SENTENCING MENTALLY DISORDERED OFFENDERS

Lessons from the US and Singapore

Mentally disordered offenders pose a unique challenge to criminal justice systems. Worldwide there is an observable trend of having a significant and rising number of mentally disordered offenders in prisons and other detention facilities. This article seeks to address how mentally disordered offenders are sentenced in the US and in Singapore, and discusses whether the present approach to sentencing suitably addresses the broad goals of the criminal justice system while taking into account the situation of mentally disordered offenders.

CHUA Hui Han, Eunice*
LLB (Hons) (National University of Singapore),
LLM (Harvard University);
Assistant Registrar, Supreme Court of Singapore.

I. Introduction

1 Mentally disordered offenders pose a unique challenge to criminal justice systems. Worldwide there is an observable trend of having a disproportionately high prevalence rate of mental disorders in prisons and other detention facilities as compared to the general population.[1] In the US, according to the findings of a Justice Centre study released in 2009, of more than 20,000 adults entering five local jails, 14.5% of the men and 31% of the women (which taken together comprised 16.9% of those studied) had serious mental illnesses, defined as the presence of one or more of the diagnoses of bipolar disorder, schizophrenia and major depression.[2] This was a rate more than three to

* The author would like to thank her supportive husband and family for providing inspiration and encouragement during the writing of this article.

1 See, *eg*, James R P Ogloff *et al*, "The Identification of Mental Disorders in the Criminal Justice System" Trends & Issues in Crime and Criminal Justice, No 334 (March 2007) <http://www.aic.gov.au/documents/E/B/4/%7BEB4E29C4-4390-41C6-8EEF-93AB042C6BFC%7Dtandi334.pdf> (accessed 10 May 2011); Ministry of Justice, Bulletin, "Statistics of Mentally Disordered Offenders 2008 England and Wales" (29 January 2010) <www.justice.gov.uk/publications/mentally-disordered-offenders.htm> (accessed 10 May 2011).

2 Council of State Governments Justice Center, "Justice Center Study Brief: Prevalence of Serious Mental Illness among Jail Inmates" (June 2009) <http://consensusproject.org/the_report> (accessed 10 May 2011).

six times that found in the general population.[3] A survey by the Bureau of Justice Statistics released in 2006 found that more than half of all prison and jail inmates reported symptoms of a mental disorder.[4] Although figures of the size of the mentally ill population in Singapore's prisons are not publicly available, in 2006, the Singapore Prison Service reported that it was currently experiencing an increase in the number of prisoners with mental health problems and chronic illnesses.[5]

2 These figures and trends prompt questions as to how appropriately mentally disordered offenders are being convicted and sentenced. This article, however, focuses on sentencing rather than conviction for a number of reasons. First, it would appear that a greater number of mentally ill accused persons choose to plead guilty rather than try to escape conviction by challenging the Prosecution's evidence on whether they had the requisite mental state to commit the offence they were charged with or relying on the defence of insanity or unsoundness of mind.[6] Second, of those who do try, many will fail and fall to have their sentences passed upon. Third, it is well known that one of the primary concerns of persons facing a criminal charge is the sentence they will be liable for.[7] This probably applies to a greater degree to the mentally ill who are, in most cases, more vulnerable to punishment. Finally, much has been written on the interplay between mental illness and criminal responsibility and this author can do no better than refer the reader to those excellent sources.[8]

---

3 Council of State Governments Justice Center, "Justice Center Study Brief: Prevalence of Serious Mental Illness among Jail Inmates" (June 2009) <http://consensusproject.org/the_report> (accessed 10 May 2011).

4 Bureau of Justice Statistics, "Mental Health Problems of Prison and Jail Inmates" (6 September 2006) <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=789> (accessed 10 May 2011).

5 Asian and Pacific Conference of Correctional Administrators, "26th APCCA Conference Report" (November 2006) at p 73 <http://www.apcca.org/Pubs/26th/26th%20APCCA%20Conference%20Report.pdf> (accessed 10 May 2011).

6 Statistics show that a vast majority of criminal cases in the US do not go to trial. In *Blakely v Washington* 542 US 296 at 337 (2004), Justice Breyer observed that more than 90% of defendants reach plea agreements before trial. Precise figures are not available for Singapore but anecdotal evidence suggests that more accused persons plead guilty than claim trial. In all likelihood this same trend applies to mentally ill offenders.

7 This would explain the popularity of plea bargaining in the US, which Singapore's Attorney-General recently announced would also be institutionalised in Singapore by the first quarter of 2012. K C Vijayan, "Plans for laws to support plea bargaining" *The Straits Times* (6 May 2011) at p A21.

8 See, *eg*, Ellen Byers, "Mentally Ill Criminal Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?" (2004) 57 Ark L Rev 447 (this paper advocates for graduated culpability findings and the abolition of the insanity defence); and H L A Hart, *The Morality of the Criminal Law – Two Lectures* (Magnes Press, Hebrew University, 1964) at pp 24–25; Norval Morris, *Madness and the Criminal Law* (University of Chicago Press, 1982) at pp 55–56, 62–63, 142; Christopher Slobogin, "An End to Insanity:

(*cont'd on the next page*)

3 In summary, this article seeks to address how mentally disordered offenders are sentenced in the US and Singapore and discusses whether the present approach to sentencing suitably addresses the broad goals of the criminal justice system while taking into account the situation of mentally disordered offenders. Because decision makers in the US and in Singapore are faced with similar sentencing options yet take different approaches towards selecting the appropriate sentence for a mentally disordered offender, useful lessons can be gleaned through a comparative examination of their successes and failures.

II. Mental illness and the principles of sentencing

4 As a preliminary matter, it is helpful to set out a framework in which to consider how mental illness should feature in the process of sentencing (regardless of whether or not the offender qualifies for any exceptions or defences in the criminal law relating to diminished responsibility or unsoundness of mind).

5 The four classic principles of sentencing are retribution, deterrence, incapacitation and rehabilitation.[9] Retribution is a corollary of desert and proportionality[10] – it requires commensurate punishment for wrongful actions where punishment is deserved.[11] This notion of sentencing "addresses the offender as a moral agent, as having the capacity to evaluate and to respond to an official evaluation of their conduct".[12] Deterrence, in contrast, has an eye on the future and may be described as consequentialist.[13] Deterrence may be particular, applying to the criminal himself to prevent him from committing further crimes by giving him an unpleasant experience he will not want to endure

---

Recasting the Role of Mental Disability in Criminal Cases" (2000) 86 Va L Rev 1199 at 1200–1202, all of whom argue for mental illness to be considered in relation to guilt only to the extent it affects the question of the mental state required to make out the offence and to feature more prominently in sentencing.

9 See, *eg*, *R v James Henry Sargeant* (1974) 60 Cr App R 74 at 77, where although Lawton LJ referred to "retribution, deterrence, *prevention* and rehabilitation" [emphasis added], he intended prevention to mean incapacitation. Today, "prevention" is sometimes thought of as referring to "specific deterrence", thus, for the avoidance of doubt, "prevention" here has been substituted with "incapacitation".

10 For a detailed and principled argument concerning the desert theory and proportionality, see Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (Hill and Wang, 1976); Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005).

11 Susan Easton & Christine Piper, *Sentencing and Punishment* (Oxford University Press, 2nd Ed, 2008) at p 56.

12 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th Ed, 2005) at p 84.

13 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th Ed, 2005) at p 75.

again, or general, applying to all members of the community as a warning lest they suffer the same fate.[14] The third principle, incapacitation, also known as restraint or public protection, is based on the perceived need to protect society from persons deemed dangerous,[15] usually because of their past criminal conduct or a characteristic of their person. A sentence based on incapacitation depends on a prediction of future dangerousness of criminals and translating that into a period of time during which they need to be isolated from their communities. Finally, rehabilitation seeks to provide convicted criminals with appropriate treatment such that they may be returned to society so reformed that they will not desire to commit further crimes.[16] Like deterrence and incapacitation, rehabilitation seeks to prevent crime,[17] but through a different strategy – rehabilitation is concerned primarily with changing the offender's behaviour such that the identified antecedent cause for criminal conduct may be removed.

6 Going through these principles of sentencing, it becomes immediately apparent that they may at times conflict and the court will have to prioritise one or more of them over the others. This is particularly so when a mentally disordered offender is involved. Depending on how the four principles are weighed and balanced, the presence of a mental disorder may be regarded as an aggravating (tending to increase the severity of a sentence) or a mitigating (tending to decrease the severity of a sentence) factor.

