THE SOCIETAL IMPACT OF PUNISHMENT THEORIES IN CANADA'S OFFENDER SENTENCING PRACTICES

The Societal Impact of Punishment Theories in Canada's Offender Sentencing Practices

By Alexia Cipriani, Bachelor of Arts (Honours)

A Thesis Submitted to the School of Graduate Studies in Partial Fulfilment of the Requirement for the Degree of Master of Arts

McMaster University MASTER OF ARTS (2023) Hamilton, Ontario (Philosophy)

TITLE: The Societal Impact of Punishment Theories in Canada's Offender Sentencing Practices
AUTHOR: Alexia Cipriani, Bachelor of Arts (Honours) (McMaster University)
SUPERVISOR: Dr. Alice Pinheiro Walla
NUMBER OF PAGES: i – vi; 94.

Lay Abstract

There has been controversy surrounding high-profile Canadian court cases due to the victims' families and the public perceiving the offenders' sentencing as lax and disproportionate to their crimes' severity. I aim to make sense of and determine why this is their perception of these cases and offer a way to understand these cases' judicial decisions. Reading these cases through the lens of philosophical punishment theories will (1) determine the underlying compatible legal theory guiding these sentences that are perceived as lax and disproportionate, (2) explain the reasoning behind these sentences, and (3) help us understand why the public and the victims' families perceive these sentences as lax and disproportionate. Based on my findings, I will sketch an alternative Kantian punishment theory that can be a theoretical lens through which we can evaluate proportionality in sentencing by providing a victim-centred approach to punishment.

Abstract

There has been controversy surrounding high-profile Canadian court cases due to stakeholders asserting that justice was not delivered in the offenders' sentencing. Cases such as *R v. Bernardo* (including *R. v. Homolka*), *R v. Pickton* and *R v. Li* have drawn criticism from stakeholders, such as the victims' families and the public, for perceived lax and disproportionate sentencing. I aim to make sense of and determine why this is their perception of these cases and offer a way to understand these cases' judicial decisions. Reading these cases through the lens of philosophical punishment theories will (1) determine the underlying compatible legal theory guiding these sentences that are perceived as lax and disproportionate, (2) explain the reasoning behind these sentences, and (3) help us understand why the public and the victims' families perceive these sentences as lax and disproportionate.

In this thesis, I will argue that Canada's criminal justice system could be understood as incorporating various punishment theories for criminal offender sentencing, such as strict retribution, utilitarianism, and paternalism as a form of rehabilitation. I will focus my research on three punishment theories that I believe have been significant in guiding the law's application in the Canadian legal system and the modern history of Western law: Immanuel Kant's strict retributive punishment theory, Jeremy Bentham's utilitarian punishment theory, and Herbert Morris' paternalistic punishment theory. I will argue that by identifying the underlying punishment theories, we can identify where the judicial decision is perceived as flawed by the public and the victims' families and how to understand the effect of these theories in future judicial decisions.

Based on my findings, I will sketch an alternative Kantian punishment theory that can be a theoretical lens through which we can evaluate proportionality in sentencing by providing a victim-centred approach to punishment.

Acknowledgements

Thank you, Dr. Alice Pinheiro Walla and Dr. Violetta Igneski, for your helpful, critical, and insightful feedback while writing my thesis. Your guidance and encouragement have helped me write the thesis that I envisioned. I would also like to thank the Philosophy department at McMaster University for their support and guidance while writing this thesis. Most importantly, I would also like to thank my parents for their emotional support, encouragement, and words of wisdom during this process. I could not be more grateful for their guidance.

Table of Contents

Introduction

There has been controversy surrounding high-profile Canadian court cases due to stakeholders asserting that justice was not delivered in the offenders' sentencing. Cases such as *R. v. Bernardo* (including *R. v. Homolka*), *R. v. Pickton* and *R. v. Li* have drawn criticism from stakeholders, such as the victims' families and the public, for perceived lax and disproportionate sentencing. The victims' families and the public perceive these sentences as disproportionate since the offender received a lighter sentence than the crime's severity. This thesis will offer a philosophical lens for reading and understanding these cases' judicial decisions and the offenders' sentencing. From this analysis, I aim to explore the perception of the victims' families and the public regarding these cases and discuss why they are critical of these offenders' sentencing. A deeper analysis of these cases demonstrates a disconnect between the court's stated aims of safety and faith in the justice system and the stakeholders' perception and experience in these cases.

Reading these high-profile cases through the lens of philosophical punishment theories will provide a novel way of interpreting these sentences by determining the underlying compatible legal theory guiding the offender's sentencing. The punishment theories I will discuss will explain the reasoning behind the offender's sentencing and help us understand why they are perceived as disproportionate by the victims' families and the public. Analyzing these cases through these theories suggests that they seem to implicitly endorse a specific punishment theory, retribution (*ius talionis* or "eye for an eye"), that does not always align with the legal theory implemented by legal officials such as the judge, jury or the prosecution. Reading these cases and the underlying compatible punishment theory guiding the offender's sentencing, I will sketch an alternative punishment theory based on Immanuel Kant's retributivism that can be a lens through which we can evaluate proportionality in sentencing.

In order to determine the underlying compatible punishment theory guiding an offender's sentence, legal interpretivism is applied when reading these legal cases. Legal interpretivism provides a philosophical explanation as to how underlying philosophical principles within our legal intuitions guide the law and judicial decisions.[1] The main claim of legal interpretivism is that the institutional practices rooted within a criminal justice system, which impact the law, are determined by legal, philosophical principles.[2] These underlying principles explain and provide reasoning behind significant legal actions and practices. For instance, judges and lawyers interpret and implement laws encompassing these legal philosophies, which affect judicial decisions. Thus, these legal philosophies evaluate the offender's criminal actions and their resulting sentence as punishment, thereby impacting the stakeholder's perception of the case.

However, it is important to note that during judicial decisions, although judges and lawyers interpret and apply the law, they might not be familiar with or aware of the underlying legal philosophies, such as the specific punishment theory guiding the offender's sentencing. Thus, I aim to interpret and discover the underlying punishment theories guiding judicial decisions to help us understand why the public and the victims' families perceive that there have been lax and disproportionate sentences in Canada's criminal justice system.

One could assert that it seems contradictory when stating that a judge may not be familiar with these underlying punishment theories but is also guided by them in their judicial decisions. I am not arguing that these are the precise punishment theories that the judges in the cases are implementing. Rather, I am tracing the judge's legal philosophy by reviewing the case and the

[1] Legal interpretivism is associated with philosopher Ronald Dworkin, who developed his arguments through texts such as *Law's Empire*. His work has stimulated debate from philosophers, such as H.L.A. Hart and Joseph Raz.
[2] Nicos Stavropoulos, "Legal Interpretivism," *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), Edward N. Zalta (ed.), URL = https://plato.stanford.edu/archives/spr2021/entries/law-interpretivist/.

resulting judicial decision.[3] Specifically, I am tracing and extrapolating evidence from the case that reveals the underlying compatible punishment theory that the judicial decision resembles, aside from whether the judge has been consciously guided by the theory when presiding over the case. Reading these cases through the lens of philosophical punishment theories will aid in understanding the offender's sentence and determine the underlying compatible punishment theory guiding the sentences perceived as lax and disproportionate.

In this thesis, I draw influence from Ronald Dworkin and his notion of the interpretative approach to the law to shape my analytical intervention.[4] He argues that it does not need to be proven that an individual is guided by a certain theory (in this case, a judge is guided by a particular punishment theory). Instead, he argues that we can use certain theories (such as a specific punishment theory) to make sense of the individual's practice, which, in this case, is the judge's judicial decision. The same notion can be argued for other legal officials, such as lawyers and juries. For example, if a judge's judicial decision maximizes social utility, it could be perceived that Bentham's utilitarianism would make sense of this judge's reasoning and clarify the rationale behind the offender's sentence. Therefore, legal interpretivism can be a resource within Canada's offender sentencing practices to reveal the underlying punishment theory guiding judicial decisions.

In this thesis, I will argue that Canada's criminal justice system could be understood as incorporating various punishment theories for criminal offender sentencing, such as strict retribution, utilitarianism, and paternalism as a form of rehabilitation. I will focus my research on three punishment theories that I believe have been significant in guiding the law's application in

[3] A judge's legal philosophy could be perceived as how the judge understands and interprets the law, such as if they have a "conservative" or "liberal" reading of the law in their sentencing. In this case, it would be if the judge understood and interpreted the law from a Kantian or utilitarian perspective.
[4] Ronald Dworkin, *Laws Empire* (Cambridge: Mass: Belknap Press, 1986) 66.

the Canadian legal system and the modern history of Western law: Immanuel Kant's strict retributive punishment theory, Jeremy Bentham's utilitarian punishment theory, and Herbert Morris' paternalistic punishment theory. I will argue that by identifying the underlying punishment theories, we can identify where the judicial decision is perceived as flawed by the public and the victims' families and how to understand the effect of these theories in future judicial decisions. I will suggest that traditional punishment theories, which focus on re-enforcing the State's security once a crime has occurred, such as Bentham's or Kant's, guide judicial decisions in cases where the offender is held criminally responsible and is aware of their actions. Conversely, when an offender is deemed Not Criminally Responsible on account of a Mental Disorder (NCRMD), the mentally ill offender's sentence is guided by Morris' paternalism to rehabilitate the offender. This non-traditional punishment theory focuses on aiding the mentally ill offender's well-being and moral development for reintegration into society.

However, by having three punishment theories guiding Canada's sentencing practices, proportionality in an offender's sentence is not consistently emphasized due to the regulatory function of the punishment theory (what governs the offender's punishment). For instance, Bentham's theory guides an offender's sentence through deterrence by instrumentalizing the offender for social utility. Conversely, Morris' theory uses paternalism to regulate the mentally ill offender's sentence by deeming them NCRMD to seek treatment and aid their moral development and well-being for rehabilitation. The idea of proportionality does not regulate the offender's sentence in either theory, resulting in the offender receiving a perceived lesser sentence than the crime's severity. Additionally, although strict retribution (*ius talionis*) ensures proportionality, a strict interpretation cannot justly guide all offender sentencing because it does not include external social factors like mental illness that must be recognized in the offender's sentence. Canada's

criminal justice system recognizes that mentally ill offenders deemed NCRMD cannot be treated like those aware of their actions. However, the guidance of Morris' theory leads to a perceived lax and disproportionate sentence for the victims' families and the public as it emphasizes the mentally ill offender's rehabilitation and reintegration over their needs as stakeholders.

Thus, this thesis will connect theoretical and applied perspectives to the administration of justice and punishment. In Chapter One, I will briefly reconstruct the three punishment theories I will focus on to critically compare three distinct ways of conceptualizing punishment. I will examine each punishment theory and discuss the strengths and weaknesses of the theory's guidance within an offender's sentence. In Chapter Two, I will apply the theoretical analysis to Canada's legal practice and structure. To do so, I will draw on concrete Canadian court cases as case examples, such as *R. v. Bernardo* (including *R. v. Homolka*), *R. v. Pickton*, and *R. v. Li*, to explore the societal impact of different punishment types, that is, how the public and the victims' families perceive the justice of the sentencing. These cases are important because (1) they exemplify a corresponding punishment theory as an underlying legal, philosophical principle guiding Canada's sentencing practices in judicial decisions, and (2) they demonstrate the societal impact of the punishment theories guidance in Canada's sentencing practices, specifically, how the public and the victims' families perceive the lack of proportionality as unjust.

Examining what I will call the societal impact of the sentencing is important because it identifies how the underlying punishment theories negatively affect the victims' families and the public when guiding a judicial decision. The public and the victims' families are concerned about their safety as they experience physical and mental anguish over the offender's actions. They feel vulnerable and unsafe from threats due to the offender's release or future potential release. Although judges and lawyers who are reasoning in these cases may not be aware of the underlying

punishment theories' guidance in their judicial decision, it is important to be aware of these underlying theories to understand and possibly improve the outcomes of offenders' sentences for the victims' families and the public. By reviewing these Canadian cases and interpreting the underlying punishment theories after the judicial decisions have occurred, I evaluate from a legal, philosophical perspective if the theories that guided the case should guide future judicial decisions.

