Debt," *supra* note 7 at 550.

130. See T Cameron Wild, Jody Wolfe & Elaine Hyshka, "Consent and Coercion in Addiction Treatment" in Adrian Carter, Wayne Hall & Judy Illes, eds, *Addiction Neuroethics: The Ethics of Addiction Neuroscience Research and Treatment* (Elsevier, 2012) 153 at 161.

131. Stanton Peele, *The Meaning of Addiction: Compulsive Experience and Its Interpretation* (DC Heath, 1985) at 143-44.

132. Hyoun Kim et al, "When do gamblers help themselves? Self-discontinuity increases self-directed change over time" (2017) 64 *Addictive Behav* 148 (exploring the factors that motivate an individual to undertake self-directed change); Jennifer Swan & David Hodgins, "Brief Interventions for Disordered Gambling" (2015) 6 *Can J Addiction* 29 at 29-30; Wendy S Slutske, "Natural recovery and treatment-seeking in pathological gambling: Results of two U.S. National Surveys" (2006) 163 *Am J Psychiatry* 297; Nerilee Hing, Elaine Nuske & Sally Gainsbury, "Gamblers at-risk and their help-seeking behaviour" (2011) online: *New South Wales Office of Responsible Gambling* <[www.responsiblegambling.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0019/225802/Gamblers-at-risk-and-their-help-seeking-behaviour.pdf](http://www.responsiblegambling.nsw.gov.au/__data/assets/pdf_file/0019/225802/Gamblers-at-risk-and-their-help-seeking-behaviour.pdf)> at 300 (arguing that self-help strategies are "widely used" by gamblers); David Hodgins & Nady el-Guebaly, "Natural and Treatment Assisted Recovery from Gambling Problems: A comparison of Resolved and Active Gamblers" (2000) 95 *Addiction* 777 at 787 (finding that self-recovery is more common amongst gamblers with less severe problems, whereas those with more severe problems may require outside intervention).

133. Igor Yakovenko & David C Hodgins, "Effectiveness of a Voluntary Casino Self-Exclusion Online Self-Management Program" (2017) [unpublished, available from author].

Thus, we should be slow to adopt practices—such as compulsory treatment—that might erode these feelings of self-efficacy and hurt a person’s chances of recovery. Given what we know—and what we do not know—about compulsory treatment, trustees and judicial officers should be reticent to impose therapeutic interventions on problem gamblers.

Trustees and judicial officers may be concerned that, absent treatment, gamblers will continue to gamble, triggering additional bankruptcies. Recidivism is a legitimate concern: bankruptcy is supposed to provide a fresh start for people who encounter unexpected financial disruptions, but there is a risk that individuals may use it strategically and repeatedly to avoid their financial obligations.<sup>134</sup> Thomas Telfer’s research on repeat bankrupts suggests that gambling is not a common cause of bankruptcy recidivism—it is cited as the primary cause of bankruptcy in about 1 per cent of repeat bankruptcies, which is similar to how often gambling is cited as the primary cause by first time bankrupts.<sup>135</sup> These numbers likely underreport how frequently gambling leads to bankruptcy and yet also suggest that bankruptcy recidivism is primarily driven by other causes such as overspending, poverty, and illness.<sup>136</sup> Moreover, the *Bankruptcy and Insolvency Act* contains rules that are intended to discourage strategic recidivism. Second-time bankrupts must wait longer than first-timers before getting an automatic discharge.<sup>137</sup> Third-time bankrupts have no entitlement to an automatic discharge, and instead, must appear at a discharge hearing.<sup>138</sup> Where individuals repeatedly gamble their way into bankruptcy, these rules can address their recidivism once it occurs.

Trustees and judicial officers do not need to turn a blind eye to an individual’s gambling. There is scope within the bankruptcy system for trustees,

134. Thomas Telfer notes that bankruptcy creates a moral hazard, because individuals may incur debts with no intention of repaying the debt, but rather an intention to discharge them in bankruptcy. The censure of repeat bankrupts aims to protect the integrity of the bankruptcy system by lessening this moral hazard. See Thomas Telfer, “Repeat Bankruptcies and the Integrity of the Canadian Bankruptcy Process” (2014) 55 Can Bus LJ 231 at 241-45.