7 Focusing on retribution, the presence of a mental disorder ought to have a mitigating effect to the extent that the mental illness affects the criminal's moral agency. Because mental illness is so varied – some mentally disordered people have impaired understanding,[18] whereas others may suffer affective disorders that reduce their ability to control their actions[19] – and occurs to different degrees, this will essentially be a matter of judgment for the court to make based on the totality of the evidence. In each case, it will be for the court to justify why punishment is deserved. The retributive principle also contains a proportionality requirement that relates to the nature of the crime committed and its effects on society. The proportionality principle operates to ensure that mentally disordered offenders are not detained

14 Wayne R LaFave, *Criminal Law* (Thomson/West, 4th Ed, 2003) at pp 27–28.
15 Wayne R LaFave, *Criminal Law* (Thomson/West, 4th Ed, 2003) at pp 27–28; also see Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th Ed, 2005) at p 80.
16 Wayne R LaFave, *Criminal Law* (Thomson/West, 4th Ed, 2003) at p 27.
17 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th Ed, 2005) at p 82.
18 This may include those suffering from dementia, post-partum psychosis, chronic schizophrenia, delusional disorders and paranoid personality disorders.
19 This would include obsessive compulsive disorder and kleptomania.

under criminal law exceeding the period that a non-disordered offender would be detained for the equivalent offence.[20]

8 Deterrence, both specific and general, will usually be neutral considerations. There will be no value imposing a more severe sentence for the purposes of specific deterrence because mental illness may render offenders "undeterrable" in the sense of being unable to understand the significance of punishment as a result of their mental illness affecting their thought processes or because they will be unable to control their future behaviour by reason of their mental illness.[21] Likewise with general deterrence because those of the public at large who are mentally ill may not be able to comprehend the warning meant for them and, even if able to comprehend, may be themselves "undeterrable". However, it is possible to imagine exceptional scenarios where the offender has sufficient comprehension and control despite the presence of a mental disorder such that specific deterrence may be of some relevance. Similarly, general deterrence may also feature in that scenario where the ability to understand the significance of punishment and to control future behaviour applies generally to all those with the same mental disorder.

9 Rehabilitation would, akin to retribution, augur for a less severe sentence for mentally disordered offenders. It is well known that prisons are not the ideal environment for psychiatric treatment. Overcrowding endemic in present-day prisons tends to result in greater violence, a lack of privacy, excessive noise, and other stressful conditions that negatively affect the mentally ill who are vulnerable to emotional and psychiatric problems.[22] Thus, to the greatest extent possible, rehabilitation would mean choosing a sentence such as probation over imprisonment. Where imprisonment is unavoidable, a more lenient sentence ought generally to be imposed, unless it can be shown that the particular offender would respond positively rather than negatively to treatment in a prison environment. Even if this was the case, the principle of proportionality ought to serve as a check on the imposition of lengthy sentences for the purposes of compulsory treatment.

10 As for incapacitation, it may, in theory, have either a mitigating or an aggravating effect on sentence depending on the circumstances. If the offender's mental illness is treatable expediently, then it would be unjust to detain the offender longer than necessary to administer the

20 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th Ed, 2005) at p 378.

21 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th Ed, 2005) at pp 370–371: "Sentencing has a communicative element, which cannot be realized where it is the offender's understanding that is impaired."

22 Olinda Moyd, "Mental Health and Incarceration: What a Bad Combination" (2003) 7 DC L Rev 201 at 205.

cure because the need for incapacitation would have been removed. On the other hand, if the mental illness is incurable and the risk to society posed by the offender is great, then, in theory, it is possible that a disproportionately long sentence may be required. However, this should rarely be the case in reality. First, predictions of future dangerousness, upon which a lengthy sentence would have to be based, are of doubtful value.[23] In fact, the American Psychiatric Association has frequently contended that long-term clinical predictions of future dangerousness are more frequently wrong than right.[24] Second, mental illnesses are not easily classifiable into the categories of curable and incurable – the successful management of one's mental illness may depend on a whole host of factors including family support, availability of psychiatric medication, access to therapy, the patient's co-operation in taking medication and even having regular employment. It would be too simplistic and also cruel to label an offender incurable in order to justify inordinately long incarceration without knowledge of how he will respond to treatment over time. Finally, there are also fairness issues when mentally ill offenders are held for longer periods than offenders who are not mentally ill, all other things being equal, solely for the purposes of incapacitation. Thus, although incapacitation would understandably be demanded by the public, especially where violent crimes have been committed against vulnerable individuals, the courts should resist the temptation to order a more severe sentence solely for the purpose of incapacitation. Alternatives outside the criminal justice system, such as civil commitment (*ie*, placing a person in a psychiatric hospital or ward), should be utilised instead.

11 It then follows that because deterrence and incapacitation will seldom be the driving concern when sentencing a mentally disordered offender, focus should be placed primarily on considerations of retribution and rehabilitation, with the proportionality element of retribution providing the upper limit of the sentence for the sake of fairness. A mental illness that affects the moral agency of the accused person should therefore generally result in a mitigated sentence.

III. Approaches to sentencing mentally disordered offenders

12 With this framework in mind, we may now proceed to examine how mentally disordered offenders are sentenced in the Federal Courts of the US and in Singapore.

---

23 See Erica Beecher-Monas & Edgar Garcia-Rill, "Danger at the Edge of Chaos: Predicting Violent Behaviour in a Post-Daubert World" (2003) 24 Cardozo L Rev 1845 at 1845.

24 See, *eg*, the American Psychiatric Association's *amicus* brief to the US Supreme Court in *Barefoot v Estelle* 463 US 880 (1983) <http://archive.psych.org/edu/other_res/lib_archives/archives/amicus/82-6080.pdf> (accessed 10 May 2011).

A. The US – Legislative guidance giving way to judicial discretion

13 In the US, sentencing is a part-legislative and part-judicial activity. Occasionally, mandatory penalties are established for particular offences and all the judge has to do is decide whether or not the offender falls into the relevant category.[25] However, more generally, the Legislature establishes a penalty for a given criminal offence by reference to statutes defining ranges of imprisonment terms and fines.[26] It is then up to the sentencing court to determine an appropriate sentence within the range.

14 It is also important to bear in mind that criminal punishment operates alongside numerous initiatives that deal specifically with mentally ill offenders.

15 First, prompted by the passage of the US Law Enforcement and Mental Health Project Act[27] in 2000, therapeutic mental health courts have been established in 32 states in order to divert mentally ill defendants in minor criminal cases into treatment and intensive supervision.[28] Mental illness is defined broadly such that a defendant suffering from a mental, behavioural or emotional disorder, diagnosable using the Diagnostic and Statistical Manual of Mental Disorders, which results in functional impairment of one or more life activities, may be diverted into mental health courts.[29] Mental health courts differ from state to state but generally take a "problem-solving" approach to address the root causes of behaviours that bring people before the courts.[30] Participants are identified through mental health screening and assessments and are invited to participate in a judicially supervised treatment plan developed jointly by a team of court staff and mental health professionals.[31] Mental health courts have been regarded by many as successful in achieving the goal of diversion.[32]

25 See, *eg*, the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today ("PROTECT") Act (Pub L 108-21) (US) §151, 117 Stat 650 at 654 (2003).

26 Russell L Weaver *et al*, *Principles of Criminal Procedure* (Thomson/West, 3rd Ed, 2008) at p 395.

27 42 USC §3796ii (2000).

28 Ellen Byers, "Mentally Ill Criminal Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?" (2004) 57 Ark L Rev 447 at 528.

29 42 USC §3796ii-1(A) and (B) (2000).

30 Bureau of Justice Assistance, US Department of Justice, "Mental Health Courts – A Primer for Policymakers and Practitioners" (2008) at p 3 <http://consensusproject.org/mhcp/mhc-primer.pdf> (accessed 10 May 2011).

31 Bureau of Justice Assistance, US Department of Justice, "Mental Health Courts – A Primer for Policymakers and Practitioners" (2008) at p 4 <http://consensusproject.org/mhcp/mhc-primer.pdf> (accessed 10 May 2011).