Through this analysis, in Chapter Three, I sketch an alternative Kantian punishment theory that foregrounds retribution in the offender's sentencing for a proportionate punishment to the crime's severity. Although retribution regulates the offender's punishment, additional factors, such as deterrence (without instrumentalizing the offender for social utility) and rehabilitation (not paternalistic), are considered.[5] My theory will draw influence from Kantian scholars who advocate that Kant is not a strict retributivist because he recognizes deterrence within the law and retribution in the punishment's implementation. Based on this, I argue that the deterrent features of Kant's theory explain why retributive principles will be implemented in the offender's punishment. This is viewed in the State's right to punish offenders by upholding a justice system that deters potential offenders through promulgated laws and enforces the State's security. However, I will also argue that rehabilitation is included in this hybrid punishment theory along with deterrence and retribution. Special considerations or external social factors, which Kant calls "extraneous considerations," indicate that he is not a strict retributivist allowing for rehabilitation. This is demonstrated by his example of an individual's honour being disparaged. In this example, Kant does not enforce strict retribution, although a murder has occurred, indicating mitigating factors that allow the offender to reintegrate into society as a citizen.

[5] My theory is not arguing against deterrence, retribution, and rehabilitation. Rather, this single theory will encompass the advantages of the three underlying punishment theories' guidance.

Therefore, my Kantian theory is divided into two parts: the ideal theory and the applicable theory. The ideal theory will implement punishment foregrounded on retribution and will be executed to uphold the initial threat of the law's promulgation as it did not deter the offender. This specific aspect of the theory would be mainly used when sentencing an offender, specifically those aware of their actions. In contrast, the applicable theory still emphasizes deterrence in the law's threat and proportionality through retribution in the offender's punishment. However, I argue that it will take into account empirical considerations, specifically social factors like mental illness, that would explain why the offender committed the crime. This aspect of the theory will help rehabilitate mentally ill offenders but under the condition that their rehabilitation will restore security and the public's faith in justice. This aspect of my theory can be used to guide mentally ill offenders' sentencing who are deemed NCRMD. My hope is that my alternative punishment theory can be a theoretical lens through which we can evaluate proportionality in sentencing, providing a victim-centred approach to punishment.

Chapter One: The Punishment Theories

In this chapter, I will outline and examine three punishment theories that I suggest have been significant in guiding the law's application in Canada's legal system and the modern history of Western law: 1.1 Jeremy Bentham's utilitarian punishment theory, 1.2 Immanuel Kant's strict retributive punishment theory, and 1.3 Herbert Morris' paternalistic punishment theory. I will examine each punishment theory and discuss the strengths and weaknesses of the theory's guidance within an offender's sentence.

1.1 Jeremy Bentham's Utilitarian Punishment Theory

Utilitarianism is a normative theory that aims to promote the greatest good for society (social utility) as a collective. The theory focuses on guiding an individual solely on their action's consequences, which should result in social utility for all. One common form of utilitarianism is proposed and defended by Jeremy Bentham, who bases his theory of social utility on an individual's experience of pleasure and pain. For Bentham, the principle of social utility is that

"one ought always to act so as to promote the greatest good for the greatest number," hence his promotion of social utility in his punishment theory.[6] A strength of Bentham's utilitarian punishment theory is that it focuses on social utility through deterrence to promote pleasure for the greatest number and applying pain through punishment for those who disrupt the balance of society's pleasure. Deterrence is a key element of Bentham's theory as it inhibits the offender's criminal behaviour through fear. The emphasis on deterrence reinforces the State's security when a crime occurs by preventing the offender and potential offenders in the community from criminal activity. His theory is a traditional approach to punishment.

However, one concern regarding Bentham's theory involves the morally unacceptable idea of staging an offender's punishment by instrumentalizing them for deterrence and social utility, respectively, making his theory not sensitive to an offender's guilt since it focuses on quantitative measurements regarding pleasure and pain.[7] The offender's guilt is not a calculus that can be quantified as it is hard to determine the pain experienced by the victim's family and the public's concern for safety. Analyzing Bentham's theory allows legal philosophers to explore the societal impact of the theory on the public and victims' families when guiding judicial decisions.

In this subsection, I will examine Bentham's 1830 work, *The Rationale of Punishment,* where he argues that punishment through the principle of deterrence is necessary for crime reduction and prevention, although punishment is evil in itself.[8] I will then critique Bentham's

[6]Andrew Altman, *Arguing About Law: An Introduction to Legal Philosophy*. 2nd ed. (Belmont, CA: Wadsworth/Thomson Learning, 2001), 136.

[7] See, Peter Karl Koritansky, "The Problem with the Utilitarian Theory of Punishment," in *Thomas Aquinas and the Philosophy of Punishment*, (Washington: Catholic University of America Press, 2011), 11-38.

[8] On page 23 in *The Rationale of Punishment,* Bentham argues that "all punishment being in itself evil, upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil." When analyzing this statement, Bentham believes that the greatest good in life is pleasure, and the greatest evil is pain. But with punishment, although it is evil, the evil created by the punishment is justified when the punishment's good, such as crime reduction and prevention, can be achieved. The punishment's pain is worth the evil towards the offender because it deters them and society from performing the same or similar crimes.

theory, specifically the theory's lack of sensitivity to guilt. This analysis will be important for Chapter Two as I will explore the Canadian court case *R. v. Bernardo* (including *R. v. Homolka*) to analyze the societal impact of Bentham's utilitarianism as a compatible punishment theory guiding Canada's offender sentencing practices in these cases' judicial decisions.

In his work, Bentham argues that when a criminal act has been committed against the State, the legislator's concern is maintaining the community's safety. Due to this, the legislator aims to (1) prevent the crime from reoccurring and (2) compensate for the "mischief" created by the committed crime.[9] The "mischief" or the effects of the crime might arise from either (1) "the conduct of the party himself who has been the author of the mischief already done" or (2) "the conduct of such other persons as may have adequate motives and sufficient opportunities to do the like."[10] The concern is that the offender might re-offend in their criminal activity, or individuals with the same motive and opportunity might commit the same crime. Hence, as a solution, Bentham argues for deterrence to regulate the offender's punishment for crime reduction to maintain the community's safety by preventing future danger and compensating for the crime committed.[11] Deterrence will inhibit the offender's behaviour through fear of their action's consequence. The concept of prevention is based on the idea of deterrence and is divided into two types: *particular prevention/deterrence* and *general prevention/deterrence*.[12]

Particular prevention/deterrence is applied to the offender because the pain inflicted by the punishment prevents them from re-offending. This can be done by (1) taking the offender's physical power away so they cannot re-offend, (2) taking away their desire to re-offend, and (3)

[9] Jeremy Bentham, *The Rationale of Punishment* (R. Heward, 1830), 19.
[10] Bentham, *The Rationale of Punishment*, 19.
[11] Ibid.
[12] Ibid.

making them afraid to re-offend.[13] In the first instance, through physical incapacitation, the offender's physical power is taken away, forcing them not to engage in criminal activity and re-offend; in the second, through moral reformation, the offender no longer desires to engage in criminal activity because they understand their wrongdoing; and in the third, through the law's intimidation, although the offender might still wish to re-offend, no longer dares to, due to the pain inflicted by the punishment.

In contrast, general prevention/deterrence is applied to all community members without exceptions to ensure that the crime is not repeated by serving as an *example.* The offender's punishment is instrumentalized as an example to deter the community by presenting its members with what they would suffer if they committed the same crime and were found guilty. General prevention/deterrence is the main form of prevention implemented since the punishment deters the offender by being punished in the process of deterring the community. Hence, Bentham classifies general prevention/deterrence as the "chief end of punishment."[14] I interpret that if we view an offender's actions in isolation as if they will never reoccur or be imitated, the punishment would be considered purposeless in its application. Instead, we must consider that an unpunished crime would not deter the offender's future criminal behaviour or potential offenders in the community.

Although punishment is evil since it produces pain, it must be implemented as long as it excludes a greater evil, thus creating a *profit*. The punishment's pain is a "hazard" or a risk for the expected profit of crime reduction and prevention. [15] Bentham's calculations aim to balance the punishment's profit and any unintended harm of the punishment's implementation, which is perceived as a loss, making the punishment worth the harm created for the greater good. Bentham

[13] Bentham, *The Rationale of Punishment*, 20.
[14] Ibid.
[15] Ibid., 27.

defines this calculation as the "*expense of punishment*."[16] Although the punishment inflicts harm on the offender, their punishment is for the greater good as it provides security for the community by restricting their ability to re-offend. The term *expense* concerns the punishment's economy, such as whether the punishment is "economic" or "expensive."[17] Implementing such terminology indicates that punishment has a perceived *value*, divided into *apparent* and *real value*. Bentham states the punishment's apparent value is its appearance to the offender or potential offenders, which influences their conduct through deterrence out of fear they will face the same consequence.[18] The punishment's profit is produced through deterrence, which is crime reduction and prevention. In contrast, the punishment's real value focuses on the expense, such as whether the punishment is considered "economic" as it produces its apparent value with the least harm. [19] Conversely, the punishment is deemed "expensive" when it produces more harm than good.

The punishment's value should outweigh the profit of an offender's crime because the punishment's pain forces the offender to refrain from criminal activity and comply with the law. For this reason, Bentham argues that deterrence for the sake of social utility must be the main reason for implementing punishment. However, he contends there may be instances when it is more appropriate to stage a punishment as an example to deter the community.[20] Bentham states: "If hanging a man in *effigy*, would produce the same salutary impression of terror upon the minds

[16] Bentham, *The Rationale of Punishment*, 27.
[17] Ibid.
[18] Ibid., 28.
[19] Ibid.
[20] The punishment's staging can be of an innocent or guilty individual. In terms of staging an innocent person's punishment, suppose an offence was committed, and the community is outraged, but the police cannot find the offender to alleviate the community's anxiety. In that case, the police might frame an innocent individual alleviating society's concern and possibly deterring the real offender from re-offending. The innocent individual is punished in *effigy*, making it a staged punishment by either: (1) being in on their punishment or (2) being truly punished, forcing them to suffer great pain. However, for my thesis, I am focusing on Bentham's willingness to stage a guilty offender's punishment. I will discuss this in Chapter Two with *R. v. Bernardo* (including *R. v. Homolka*).

of the people, it would be folly or cruelty ever to hang a man *in person*."[21] This statement can be interpreted as his willingness to stage a guilty offender's punishment as an example or, in *effigy*, for the greater good. In support of this interpretation, Bentham includes a footnote for the punishment in *effigy* statement outlining the following:

> At the Cape of Good Hope, the Dutch made use of a stratagem which could only succeed among Hottentots. One of their officers having killed an individual of this inoffensive tribe, the whole nation took up the matter and became furious and implacable. It was necessary to make an example to pacify them. The delinquent was therefore brought before them in irons, as a malefactor: he was tried with great form, and was condemned to swallow a goblet of ignited brandy. The man played his part;—he feigned himself dead, and fell motionless. His friends covered him with a cloak, and bore him away. The Hottentots declared themselves satisfied. "The worst we should have done with the man," said they, "would have been to throw him into the fire; but the Dutch have done better—they have put the fire into the man."—*Lloyd's Evening Post*, for August or September 1776.[22]

The footnote illustrates that the Dutch, as European colonizers, played a trick against the "Hottentots," leading to the death of one of their members.[23] The "Hottentots" were upset, leading the Dutch to appease them by placing the officer who murdered their member on trial and condemning the man to "swallow a goblet of ignited brandy" as his punishment. However, although the "Hottentots" were pleased that the offender was punished, they were unaware the offender staged his punishment. The apparent value of the punishment's appearance deters the community from committing the same offence and alleviates the community's tension. Bentham's example shows that staging an offender's punishment can ease tension for the greater good.

A takeaway from Bentham's *effigy* statement and the "Cape of Good Hope" footnote is that the punishment's appearance is important to Bentham's theory. Whether the offender is innocent or guilty or if the punishment is real or staged, the punishment's appearance influences

[21] Bentham, *The Rationale of Punishment*, 29.
[22] Ibid.
[23] "Hottentot," a term that was once used in reference the Khoekhoe or Indigenous nomadic pastoralists of South Africa, is now classified a derogatory racial term.

conduct by deterring offenders. Additionally, the punishment's appearance eases the tension within the community. Punishment must be promulgated to the alleged offender and the public to deter potential offenders. If the punishment is unknown, no individual will be deterred from committing criminal activity, jeopardizing the community's safety.

One could object from a utilitarian perspective that the main takeaway from Bentham's theory is not the punishment's appearance but rather the perceived profit, making the appearance secondary to its effectiveness. Bentham's theory aims to balance the punishment's profit and any unintended harm of the punishment's implementation. The punishment decided and implemented should be based on a less costly and equally effective punishment. The appearance is only important if it effectively achieves the necessary goal of crime reduction and prevention. This is an important observation and an agreeable point. However, in practice, the punishment's appearance is the deciding factor when implementing the punishment. Although the punishment's cost-effectiveness is important, it is based on its appearance to deter the offender and potential offenders' behaviour while alleviating tension for the greater good of the community.