135. See *ibid* at Table 1:

Year	2010	2011	2012
Percentage of Bankrupts Listing Gambling as Cause of Bankruptcy	0.75%	0.68%	0.71%
Percentage of Repeat Bankrupts Listing Gambling as Cause of Bankruptcy	1.10%	0.94%	0.97%

136. See *ibid*.

137. See *BIA, supra* note 91, s 168.1(1)(b).

138. See *ibid*, s 169.

especially, to help. A bankruptcy proceeding can be a negative shock that primes individuals to make changes in their lives.<sup>139</sup> A trustee can provide an individual with information or referrals to gambling support services.<sup>140</sup> During the mandatory financial counselling sessions, the person carrying out the counselling might help a debtor to strategize about how the debtor plans to address their problem gambling. If an individual wants to undertake treatment and believes that making their discharge contingent on fulfilling treatment will help them remain committed to recovery, a bankrupt should be allowed to consent to the imposition of a conditional order as a form of commitment device.<sup>141</sup> Absent such consent, trustees and judicial officers should neither delay a bankrupt gambler's discharge nor impose compulsory gambling treatment on them.

The social context evidence about gambling highlights an additional reason to be concerned about the delays and compelled treatment experienced by bankrupt gamblers. Members of marginalized groups are more likely to develop diagnosable gambling disorders, and therefore are more likely to have their access to a discharge delayed and to be subject to compulsory treatment. Research on other legal initiatives that use the force of law to impose treatment on addicted individuals has suggested that "minority groups appear to be disproportionately represented" in these programs.<sup>142</sup> Reflecting on this feature of mandatory treatment programs, the American social worker and academic Thomas O'Hare noted that the practitioners involved in these programs "may be unintentionally participating in a system that at best provides a more human diversion from punishment or at worst colludes with an oppressive social structure."<sup>143</sup> The possibility that already marginalized groups may be disproportionately harmed by how legal actors are practicing bankruptcy law is a compelling reason to shift those practices.

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139. See Langham et al, *supra* note 3 at 7.

140. See Hing, Nuske & Gainsbury, *supra* note 132 at 299.

141. See Lund & Shah, *supra* note 11 at 358. See also Robert E Scott, "Error and Rationality in Individual Decision-making: An Essay on the Relationship between Cognitive Illusions and the Management of Choices" (1986) 59 S Cal L Rev 329 at 352 (discussing commitment devices more generally).

142. Christine MJ Snyder & Stephen A Anderson, "An Examination of Mandated versus Voluntary Referral as a Determinant of Clinical Outcome" (2009) 35 J Marital & Family Therapy 278 at 279. See also Thomas O'Hare, "Court-Ordered versus Voluntary Clients: Problem Difference and Readiness for Change" (1996) 41 Soc Work 417 at 421 (discussing treatment providers' potential participation in oppressive social structures).

143. O'Hare, *ibid* at 421.

### C. WHEN GAMBLING HAS CONTRIBUTED TO AN ADDITIONAL CULPABLE ACT

The *Bankruptcy and Insolvency Act* creates hurdles for gamblers who go bankrupt, but gambling can be relevant in a second scenario: when an individual has engaged in activities which otherwise would be considered culpable and claims that a gambling problem drove them to misbehave.<sup>144</sup> For example, in *Re Duong*, the bankrupt falsified information on a credit application and then gambled away the borrowed money.<sup>145</sup> In *Re Elkareh*, the bankrupt raised money for gambling by purchasing goods on credit and reselling them, for cash, at a discounted price, to a gentleman the bankrupt met at a casino.<sup>146</sup> Canadian bankruptcy law takes these forms of misconduct seriously. A person who lies to get credit or resells goods purchased on credit may be convicted of an offence under the *Bankruptcy and Insolvency Act* or the *Criminal Code*.<sup>147</sup> Additionally, they may be denied access to a discharge, or a court may stipulate that the bankrupt's obligation to repay the fraudulently obtained loans or the cost of the resold goods survives, notwithstanding a discharge.<sup>148</sup>

When insolvency trustees and bankruptcy courts are asked to judge the deservingness of these individuals under the current medical model of bankruptcy, they may be willing to excuse the debtor's bad behaviour if they are satisfied that the debtor was acting under the compulsive force of an addiction. They will exempt the individual from the normal consequences of their actions if the individual identifies as sick and seeks treatment.<sup>149</sup> An insolvency trustee or judge may seek expert corroboration of the illness to guard against malingering. An individual who does not seek treatment, or who cannot provide expert corroboration of their addiction may find they are not exempted from responsibility. For example, in the case *Re Hosseini*, the bankrupt had engaged in misconduct, which resulted

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144. Individuals with gambling disorders may engage in criminal activity to raise funds to gamble. See Langham et al, *supra* note 3 at 11.