32 See, *eg*, Bureau of Justice Assistance, US Department of Justice, "Mental Health Courts – A Primer for Policymakers and Practitioners" (2008) at p 14 <http://consensusproject.org/mhcp/mhc-primer.pdf> (accessed 10 May 2011)

(*cont'd on the next page*)

16 Second, civil commitment orders are available independently or post-incarceration. Although there are variations amongst the different states, civil commitment statutes generally require that a mentally ill individual be dangerous to others, dangerous to themselves or gravely disabled as to be unable to meet his or her basic needs before they may be placed in a mental hospital.[33] Additionally, after *Lessard v Schmidt*,[34] numerous procedural safeguards have been built into the civil commitment process in order to protect the rights of the mentally ill.[35]

17 Finally, outpatient treatment orders, which are court orders directing a person to comply with specified treatment requirements outside a residential setting that are reasonably designed to alleviate or reduce the person's illness or disability, or to maintain or prevent deterioration of the person's mental or emotional functioning,[36] may also be available. The use of outpatient treatment programmes have been found to reduce hospitalisations, homelessness, arrests and other consequences of untreated mental illnesses (like violence and victimisation), as well as improve treatment compliance.[37]

18 It is beyond the scope of this article to discuss these mental health initiatives in detail. Suffice to say, in an ideal world, mentally ill persons would be treated and cared for in order to reduce the likelihood of them committing crimes in the first place. Outpatient treatment

---

(citing studies showing that mental health court participation resulted in comparatively fewer new bookings into jail, lower likelihood of incurring new charges or being arrested, increased frequency of treatment services, improved independent functioning, decreased substance use, and fewer days in jail); Ellen Byers, "Mentally Ill Criminal Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?" (2004) 57 Ark L Rev 447 at 529–530 (recommending that the jurisdiction of mental health courts be broadened to include violent felony offences); Liesel J Danjczek, "The Mentally Ill Offender Treatment and Crime Reduction Act and its Inappropriate Non-Violent Offender Limitation" (2007) 24 J Contemp Health L & Pol'y 69 (arguing that mental health courts should divert violent mentally ill offenders as well as non-violent mentally ill offenders).

33 Alan A Stone, "Overview of Law and Psychiatry" in *Harvard Guide to Psychiatry* (Armand M Nicholi Jr MD ed) (Belknap Press, 3rd Ed, 1999) at p 808.

34 414 US 473 (1974). This was a case where the US Supreme Court upheld the decision of a Milwaukee Federal District Court that struck down Wisconsin's civil commitment law as unconstitutional. The court rejected the *parens patriae* principle as a ground for commitment and established a "dangerousness" standard in order to justify civil commitment.

35 These include the requirements of a preliminary hearing within 48 hours of detention and a full hearing within 10 to 14 days, the right to counsel, the privilege against self incrimination, and exclusion of hearsay evidence.

36 See, *eg*, the Mental Hygiene Law §9.60 (L 1999, ch 408), reviewed in *In re KL* 1 NY 3d 362 (2004).

37 Liesel J Danjczek, "The Mentally Ill Offender Treatment and Crime Reduction Act and its Inappropriate Non-Violent Offender Limitation" (2007) 24 J Contemp Health L & Pol'y 69 at 113.

orders and civil commitment orders would then come in to fill the gaps where family and community support systems break down. Should the mentally ill have run-ins with the law because they were missed by the mental health system or because of a relapse, they should then be given a chance to respond to (further) treatment and care. The mental health courts should screen out such persons from the criminal justice system. Unfortunately, whether because the mental health initiatives described above are not implemented broadly enough, do not have sufficient resources, or because of some underlying social malaise, the criminal courts today see more than their fair share of mentally ill offenders.

(1) Legislative guidance: The Federal Sentencing Guidelines

19 Let us now return to the US federal criminal justice system. In order to eliminate unwarranted disparity and promote transparency, certainty, fairness and proportionality in sentencing,[38] the Sentencing Reform Act of 1984[39] created the US Sentencing Commission, tasked with promulgating Federal Sentencing Guidelines ("Guidelines").[40] As described in the Harvard Law Review:[41]

> The heart of the Guidelines is a one-page table: the vertical axis is a forty-three-point scale of offence levels, the horizontal axis lists six categories of criminal history, and the body provides the ranges of months of imprisonment for each combination of offence and criminal history. A sentencing judge is meant to use the guidelines, policy statements, and commentaries contained in the other 600-odd pages of the Guidelines Manual to identify the relevant offence and history levels, and then refer to the table to identify the proper sentencing range.

20 The sentencing options in the Guidelines include probation, imprisonment and supervised release. In respect of probation and supervised release, the court may impose an additional condition that the defendant participate in a mental health programme approved by the US Probation Office where the court has reason to believe that he or she is in need of psychological or psychiatric treatment,[42] or that the defendant be confined in a community mental health facility and

38 US Sentencing Commission, "Fifteen Years of Guidelines Sentencing" (2004) at p iv <http://www.ussc.gov/15_year/executive_summary_and_preface.pdf> (accessed 10 May 2011).

39 Pub L No 98-473, tit II, ch II, 98 Stat 1987 (codified as amended in scattered sections of 18 and 28 USC).

40 2010 Federal Sentencing Guidelines Manual <http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm> (accessed 10 May 2011).

41 "*Booker*, the Federal Sentencing Guidelines, and Violent Mentally Ill Offenders" (2008) 121 Harv L Rev 1133 at pp 1134–1135.

42 See §§5B1.3(d)(5) and 5D1.3(d)(5) of the 2010 Federal Sentencing Guidelines Manual <http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm> (accessed 10 May 2011).

participate in treatment during non-residential hours.[43] Another potentially useful sentencing option with respect to mentally disordered offenders is occupational restrictions, which can only be imposed where (a) there is a reasonably direct relationship between the defendant's occupation and the conduct relevant to the offence of conviction and (b) such a restriction is reasonably necessary to protect the public.[44] This measure may conceivably be used against, for instance, a person with paedophilia who worked in a school.

21 Section 3553(a) of the Guidelines requires a court determining a particular sentence to consider a long list of varying types of considerations,[45] two of which relate to sentencing principles or goals. Unfortunately, no direction is provided to the court as to which goal is to take priority over the others in the event of conflict. This leaves judges free to rely on any one or more sentencing goals to justify a sentence they deem fair.[46]

22 However, to ameliorate such a situation, the Guidelines contain numerous policy statements framed as rules to limit the factors a judge may rely on to depart from a Guidelines sentence. In respect of mentally disordered defendants, §5H1.3 of the Guidelines dictates that:

> Mental and emotional conditions *may be relevant* in determining whether a departure is warranted, *if such conditions*, individually or in combination with other offender characteristics, *are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines*. See also Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

---

43 It is recommended that community confinement not be imposed for a period in excess of six months. See Commentary to §5F1.1 of the 2010 Federal Sentencing Guidelines Manual <http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm> (accessed 10 May 2011).

44 2010 Federal Sentencing Guidelines Manual <http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm> (accessed 10 May 2011) §5F1.5.

45 These are: (1) the nature and circumstances of the offence and the history and characteristics of the defendant; (2) the need for the sentence imposed to meet the goals of retribution, deterrence, protection and education; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established in the relevant guidelines; (5) any pertinent policy statement; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offence.

46 As eloquently put in Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th Ed, 2005) at p 73, giving judges the freedom to select from among the various sentencing goals "is a freedom to determine policy, not a freedom to respond to unusual combinations of facts" as well as "more of a licence to judges to pursue their own penal philosophies than an encouragement to respond sensitively to the facts of each case".

> In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. See §5C1.1, Application Note 6.
>
> [emphasis added]

23 It is noteworthy that the above was only inserted with effect from 1 November 2010, replacing the paragraph below:

> Mental and emotional conditions are *not ordinarily relevant* in determining whether a departure is warranted, *except* as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure). [emphasis added]

This amendment was a move in a positive direction and showed a greater willingness to allow an offender's mental condition to feature in the sentencing calculus. Downward departures from the Guidelines were also specifically recognised as being appropriate in certain cases to "accomplish a specific treatment purpose". Nevertheless, as will be argued below, this amendment does not quite go far enough.

24 The other relevant portion of the Guidelines is §5K2.13, concerning diminished capacity. Presumably, in determining whether a mental condition is "present to an unusual degree", this section should also be considered. §5K2.13 states that a sentence below the applicable guideline range may be warranted if: (a) the defendant committed the offence while suffering from a significantly reduced mental capacity; and (b) the significantly reduced mental capacity contributed substantially to the commission of the offence. The extent of such a departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offence. However, the court may not depart below the applicable guideline range if: (i) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (ii) the facts and circumstances of the defendant's offence indicate a need to protect the public because the offence involved actual violence or a serious threat of violence; (iii) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (iv) the defendant has been convicted of a violent offence.