Deterrence is a key element of Bentham's theory as it inhibits the offender's behaviour through fear of consequences based on the punishment's appearance. Using deterrence to regulate the offender's punishment is a perceived strength of his theory. The emphasis on deterrence reinforces the State's security when a crime occurs by preventing the offender from re-offending and potential offenders in the community from committing the same crime. Instrumentalizing the offender for social utility through deterrence leads to (1) creating a visual example and representation for the offender not to re-offend by physically restraining their behaviour; (2) the visual example and representation of the offender's punishment deter others with the same motive

not to participate in criminal activity out of fear of punishment resulting in crime reduction and prevention; and (3) seeing the offender receive a punishment alleviates community tension.

Deterrence is needed to prevent crime. However, regulating the offender's punishment through deterrence for social utility has weaknesses as it is incompatible with the community's sense of justice, specifically when an offender receives a staged punishment to attempt to alleviate community tension. Staging an offender's punishment is not sensitive to an individual's guilt, the public's need for security and the restoration of justice. For instance, in the "Cape of Good Hope" scenario, Bentham is willing to stage an offender's punishment as an example for the greater good of the community. Allowing an offender who has committed a crime to receive a staged punishment instead of a real punishment proportional to the crime's severity is unjust and morally unacceptable for a non-utilitarian. Although the appearance of the staged punishment alleviates any ire that the community feels against the offender, in this scenario, the offender does not learn their lesson because they are not truly punished for their crimes.

Bentham does not explicitly indicate a utilitarian argument for the offender to learn a lesson from their punishment. Instead, he focuses on social utility by deterring the offender. However, if the offender is not formally punished for wrongdoing or receives a punishment lax and disproportionate to their crime's severity, they will continue re-offending. The offender's staged punishment signifies that they can continue their criminal activity and not be punished because they did not learn from the punishment that aimed to deter them. When stating that the offender "learns" from their punishment, I do not mean they learn the moral significance of their wrongdoing. Rather, they learn that committing a specific crime has a specific consequence, thus deterring future criminal activity. If the offender is not properly sentenced with a proportional punishment to the crime's severity, they will not "learn" the consequences of their actions and thus

will not be deterred from future criminal activity. The offender assumes they can continue their criminal activity and not receive a real punishment proportionate to their crime.

I argue that a staged punishment can occur for the sake of social utility in two ways. The first is seen in the "Cape of Good Hope" example, where the offender's punishment is staged to reduce tension and appease the community. The offender is perceived as punished for their wrongdoing, creating the perception for the community that faith is restored in the justice system and the State's security. The second instance is when the offender is truly punished but not to the fullest extent of the law. For instance, a deal, such as a plea bargain, could be reached to reduce the offender's sentence in exchange for information on another offender. In this case, the offender is instrumentalized to convict another in exchange for a lighter sentence. The community possibly views the offender punished for their wrongdoing, although with a lighter sentence, attempting to restore justice and the State's security. I will discuss this latter instance in Chapter Two with *R. v. Bernardo* (including *R. v. Homolka*). For serial rapist and killer Paul Bernardo to be convicted and sentenced, his then-wife Karla Homolka was instrumentalized by exchanging her testimony against Bernardo for a plea bargain. Her plea bargain is perceived by the public and the victims' families as a lax and disproportionate sentence to her crime's severity. In these two ways of staging an offender's punishment, the victims' families and the public perceive the offender as not receiving a deserving and proportional punishment based on their crime's severity.

This is counter-intuitive to Bentham's goal of deterrence for the sake of social utility. Although the apparent value of the punishment's appearance might deter the community from committing the same offence and alleviate the community's tension, it does not deter the offender from re-offending. A punishment theory aims to apply justice and ensure that those who commit crimes are punished. Bentham's endorsement of a stage punishment shows that the theory is

"defective" because any punishment theory favouring the deliberate staging of a guilty individual's punishment for social utility contradicts the purpose of punishment.[24] Allowing an offender to receive a staged punishment is perceived as immoral and unjust because it does not consider the community's safety or justice for the victims' families.

A proponent of the utilitarian perspective might object that Bentham would not accept a form of punishment that ultimately makes the public less safe as it will contradict the greatest good for the community. I agree that this is true in theory that Bentham aims to enforce the State's security by deterring future criminal activity. However, if this is done through a staged punishment, Bentham relies on the punishment's appearance to ensure the State's safety. A staged punishment might satisfy the community if they perceive the offender's punishment as real. This deters the community from committing the same crime and relieves them that the potential threat has been brought to justice. It could be said that the community learns that committing a specific crime has specific consequences, resulting in them being deterred. However, the community's perception of these crimes is subjective. If the offender's punishment is not perceived as real, the community and the victims' families will lose faith in the justice system because the offender was not proportionally sentenced to the crime's severity.

Allowing an offender to receive a staged punishment might release the offender into the public due to their lighter sentence jeopardizing public safety. Their punishment does not restrict the offender's criminal ability. For example, the Dutch officer in the "Cape of Good Hope" example was not formally put to death. Rather, his death was staged to appease the "Hottentots." Although Bentham argues for deterrence for social utility, which in this case is to appease the public to relieve community tension, the offender was not brought to justice by being restricted

[24] Altman, *Arguing About Law: An Introduction to Legal Philosophy,* 138.

with their punishment. The offender could re-offend, jeopardizing the community's safety and possibly re-target the victim. Bentham intends to promote the greatest good, but staging a punishment does provide security and contradicts his goal of deterrence.

The utilitarian method fails to approach individuals respectfully because the theory promotes social utility over an individual's humanity.[25] The offender's stage punishment is considered inhumane for the victim and their family because they do not receive real justice. The staged punishment deceives and manipulates the victims' families and the community into a false sense of security that justice was restored and that they are safe from any potential threat. Although the intent of the offender's staged punishment aims to appease society, such a method shows that justice is not a priority. For instance, the Dutch in the "Cape of Good Hope" example are not concerned if the "Hottentots" receive justice but want to appease them so they do not need to face any tension. The masses' satisfaction when an offender receives a staged punishment is subjective because they must believe it is real. If not, there will be tension within the community.[26]

Each individual has an intrinsic dignity that makes it morally wrong to use them merely to maximize social utility for the greater good. For this reason, critics argue that individuals' dignity requires that they are treated according to what they deserve.[27] These criticisms demonstrate that Bentham's theory is not sensitive to an offender's guilt by allowing them to receive a stage

[25] Altman, *Arguing About Law: An Introduction to Legal Philosophy,* 139.
[26] One could ask if the Dutch's racism is implicit in this indifference to justice or if it is an intrinsic characteristic of Bentham's theory. Specifically, would it be different if the Dutch punished their people? The answer to this question could be that racism motivates the Dutch's response toward the "Hottentots." The Dutch's lack of concern for real justice could be tainted by racism. Conversely, it could be argued that this could be applied to their people. It is an open question if a hard-core utilitarian would treat their people like they would another individual or group.
[27] Sterling Harwood critiques Bentham's utilitarianism because it fails to treat the offender with retributive justice, by punishing the guilty with an equal and proportionate punishment fitting the crime's severity. He draws on the retributivist method proposed by Kant, thus using proportionality as a regulatory function in the punishment's guidance, not deterrence for the sake of social utility. See, Sterling Harwood, "Eleven Objections to Utilitarianism." In *Moral Philosophy: A Reader* 4th ed. edited by Louis P. Pojman and Peter Tramel (Indianapolis: Hackett Pub. Co., 2009), 189-191.

punishment. A lack of proportionality in the offender's sentencing creates a trade-off between proportional justice and appeasing the public. In the next subsection, I will discuss Immanuel Kant's strict retributive punishment theory, which emphasizes proportionality through retribution, ensuring a deserving punishment.

1.2 Immanuel Kant's Strict Retributive Punishment Theory

Retributivism is a normative theory that focuses on justice being served proportionally to those guilty and convicted for their crimes. Retributivists believe those deemed guilty "deserve punishment because their actions have caused (or have risked causing) wrongful harm to someone."[28] Conversely, critics argue that the theory promotes a veiled form of revenge by arguing that the offender "deserves" punishment for their actions. They believe retributivism endorses the idea that society must seek vengeance on offenders by punishing them for the harm they have inflicted directly on their victims and indirectly on the public by jeopardizing the community's safety. Immanuel Kant, one of the leading proponents of retributivism and *ius talionis* ("eye for an eye"), is often attributed promoting strict retributivism that enforces revenge.[29] The theory is a traditional punishment approach that reinforces the State's security when punishing the offender. The common perception of Kant's punishment theory is that it is inflexible, as offenders must be punished for their crimes equivalent to the losses they inflicted on their victims. However, many scholars believe his theory is not strictly retributivist. I will explore this debate further in Chapter Three, detailing my alternative Kantian punishment theory. However, for this subsection, I am focusing on this common interpretation as this is the version often implicitly argued by the public

[28] Altman, *Arguing About Law: An Introduction to Legal Philosophy*, 139.
[29] See, for example, V.T. Sarver, "Kant's Purported Social Contract and the Death Penalty." *The Journal of Value Inquiry* 31, no. 4 (1997): 455–72. https://doi.org/10.1023/A:1004201120831

and the victims' families as the form of punishment needed to ensure proportionality when sentencing an offender. This will be seen in the cases I will describe in Chapter Two.

In this subsection, I will examine Kant's retributive punishment theory by critically analyzing General Remark E in his 1797 work, the *Doctrine of Right.* This work identifies Kant's central arguments regarding his punishment theory, which focuses on the offenders being punished through the principle of retribution, ensuring proportionality and equality in their sentencing because they "deserve" to be punished. This notion is a strength of Kant's theory. However, his theory promotes revenge by emphasizing proportionality without recognizing external social factors that explain the offender's actions. This analysis will be important for Chapter Two as I will explore the Canadian court case *R. v. Pickton* to analyze the societal impact of Kant's strict retributivism as a compatible punishment theory guiding Canada's sentencing practices in the case's judicial decision.

In his work, Kant argues that the *right to punish* is the responsibility and right that the commonwealth has against the offender because they violated public safety.[30] He expresses that:

> A transgression of public law that makes someone who commits it unfit to be a citizen is called a crime simply (*crimen*) but is also called a public crime (*crimen publicum*); so the first (private crime) is brought before a civil court, the latter before a criminal court. - *Embezzlement*, that is, misappropriation of money or goods entrusted for commerce, and fraud in buying and selling, when committed in such a way that the other could detect it, are private crimes. On the other hand, counterfeiting money or bills of exchange, theft and robbery, and the like are public crimes because they endanger the commonwealth and not just an individual person.[31]

When analyzing the above passage, there is a distinction between private and public crime. Kant emphasizes that the offender's public crime is against the commonwealth, deeming them unfit to be a citizen because they violated public laws, jeopardizing the commonwealth's security and

[30] Mary Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant* (Cambridge: Cambridge University Press, 1996), 473.
[31] Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant*, 473.

existence. The commonwealth's safety is secondary to what the offender deserves but together operates to explain why the offender deserves punishment. The offender's transgression endangers the commonwealth, not just the individual victim, hence his example of distinguishing between embezzling and counterfeiting money. Embezzlement is a private crime prosecuted in a private civil court because the offence is between individuals. Conversely, counterfeiting money is a public crime that endangers the victim and the greater community. Thus, the offender is brought before a public criminal court to be punished.

Punishment by a court cannot be inflicted on the offender for a specified end. The offender's punishment cannot be implemented merely to promote another good because they have committed a crime.[32] The punishment is applied because the offender committed a crime, thus indicating they "deserve" to be punished. Kant's argument differs from utilitarian punishment notions that promote the greatest good through deterrence for the sake of social utility in the offender's punishment. This was seen with Bentham's use of the offender's punishment as an example to deter potential offenders with the same motive and opportunity to commit the same crime. For Kant, this would amount to instrumentalizing the offender.

He argues that although the offender has committed a crime and "deserves" to be punished, they should not be instrumentalized as objects for an end goal. To illustrate this idea, Kant provides the following example by asking:

> What, therefore, should one think of the proposal to preserve the life of a criminal sentenced to death if he agrees to let dangerous experiments be made on him and is lucky enough to survive them, so that in this way physicians learn something new of benefit to the commonwealth? A court would reject with contempt such a proposal from a medical college, for justice ceases to be justice if it can be bought for any price whatsoever.[33]

[32] Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant*, 473.
[33] Ibid.

Kant disagrees with the idea of a court sentencing the offender for experimental purposes for society to advance medically for social utility. This utilitarian example positions the offender to be used as a mere means and an object for society's sake medically. Allowing an offender to preserve their life for dangerous experiments is not justice for Kant because "justice ceases to be justice if it can be bought for any price whatsoever." The "price" of this punishment is preserving the offender's life for medical experiments, which is not a proportional sentence to the crime's severity since they have taken the life away from their victim.