145. See *Re Duong*, 2006 CanLII 30589 (Ont Sup Ct) at para 9.

146. See *Re Elkareh*, 2007 CanLII 15235 (Ont Sup Ct) at para 4. See also *Re Nadarajah*, 2014 ONSC 176 at para 11; *Re Ismail*, 2007 CanLII 3883 (Ont Sup Ct) at paras 4-5.

147. See *BIA*, *supra* note 91, s 198(1)(e), (g). The maximum fine is ten thousand dollars and the maximum period of imprisonment is three years. See *Criminal Code*, *supra* note 30, s 380. See e.g., *Re Nadarajah*, *supra* note 146 at para 6. For a discussion of the offences in the *BIA*, see John D Honsberger & Vern W DaRe, *Honsberger's Bankruptcy in Canada*, 5th ed (Thomson Reuters, 2017) at ch 28.

148. See *BIA*, *ibid*, ss 173(1)(k), 178(1)(e); *Re Nadarajah*, *supra* note 147 at para 112.

149. See Parsons, *supra* note 29.

in an RCMP investigation, charges, and a guilty plea to one bankruptcy offence.<sup>150</sup> At a subsequent discharge hearing, the bankrupt claimed gambling caused his financial woes, but the judicial officer rejected this excuse:<sup>151</sup>

The only explanation offered at the hearing by the Bankrupt for his conduct was that he was under pressure, and sick. No evidence was proffered of any medically diagnosed illness, or of any course of treatment for any illness. I do not accept this evidence.

The question of whether or not Mr. Hosseini's misconduct was attributable to the illness was subsumed in the question of whether or not he was truly "sick." This case illustrates how the medical model can support binary thinking that distinguishes between "sick" problem gamblers and "bad" recreational gamblers, where individuals who fall into the former category are excused from responsibility and those falling into the latter are not.

This binary approach to culpability creates two problems for gamblers. First, it privileges individuals who can secure a medical diagnosis and complete a course of treatment. Although individuals from socially marginalized groups are more likely to develop diagnosable gambling problems, they may struggle to elicit the evidence needed to prove their medical disorders in court. When they attempt to access medical care, they face barriers including the cost of care (if not covered by a public health care plan), the cost of transportation to attend at a health care centre, and lack of information about available services.<sup>152</sup> Moreover, the care they receive may be tinged by the negative stereotypes that health care professionals hold regarding socially marginalized groups.<sup>153</sup> These barriers impede socially marginalized gamblers from securing the evidence necessary to satisfy the court that they have a verifiable medical condition and that they have taken genuine steps to address it. Under a binary medical model, they risk being labelled as a bad gambler, instead of a sick one.

The second problem with the binary medical model is that it masks the role that social context plays in fostering gambling and related misconduct. Under the binary model a gambler is either sick or bad, whereas a legal actor who examines an individual's social context can take a nuanced approach to assessing

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150. See *Re Hosseini*, 2008 CanLII 56008 (Ont Sup Ct) at paras 4-5.

151. *Ibid* at para 13.

152. Deanna L Williamson et al, "Low Income Canadians Experiences with Health Related Services: Implications for Healthcare Reform" (2006) 76 Health Pol'y 106 at 113-15.

153. See *ibid* at 118.

the individual's deservingness allowing for degrees of culpability.<sup>154</sup> A trustee's or judicial officer's assessment of a bankrupt's culpability informs the terms on which that bankrupt can access debt relief. Therefore, whether these legal actors consider an individual's social context has significant, real world implications for the individual, including the possibility of a delayed discharge and the associated negative consequences discussed in section II.B.