25 This last admonition significantly restricts the ability of the sentencing court to regard the presence of a mental disorder as a mitigating factor. Effectively, a defendant's mental disorder is relevant to sentencing only if he is a first or second-time offender (if the latter the prior offence must have been non-violent) committing a non-violent offence, and proximate to the time of the offence there was no voluntary use of intoxicants. Otherwise, it is likely that incarceration will be ordered and this is, in fact, borne out by the profile of prisoners in the US. As statistical data demonstrates, a majority of the mentally ill in

state prisons (74%) and local jails (76%) are substance abusers, and a significant proportion have committed a current or past violent offence (61% in state prison and 44% in local jails) or have three or more prior incarcerations (25% in state prison and 26% in local jails).[47]

26 The Guidelines may, however, benefit mentally disordered offenders because even if a defendant is unable to qualify for a downward departure under the exceptions contained in §5K2.13 or under the treatment limb of §5H1.3, the first paragraph of §5H1.3 suggests that an upward departure is similarly unwarranted save in exceptional cases. Rather, according to *United States v Moses*,[48] civil commitment[49] was the appropriate remedy. §5H1.3 may therefore curb the risk of over-emphasising incapacitation as a sentencing goal in most cases. However, it must also be recognised that §5H1.3 can also be a double-edged sword as fear of and unfamiliarity with mental conditions may lead the courts to readily identify cases as atypical ones where a mental condition is "present to an unusual degree" in order to impose more severe sentences.

(2) The courts have the last word: Expansion of judicial discretion

27 Although the Sentencing Reform Act mandated judicial compliance with the Guidelines, the US Supreme Court has since, in *United States v Booker*[50] ("*Booker*"), declared the Guidelines "effectively advisory".[51] Nevertheless, they continue to be important and appellate courts reviewing a sentence imposed by a lower court will consider that court's application of the Guidelines.[52] A proper application of the Guidelines may lead to the appellate court applying a presumption of reasonableness to the lower court sentence but a departure from the

47 Bureau of Justice Statistics, "Mental Health Problems of Prison and Jail Inmates" (6 September 2006) <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=789> (accessed 10 May 2011).

48 106 F 3d 1273 (6th Cir, 1997).

49 18 USC §4246 provides that a person whose sentence is about to expire and is "presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another" may have his release stayed and be subject to further commitment.

50 543 US 220 (2005). See Douglas B Bloom, "*United States v Booker* and *United States v Fanfan*: The Tireless March of *Apprendi* and the Intracourt Battle To Save Sentencing Reform" 40 Harv CR-CL L Rev 539 for the US Supreme Court's treatment of the 2010 Federal Sentencing Guidelines Manual <http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm> (accessed 10 May 2011) leading up to *United States v Booker*.

51 *United States v Booker* 543 US 220 at 245 (2005).

52 See *United States v Rita* 551 US 338 (2007); *Gall v United States* 552 US 38 (2007).

Guidelines does not lead to a presumption of unreasonableness.[53] The standard of review is a deferential abuse of discretion standard.[54]

28 In short, post-*Booker*, sentencing judges have significantly more discretion to depart from the Guidelines by utilising the factors enumerated in §3553(a).[55] What does this mean for mentally ill defendants? Has the result been a greater willingness to regard mental illness as a mitigating factor despite the disqualifications in §5K2.13 of the Guidelines?

29 One view is that if there is to be any departure from the Guidelines due to a defendant's mental illness, it will more likely be upward rather than downward because: (a) downward variances have proved much less likely than upward ones to be sustained on appeal; (b) the wording of the factors in §3553(a) of the Guidelines, particularly the need to "protect the public from further crimes of the defendant" and "to provide the defendant with needed … treatment in the most effective manner", appears to encourage higher sentencing; and (c) judges may react to the "lurid particularities" of mental illness and violent crimes by seeking to remove the frightening person from society for as long as possible.[56]

30 On the other hand, statistics show that post-*Booker*, the percentage of cases with downward departures increased much more significantly (pre-*Booker* 28.4% of offenders had downward departures,[57] whereas in 2010, 43.1% of cases saw downward departures[58]) than the percentage of cases with upward departures (pre-*Booker* 0.7% of cases

53 *United States v Rita* 551 US 338 at 347 (2007).

54 *Gall v United States* 552 US 38 at 56 (2007).

55 For a thorough discussion of the historic tussle between judicial discretion and legislative dictate see D Michael Fisher, "Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing" (2007) 46 Duq L Rev 65; and also Lee D Heckman, "The Benefits of Departure Obsolescence: Achieving the Purposes of Sentencing in the Post-Booker World" (2008) 69 Ohio St LJ 149.

56 "*Booker*, the Federal Sentencing Guidelines, and Violent Mentally Ill Offenders" (2008) 121 Harv L Rev 1133 at 1139. Also see John Q La Fond & Mary L Durham, "Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?" (1994) 39 Vill L Rev 71 at 102–103, which reported research showing that "Guilty but Mentally Ill" offenders are given longer sentences than guilty offenders.

57 US Sentencing Commission, "FY2005 Sourcebook", Figure G <http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2005/fig-g-pre.pdf> (accessed 10 May 2011).

58 US Sentencing Commission, "FY2010 Sourcebook", Figure G <http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureG.pdf> (accessed 10 May 2011).

had upward departures,[59] whereas in 2010, 1.8% of cases saw upward departures).[60] Although at present a majority of cases are still decided within the range provided for in the Guidelines, this figure has been on a downward trend, falling from 70.9% pre-*Booker*[61] to 55.0% in 2010.[62] However, it is unknown how these statistics would look if only mentally ill offenders were considered.

31 A sampling of post-*Booker* cases concerning mentally disordered offenders shows that those who are regarded as dangerous tend to receive above-Guidelines sentences consistent with the first prediction, and contrary to the statistical trend. This perhaps indicates an over willingness to find the presence of mental conditions that are "present to an unusual degree" under §5H1.3 of the Guidelines. It may also be observed that the courts do not balance the competing sentencing principles of retribution, deterrence, incapacitation and rehabilitation contained in §3553(a) in their analysis, rather they focus only on the one that would justify a more severe sentence.

32 In *United States v Pinson*,[63] the defendant was convicted of threatening to harm the US President, knowingly and wilfully making a materially false statement to a US Marshal (that another inmate intended to kill his sentencing judge), and mailing threatening communications (in which he threatened to injure a juror who had served on his trial). A psychologist testifying for the defendant concluded that he suffered from severe and chronic post-traumatic stress disorder stemming from long years of abuse. He had also previously been diagnosed with bipolar disorder and schizophrenia. The psychologist opined that the defendant's condition was treatable but that being in jail without activities would be a "cruelty" because the defendant was one of those "paradoxical types that … needs to be worked a lot, because standing in jail, he paces and goes over and over all of the people that he feels have been unfair to him and abusive".[64] Despite being sympathetic to the defendant's plight, the District Court sentenced the defendant to a total of 240 months in prison, a 135-month

59 US Sentencing Commission, "FY2005 Sourcebook", Figure G <http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2005/fig-g-pre.pdf> (accessed 10 May 2011).

60 US Sentencing Commission, "FY2010 Sourcebook", Figure G <http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureG.pdf> (accessed 10 May 2011).

61 US Sentencing Commission, "FY2005 Sourcebook", Figure G <http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2005/fig-g-pre.pdf> (accessed 10 May 2011).

62 US Sentencing Commission, "FY2010 Sourcebook", Figure G <http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureG.pdf> (accessed 10 May 2011).

63 542 F 3d 822 (10th Cir, 2008) (petition for cert denied), 129 S Ct 657 (2008).

64 *United States v Pinson* 542 F 3d 822 at 828–829 (10th Cir, 2008).

increase from the high end of the recommended Guidelines range. The Court of Appeals upheld the above-Guidelines sentence of the District Court but took a moment to "express [its] concern that courts use upward variances to increase the incarceration time for those who might pose a risk to the public *because of* their mental health problems"[65] [emphasis in original]. In the court's view, civil commitment post-incarceration was the proper mechanism by which a prisoner who posed a substantial risk to himself or others could be further detained.

33 In a similar case concerning a convicted murderer suffering from paranoid schizophrenia who wrote letters from prison threatening to kill the President, the District Court justified its above-Guidelines sentence because "the defendant's history of violent conduct, coupled with his obvious unstable mental condition … strongly suggest[ed] that [he] should never again be pardon[ed], paroled, or released into society".[66] This extreme reliance on the need to protect the public from a defendant by reason of his mental illness may also be seen in numerous other cases involving the offences of, for example, homicide and being a felon in possession of a firearm.[67]

34 On occasion, the sentencing court has imposed a sentence below the Guidelines range for mentally ill offenders it regarded as non-violent. Not surprisingly, perhaps because the court senses it is going against the norm, it pays careful attention to the variety of sentencing considerations in §3553(a) of the Guidelines. In *United States v Pallowick*,[68] a man with a history of mental illness and a prior conviction of robbery was convicted of armed bank robbery but sentenced to 24 months below the Guidelines range. The court justified a more lenient sentence because the defendant did not actually possess any weapons in the bank robbery, it believed that the defendant's mental illness played a major role in the offences and that his success in treatment made him less likely to reoffend.[69]

65 *United States v Pinson* 542 F 3d 822 at 838 (10th Cir, 2008).