Kant would disagree with this exchange because (1) the offender's life is instrumentalized and bought for a chance to survive in exchange for these experiments, and (2) if the offender lives after these experiments, Kant would argue that this contradicts a deserving and proportional punishment since their victim was murdered. The punishment's justice must be proportional and equal; hence, Kant disagrees with this example, indicating "his strict demands of justice."[34] The offender deserves punishment because they have committed a crime and must not be instrumentalized as a mere means. Kant states: "Punishment … can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only because he has committed a crime."[35] The offender is not punished for another purpose, such as for the greater community, except for the reason they committed a crime.

In Kant's account, the offender's punishment should not be instrumentalized for a particular purpose. Instead, the offender's punishment should be founded on "the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than to the other."[36] For justice to be achieved, the offender's punishment must be reciprocal and

[34] Krista K.Thomason, "The Symbol of Justice: Bloodguilt in Kant," *Kantian Review* 26, no. 1 (2021): 93 https://doi.org/10.1017/S1369415420000345.
[35] Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant,* 473.
[36] Ibid.

proportional to the crime's severity. The State recognizes and responds to the offender's transgression of the law by imposing a mirror-image punishment proportional to the offence's severity. Kant states:

> Accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself. But only the law of retribution (*ius talionis*) - it being understood, of course, that this is applied by a court (not by your private judgment) - can specify definitely the quality and the quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them.[37]

Whatever undeserving evil the offender has inflicted on their victim, in return, they will face the same degree of punishment. The degree of punishment can be the same form of "evil" inflicted on their victim or be based on the principle of the "evil" inflicted on their victim.[38] In either scenario, the offender transgressing public law allows the State to recognize their actions and exclude them from the law's protection.[39] For example, an offender who stole from another not only harms another by taking their property but has acted contrary to the State's purpose of enforcing laws. Hence, Kant argues that if an individual steals from another, they are stealing from themselves because they exclude themselves from the protection of laws. Kant states, "[w]hoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property."[40] The offender's punishment reflects a reciprocal

[37] Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant,* 473.
[38] There are instances where an offender cannot be punished for the exact form of their crime. Rather, they can be punished based on the principle of the offence as it remains valid regarding its effect on the victim. These instances include sexual assault and genocide. Kant provides the example of someone of a higher rank who has committed a violent act against a socially inferior individual. The higher-ranking individual will be punished by apologizing publicly to the socially inferior individual for their actions and will be placed in confinement. This punishment puts the higher-standing individual in discomfort and will have their pride and honour insulted, which they value. See Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant*, 474.
[39] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009), 316.
[40] Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant*, 473.

and proportional response to the offender transgressing the State's laws with the same degree and amount of punishment in relation to the crime

Moreover, the offender's evil action on their victim is undeserving because private citizens cannot impose a punishment unilaterally. Although private individuals can harm one another, they do not have the *authority* to punish an individual. Only the State and its courts can punish individuals because they transgressed the State's laws. [41] The court's authority can specify and impose an appropriate punishment on the offender concerning the crime's severity. The offender transgressed public law and violated the rights of another. They have no right to complain that they are harshly sentenced because they deserve to be punished accordingly for their transgressions. For example, Kant provides an instance where a society is about to dissolve based on the consent of all its citizens. He explains that the "last murderer remaining in prison would first need to be executed so that each has done to him what his deeds deserve."[42] The offender has no right to protest they have been wronged because the offender originally murdered their victim. The State's laws no longer protect the offender, and are thus punished for their transgressions.

Furthermore, Kant's idea of reciprocity and proportionality in punishment connects to his idea of *imputation* and why an offender "deserves" punishment. Kantian scholars Sharon Byrd and Joachim Hruschka explain that Kant defines imputation in the *Doctrine of Right* as "the judgement that an action is a deed, meaning a free action is traditionally called "imputation."[43] Humans are holders of rights, legal duties and moral faculties. When an individual murders another, we

[41] Kant's idea of punishment's proportionality is grounded in transitioning from the lawless state of nature into the State's civil condition. This transition is needed because there is no rightful authority, such as judicial courts, to administer public justice and settle disputes between individuals. The court's binding authority, which is only available in the civil condition, will determine and bind offenders to a proportional sentence.
[42] Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant*, 474.
[43] B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press, 2010), 290.

consider the individual's conduct legally relevant. The individual's legally relevant actions will be evaluated because their actions are "deeds," indicating they are "free actions" subject to the law. Kant's theory holds that the State's laws recognize the self-determination of individuals by holding them responsible for actions they commit that encroach on the freedom of individuals.[44] The law of retribution recognizes an individual's free will and autonomy by enforcing punishment because the offender committed a crime and inflicted harm on their victim(s). Hence, the offender "deserves" to be punished for their criminal actions.

Kant's theory identifies the offender's moral culpability, intentionality, and the nature of their wrongdoings based on imputation and determining the quantity and quality of the offender's punishment through retribution. Together, imputation and retribution ensure that the offender receives a deserving punishment because they committed a crime. When analyzing the nature or gravity of the offender's wrongdoings, Kant's idea of imputation can help us understand how to determine an offender's sentence based on their criminal actions. The court will assess how the offender violated the victim's innate right to freedom and bodily integrity because the victim was violated through tangible and intangible harms. Tangible harms include physical injury, while intangible harms may include emotional or psychological impact.[45] The offender's crime against their victim is an external act which has infringed upon their freedom. Due to this, the offender's wrongdoing affects the punishment's quality and quantity, and the court must ensure that the offender receives a proportional and equal punishment for the crime committed. Hence, whatever the offender inflicts on their victim will be inflicted on them as their punishment.

The strength of Kant's strict retributive punishment theory is that it ensures that the offender receives a deserving punishment equal and proportional to the crime. The term "deserve"

[44] Simon Young, "Kant's Theory of Punishment in a Canadian Setting," *Queen's Law Journal* 22, no. 2 (1997): 347.
[45] Young, "Kant's Theory of Punishment in a Canadian Setting," 358.

ensures that offenders are punished for committing a crime and will not be instrumentalized for social utility. Allowing an offender to be used as an example possibly permits the offender to receive a lesser sentence disproportionate to the crime's severity, as outlined when discussing Bentham's utilitarian punishment theory. At first sight, strict retribution as an underlying punishment theory could ensure proportionality and reciprocity within the offender's punishment to prevent disproportionate sentences. However, strict implementation of retribution and focus on the crime's severity could promote revenge when it does not consider external social factors that would mitigate an offender's sentence. In their judicial decision, a judge could enforce strict retribution in the offender's sentencing that could be vengeful if the judge applies a sentence that matches the gravity of the crime without considering mitigating factors that could have led the offender to commit the crime, such as mental illness. Although the aim is proportional justice, certain offender characteristics, such as mental illness, must be recognized. This is because mentally ill offenders who do not appreciate the nature of their actions at the time of the crime are treated differently from those who are aware of their actions. In the next subsection, I will discuss Herbert Morris' paternalistic punishment theory, which focuses on mitigating factors such as lack of competence or voluntariness, which lessens the offender's punishment by having the criminal justice system interfere in their sentence. The theory aims to justify the offender's actions to further their potential through treatment.

1.3 Herbert Morris' Paternalistic Punishment Theory

Paternalism is a normative theory that argues that it is justifiable to interfere with someone's autonomy against their will when it is in the individual's best interest.[46] A punishment

[46] Paternalism can be classified in two ways: soft/weak or strong/hard paternalism. Soft/weak paternalism justifies the interference only when the individual acts involuntarily or is ignorant of the situation's facts. In contrast, hard/strong paternalism argues that an individual truly knows best for another, even if they act voluntarily or are not ignorant. For this thesis, I will focus on soft/weak paternalism with punishment, referencing individuals who act

theory that endorses paternalism aims to benefit the offender by recognizing mitigating factors such as lack of competence or voluntariness. Recognizing mitigating factors lessens their punishment by having the criminal justice system interfere in their sentence. The theory aims to justify the offender's actions to further their well-being through treatment. For this reason, the offender will be treated based on a parental-relationship model (hence the term "paternalism"), where the offender is viewed as a child, and the criminal justice system, like a parent, will interfere to help the offender seek treatment.

For this reason, paternalistic and rehabilitative punishment theories are often compared since they aim to improve the offender's well-being. However, some philosophers argue that paternalistic and rehabilitative punishment theories differ because rehabilitation aims to "reform" the offender, while paternalism focuses on the offender's moral development through a parental-relationship model. For example, Herbert Morris, one of the leading proponents of paternalistic punishment, argues that his theory is not rehabilitative but *communicative* since he aims to aid the offender's moral development by signalling their inappropriate conduct.[47] In this subsection, I will examine Morris' central arguments regarding his theory in his 1981 work "A Paternalistic Theory of Punishment."[48] Furthermore, I will describe criticisms against Morris' theory, specifically that his theory resembles a rehabilitative theory because of the commonalities that the theories share. Although Morris and his critics make valid points, I argue that his theory is an underlying compatible punishment theory for rehabilitative measures guiding Canada's sentencing practices.

involuntarily due to a mental illness. See, Michael Proudfoot and Alan Robert Lacey. *The Routledge Dictionary of Philosophy* (Routledge, 2009), 293 for paternalism's definition.

[47] Herbert Morris, "A Paternalistic Theory of Punishment," *American Philosophical Quarterly* 18, no. 4 (1981): 264.

[48] Herbert Morris has also been known as a retributivist and has had earlier writings that did not focus on rehabilitation. Contemporary retributivists have cited Morris' punishment theory as an explanation of viewing the offender's punishment as implementing "benefits and burdens" to maintain the proportionality of the offender's punishment. See, example Marcus Dubber, "The Pain of Punishment," *Buffalo Law Review* 44 (1996): 560.

Canada's criminal justice aims to punish individuals who intend harm.[49] However, individuals with particular mental disorders that inhibit their ability to understand or appreciate their wrongdoing during the crime may not have conscious control over their actions. A mental disorder defence attempts to recognize individuals whose disorder renders them blameless, such as persistent psychiatric disease or episodic psychosis during the crime, and might pose a continual public threat. Individuals are deemed Not Criminally Responsible on account of Mental Disorder (NCRMD) "for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong."[50] I define a mentally ill offender as an individual who suffers from a mental disorder at the time of the crime, resulting in them not appreciating the nature of their wrongdoing, thus being deemed NCRMD. Once the individual is deemed NCRMD, the court and the Criminal Code Review Board will determine treatment and reintegration based on public safety. NCRMD individuals are then placed under territorial or provincial Review Boards' jurisdiction, which must regularly review NCRMD dispositions. These will include detention in hospital(s) for treatment, progressing to conditional release or absolute discharge.

The provisions under Section XX. I of the *Canadian Criminal Code* defines that a mentally ill offender's detention under the Criminal Code Review Board is intended to protect the public while addressing the clinical needs of the accused deemed NCRMD. The NCRMD offender is not "punished" per se like an offender aware of their wrongdoing and intended their criminal actions.

[49] When an offender commits a crime, it is analyzed and divided into two parts: *actus reus* and *mens rea*. *Actus reus* is the Latin term for the "guilty act," which constitutes the crime's physical act, while *mens rea* is the Latin term for the "guilty mind," which constitutes the crime's mental element. The goal of the offender's defence is to discredit either the crime's physical act or mental element. The mental element is crucial to an offender's case as it identifies their intent and competence during the crime.

[50] *Canadian Criminal Code*, RSC 1985, c C-46, s 16(1). https://laws-lois.justice.gc.ca/eng/acts/C-46/section-16.html.

Rather, they are detained to gain treatment. As such, I am not arguing that mentally ill offenders deemed NCRMD should be punished like an offender who intended their actions. It would be inappropriate since they did not intend their harm. Instead, the NCRMD offender, based on the judicial decision of *Winko v. British Columbia (Forensic Psychiatric Institute),* will be detained through an assessment-treatment alternative process to replace the typical criminal law procedure of either a conviction or acquittal.[51] The NCRMD offenders will be treated with dignity through treatment to help rehabilitate and reintegrate them into the public.