The complex interaction of social context and personal culpability can be illustrated with a vignette. Imagine two recently widowed seniors are both struggling to acclimate to the loss of their respective spouses.<sup>155</sup> One lives in the country. She attends a weekly bingo night with friends from church.<sup>156</sup> The outings are primarily social. Sometimes she wins money, mostly she loses, but because the gambling only lasts for a few hours, once a week, her losses are limited. The second widow lives at a retirement home in a city, near a casino. The casino regularly buses seniors in for an afternoon of gambling. She initially attends the outings with friends and starts playing the slot machines.<sup>157</sup> She finds that playing the machines numbs the pain of her loss. Because the casino is nearby and open for most of the day, the second widow can play slot machines whenever she wants, for hours at a time. The second widow lives on a modest pension and quickly runs out of cash, but there are other options available to fund her play. Perhaps she attends at a financial institution and is assisted by a lending agent, who encourages her to stretch the truth a little when filling out the credit application. (The lending agent recognizes that the widow is unlikely to be approved on the basis of an accurate application, and the lending agent is under

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154. Yvana LBH Mols, "Bankruptcy Stigma and Vulnerability: Questioning Autonomy and Structuring Resilience" (2012) 29 Emory Bankr Dev J 289 at 322-23.

155. See *Re Teatro*, 2009 CanLII 14395 (Ont Sup Ct), in which the bankrupt had started gambling after separating from his wife. The judicial officer noted, "He found it a way to fill the void left in his life. The end of a marriage has often been likened to a death in terms of the hole it leaves in one's life" (*ibid* at para 6).

156. Reporting the bingo players tend to be female, see Volberg & Wray, *supra* note 37 at 65; Volberg, "Feminization of Gambling," *supra* note 55 at 12.

157. Finding that slot machine players tend to be older and female, see Petry, *supra* note 65 at 652; see also Urbanoski & Rush, *supra* note 65 at Table 5.

considerable pressure to meet a sales quota.<sup>158</sup>) Or perhaps, like Mr. Elkareh, a charming stranger approaches the widow at the casino and offers to buy goods from her for cash, after she purchases them on credit.

Both widows undergo the same, very human experience of losing a loved one; both are exposed to gambling opportunities; but only one copes with her loss through excessive gambling. In the first widow's case, her social context protects her against excessive gambling and resulting misfeasance; in the second widow's case, her social context contributes to it. The second widow has ready access to a highly addictive form of gambling (and her descent into gambling-related debt has been facilitated by problematic lending practices – though that is a topic for another article).<sup>159</sup> Approaching the question of the second widow's responsibility using the framework of the sick role oversimplifies the narrative. The role of social context is obscured and the second widow is either culpable (or not) depending on whether she can establish that she was truly sick. A nuanced approach to the question of culpability would allow space for more shades of responsibility and exculpation.

When called on to assess the culpability of gamblers who have misbehaved, insolvency trustees and judicial officers may wish to consider how the gambler's choices have been constrained by their environment. They may wish to pay particular attention to how an individual's social context either insulates an individual against harm or burdens them with increased exposure. For example, the accessibility and format of gambling that the provincial government made available to the second widow made her particularly susceptible to gambling to excess. Her modest income meant that she quickly ran into financial difficulty as a result of her gambling losses. These social context factors may not entirely excuse the widow's dishonest behaviour, but they mitigate her responsibility. The trustee administering the second widow's bankruptcy may point to the social

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158. In an investigation carried out by the Canadian Broadcasting Corporation, the journalists heard from employees at the five major Canadian banks who “feel pressured to upsell, trick and even lie to customers to meet unrealistic sales targets and keep their jobs.” See Erica Johnson, “‘We Are All Doing It’: Employees at Canada’s 5 Big Banks Speak Out about Pressure to Dupe Customers” (15 March 2017), online: *CBC News* <[www.cbc.ca/news/business/banks-upselling-go-public-1.4023575](http://www.cbc.ca/news/business/banks-upselling-go-public-1.4023575)>. In *Re Nadarajah*, *supra* note 146 at para 90, the court noted that “numerous credit card companies granted [the bankrupt] numerous cards with significant available amounts.”