66 *United States v Cousins* No 5:04 CR 169, 2007 US Dist LEXIS 36254 (17 May 2007) (ND Ohio) at 21–22.

67 See, *eg*, *United States v Gillmore* 497 F 3d 853 (8th Cir, 2007) (the Court of Appeals upheld a 110% upward variance to 396 months, for a woman suffering from depression and Post-traumatic Stress Disorder who killed a man with a hammer and a knife and then attempted to burn down his house to cover up the murder while trying to obtain money for drugs); *United States v Humphrey* No 06-4995, 273 Fed Appx 251(4th Cir) (15 April 2008) (the Court of Appeals upheld an upward variance of 34 months to 91 months, for a man suffering from major depression and with a schizo-typal personality for being a felon in possession of a firearm).

68 364 F Supp 2d 923.

69 *United States v Pallowick* 364 F Supp 2d 923 at 927.

35 More commonly though, sentencing courts continued to sentence mentally disordered offenders within the Guidelines range where the offence committed was not considered a violent one.[70] This is unsurprising given that there is a presumption of reasonableness when a defendant is sentenced within the Guidelines range. Unfortunately, such a presumption does not promote principled analysis of the four sentencing principles.

36 Evidently, *Booker* did not do much to improve the situation for mentally disordered offenders, and in fact, made those who were branded dangerous worse off by permitting sentencing courts to rely excessively on the incapacitation rationale of sentencing. This is not to say that the Guidelines were ideal – they were not because they did not go far enough to provide guidance as to when mental conditions could be said to be "present to an unusual degree"; and if so, whether upward or downward departures should be resorted to.

(3) Critique of the US approach

37 The approach to mentally ill offenders contained in the Guidelines may be contrasted with standard 18-4.4(b)(iv)(B) of the American Bar Association's Criminal Justice Sentencing Standards, which reads:[71]

> The legislature should permit sentencing courts to impose a sentence of lesser or greater severity or types of sanctions different from the presumptive sentence if the court finds substantial reasons for so doing. Such circumstances are present … [w]hen a court, sentencing an individual offender, finds a social, economic, physical, or *mental*

70 See, *eg*, *United States v Alcasar-Sanchez* No 06-50712, 267 Fed Appx 622 (9th Cir) (20 February 2008) (the Court of Appeals affirmed a sentence of 41 months' imprisonment, which was at the low end of the 2010 Federal Sentencing Guidelines Manual (<http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm> (accessed 10 May 2011)) range, for a man convicted of illegal re-entry as the District Court reasonably balanced the man's mental health and intellectual capacity, the severity of his prior criminal history, the nature of the present offence, and his family support); *United States v Minchey* No 06-4299, 246 Fed Appx 582 (10th Cir) (31 August 2007) (the Court of Appeals affirmed a sentence of 86 months' imprisonment, which was roughly in the middle of the Guidelines range, for a man who pleaded guilty to possession of stolen firearms, since the District Court had considered the man's psychological profile before denying a motion to depart); *United States v Goldsmith* 486 F 3d 404 (8th Cir) (7 January 2008) (the Court of Appeals affirmed a sentence of 33 months, which was at the bottom of the Guidelines range, for the owner of a law firm who failed to pay over tax money because the District Court did not fail to give considerable weight to the appellant's mental condition).

71 American Bar Association, Criminal Justice Standards Committee, "Criminal Justice Standards – Sentencing" <http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_sentencing_toc.html> (accessed 10 May 2011).

> *characteristic* of the offender, *indicative of circumstances of hardship, deprivation, or handicap, that justifies imposition of a less severe sentence*. [emphasis added]

38 This broad statement embodies an acceptable, in the sense of not unduly constraining judicial discretion, yet simple starting point; that is, for judges to consider that an offender's mental illness is, *prima facie*, a justification for a less severe sentence rather than regarded as relevant only in exceptional cases whether to increase or decrease a sentence. As argued above, the presence of a mental illness, by rendering deterrence of marginal significance in all but the most exceptional circumstances and placing at the forefront retribution and rehabilitation, will tend to be a mitigating factor.

39 In line with the above statement, it is submitted that §5H1.3 of the Guidelines should be revised to make retribution and rehabilitation the primary goals for sentencing mentally disordered offenders, with the notion of proportionality serving as an upper limit. This would prevent judges from meting out excessive sentences for purposes of providing treatment or for public protection. Additionally, §5H1.3 should provide that a mental or emotional condition that is causally related to the commission of the offence is, *per se*, a *sufficient* reason to decrease a defendant's sentence.

40 It would then be for the sentencing judge to balance other relevant considerations such as the offender's role in the offence, the absence or presence of multiple counts, and the offender's previous criminal history,[72] in order to determine whether on the facts of the case it would be appropriate to mete out a more lenient sentence. This would counteract the tendency of judges and juries to react to mentally ill offenders by wanting to put them away for as long as possible, as well as their sense that upward rather than downward departures will more likely be sustained on appeal.

41 Although post-*Booker* the Guidelines would still only be advisory rather than mandatory, they can nevertheless serve to provide the sentencing judge with a principled methodology towards sentencing offenders with mental illness and would greatly benefit from revision.

B. Singapore – Guided by precedent

42 In Singapore, legislative guidance in respect of sentencing is limited to the inclusion of minimum or maximum sentences in the definition of criminal offences, or in establishing mandatory sentences

72 See 2010 Federal Sentencing Guidelines Manual chs 3–4 <http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm> (accessed 10 May 2011).

for particular offences. Generally, how to approach sentencing mentally offenders is, more so than the US, a matter of judicial discretion and has to be gleaned from case law. However, because the Singapore court structure is much simpler than that of the US – there are generally speaking two types of criminal appeals, first from the Subordinate Courts to the High Court,[73] and second, from the High Court to the Court of Appeal[74] – this system has produced consistent and comprehensive guidelines towards sentencing mentally disordered offenders.

(1) Sentencing benchmarks

43 The courts utilise sentencing benchmarks and guidelines in their decision-making, which may be ascertained from the sentencing decisions of the courts[75] or gleaned from various publications.[76] Sentencing benchmarks proved to be a difficult and contentious area of criminal law when the public and members of the profession expressed some concern about inconsistency in their application as well as their proportionality.[77] This led to the formation of a Sentencing and Bail Review Panel in 2007 to examine how current sentencing and bail guidelines can be further rationalised and improved.[78] The outcomes of this measure are not expected to be made public, but as before, the High Court and the Court of Appeal have, in their role as appellate courts, made known the sentencing benchmarks for various offences as well as clarified when lower court judges should feel justified in departing from them.[79] In the process of applying the sentencing benchmarks to each

73 *Ie*, Magistrates' Appeals. A designated number of judges with expertise in the criminal law hear Magistrates' Appeals, including Chief Justice Chan Sek Keong and Judge of Appeal V K Rajah.

74 Appeals from the High Court to the Court of Appeal concern criminal cases over which the High Court has original jurisdiction.

75 This can be done by assessing the "Results of Magistrate's Appeals Database", an online research database available to all subscribers of Lawnet, as well as by drawing on the experience of veteran counsel who are familiar with sentencing trends. See Anand Nalachandran *et al*, "Plea in Mitigation" *Singapore Law Gazette* (January 2006) <http://www.lawgazette.com.sg/2006-1/Default.htm> (accessed 10 May 2011).

76 Judge Jasvender Kaur *et al*, *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2nd Ed, 2003); Kow Keng Siong, *Sentencing Principles in Singapore* (Academy Publishing, 2009).

77 "Improving on a Formidable Legacy" *The Straits Times* (24 April 2006) at Review – Others.

78 Speech by Chan Sek Keong, Chief Justice of Singapore, at the 2007 Subordinate Courts Workplan Seminar <http://app.subcourts.gov.sg/Data/Files/File/Workplans/Workplan2007/CJKeynoteAddress2007.pdf> (accessed 10 May 2011).