With this information, I argue that Morris' theory is an underlying compatible punishment theory for rehabilitative measures in Canada's sentencing practices when identifying offenders as mentally ill, thus making them not criminally responsible for their crimes. Although Morris contends that his theory is not rehabilitative as it does not reform the offender but focuses on their moral development, I argue that in practice, the mentally ill offender is rehabilitated through this alternative treatment process as they develop morally and are reformed by learning to appreciate the nature of their wrongdoing. One could ask why I specifically focus on rehabilitating mentally ill offenders deemed NCRMD and not all offenders, such as those aware of their actions. To answer this question, I would like to explain that I am focusing on rehabilitation for mentally ill offenders because the public and victims' families perceive NCRMD sentences as lax and disproportionate to the crime's severity. Although Canada's criminal justice system aims to protect the public by detaining mentally ill offenders for treatment before considering their reintegration, the victims' families and the public are concerned that by releasing them, they will re-offend. By reviewing Morris' theory as a compatible underlying punishment theory, we can determine why the public and the victims' families have this perception regarding NCRMD cases. This analysis will be

[51] *Winko v. British Columbia (Forensic Psychiatric Institute),* [1999] 2 S.C.R. 625 at para. 42. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1711/index.do.

important for Chapter Two as I will explore the Canadian court case *R. v. Li* to analyze the societal impact of theory guiding the case's judicial decision.

In his 1968 work "Person and Punishment," Morris explains that a punishment system must respect the mentally ill offender's status as a person because he recognizes that their behaviour determines how the legal system will treat them. He asserts that failing to promote their well-being by not providing "adequate facilities and medical care" is unjust because they are entitled to treatment and reintegration into society to become productive citizens.[52] Morris states:

> Those human beings who fill our mental institutions are entitled to more than they do in fact receive; they should be viewed as possessing the right to be treated as a person so that our responses to them may increase the likelihood that they will enjoy fully the right to be so treated. Like the child the mentally ill person has a future interest we cannot rightly deny him.[53]

The mentally ill must be given resources to help them reach their potential and reintegrate into the larger community because they also have a "future interest."

Morris comparing the mentally ill to a child is an important observation not to be taken in a derogatory fashion. His comparison identifies that we need to approach punishment toward mentally ill offenders in a paternalistic way, like a parent-child relationship where the parent teaches the child right from wrong. This presupposes that authority figures such as the penal system, the courts and the judges who preside over the mentally ill offender's case know better than them because they do not appreciate the wrongness of their actions. Morris recognizes how we punish offenders who are in control of their actions differs from those who are not. Mentally ill offenders' punishment is a treatment-based approach because he recognizes that we need to maximize their moral potential and well-being by providing them with the resources needed to help them cope in the community once reintegrated. This is similar to a parent guiding their child

[52] Herbert Morris, "Persons and Punishment," *The Monist* (1968): 501.
[53] Morris, "Persons and Punishment," 501.

until they leave their household. These ideas are further explored in his work "A Paternalistic Theory of Punishment."

Contemporary discussions of paternalism focus mostly on specific laws that require or prohibit specific conduct. In contrast, Morris is not applying paternalism in this regard "but rather with regard to the existence of a system of punitive responses for the violation of any law."[54] He argues that punishment correlates with the offender's criminal actions by envisioning punishment as a communicative act that mediates in their efforts to help them understand their wrongful conduct and why they were punished.[55] Thus, punishment as a "communicative act" informs the offender that their conduct was inappropriate, signifying the nature of their wrongdoing. Morris believes that for this to happen, we must punish the offender like a parent punishes their child. He explains that:

> Sometimes parents coercively interfere to protect the child from hurting itself, sometimes to assure its continued healthy growth, sometimes so that the child will learn to move about comfortably in a world of social conventions. But sometimes, of course, coercion enters in with respect to matters that are moral; certain modes of conduct are required if valued relationships among individuals within the family and outside the family are to come into existence and be maintained.[56]

Morris draws the comparison because he believes that by interfering with the offender's wrongdoing as a parent interferes with their child, we can protect the offender from hurting themselves and others. This will allow the offender, like a child, to learn from their mistakes and gain a sense of personal responsibility.[57] Punishment for the offender, like for a child, will allow them to understand the limitations of their actions, appreciate the seriousness of their wrongdoing,

[54] Morris, "A Paternalistic Theory of Punishment," 263.
[55] Ibid., 265.
[56] Ibid., 266.
[57] Ibid.

and how their actions have impacted others. For this reason, Morris argues that punishment leads to a person's moral development by interfering in an individual's actions.[58]

Morris's theory contrasts traditional punishment theories, such as retribution and utilitarianism. Typically, punishment theories strictly focus on applying proportionality or deterrence for social utility, not a punishment that benefits the offender. In contrast, Morris' theory emphasizes what retributivists and utilitarian theories have disregarded: that the primary justification for punishment is "the potential and actual wrongdoer's good."[59] However, his theory should not be mistaken with "reformative" or "rehabilitative" theories. He adds:

> First, these [rehabilitative] theories may be based, not on consideration of what promotes the good of actual and potential wrongdoers, but on what promotes value for society generally. A reform theory, further, may countenance responses ruled out under the paternalistic theory proposed in these pages. And, finally, reform theories usually fail to address the issue of how instituting a practice of punishment, meaning by this both the threat of punishment and its actual infliction, may promote a specific moral good and this is a central feature of the theory that I propose.[60]

Morris denies similarities between his theory and rehabilitative punishment theories because he does not seek to "reform" the offender but to have them recognize they are responsible and rational agents, allowing them to develop their status as a moral person.[61] His proponents commend him on creating a beneficial punishment theory that furthers the offender's moral development.[62]

---

[58] Morris, "A Paternalistic Theory of Punishment," 267.
[59] Ibid., 264.
[60] Ibid.
[61] David Dolinko, "Morris on Paternalism and Punishment." *Law & Phil.* 18 (1999): 347. https://doi.org/10.2307/3505229.
[62] See examples Jean Hampton, "The Moral Education Theory of Punishment." *Philosophy & Public Affairs* (1984): 208-238; David Dolinko, "Morris on Paternalism and Punishment." *Law & Phil.* 18 (1999): 343-361. https://doi.org/10.2307/3505229; David Birks, "Paternalism as Punishment." *Utilitas* 33, no. 1 (2021): 35-52. https://doi.org/10.1017/S0953820820000254.

However, critics argue that his theory is rehabilitative even though he asserts the opposite.[63] The common goal of rehabilitative and paternalistic punishment theories is to restore the offender's potential and well-being, whether to "reform" or improve their moral development. Both theories accomplish these goals by intervening in the offender's actions to deprive them of their autonomy since the State intervenes to decide what is best for the offender.[64] Additionally, rehabilitative measures can be implemented not specifically to "reform" the offender but to facilitate the offender to "develop his or her own potential to the fullest degree" and, in the process, have the offender become a responsible citizen who recognizes their faults.[65] These commonalities make paternalistic punishment similar rather than different from rehabilitative punishment theories.

I agree that the theories are different theoretically because rehabilitative punishment theories aim to "reform" through State intervention for the offender's potential. In contrast, paternalistic punishment uses the parental-relationship model to help the offender's moral development and well-being. But when the theories are applied in a criminal justice system, they share the goal of having the offender appreciate their wrongdoing. This will allow the offender to feel remorse and take responsibility for their actions, forcing them to reject any inclination to re-offend. As I outlined, the NCRMD process will detain mentally ill offenders and place them through an assessment process to support their rehabilitation and reintegration into the public. The court system and the Criminal Code Review Board interfere in the mentally ill offender's well-being to ensure they receive treatment to aid in appreciating their crime. Although Morris argues that his theory is not rehabilitative and does not interfere with the offender's autonomy, this is

[63] See examples, Heta Häyry, "A Critique of the Paternalistic Theories of Correction," *Canadian Journal of Law & Jurisprudence* 4, no. 1 (1991): 187-198. https://doi.org/10.1017/S0841820900001326; Namita Wahi, "A Study of Rehabilitative Penology as an Alternative Theory of Punishment," *Student Bar Review* 14 (2002): 92-104.
[64] Namita Wahi, "A Study of Rehabilitative Penology as an Alternative Theory of Punishment," *Student Bar Review* 14 (2002): 96.
[65] Wahi, "A Study of Rehabilitative Penology as an Alternative Theory of Punishment," 97.

untrue. For the offender to develop morally, the State interferes with their autonomy, even if it uses a parental-relationship model.

To contribute to the debate, I argue that Morris' paternalistic punishment theory is a version of rehabilitation. I argue this because the application is different. Although they have common goals when punishing an offender, such as improving the offender's potential, rehabilitative theories do not implement punishment based on a parental-relationship model. Classifying Morris' paternalistic punishment theory as a version of rehabilitation acknowledges that the theories aim to promote the offender's potential and well-being (improving the offender). Still, since the application is different, it is classified as its own distinct theory under rehabilitation rather than dismissing it as a rehabilitative theory. A noticeable issue is that legal philosophers on either side of the debate focus strictly on the philosophical and hypothetical notions of the theories without analyzing how they are underlying guiding principles within a criminal justice system. It is important to analyze how the theory's guidance affects the offender's sentencing and the perception of the sentencing by the public and the victims' families. The difference in application is important. Morris argues that his theory is more than mere rehabilitation as it first focuses on improving the offender's moral development and well-being, as their reintegration is secondary.

This is particularly important regarding Morris' idea that the offender's punishment will "promote a particular kind of good for potential and actual wrongdoers" because the punishment focuses on the offender becoming a morally autonomous person through the parental-relationship model."[66] I interpret this aspect as an underlying rehabilitative principle in Canada's sentencing practices, specifically for mentally ill offenders deemed NCRMD. Morris explains that the offender's moral autonomy is structured in four components stemming from the offender: (1)

[66] Morris, "A Paternalistic Theory of Punishment," 265.

appreciating the nature of their evil actions, (2) feeling remorse, (3) rejecting the disposition to re-offend, and (4) taking responsibility for their actions.[67]

Morris' first component, appreciating the nature of their evil actions, asks the offender to reflect on their criminal activity and how it impacted themselves and others. This requires empathy from the offender as they must put themselves in another person's position and look at the implications of their actions if they continue to conduct themselves criminally.[68] These steps are essential for the offender's moral status because they comprehend the "evil of their actions."[69] This leads to the second component of "the good," in which the offender feels remorseful. The offender's remorse is part of their moral autonomy and development because they feel guilty about their wrongdoing and the pain it caused those affected by their actions. Their remorse will force them to look within themselves to identify ways to restore the damage created by their actions.[70] The offender recognizing their humanity leads to the third component of "the good," which is the offender rejecting the disposition to re-offend. Their punishment will allow offenders to forgive themselves and provide them with the emotional and physical resources needed to reintegrate into society without re-offending, ultimately becoming productive citizens. This allows the offender to alter their relationship with their community. The final component of "the good" is the offender realizing their self-respect as a person who takes responsibility for their actions. Punishment is an aid to help the offender restore their relationship with their community.

Morris's theory allows the mentally ill offender to learn and understand their wrongdoing. This is a strength of his theory. But will all offenders gain a sense of guilt, take responsibility for their actions, and reject any disposition to re-offend? Although Morris argues that punishment is a

[67] Morris, "A Paternalistic Theory of Punishment," 265.
[68] Ibid.
[69] Ibid.
[70] Ibid.

communicative act that enables the offender to acknowledge their wrongdoing, my question is: what happens if the offender is incurable or refuses to take responsibility? Morris does not address this issue. Morris's theory emphasizes the offender's potential and well-being more than the concerns of the public and the victims' families may have about the offender's reintegration. Often, the public and the victims' families consider the reintegration lax and disproportionate to the crime's severity. This is because the mentally ill offender, once deemed by the Criminal Code Review Board that they are no longer a threat to the public, will be released through an absolute discharge. Although his theory provides resources for developing the offender's moral potential and reintegration, which is needed for mentally ill offenders, his theory does not provide the same emphasis to those affected by the offender's actions. Additionally, some would argue that the mentally ill offender has nevertheless committed an indictable crime and should not have the opportunity to be reintegrated or as quickly reintegrated into the public. Rehabilitation is not guaranteed, and having the mentally ill offender re-integrate without continued support creates uncertainty for the public and the victims' families as a punishment theory guiding judicial cases.

Chapter Two: The Societal Impact of Punishment Theories Guiding Canada's Sentencing Practices

In the previous chapter, I briefly reconstructed three punishment theories to critically compare three ways of conceptualizing punishment. I examined each punishment theory and discussed the strengths and weaknesses of the theory's guidance within an offender's sentence. In this chapter, I will apply the theoretical analysis to Canada's legal practice and structure. To do so, I will draw on concrete Canadian court cases such as *R. v. Bernardo* (including *R. v. Homolka*), *R. v. Pickton*, and *R. v. Li* to explore the societal impact of theories, that is, how the public and the victims' families perceive the justice of the sentencing. These cases are important because (1) they exemplify a corresponding punishment theory guiding the judicial decision, and (2) they demonstrate the societal impact of these underlying punishment theories guiding Canada's sentencing practices, specifically, how the lack of proportionality is perceived as unjust by the public and the victims' families. In each subsection, I will discuss the case, the punishment theory I interpret that guided the judicial decision, and the societal impact of the theory's guidance.