159. On responsible lending, see Micheline Gleixner, “Financial Literacy, Responsible Lending and the Prevention of Personal Insolvency” in Janis Sarra, ed, *Annual Review of Insolvency Law 2013* (Carswell, 2014); Jacob Ziegel, *Comparative Consumer Insolvency Regimes—A Canadian Perspective* (Hart, 2003) at 150-51.

context factors as justifying a less onerous discharge order, and the judicial officer may likewise adopt these factors as rationale when granting such an order.

The social context of the gambler operates in a similar manner to the diagnosis of a gambling disorder in Parson's sick role in the sense that both exculpate the individual from responsibility, but the social context approach has a number of advantages over the medical one. The social context approach does not place as much weight on a person being diagnosed with a disorder and seeking treatment, which can disadvantage already socially marginalized individuals who may have difficulty accessing health services. Moreover, by de-emphasizing the role of medical experts, the social context approach can empower gambling bankrupts, because they are not told they require medical experts to identify or treat their problems. This message may bolster their feelings of self-efficacy and thereby support the natural recovery process. The medical approach invites binary thinking about sick individuals, who have no control over their own actions, and others who are not sick and are thus inexcusably bad. The social context approach invites more nuanced thinking because it recognizes that individuals are exercising their autonomy, but doing so in constrained circumstances. Of course, these benefits to the social context approach will be lost if one's environment is treated as being entirely deterministic of one's behaviour. Such a turn in reasoning would invite a new, binary approach to responsibility and disempower individuals by giving them the message that they are powerless in the face of their environment.

### III. SOCIAL CONTEXT EDUCATION AS A FIRST STEP TOWARDS CHANGE

Helpfulness is generally considered to be a positive character trait. The medical model engenders helpful interventions aimed at treating individual malfunction, and one might embrace the medical model because it fosters this helpful orientation. The title of this article, "Help is the Sunny Side of Control," reminds readers that helpfulness is complicated. Over the past century, excessive gambling has been reconceptualised as a medical problem. When gamblers go bankrupt, the trustees and judicial officers involved in their cases may adopt a therapeutic approach to the gambler: they may try to help. This medically-justified helpfulness can go astray. The medical model invites paternalistic interventions and legal actors may justify potentially harmful "help" in medical terms. The medical model focuses attention on the individual, which can obscure an individual's social context. This can lead to legal actors unfairly attributing blame to individuals and perpetuating social inequality. When legal actors in the bankruptcy system adopt a medical

model of gambling, individuals experience a range of harms: delayed discharges, compulsory treatment, and overly narrow assessments of their culpability.

Individuals working as insolvency trustees describe the ability to help others as one of the best, and most rewarding, parts of their job.<sup>160</sup> It would be unfortunate and more than a little unfair to recast this helping impulse in an entirely negative light. Help can be the sunny side of control, but trustees and judicial officers can also implement bankruptcy law in a manner that reflects the complex interplay of social context and individual responsibility, and that builds resilience while avoiding paternalistic interventions. In other words, they can offer help that is less likely to cause harm. But doing so requires them to understand the social context that their clients inhabit. In particular, it may be important to educate trustees and judicial officers about how the accessibility of gambling and the social marginality of gamblers affects which people develop a diagnosable gambling disorder. One aim of this article has been to educate trustees and judicial officers about these topics.

This article fits into a larger movement in Canadian law that aims to incorporate social context evidence into how legal actors apply the law.<sup>161</sup> Whether they do so consciously or not, legal actors draw on their own attitudes and beliefs about how the world works when passing judgment on others, including bankrupt individuals.<sup>162</sup> When uncritically relied on, these attitudes

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160. Lund, *Trustees at Work*, *supra* note 96.