79 See, *eg*, *PP v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR(R) 334 at [74]–[75] (establishing benchmarks for credit card cheating offences); *ADF v PP* [2010] 1 SLR 874 at [91]–[92] (establishing benchmarks for voluntarily causing hurt to a domestic maid).

individual case, judges are further expected to balance the sentencing goals of retribution, deterrence, incapacitation and rehabilitation.[80] Similar to the US, the sentencing judge will examine the particular factual matrix of each case to determine which sentencing goal(s) will take precedence.[81]

44 In contrast to the US where an offender's mental and emotional condition is regarded as relevant to sentencing only in certain defined circumstances, the Singapore courts have taken a far stronger position. The following excerpt from *Sentencing Practices of the Subordinate Courts*, a book written by judges in the Subordinate Courts, illustrates this nicely:[82]

> The existence of a mental disorder is *always a relevant factor in the sentencing process*, but its impact will vary considerably according to the circumstances of the individual case. [emphasis added]

45 In *PP v Goh Lee Yin*[83] ("*Goh Lee Yin*"), a recent case that dealt comprehensively with sentencing mentally disordered offenders, Judge of Appeal V K Rajah described this as "the paradox of sentencing the mentally ill"[84] – on the one hand, courts are expected to fulfil a vital social-control role in sentencing an offender such that when mental illness points towards a future danger more severe sentencing may be required to protect society; on the other, courts are concerned with rehabilitating the offender, which may require imposing a less severe sentence.

46 At this juncture, it is appropriate to mention the Community Court, which was established on 1 June 2006 to deal with a specific category of offences and offenders, including offenders with mental disabilities, youthful offenders between the ages of 16 to 18, neighbourhood disputes and family violence cases.[85] The Community Court is committed to the principles of restorative justice and

80 See, *eg*, *PP v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [17] ("[i]n determining any sentence, a good starting point is the four classical principles of sentencing"); *PP v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449 at [28] ("[i]n every case, the sentencing court strives to achieve a proper balance of the *applicable* principles of those four 'pillars of sentencing'" [emphasis added]).

81 For example, where the respondent is a young offender who has committed a serious offence, the principles of rehabilitation and deterrence may be regarded as the most important. See *PP v Mohammad Al-Ansari bin Basri* [2008] 1 SLR(R) 449 at [28].

82 Judge Jasvender Kaur *et al*, *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2nd Ed, 2003) at pp 92–93.

83 [2008] 1 SLR(R) 824.

84 *PP v Goh Lee Yin* [2008] 1 SLR(R) 824 at [1].

85 See Community Court Secretariat, Subordinate Courts, "Brochure on the Community Court (2009)" <http://app.subcourts.gov.sg/Data/Files/File/Infor Booklet_Brochures/Brochure_Crime_CommCt.pdf> (accessed 10 May 2011).

rehabilitation and, akin to the mental health courts in the US, takes a non-traditional problem-solving approach to dealing with offenders.[86] Psychologists, social workers, the families of the accused and other interested parties may be involved in the process of formulating appropriate treatment plans as well as exploring sentence alternatives and community-based sanctions.[87] This unique approach, like the US, only applies to minor offences, but should not be forgotten as a valuable alternative to the traditional criminal justice approach of sentencing mentally disordered offenders. Additionally, there have been a number of recent legislative initiatives to broaden the scope of post-incarceration civil commitment as well as to introduce new sentencing options, including mandatory treatment orders. These will be discussed in greater detail below.

(2) Focus on rehabilitation and deterrence for non-serious offences

47 The case of *Goh Lee Yin*, concerning a young woman diagnosed with kleptomania, provides an excellent illustration of when a mental illness may be regarded as a mitigating factor in the Singapore courts. Goh had previously been convicted for shoplifting and while her sentence was on appeal, she committed similar offences. Nevertheless, the High Court allowed the appeal and placed her on 24 months' probation with a warning that if she reoffended again, the courts would have little alternative but to visit upon her a period of incarceration. Unfortunately, during the probation period, the respondent committed another spate of shoplifting offences and the District Court sentenced her to one day's imprisonment and a fine of $8,000. Dissatisfied, the Prosecution appealed. The High Court held that where an offender committed offences while suffering from a psychiatric disorder, *viz*, kleptomania, which seems to prompt the offence, the principles of rehabilitation and deterrence must form the prime focus of the court's attention.[88]

86 See Keynote Address by Chan Sek Keong, Chief Justice of Singapore, at the 2006 Subordinate Courts Workplan Seminar, at para 7 <http://app.subcourts.gov.sg/Data/Files/File/Workplans/Workplan2006/KeynoteAddress.pdf> (accessed 10 May 2011).

87 See Community Court Secretariat, Subordinate Courts, "Brochure on the Community Court (2009)" <http://app.subcourts.gov.sg/Data/Files/File/InforBooklet_Brochures/Brochure_Crime_CommCt.pdf> (accessed 10 May 2011); also see K C Vijayan, "Adult offenders: When does the parenting end?" *The Straits Times* (13 August 2010) where Community Court Judge Soh Tze Bian ordered a 25-year-old suffering from paraphilia to, *inter alia*, undergo two years of probation with the condition that his parents supervise his use of the Internet, be banned from using any camera phone, and have his parents supervise his use of other camera and video equipment.

88 *PP v Goh Lee Yin* [2008] 1 SLR(R) 824 at [60].

48 In respect of rehabilitation, the court relied on the fact that the respondent's psychiatrist testified that his treatment plan for the respondent could be "irreversibly derailed" should she be sent to prison, and further, a stint in prison could have a negative effect on her self-confidence and self-esteem, reversing her excellent progress thus far.[89] On that basis, and also because the offences committed were of a low-key nature, rehabilitation could take precedence over incapacitation. It is of note that in another case, the Court of Appeal observed that "[w]hile the respondent's rehabilitation was a relevant consideration, there was no suggestion that he could not be similarly rehabilitated in prison. In fact … the respondent's private psychiatrist … was also a psychiatrist engaged by the prison authorities".[90] This holding appears inconsistent with the scientific consensus and manifests a rather simplistic approach to what is required for successful rehabilitation. However, as can be seen from *Goh Lee Yin*, this approach was probably necessitated because the defence presented no evidence to the court in this respect, leaving the court with no hook on which to hang any holding favouring the defendant.

49 As for deterrence, the court provided a detailed analysis of the relationship between mental illness and deterrence. It recognised that specific deterrence usually worked best where there was a conscious choice to commit crimes and accepted that the theory of "undeterrability" as posited by Nigel Walker and Nicola Padfield (that elements such as pathologically weak self-control, addictions, mental illnesses and compulsions rendered deterrence futile because they involved some form of impulse or inability to make proper choices on the part of the offender),[91] applied to kleptomaniacs, who by definition, could not control their impulses to steal.[92] However, it added that:

> [B]ecause the cause of kleptomania is known, or thought to be known … and treatment modalities can be prescribed to limit, or even cure, the extent of kleptomania, the onus must therefore be on the sufferer to stick religiously to his or her treatment. ***If the sufferer knows that he or she is likely to reoffend and yet violates the treatment programme designed for him or her with impunity and total disregard, it would be right for the concept of specific deterrence to bite and provide the discouragement necessary for the offender not to skip future treatments.*** In this sense, the principle of specific deterrence … acts as a *secondary* as opposed to a primary source of deterrence or discouragement. [emphasis in bold italics added]

89 *PP v Goh Lee Yin* [2008] 1 SLR(R) 824 at [148].

90 *PP v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [37].

91 See Nigel Walker & Nicola Padfield, *Sentencing: Theory, Law and Practice* (Butterworths, 2nd Ed, 1996) at p 99 ("[m]ental illnesses can preoccupy or mislead sufferers to an extent that makes the consequences of their actions irrelevant").

92 *PP v Goh Lee Yin* [2008] 1 SLR(R) 824 at [78]–[80].

50 Thus, specific deterrence could and would apply (in a secondary manner) when the kleptomaniac skips or disregards his or her treatment.

51 With respect to general deterrence, the court held that this would usually be irrelevant in cases involving kleptomaniacs given the type of offences involved, the "undeterrability" of kleptomaniacs and the low incidence of kleptomania among apprehended shoplifters. More generally, the court also endorsed the proposition that the element of general deterrence could and should be given considerably less weight if the offender was suffering from a mental disorder at the time of the commission of the offence.[93] However, similar to specific deterrence, the court considered that the element of general deterrence would warrant some weight if the offender in question had skipped his or her treatment plan persistently – in that case, a general deterrent message would be sent out that "kleptomaniacs cannot expect to skip their treatment programmes and then steal, with the courts forgiving them of everything".[94]

52 The idea of deterrence having secondary value, where a mentally disordered offender with understanding and ability to control his or her actions deliberately fails to comply with treatment, is a novel one in sentencing mentally disordered offenders. It is the author's view that the logic of the court's analysis cannot be faulted and that the scenario it posits would constitute an exceptional circumstance under the proposed framework where the offender was deterrable rather than undeterrable.