2.1 The Case of Paul Bernardo and Karla Homolka (Bentham's Utilitarianism)

Paul Bernardo, also known as "The Scarborough Rapist" and "The Schoolgirl Killer is known for initially committing numerous sexual assaults between 1987 and 1990 before committing three murders with his then-wife Karla Homolka.[71] Bernardo was sentenced to life and declared a dangerous offender for the sexual assaults and murders of Kristen French, Leslie Mahaffy, and Homolka's sister, Tammy Homolka. The Scarborough sexual assaults and "particularly the 1990s sex slayings of teenagers Leslie Mahaffy and Kristen French — were among the most horrifying and controversial in Canadian history."[72] The controversy around the case stemmed from errors in the police investigation and Homolka's lax and disproportionate sentence since she was offered a plea bargain for her testimony against Bernardo.

In this subsection, I will discuss *R. v. Bernardo* (including *R. v. Homolka*) and explain that I interpret Bentham's utilitarian punishment theory as the underlying compatible legal theory guiding the Crown and the judge's judicial decisions. This subsection will analyze the Bernardo-Homolka case and identify where the underlying utilitarian principles affected the case's judicial decisions and how this resulted in negative outcomes for the victims' families and the public. This analysis will also explain the reasoning behind their sentences and help us understand why Homolka's sentence is perceived as lax and disproportionate by the victims' families and the public. By analyzing the underlying compatible punishment theory, I will argue that Bernardo's punishment is consistent with Bentham's theory since his sentence was instrumentalized for social utility to deter and inhibit future criminal activity and alleviate tension surrounding his crimes.

[71] Edward Butts, "Paul Bernardo and Karla Homolka Case." In *The Canadian Encyclopedia*. (Historica Canada), article published June 20, 2016; last edited October 31, 2018.
https://www.thecanadianencyclopedia.ca/en/article/paul-bernardo-and-karla-homolka-case
[72] Butts, "Paul Bernardo and Karla Homolka Case."

However, it is perceived that utilitarianism was used at the expense of justice, whether the Crown and judge were aware of this in the judicial decision. The public and the victims' families did not oppose the judicial decision in Bernardo's case but rather against how his conviction and sentence were achieved. For Bernardo to be convicted, Homolka was also instrumentalized by exchanging her testimony for a plea bargain. Homolka's lighter sentence is perceived by the public and the victims' families as lax and disproportionate to her crimes' severity. During the investigation, there was speculation about Homolka's involvement in the crimes. However, for the Crown to build a strong case against Bernardo and secure a conviction, they offered Homolka a plea bargain, reducing her sentence from second-degree murder and sexual assault to two counts of voluntary manslaughter. The Crown relied heavily on Homolka's testimony against Bernardo to secure a conviction due to errors in the police investigation of the Scarborough sexual assaults and the deaths of Mahaffy and French.

I argue that the Crown's use of a plea bargain is compatible with Bentham's theory, as it is observed as a staged punishment for the sake of social utility. The appearance of Homolka's punishment aimed to (1) deter future criminal activity and (2) alleviate the public's tension regarding the couple's crimes. Although these were the intended outcomes, the public and the victims' families perceived her sentence as disproportionate to her criminal behaviour as she only served twelve years. Her plea bargain and sentence were perceived as a trade-off between proportional justice and attempting to appease the public and the victims' families by convicting and sentencing Bernardo to the fullest extent of the law. The public and the victims' families wanted this same pursuit of justice for Homolka. Hence, her plea bargain is referred to as a "Deal with the Devil."[73] Examining the Bernardo-Homolka case after the judicial decisions creates an

[73] Brad Hunter, "Deal with the Devil: 25 Years since Karla Homolka Skated." *Toronto Sun*, June 28, 2018, https://torontosun.com/news/local-news/deal-with-the-devil-25-years-since-karla-homolka-skated.

opportunity to learn why the public and the victims' families have this perception around her plea bargain and to understand the judicial decisions. I will first outline the Bernardo-Homolka case to position my analysis of how I believe Bentham's theory is the underlying compatible punishment theory guiding these judicial decisions.

In 1987, the first attack on a young woman leaving a bus shuttle near her home occurred in Scarborough, Ontario, a suburb of Toronto. This was one of twenty-four sexual assaults or attempted sexual assaults on teenage girls and young women that occurred over five years.[74] The perpetrator was deemed "The Scarborough Rapist." It was not until May 1990 that one of the victims of "The Scarborough Rapist" described her attacker's face allowing the police to generate a computer composite portrait for the media.[75] The portrait generated numerous responses, but three were from individuals who identified "The Scarborough Rapist" as Bernardo.[76] Due to the leads, investigators called Bernardo twice for an interview to discuss his likeness to the portrait. The police were satisfied that although he looked like the portrait, he was not a likely suspect, but as a matter of routine, they took DNA samples for testing. DNA testing was a new scientific method in Canada. Toronto's Centre of Forensic Sciences (CFS) was understaffed, resulting in samples from the Scarborough Rapist case, including Bernardo's, not being tested.[77] At this time, "The Scarborough Rapist" appeared to stop his criminal activity.

In December of 1990, Bernardo was engaged to Homolka and moved into her family home in St. Catherines, Ontario. Although Bernardo was engaged to Karla, he had a flirtatious relationship with her fifteen-year-old younger sister, Tammy. Karla accepted the relationship between her fiancée and her younger sister and decided to "gift" her sister to Bernardo for

[74] Butts, "Paul Bernardo and Karla Homolka Case."
[75] Ibid.
[76] Ibid.
[77] Ibid.

Christmas.[78] On December 23rd, 1990, Homolka and Bernardo drugged Tammy at the Homolka residence to sexually assault and videotape her while she was unconscious.[79] But on the morning of December 24th, Tammy was still unconscious. They hid the videotape of Tammy's sexual assault and called the police to report she was unconscious.[80] Tammy was taken to St. Catharines General Hospital and was pronounced deceased. The Niagara Regional Police questioned the couple regarding Tammy's death and an unusual burn mark on her mouth. Bernardo told the police the burn surfaced when he dragged her to her bedroom to help revive her, but in fact, it was caused by an anesthetic called halothane, which Homolka retrieved from her veterinarian's office and administered to Tammy to keep her unconscious.[81] The police and doctors concluded that Tammy died of asphyxiation (by choking on her vomit) while sleeping, leading her case to be closed.

Once married, the couple committed two additional sexual assaults and murders. In 1991, the police discovered the dismembered remains belonging to fourteen-year-old Leslie Mahaffy from Burlington, Ontario, at Lake Gibson in St. Catherines. The police searching for clues gained aid from the American Federal Bureau of Investigation (FBI) to create a criminal psychological profiling of the murderer, which deemed them a sadistic sexual predator with the characteristics to kill again.[82] In 1992, the remains of fifteen-year-old Kristen French of St. Catharines, Ontario, were found in a ditch on a rural road in Burlington, Ontario. The young woman was beaten, sexually assaulted, and half of her hair was shaven, making her almost unrecognizable. The police located a shoe, a map fragment, and a lock of her hair in the Grace Lutheran Church parking lot, which she passed on her way to school. A witness said that two people, a man and a woman, forced

[78] Nick Pron, *Lethal Marriage: The Unspeakable Crimes of Paul Bernardo and Karla Homolka* (Ballantine Books, 2010), 127.
[79] Butts, "Paul Bernardo and Karla Homolka Case."
[80] Ibid.
[81] Ibid.
[82] Ibid.

the girl into a "cream-coloured Chevrolet Camaro."[83] This led the police to locate cream-coloured Camaros, but it was a mistaken lead because Bernardo's vehicle was a gold-coloured Nissan. Due to limited evidence and connections between the cases, they exhumed Mahaffy's remains for the medical examiners to re-analyze. They concluded that Mahaffy's body had bruises, similar to French's blunt force trauma injuries.[84] This evidence connected the two murders for the first time.

In 1993, Homolka was involved in a domestic violence incident with Bernardo, where she was physically assaulted with a flashlight. Bernardo was arrested, charged with assault with a deadly weapon, and released on bail.[85] A month after their domestic violence incident, CFS identified Bernardo's DNA with that of "The Scarborough Rapist." Bernardo was placed under surveillance, and Homolka was questioned about the "Schoolgirl Murders." Homolka was initially uncooperative with the investigation, but after consulting her lawyer, she agreed to testify against Bernardo on the requirement of being granted full immunity from prosecution. Ontario's attorney general would not agree to full immunity but was willing to entertain a reduced sentence.

In February of 1993, Bernardo was arrested for the murders of French, Mahaffy and the numerous Scarborough sexual assaults. For the police to gain further information, they interrogated Homolka, leading her to implicate Bernardo for the crimes, including her younger sister's death.[86] Homolka described how Bernardo kidnapped Mahaffy from her home and how they had enticed French into their car in the Church's parking lot. Homolka explained that Mahaffy and French were used as "sex slaves" before Bernardo strangled the young women.[87] Homolka explained that the girls suffered emotional, physical, and sexual abuse at the hands of Bernardo.

[83] Butts, "Paul Bernardo and Karla Homolka Case."
[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Ibid.

However, Homolka never implicated herself in the crimes. The investigators were unsure if Homolka was a battered wife who suffered repeated abuse at the hands of Bernardo, making her forced rather than complicit in the crimes, or if she portrayed herself as a battered wife. Overall, the Crown suspected she played a role in the crimes but questioned if she wilfully participated because she placed the blame on Bernardo.

In July of 1993, as part of her plea bargain, Homolka was charged and convicted on two counts of voluntary manslaughter for her to serve concurrently for the French and Mahaffy murders.[88] While searching the couple's residence, the authorities did not initially locate videotapes of the sexual assaults and murders of Homolka's sister, French and Mahaffy, which showed Homolka as a willful accomplice in the crimes. Before the search, Bernardo's lawyer, Ken Murray, retrieved the hidden tapes, which were not turned over to the authorities until September 1994.[89] Homolka appeared in each video as a consenting accomplice in the crimes, not as an abused wife or coerced, frightened participant. By this time in the investigation, the case captured media attention across North America. The public and the media accused the Crown of making a "Deal with the Devil" by only convicting Homolka to twelve years for her actions, arguing that the sentence was disproportionate to her crime's severity and intent.[90] The Crown argued they were obliged to uphold Homolka's plea bargain. But more so, they needed her testimony against Bernardo to ensure a conviction because she was the only witness to the crimes.

The Bernardo trial began in May of 1995 when Homolka testified against her ex-husband for over seventeen court days. Bernardo was convicted on all charges: kidnapping, aggravated sexual assault, forcible confinement, one count of indignity to a human body, and two counts of

[88] Butts, "Paul Bernardo and Karla Homolka Case."
[89] Murray was charged with conspiracy to obstruct justice and obstruction of justice but was acquitted on all charges.
[90] Lee Mellor, *Cold North Killers: Canadian Serial Murder* (Toronto, Ontario: Dundurn, 2012), 410.

first-degree murder.[91] He was sentenced to life in prison without parole for twenty-five years. Additionally, Bernardo was deemed a dangerous offender, reducing his ability to be granted parole because he is a threat to society with characteristics to re-offend. The dangerous offender status is the most severe title deemed on an offender in Canada's criminal law.

The aftermath of the Bernardo-Homolka crime impacted the victims' families. The families were outraged that after Homolka had served her twelve years, she settled in the Caribbean Island of Guadeloupe and then Montreal, Quebec. She legally changed her name to Leanne Bordelais when she married her lawyer's brother, Thierry Bordelais, and had three children. The lawyer for both the Mahaffy and French families, Tim Danson, spoke on their behalf in an interview with *CBC News*, explaining that "[t]hey're feeling a real sense of injustice that Karla Homolka's free and their daughters never will be."[92] This statement by Danson reveals that the families feel a sense of injustice by having Homolka retain her freedom after her release due to her plea bargain.

Analyzing the Bernardo-Homolka case is philosophically interesting because it can be interpreted that Bentham's utilitarian punishment theory is the underlying compatible punishment theory guiding the Crown and the judge's judicial decisions. But what is also apparent is utilitarianism at the expense of justice due to Homolka's plea bargain, which I argue is perceived as a staged punishment when evaluating her sentence with Bentham's theory's influence. Her sentence lacks sensitivity to her criminal intent, creating a trade-off between proportional justice and appeasing the public and the victims' families to secure Bernardo's conviction and ensure he is sentenced to the fullest extent of the law. First, I will describe how Bernardo's sentence is compatible with Bentham's theory.