161. In Canada, we have at least thirty years of experience in providing judges with social context education, and there are many lessons that can be drawn from that experience and usefully applied to providing social context education to other legal actors. See *e.g.*, T Brett Dawson, "Judicial Education on Social Context and Gender in Canada: Principles, Process and Lessons Learned" (2014) 21 *Intl J Leg Prof* 259; Hon Brian W Lennon & Natalie Williams, "Social Context and Judicial Education in Canada" (2013) 1 *J Intl Org for Judicial Training* 31; Hon John F McGarry, "The Social Context Initiative: Comprehensive, In-Depth and Credible" in *20th Anniversary Essays* (Ottawa: National Judicial Institute, 2009) n.p., online: *National Judicial Institute* <[www.nji.ca/nji/UserFiles/File/NJI\\_20th\\_Anniversary\\_Essays\\_-\\_A\\_Collection.pdf](http://www.nji.ca/nji/UserFiles/File/NJI_20th_Anniversary_Essays_-_A_Collection.pdf)>. See also Stephanie Ben-Ishai, "Re-Defining the Role of the Canadian Judiciary in Bankruptcies and Receiverships" (2005) 20 *BFLR* 241 at 251-52 (calling for social context education for bankruptcy judges). Legal scholars have offered articulate arguments in favour of using social context evidence in very different legal areas as well. See, for instance, Reem Bahdi, "Arabs, Muslims, Human Rights, Access to Justice and Institutional Trustworthiness: Insights from Thirteen Legal Narratives" (2018) 96 *Can Bar Rev* 72.

162. See Emma Cunliffe, "Judging, Fast and Slow: Using Decision-Making Theory to Explore Judicial Fact Determination" (2014) 18 *Intl J Evidence & Proof* 139 at 146; Lynn Smith, "Judicial Education On Context" (2005) 38 *UBC L Rev* 569 at 570. See also Richard Devlin, "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education" (2001) 27 *Queen's LJ* 161 at 168. Devlin opines that "every act of judgment takes place in the context of a larger set" of unarticulated "practices and conventions."

and beliefs may “reinforce established patterns of discrimination ... [and] perpetuate inequality.”<sup>163</sup> When it comes to problem gamblers, these attitudes and beliefs may obscure the social context in which gamblers operate, and recast the effect of environmental constraints as being entirely matters of personal choice or responsibility. Social context education provides trustees and judicial officers with information about the systemic disadvantages faced by some individuals, and how those disadvantages may manifest as gambling problems. Trustees and judicial officers are then better positioned to identify their embedded biases and to understand how these biases shape their assessments of culpability.<sup>164</sup> In other words, they learn to scrutinize their reflexive, intuitive judgements.<sup>165</sup>

Social context education must do more than just teach insolvency trustees and judicial officers about the social factors that might lead some individuals to gamble excessively; it must also help insolvency trustees and judicial officers to recognize how some individuals may come to be scrutinized for their gambling—and related misconduct—more than others.<sup>166</sup> The social context education of insolvency trustees and judicial officers should include training on how the law can be selective in a consistently patterned way that over-polices “marginalized people whose disadvantage becomes a reason to view them as suspicious, dangerous, and in need of containment.”<sup>167</sup> Gambling laws have historically been applied so as to perpetuate the marginalization of some groups.<sup>168</sup> Social context education can help trustees and judicial officers avoid perpetuating this legacy by making them aware of this historical dynamic as well as contemporary realities including a higher prevalence rate of diagnosable gambling disorders amongst socially marginalized groups.

This article has argued that social context education may be particularly important for addressing the drawbacks of the medical model. This article uses personal bankruptcy law to illustrate the drawbacks of the medical model and the relevance of social context evidence to the everyday practice of bankruptcy law. It is intended to help guide the practices of legal actors who play a role in the bankruptcy system, but also individuals involved in other areas of law. Illness is used as an excuse, as a pre-requisite to entitlements, and as a justification for

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163. Kathleen Mahoney, “Judicial Bias: The Ongoing Challenge” (2015) J Disp Resol 43 at 46.

164. See Smith, *supra* note 162 at 575.

165. See Dawson, *supra* note 161 at 260.

166. See Sonia N Lawrence & Toni Williams, “Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing” (2006) 56 UTLJ 285.

167. *Ibid* at 295.

168. See Morton, *supra* note 57 at 120-24 and text accompanying to note 90; Tepperman et al, *supra* note 44 at 209.

increased social control in many areas of law. Legal actors must think through how they use the medical model and social context evidence in each of these areas. Consider gamblers. An individual's gambling may bring them into contact with criminal law, as some individuals engage in criminal activity to fund their gambling.<sup>169</sup> Lenders who provide consumer loans may find themselves seeking to collect gambling-related debt.<sup>170</sup> A spouse's gambling may have repercussions for how the family's assets are divided upon the breakdown of a marriage.<sup>171</sup> An employer will need to determine the scope of its duty to accommodate when a wayward employee admits to having a gambling disorder.<sup>172</sup> In each of these areas, parties may contest whether gambling should be characterized as a moral or medical problem. The medical characterization is viewed as the more progressive option, yet by mapping some of the risks posed by the medical model, this article highlights the need to proceed cautiously and the value of incorporating social context evidence.