(3) Retribution and incapacitation highly relevant to violent offences

53 The court did not address the principle of retribution in *Goh Lee Yin* but it appears from the case law that this principle features only where the crime committed by the mentally disordered offender was cruel, inhumane or particularly heinous.[95] In those cases, the courts imposed the most severe sentence prescribed by the Legislature for the particular offence.

54 Incapacitation remains highly relevant in cases involving serious offences where the potential risk to victims is substantial, notwithstanding

93 *PP v Goh Lee Yin* [2008] 1 SLR(R) 824 at [94].

94 *PP v Goh Lee Yin* [2008] 1 SLR(R) 824 at [95].

95 See, *eg*, *PP v Barokah* [2009] SGHC 46 at [70] (where a domestic maid suffering from a moderate depressive episode strangled her elderly employer after an argument and while she was unconscious pushed her out of the window of her ninth floor flat); *PP v Ng Kwok Soon* [2001] 3 SLR(R) 626 at [33]–[34] (where a man suffering from a major depressive episode poured inflammable liquid on a female co-worker and set her on fire).

the fact that the offender suffers from an impulse control psychiatric disorder, which causes the commission of the very offence.[96] However, in numerous instances, the courts have struggled with applying the principle of incapacitation because of the limited sentencing options available, particularly in cases of culpable homicide not amounting to murder punishable under s 304(*a*) of the Penal Code.[97]

55 Prior to the Penal Code (Amendment) Act 2007 (which came into effect on 1 February 2008),[98] the legislatively prescribed sentence under s 304(*a*) was life imprisonment, or imprisonment of up to ten years. "Life imprisonment" in Singapore has, since 1997,[99] been an initial period of 20 years and then up to the time the prisoner is released by a Life Imprisonment Review Board.[100] This meant that when sentencing an offender under s 304(*a*), the court had to choose between a sentence of up to six years and eight months' imprisonment (with remission) and a *minimum* sentence of 20 years' imprisonment up to the extent of the offender's natural life. This gap led to starkly different outcomes for mentally disordered offenders who came before the courts.

56 Guided by the criteria expressed in *R v Rowland Jack Forster Hodgson* ("*Hodgson* criteria"),[101] the courts tended to sentence mentally disordered offenders to life imprisonment where it appeared from the nature of their offences or their histories that they were of unstable character and likely to reoffend, and where if they did reoffend, the consequences to others might be specially injurious, as in the case of sexual offences or crimes of violence.[102] Conversely, if the Prosecution failed to prove any one of the above factors, for instance, that reoffending was likely,[103] a determinate prison term of up to ten years (six years and eight months with remission) would be imposed.

96 *PP v Goh Lee Yin* [2008] 1 SLR(R) 824 at [107]–[108].

97 Cap 224, 2008 Rev Ed.

98 Act 51 of 2007.

99 When the Court of Appeal in *Abdul Nasir bin Amer Hamsah v PP* [1997] 2 SLR(R) 842 at [32] interpreted "life imprisonment" as used in the Penal Code (Cap 224, 1985 Rev Ed) to mean imprisonment for the natural life of the offender. Prior to this decision, "life imprisonment" was, in practice, imprisonment for a maximum of 20 years and a minimum of 13 years four months (due to remission).

100 See reg 125 of the Prisons Regulations (Cap 247, Rg 2, 2002 Rev Ed).

101 (1968) 52 Cr App R 113 at 114 approvingly cited in *Neo Man Lee v PP* [1991] 1 SLR(R) 918.

102 See, *eg*, *PP v Lim Hock Hin* [2002] 2 SLR(R) 447 (where a man slashed his mother to death with a knife in an epileptic seizure); *Purwanti Parji v PP* [2005] 2 SLR(R) 220 (where a young domestic maid who was mentally and emotionally unstable strangled her elderly employer while the latter was taking a nap); *Mohammad Zam bin Abdul Rashid v PP* [2007] 2 SLR(R) 410 (where a man with frontal lobe syndrome battered his wife to death).

103 See, *eg*, *PP v Chee Cheong Hin Constance* [2006] 2 SLR(R) 707 (where a schizophrenic domestic maid caused her employer's child to fall to her death; the court decided to give the accused the benefit of the doubt in light of expert

(*cont'd on the next page*)

57 The courts soon realised that the *Hodgson* criteria required them to make an assessment about whether an offender's illness was treatable and whether there was a likelihood of reoffending based largely on the psychiatric evidence, even though there was no certainty that the psychiatrists would turn out to be correct. The Chief Justice adroitly stated in *PP v Aniza bte Essa*:[104]

> As [the testifying psychiatrist] himself has acknowledged in another case (quoting another expert psychiatrist), 'Nothing is certain in psychiatry' … in our view, to sentence a mentally unstable offender (whose condition is treatable) to life imprisonment, because *at that point of time* we do not know with certainty when it is safe to release him or her back to society, seems to be unjust to such an offender. It would mean punishing such an offender out of proportion to his or her culpability. [emphasis in original]

58 Although the Legislature has heeded the court's pleas for greater sentencing flexibility[105] by amending the punishment for all offences

---

testimony that roughly a third of schizophrenic patients can be cured with principally drug treatment and affidavits sworn by her three sisters to assume responsibility for her future medical care and provide supervision upon her release); *PP v Han John Han* (Criminal Appeal No 1 of 2007) (5 October 2007) (where a man suffering from a delusional disorder plunged an old sword into the chest of his pregnant wife; expert testimony established that there was no need for long-term medical supervision and that the risk of recurrence was low).

104 [2009] 3 SLR(R) 327 at [40].

105 See, *eg*, *PP v Chee Cheong Hin Constance* [2006] 2 SLR(R) 707 at [29] *per* V K Rajah JA:

> The current position, where the courts are neither empowered nor endowed with any discretion whatsoever to customise or tailor their sentences in a manner that would be consistent with either the possible recovery or decline of the medical condition of an offender who is unwell, is far from satisfactory. Judges often have to choose between a rock and a hard place when resolving their colliding instincts in determining the appropriate sentence. Should the offender's medical condition stabilise without any real risk of a relapse it would be quite unjust for him or her to continue to be incarcerated after rehabilitation through medical attention when he or she no longer poses any further risk to the public upon a return to the community. It is apodeictic that in such an instance the underlying rationale for the second of the *Hodgson* criteria … no longer prevails. *In order to properly and fairly sentence offenders whose medical condition might potentially be reversed through medical attention and/or with the passage of time, the courts should be conferred the discretion to impose a sentence band with appropriate minimum and maximum sentences tied to periodical medical assessments and reviews.* This will minimise the rather unscientific and imprecise conjecture that is now inevitably prevalent when determining appropriate sentences for such offenders. The proposed approach, while fairer to offenders, will also concomitantly serve to address and assuage public interest concerns on adequate sentencing as well as protection from mentally ill offenders with a propensity for violence. It is my hope that Parliament will review the present position and, upon taking into account the views of all relevant stakeholders in the sentencing and

(*cont'd on the next page*)

where the highest punishment is the life sentence, to provide for a term of imprisonment for up to 20 years and retaining life imprisonment as the highest punishment, the problem of uncertainty as to what period of imprisonment to impose in order to address the need for incapacitation still remains.[106]

(4) Critique of the Singapore approach

59 Generally, the Singapore system has performed well. Prison-wide, prison staff and community workers have succeeded in reducing recidivism among prisoners – in 2009 about 25% returned to prison within two years of release, down from 44% in 1988.[107] No figures are available as to the rate of recidivism of mentally disordered offenders and a study conducted in this area would certainly be very helpful towards measuring the effectiveness of the Singapore courts' approach to sentencing the mentally ill.

60 Notably, rather than focus on stating rules concerning when a mental disorder may be regarded as a mitigating factor and when it may not as the Guidelines in the US have done, the Singapore courts have taken the approach of articulating how a mental disorder affects each of the sentencing goals in different factual scenarios. It is submitted that this approach has led to more principled and consistent sentencing outcomes for mentally disordered offenders and is to be preferred.

61 However, as mentioned, the present guidelines articulated by the appellate courts place too much emphasis on incapacitation. This may lead to vastly different outcomes depending simply on whether the sentencing judge perceives the mentally ill offender as posing a possible danger to society. More focus ought to be placed on the proportionality aspect of retribution for the purposes of achieving a fair sentence, rather than on the desert aspect (for the purposes of punishing more severely acts regarded as particularly heinous or abhorrent), as has been the case thus far.