---

[91] *R. v. Bernardo*, 2000 CanLII 5678 (ON CA), <https://canlii.ca/t/1fb38>, retrieved on 2023-07-27.
[92] "Victims' Families Want to Keep Homolka Leashed: Lawyer," *CBC News*, July 5, 2005, https://www.cbc.ca/news/canada/victims-families-want-to-keep-homolka-leashed-lawyer-1.525031.

As mentioned in Chapter One, Bentham argues that when a criminal act has been committed against the State, the judge's concern is to (1) prevent the crime from reoccurring and (2) compensate for the crime's harm.[93] Hence, as a solution, Bentham argues for deterrence for social utility to maintain the community's safety through *particular prevention/deterrence* and *general prevention/deterrence*. In the case of Bernardo, it can be perceived that his sentence was used as an example of particular prevention/deterrence and general prevention/deterrence because of the high-profile nature of the crime and errors in the police investigation.

Bernardo being sentenced to life in prison and declared a dangerous offender for the sexual assaults and murders of French, Mahaffy, Homolka's sister Tammy and the numerous sexual assaults as "The Scarborough Rapist" demonstrates Bentham's punishment theory's guidance. Bernardo, being declared a dangerous offender, asserts that he is a threat to society who could re-offend, indicating that *particular prevention/deterrence* is required. This is especially true with the FBI's criminal psychological profiling of Bernardo, deeming him a sadistic sexual predator with the characteristics to re-offend. Bernardo's offender status ensures that his physical power is restricted through physical incapacitation, making it highly unlikely that he would be granted parole and released from prison. His offender status ultimately prevents him from re-offending and engaging in criminal activity, thus protecting society. Further, his sentence demonstrates *general prevention/deterrence* since his offender status warns potential offenders with the same motive or opportunity not to commit the same crimes as they will face the same consequences if found guilty. Bernardo's punishment is instrumentalized as an example to deter future criminal activity. His life sentence and dangerous offender status ensure the community's safety; hence, those involved in the case focused on securing a conviction against Bernardo.

[93] Bentham, *The Rationale of Punishment,* 19.

The public and the victims' families did not oppose the judicial decision in Bernardo's case since he received a sentence that reflected the severity of his crimes and inhibited further criminal behaviour as he would no longer be a threat to society. Instead, how his sentence was accomplished created controversy and tension among the public and the victims' families, specifically with Homolka's plea bargain in exchange for testimony against Bernardo. Although Homolka's testimony helped the Crown to convict Bernardo, the controversy stems from the police's investigative errors that forced the Crown to offer a plea bargain and rely on Homolka's testimony. These errors made the Crown dependent on Homolka's testimony, resulting in her receiving a lighter sentence, which the public and the victim's families deemed disproportionate.

It could be perceived that the Crown securing Bernardo's conviction was a way to have the victims' families and the public overlook the investigative errors outlined previously with two separate investigations, such as the police not prioritizing the computer composite sketch, which three individuals identified Bernardo as "The Scarborough Rapist" and the police not locating the videotapes during the initial search of the Bernardo-Homolka residence before Bernardo's lawyer located the tapes. From the Crown's perspective, Bernardo's conviction and sentence appeases the public and the victims' families, bringing a sense of justice. However, if proper investigative practices had been conducted, the Crown would not have depended on Homolka's testimony. [94] In 1996, a government inquiry into the Bernardo-Homolka investigation found (1) that the police had made various mistakes, such as failing to locate the videotapes in the couple's residence during initial searches, (2) rivalries among various police agencies had harmed the investigation, and (3)

[94] It could be argued that if these investigative errors had been prevented, Bernardo would have been convicted with a life sentence and dangerous offender status due to the videotapes found in the initial searches of the couple's residence. The Crown's aim of him being used as an example to inhibit further criminal behaviour would have occurred due to the nature of the crimes. Most importantly, the Crown would not have had to rely on Homolka's testimony. If found sooner, the videotapes would have corroborated the Crown's suspicion that Homolka was a wilful accomplice in the crimes since they displayed the culpability of both Bernardo and Homolka.

that Bernardo's crimes could have prevented if his DNA was processed sooner.[95] These errors positioned the Crown to use alternative measures to secure a conviction.

The aim of instrumentalizing Bernardo's sentence for social utility created a disproportionate sentence for his then-wife, Homolka, by creating a trade-off between proportional justice and appeasing the public. During the investigation, there was speculation about Homolka's involvement in the sexual assaults and murders. But for the Crown to build a strong case against Bernardo, they offered Homolka a plea bargain of voluntary manslaughter in exchange for her testimony, reducing her sentence from second-degree murder and sexual assault to two counts of voluntary manslaughter. The Crown suspected she participated in the crimes but questioned her complicitness since she placed the blame on Bernardo. The Crown's uncertainty about Homolka's role was also based on the initial psychological assessment by FBI profiler Roy Hazelwood. Hazelwood deemed Bernardo "a classic sexual sadist," while Homolka was deemed a "compliant victim of a sexual sadist."[96] This idea was explored in a co-authored article.[97] Hazelwood interviewed seven women who engaged in their partner's sexually sadistic crimes while suffering from a subcategory of post-traumatic stress disorder, Battered Woman Syndrome (BWS), thus negating their ability to break psychologically from their partner.[98] The Crown based their plea bargain on Homolka's claims of being a battered wife and Hazelwood's findings.[99]

Although there are similarities when examining Hazelwood's findings and the Bernardo-Homolka relationship, there are also key differences between Homolka and the seven women, as

[95] Butts, "Paul Bernardo and Karla Homolka Case."
[96] Mellor, *Cold North Killers: Canadian Serial Murder*, 423.
[97] Roy Hazelwood, John Warren, and Patrick Dietz, "Compliant Victims of the Sexual Sadist." *Australian Family Physician 22, no.4 (199): 474-479.* See also, Park Elliott Dietz, Robert R. Hazelwood, and Janet Warren, "The Sexually Sadistic Criminal and His Offenses." *Bulletin of the American Academy of Psychiatry and the Law* 18, no. 2 (1990): 163-178.
[98] Mellor, *Cold North Killers: Canadian Serial Murder*, 423
[99] Battered Women Syndrome (BWS) is recently known as Intimate Partner Violence.

noted by Stephen Williams in his works *Invisible Darkness* and *Karla,* that separates her from the seven women who suffered stress disorders.[100] Unlike the seven women, Homolka and Bernardo engaged in their first crime together, not married or living together, when they assaulted Homolka's sister. This differs from the seven women in Hazelwood's analysis who were married and living with their partner during the crimes they committed, contributing to their stress disorder.

Further, there were additional psychological analyses conducted on Homolka.[101] Forensic psychiatrist Dr. Graham Glancy, who was hired by Bernardo's legal team, diagnosed Homolka as a "histrionic hybristophile," which classifies Homolka as an "excessively emotional and egotistical attention-seeker" who is sexually fascinated by a partner who sexually assaults and dominates other women so long as their partner's aggressions are not exerted on them in the process.[102] When violence is directed toward them, they dissolve the relationship. Hence, after their domestic violence incident in 1993, she willingly divorced Bernardo to testify against him in court.

Although there were differing psychological analyses, the Crown agreed with Hazelwood's analysis based on Homolka's claims and the previous domestic violence incident. But they ignored key differences in the analysis to provide Homolka with a plea bargain and proceeded to uphold it even after the videotapes showed her as a willing accomplice. What is perceived with Homolka's plea bargain is that the Crown needed Homolka's testimony against Bernardo to secure a conviction due to errors in the investigation. But to secure a conviction, Homolka's account needed to be believed; hence, the Crown only focused on Hazelwood's analysis of Homolka as a victim of Bernardo's sexually sadistic nature. By portraying Homolka as a victim of his predatory

[100] See Stephen Williams, *Invisible Darkness: The Strange Case of Paul Bernardo and Karla Homolka*. Bantam, 2009; and Stephen Williams, *Karla: A Pact with the Devil*. Seal Books, 2010.
[101] There have been several dissenting opinions regarding Hazelwood's compliant victim/BWS profile of Homolka, but the one whose depiction is most regarded as plausible is Dr. Graham Glancy.
[102] Mellor, *Cold North Killers: Canadian Serial Murder,* 425. See also, Mellor, "Sexually Sadistic Homicide Offenders," In *Homicide*, (Routledge, 2016), 157.

behaviour, her involvement in the crimes will be diminished, preserving her credibility as a witness.

However, Homolka maintains the same culpability as Bernardo. As I outlined the case at the beginning of this subsection, Homolka made conscious decisions that implicate her in the crimes. Although Homolka made these decisions with criminal intent, she received a lighter sentence by providing her testimony to help the Crown secure Bernardo's conviction and to use his sentence as an example to inhibit further criminal behaviour. Homolka would not have received a dangerous offender status because she had no violent history like Bernardo as the "Scarborough Rapist." However, her role in the murders of Mahaffy and French would have convicted her of her initial charges, possibly sentencing her to life in prison without parole for up to twenty-five years. Her plea bargain of a concurrent twelve-year voluntary manslaughter sentence does not capture the true extent of her involvement. Hence, the public and the victims' families feel a sense of injustice that Homolka did not receive a proportional sentence for her role in the crimes.[103] The charge of manslaughter is defined as "causing the death of a human being, most frequently by means of an unlawful act or criminal negligence."[104] An unlawful or negligent act could be killing another without premeditation. The murders of Mahaffy and French do not align with this legal definition because these young women were abducted, sexually assaulted, tortured and murdered. These actions are not legally perceived as negligent but intentional by the public and the victims' families.

[103] The public and victims' families' perception of Homolka's sentence and plea bargain is comparable to *R. v. Olson*. Clifford Olson from Vancouver, British Columbia, was convicted for the sexual assaults and murders of eleven children and teenagers between the ages of nine and eighteen. Due to the nature of these crimes, the police were desperate to seek a confession from Olson and offered him a plea bargain. The media classified the negotiated deal as the "cash-for-bodies" deal, where Olson's wife would receive $100,000 in exchange for his help in disclosing his victims' bodies. See Mellor, *Cold North Killers: Canadian Serial Murder*, 89.

[104] Stephen Gerard Coughlan, Catherine Cotter, and John A. Yogis. *Canadian Law Dictionary*. Seventh Edition. (Hauppauge, New York: Barrons Educational Series, Inc., 2013), 203.

As I mentioned in Chapter One, Bentham's utilitarian punishment theory is not guilt-sensitive. The theory does not prioritize the offender's guilt so long as the principle of deterrence is promoted for social utility. This is seen in the "Cape of Good Hope" example, where Bentham argues that a deal can be made with the offender not to receive a real but a staged punishment for social utility. I argue that this is similar to Homolka's sentence. The Crown provided Homolka with a plea bargain discounting their suspicions about her participation in the crimes and her psychological analysis. This trade-off, Homolka's plea bargain in exchange for Bernardo's conviction, aimed not only to deter future criminal behaviour from Bernardo and potential offenders but to alleviate the tension that the victims' families and the public felt regarding his crimes and to overlook the case's investigative errors. Bernardo's punishment's appearance aimed to satisfy the public's need for justice. But, this is counter-intuitive because Homolka, who was involved in Bernardo's crimes, had the same culpability. The Crown's perception of her sentence is that they appeased the public and the victims' families' by sentencing her to twelve years. Although the trade-off was intended to alleviate tension, the public and the victims' families' perception is that her sentence did not reflect her guilt or have her learn from her sentence.[105]

I call Homolka's plea bargain a "staged punishment" because it deceived and manipulated the victims' families and the public into a false sense of security that justice was restored. The perception of any sentence, especially one of a high-profile nature like Homolka's, is subjective and must be perceived as just for the masses to believe they are safe from potential threats. For

[105] Homolka had a relationship with convicted killer Jean-Paul Gerbet while in prison at Ste. Anne des Plaines institution in Quebec. Homolka's relationship with a convicted inmate sentenced for murdering his girlfriend concerns the public and the victims' families. Her engagement with a violent offender does not communicate to them that she was deterred or has learned from her punishment since their relationship could lead to violence once they were released, especially since psychological analysis deemed her a "histrionic hybristophile" drawn to men who dominate women. See Katherine Wilton, "Homolka's Ex-Prison Beau Goes Before Parole Board." *Global News*, June 1, 2011, https://globalnews.ca/news/122187/homolkas-ex-prison-beau-goes-before-parole-board/.

instance, *CTV News* explained that when Homolka relocated to Quebec in 2005 after her release from prison, the public demanded to know of her relocation or potential re-locations.[106] Local news outlets monitored Homolka's whereabouts to inform the public of her presence, such as when she was discovered volunteering at a Quebec private elementary school. Once publicized, parents and community members demanded answers, prompting the Seventh-day Adventist Church, which operates the school, to acknowledge their concerns. In a statement, they explained they no longer allow an individual with a criminal record to volunteer at the school.[107] Their statements are interpreted to be about Homolka, although they did not admit that she volunteered. The Quebec Press Council stated, "[t]he public had a right to be informed about her new area of residence, and the newspaper had editorial freedom to publish this information."[108] Homolka's sentence does not appease the public, as they are concerned about her whereabouts. Subsequently, in Canada's legal history, her plea bargain is known as the "Deal with the Devil" because she received a lax and disproportionate sentence compared to Bernardo, leading the victims' families and the public to criticize the Crown's plea bargain, ultimately allowing her release.