Studying how the law has responded and can respond to the medicalization of gambling is important for a second reason: gambling is only the first compulsive behaviour to be characterized as an addiction. Others have been and likely will be added to the list. In 2018, the World Health Organization recognized gaming disorder—"persistent or recurrent" video gaming—as a form of behavioural addiction.<sup>173</sup> Other behaviours, including shopping, sex and eating, are in the process of being recast as medical problems when done compulsively.<sup>174</sup> Of particular interest to actors in the bankruptcy system is the move towards medicalizing financial behaviours, including "compulsive buying disorder, ... financial denial, financial dependence, financial enmeshment, financial enabling, and financial infidelity."<sup>175</sup> Bankruptcy law and the broader legal system will be called on to adjudicate disputes where the medical characterization of these

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169. See Derek Spencer, "Judicial Recognition of Gambling Addiction" (Poster Presentation, delivered at the Alberta Gambling Research Institute Annual Conference, Banff, AB, 29 March 2019) [unpublished]; Garry Smith & Harold Wynne, *Gambling and Crime in Western Canada* (Canada West Foundation, 1999) at 14; Langham et al, *supra* note 3 at 11.

170. See e.g., *Amex Bank of Canada v. Johnson*, 2007 ABPC 130.

171. See e.g., *Vitug v Vitug*, 2013 BCSC 405.

172. See *BC Public Service*, *supra* note 31.

173. See World Health Organization, "ICD-11 for Mortality and Morbidity Statistics," s 6C51 (December 2018), online: <[icd.who.int/browse11/l-m/en#http%3a%2f%2fid.who.int%2fcd%2fentify%2f1448597234](http://icd.who.int/browse11/l-m/en#http%3a%2f%2fid.who.int%2fcd%2fentify%2f1448597234)>.

174. See Piquet Pessoa et al, Meule & Gearhardt, and Farré et al, *supra* note 13.

175. Anthony Canale, Kristy L Archuleta & Bradley T Klontz, "Money Disorders" in Bradley T Klontz, Sonya L Britt & Kristy L Archuleta, eds, *Financial Therapy: Theory, Research and Practice* (Springer International, 2015) 35 at 36.

behaviours bears on the proper resolution of the dispute. This article unpacks the theoretical issues raised by the characterization of excessive gambling as a medical problem and illustrates how these theoretical issues connect to practical, everyday legal questions that arise in bankruptcy law. It models how to think through the questions that will arise about the medicalization of gambling in other areas of law and the medicalization of other compulsive behaviours. This article demonstrates how to think through these questions.

Social context education for actors in the bankruptcy system does little to address shortcomings in the current regulatory approaches to gambling across Canada, but it can be an impetus for more radical shifts in the law. There are political and policy implications to using social context evidence to address the drawbacks of the medical model. Dutch sociologist Abram De Swaan argues that the popularity of the medical model may partly stem from its ability to individualize problems, and thereby preclude systemic critique and change.<sup>176</sup> American sociologists Joseph Schneider and Peter Conrad add that the medical model hampers social critique by removing issues, such as excessive gambling, from the realm of public discussion, instead making them matters for medical experts to manage on a case-by-case basis.<sup>177</sup> Reintroducing social context evidence as an important consideration in the legal system supports, by implication, political critique and policy-making that take a similar social context approach. It creates more space for public debate about whether we are doing enough in Canada to regulate gambling and to respond to gambling-related harm. Likewise, adopting a social context approach in other areas of law, where the medical model is ascendant, can spark new conversations about what role law can play in addressing systemic inequality.

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176. See Abram De Swaan, “Expansion and Limitation of the Medical Regime” in *The Management of Normality* (Routledge, 1990) 57 at 69.

177. See Conrad & Schneider, *supra* note 14 at 249. Fiona Nicoll argues that this individualization of gambling is pervasive in the way gambling and gamblers are “researched and regulated in isolation from the social environments within which cultural meaning and practices of gambling are forged.” See Nicoll, *supra* note 34 at 218.