62 Because of the nature of judicial decision-making in an adversary system, the High Court and the Court of Appeal rely on counsel to submit evidence upon which it may reach its conclusions. Where such evidence is lacking, the courts' hands are tied. Additionally

---

rehabilitation framework, endow the courts with more comprehensive and pragmatic sentencing powers. [emphasis added]

106 *PP v Aniza bte Essa* [2009] 3 SLR(R) 327 at [42].

107 "Sentencing Options Made to Fit" *The Straits Times* (25 January 2010) (this is due in large part to a strong aftercare network, including the Singapore Corporation of Rehabilitative Enterprises, whose role is to match skills training with employment opportunities for ex-prisoners).

the appellate courts will only be able to provide guidance to the lower courts when a case is appealed and an issue brought to its attention. Thus, they have yet to consider the most recent statutory amendments affecting mentally disordered offenders.

63 The first of these is the Mental Health (Care and Treatment) Act 2008 ("the Act"),[108] which came into effect on 1 March 2010. The Act regulates the involuntary detention of a person in a psychiatric institution for treatment and although it does not *directly* provide fresh sentencing options to the courts, it *indirectly* provides a solution by broadening the scope of commitment under the Prisons Act. Where before commitment to a psychiatric institution during a prisoner's imprisonment term applied only to prisoners of unsound mind, it now applies to the "mentally disordered".[109] As amended, s 43 of the Prisons Act provides that:[110]

> (1) Whenever a prisoner undergoing a sentence of imprisonment appears to the Director on the certificate of a registered medical practitioner to be mentally disordered, the Director may, by order in writing, setting forth the grounds of belief that the prisoner is mentally disordered, direct his removal from any prison to any mental hospital or other fit place of safe custody within Singapore, there to be kept and treated as the Director directs –
>
> > (*a*) until the expiration of the term of imprisonment ordered by the sentence; or
> >
> > (*b*) if it is certified by a medical officer that it is necessary for the safety of the prisoner or of others that he should be detained under medical care and treatment, until he is discharged according to law.
>
> (2) When it appears to the Director on the certificate of a registered medical practitioner that such prisoner has ceased to be mentally disordered, the Director shall, by an order in writing, return him to the prison from where he was removed if his term of imprisonment has not expired, but if the term has expired, shall direct him to be discharged.

64 The US position as stated in *United States v Moses*[111] is a helpful source of reference on the issue of post-incarceration commitment. Because commitment *after* the expiry of the imprisonment sentence is

---

108 Act 21 of 2008.

109 See Mental Health (Care and Treatment) Act 2008 (Act 21 of 2008), Second Schedule, para 1(36). A "mental disorder" is defined under s 2(1) of the Act to mean "any mental illness or any other disorder or disability of the mind".

110 Prisons Act (Cap 247, 2000 Rev Ed) s 43.

111 106 F 3d 1273 (6th Cir, 1997) (the fact that the defendant's mental condition created a substantial risk to the public was not grounds for upward departure; the appropriate remedy was civil commitment).

available, there is very little reason for the courts to increase the severity of sentences for mentally ill offenders by reason of their mental illness. Rather, the courts can leave the matter of assessing when the offender is fit to return to society[112] to the director of prisons, who will be acting on the advice of a qualified psychiatrist, who, in turn, would have had the benefit of a substantial length of time with which to observe the mentally ill offender. The sentence of imprisonment meted out by the courts would therefore serve as the *minimum* period of detention rather than a fixed period of detention. This would provide even more reason for the Singapore courts to prioritise the sentencing goal of retribution or rehabilitation. As an aside, it is noted that one area where the Singapore commitment scheme differs from that of the US, and where the US scheme may be improved, is that commitment to an appropriate psychiatric institution may occur even *before* the expiration of the imprisonment term – this will operate more favourably towards mentally disordered offenders whose mental conditions regress in the prison environment.

65 The second new legislative measure, *viz*, amendments to the Criminal Procedure Code,[113] *directly* addresses the need for more sentencing flexibility by introducing more options to the courts. These include: (a) mandatory treatment orders (where offenders with psychiatric problems can be sent for medical treatment for up to two years in lieu of jail terms);[114] (b) short detention orders (where low-risk, first-time offenders may be put on jail terms of up to two weeks); and (c) day reporting orders (where offenders are required to report regularly to a designated centre and be monitored for up to a year, undergo programmes and possibly be electronically tagged). The options will not be mutually exclusive and more than one may be imposed at the same time to optimise their benefit. These new measures allow the courts to tailor sentences to the individual needs of offenders more closely, and they may also aid in correcting public misperceptions that *all* mentally ill patients are dangerous and there is a need to be protected from them.[115] Unfortunately, these measures are only intended

112 Mental Health (Care and Treatment) Act 2008 (Act 21 of 2008) s 10(6) provides that a person "shall not be detained at a psychiatric institution for treatment unless – (a) he is suffering from a mental disorder which warrants the detention of the person in a psychiatric institution for treatment; and (b) it is *necessary in the interests of the health or safety of the person or for the protection of other persons* that the person should be so detained" [emphasis added].

113 Criminal Procedure Code 2010 (Act 15 of 2010).

114 K C Vijayan, "Medical treatment in lieu of jail term: CPC changes" *The Straits Times* (21 January 2010).

115 A recent study by the Institute of Mental Health showed that more than one in three Singaporeans believed mentally ill patients to be dangerous. Further, about half of the respondents felt that the public should be better protected from people with mental health problems. See *Singapore Parliamentary Debates, Official Report* (15 September 2008) vol 85 at cols 57, 173–174.

for first-time offenders convicted of non-serious crimes and it is expected that they will mostly be used in the Community Court (although the author sees no reason for restricting their use as such).[116] If so, it can then be said that those who have committed more violent offences will generally be subject to much harsher punishments and a stronger social stigma despite perhaps having the same level of moral culpability as those who commit non-serious crimes. It should be recognised that such offenders deserve treatment and ought to be given the benefit of the doubt in relation to future dangerousness.

IV. Conclusion – Lessons to be learnt

66 The approaches of the US and Singapore show that different societies and legal systems may have similarly effective although different methods of establishing principles for sentencing mentally disordered offenders – this could be through the use of legislative sentencing guidelines or judicial ones. The former is able to actively take into account different policy considerations and suggestions from interested parties, and provide comprehensive directions in a single, easily accessible source. However, the danger is that important principles may become lost in detailed rules, resulting in mechanical application rather than careful analysis. The latter works best for simple court systems and, being written by judges for judges, usually contain easy to apply legal principles with an element of flexibility built in to deal with varied factual circumstances. However, the weakness of judicial guidelines is that they depend on suitable cases being brought before the court, which may take time, and even then the courts are reliant on counsel to bring the relevant evidence from which they may draw conclusions.

67 Most common law criminal justice systems require judges to justify sentences by reference to the goals of retribution, deterrence, incapacitation and rehabilitation. However, all too often insufficient direction is provided as to which of these goals are to take precedence in which circumstances. The Guidelines are an example of a rules-based approach that does not pay enough attention to explicating general principles. In contrast, the Singapore courts have done a laudable job in this respect.

68 In both the US and Singapore, mentally disordered offenders who commit violent crimes are the worst off. Whether due to public

116 See Speech by Chan Sek Keong, Chief Justice of Singapore, at the 2008 Subordinate Courts Workplan Seminar, at para 16 <http://app.subcourts.gov.sg/Data/Files/File/Workplans/Workplan%202008/CJ%27s%20Keynote%20Address.May%202008.Final.pdf> (accessed 10 May 2011).

pressures, misconceptions about mental illness, or a false confidence in the future dangerousness predictions of psychologists or psychiatrists, judges tend to impose lengthy sentences of imprisonment to this category of offenders. This is despite the recognition that psychiatric care and treatment is usually impeded in the prison environment. It is submitted that such an approach cannot be justified due to the counterbalancing effect of the sentencing goal of retribution and the availability of alternatives outside the criminal justice system to deal with mentally ill offenders, including those with violent tendencies. It is hoped that the future amendments to the Guidelines will permit downward departures from the sentencing ranges in a broader variety of circumstances, rather than rule them out as long as there is an element of violence involved. It is also hoped that the Singapore courts will make similar adjustments in light of the availability of post-incarceration civil commitment for all mentally disordered offenders.

69 This brings us to a final learning point, which is that alternatives to criminal punishment are crucial. Their availability allows sentencing judges to take a more principled legal approach and leave uncertain factual elements (such as how long the mentally ill offender needs to be given treatment before his or her mental illness is brought under control) to be worked out by those with the requisite expertise. It also allows those who require medical help to be diverted to mental hospitals rather than be incarcerated. In both the US and Singapore (and particularly Singapore), expansion of these alternatives may be considered once their effectiveness can be more broadly assessed.