Analyzing *R. v. Bernardo* (including *R. v. Homolka*) and Bentham's utilitarian punishment theory as the underlying compatible punishment theory is significant because it demonstrates where the underlying utilitarian principles affected both cases' judicial decisions, resulting in negative outcomes for the victims' families and the public. Reviewing the underlying punishment

[106] Selena Ross, "Karla Homolka, After Moving Again Near Montreal, Can't Expect Privacy: Quebec Press Council." CTV News, December 15, 2020, https://montreal.ctvnews.ca/karla-homolka-after-moving-again-near-montreal-can-t-expect-privacy-quebec-press-council-1.5232444.
[107] The Canadian Press, "Karla Homolka will No Longer Volunteer at Montreal Elementary School." *CTV News,* June 1 2017, https://www.ctvnews.ca/canada/karla-homolka-will-no-longer-volunteer-at-montreal-elementary-school-1.3440179.
[108] Ross, "Karla Homolka, After Moving Again Near Montreal, Can't Expect Privacy: Quebec Press Council."

theory allows us to understand why the public and the victims' families perceive Homolka's sentence as disproportionate and understand the reasoning behind the decision made in the case.

Deterrence is necessary as it prevents crime by instilling fear through the punishment's threat. However, deterrence should not regulate the offender's punishment for the sake of social utility as it leads to a trade-off between proportional justice and appeasing the public by discounting an offender's guilt, leading to a disproportionate sentence. This was seen with Homolka's plea bargain by prioritizing Bernardo's sentence to (1) appease the public to overlook the police's investigative errors, (2) deter future criminal behaviour, and (3) secure a conviction against Bernardo because of the case's high-profile nature. Consequently, the emphasis on deterrence for social utility prioritized Bernardo's sentence over Homolka's and manipulated the public into a false sense that justice was restored, negatively impacting the public and the victims' families by feeling insecure about Homolka's release. Thus, as an underlying punishment theory guiding an offender's sentence, Bentham's theory does not prioritize proportionality in sentencing.

2.2 The Case of Robert Pickton (Kant's Strict Retributivism)

From 1978 to 2001, at least sixty-five women vanished from Vancouver, British Columbia's Downtown Eastside, one of the city's oldest neighbourhoods.[109] It is the site of complex social and systemic issues such as disproportionately high levels of homelessness, mental illness, poverty, crime, drug use and sex trade work. Robert Pickton, a pig farmer from nearby Port Coquitlam, British Columbia, was charged with the sexual assaults, murders, and dismemberment of twenty-seven out of the sixty-five vanished women. However, although he was charged with twenty-seven first-degree murder charges, he was only convicted on six charges of second-degree murder due to a lack of forensic evidence. In a prison conversation with an undercover police

[109] Edward Butts, "Robert Pickton Case." In *The Canadian Encyclopedia*. (Historica Canada). Article published July 26, 2016; last edited April 24, 2017. https://www.thecanadianencyclopedia.ca/en/article/robert-pickton-case.

officer, Pickton confessed to murdering forty-nine women. This case led to the largest serial killer investigation, making Pickton's farm the largest crime scene in Canadian history and Pickton one of Canada's most prolific serial killers.[110] Most importantly, this case highlighted the issue of missing and murdered Indigenous women and girls in Canada and the societal prejudice against Indigenous women and sex trade workers.

> In 2012, a provincial government inquiry into the case concluded that "blatant failures" by police — including inept criminal investigative work, compounded by police and societal prejudice against sex trade workers and Indigenous women — led to a "tragedy of epic proportions."[111]

This case marks a dark history in Canada's criminal justice system. The societal impact of inept criminal investigative work affected the victims' families and the public.

In this subsection, I will discuss *R. v. Pickton* and explain that I interpret Kant's strict retributive punishment theory as the underlying compatible legal theory motivating the judge's judicial decision. This subsection will analyze the Pickton case and identify where the underlying strict retributive principles affected the case's judicial decision and how this affected the victims' families and the public. This analysis will also explain the reasoning behind Pickton's sentence and help us understand why his case is controversial. There are mixed reactions from the public and the victims' families regarding whether his sentence is proportionate or disproportionate to his crimes' severity.

In pre-trial rulings, trial judge Supreme Court Justice James Williams rejected one count of first-degree murder due to lack of evidence, reducing the charges to twenty-six. He then severed the remaining first-degree murder charges into one group of six counts and another with twenty counts. The trial proceeded with the six counts of first-degree murder, while the remaining twenty

[110] Butts, "Robert Pickton Case."
[111] Ibid.

would have been heard in a separate trial but were stayed.[112] Due to investigative failures by the police because of prejudice against sex trade workers and Indigenous women, the jury found Pickton guilty of six counts of second-degree murder instead of first-degree murder.[113] Disagreeing with the jury's findings, Justice Williams explained in court that due to the severity of Pickton's crimes, he deserved the highest parole eligibility sentence that second-degree murder offered, setting a judicial precedent and making his sentence comparable to first-degree murder.

With this, I will argue that the judge's decision was guided by proportionality and reciprocity to ensure that the punishment reflected the severity of Pickton's crimes based on the principle of retribution (*ius talionis*), rectifying the initial disproportionate sentence by the jury. As the underlying theory, Kant's strict retributive punishment theory focused on proportionality through retribution, not deterrence for social utility. Instead of instrumentalizing Pickton as an example, the emphasis on proportionality compensated for the investigative failures and prejudice towards the victims' by the Vancouver police department and the Royal Canadian Mounted Police (RCMP). The judge focused on providing Pickton with a deserving sentence. I will first outline the case to help position my analysis of how Kant's theory guided the case's judicial decision.

The Downtown Eastside saw numerous disappearances in 1983 of sex trade workers and Indigenous women. There were no investigations into the disappearances until 1998 when the Vancouver police formed a task force dedicated to the disappearances because of the demands of community activists.[114] Detective Inspector Kim Rossmo was among those activists because he believed a serial killer was stalking the Downtown Eastside. Rossmo engineered a computer

[112] *R. v. Pickton*, 2010 SCC 32 (CanLII), [2010] 2 SCR 198, <https://canlii.ca/t/2bttm>, retrieved on 2023-07-21.
[113] The Crown successfully appealed to British's Columbia's Court of Appeal regarding severing the twenty-six counts of first-degree murder and the six acquittals of first-degree murder. The court ordered a new trial on all twenty-six counts of first degree murder but this decision was stayed because Pickton lost his appeal regarding his sentence. Since he lost his appeal the Crown did not pursue the additional twenty-counts of murder.
[114] Mellor, *Cold North Killers: Canadian Serial Murder*, 370.

program called the "Criminal Geographic Targeting" (CGT) system, which analyzes the crime scene's proximity to find the killer's base of operations.[115] While developing this computer software, he ran tests on prior solved murders such as those committed by Canadian serial killer Clifford Olson. Based on the results, he was astounded to find his software revealed the four-block region where Olson resided.[116] This software became a vital feature in criminal investigations, and he wanted to use it to assist with the disappearances. Although there was insufficient evidence for a geographic profile, the software determined that there was a serial killer.

Rossmo presented his findings to chief homicide detective Fred Biddlecombe, but he was met with hostility. In the "Missing Women Inquiry" court proceeding regarding police malpractice in the Pickton case, Rossmo explained that Biddlecombe had a "temper tantrum" because he refused to tell the public that a serial killer was preying on sex trade workers in the Downtown Eastside.[117] Rossmo wanted to issue this warning to the public: "he believed the police force had a duty to inform the community a possible serial killer was preying on women."[118] Rossmo testified that Biddlecombe argued that there was no evidence of a serial killer and the women would be located. For this reason, they did not use Rossmo's software.

The task force continued its investigation, but because of the victims' transient and marginalized lifestyles, their disappearances went unnoticed until they increased, and rumours emerged that a serial killer was preying on sex trade workers. The police inaction garnered complaints from the Vancouver Sun newspaper as they accused the department of "giving low

[115] Mellor, *Cold North Killers: Canadian Serial Murder*, 371.
[116] Ibid.
[117] Neal Hall, "Former VPD Detective Kim Rossmo Testifies Bosses Nixed Serial Killer Warning." *Vancouver Sun, January 15, 2012,* https://vancouversun.com/news/former-vpd-detective-kim-rossmo-testifies-bosses-nixed-serial-killer-warning.
[118] Hall, "Former VPD Detective Kim Rossmo Testifies Bosses Nixed Serial Killer Warning."

priority to crimes committed against sex trade workers" and refusing to adopt new measures such as Rossmo's CGT software to help with the investigation.[119]

Pickton became a suspect in the disappearances in 1998 when one of his workers, Bill Hiscox, found identification belonging to the missing women. Hiscox provided this information to the police, allowing them to obtain a search warrant to examine the Pickton farm on three occasions. Still, they could not locate information connected to the missing women. Without any evidence, they were unable to continue the search. Four years later, police informant Scott Chubb told authorities Pickton had illegal firearms on the property. The police obtained a search warrant to investigate the farm and, along with firearms, found an inhaler prescribed to a sex trade worker named Sereena Abotsway, who had disappeared from the Downtown Eastside in 2001.[120] The task force searched the farm with archaeologists discovering the remains of several missing women.

Pickton was charged with first-degree premeditated murder because he specifically preyed on women from the Downtown Eastside. However, in their deliberation, the jury could not determine if he committed these crimes alone and if his actions were premeditated based on the lack of evidence provided at trial. Additionally, some jurors questioned the witness' credibility, especially those who admitted to past substance abuse, criminal activity or their line of work as sex trade workers. In 2007, Pickton was convicted on six counts of second-degree murder instead of first-degree premeditated murder. He was sentenced to life in prison without eligibility for parole for twenty-five years. Justice Williams, who presided over the case, did not agree with the jury's conclusion by explaining in his sentencing that Pickton's conduct was repeatedly murderous and that what happened to Pickton's victims was "senseless and despicable."[121] He explained that

[119] Hall, "Former VPD Detective Kim Rossmo Testifies Bosses Nixed Serial Killer Warning."
[120] Mellor, *Cold North Killers: Canadian Serial Murder,* 373.
[121] "Pickton Gets Maximum Sentence for Murders," *CBC News*, December 11, 2007, https://www.cbc.ca/news/canada/british-columbia/pickton-gets-maximum-sentence-for-murders-1.650944.

nothing could express "the revulsion the community feels about these killings" because they were innocent victims trying to earn a living since they faced hardships.[122]

After detailing the case, Justice Williams explained that an individual convicted of second-degree murder receives a life sentence automatically. Nevertheless, the judge can set the parole eligibility within ten to twenty-five years. Although a first-degree murder conviction would have sentenced Pickton to a life sentence like a second-degree murder conviction, the eligibility for parole would have been automatically twenty-five years. Justice Williams explained that the parole eligibility for second-degree murder does not typically exceed twenty years. Still, the case's severity warranted its maximum parole eligibility, setting a judicial precedent by making his sentence comparable to first-degree murder.

The public and the victim's families reacted differently regarding Pickton's sentence. Many are pleased and relieved with the judge's decision as it is equivalent to a first-degree murder charge. In an interview with *CBC News,* Rick Frey, the father of Marine Frey and one of Pickton's victims, told the media outlet that he was disheartened when he heard that the jury convicted Pickton of second-degree murder instead of first-degree murder. He explained that: "When it was second-degree, you know, you kinda go down a bit," but "[n]ow that Justice Williams has imposed the maximum 25 years, ya know, it's good. It's a good day for us."[123] Additional family members of the victims expressed relief. Speaking to *CBC News,* Cynthia Cardinal, the sister of Georgina Papin, indicated that she was "uplifted" and felt that "[a] lot of weight has been lifted off. For sure, I'm grateful for what happened in the courtroom."[124] Although Justice Williams rectified the jury's

[122] "Pickton Gets Maximum Sentence for Murders."
[123] Ibid.
[124] "Pickton Verdict Evokes 'Elation,' 'Disappointment' from Victims' Friends, Family." *CBC News*. December 9, 2007. https://www.cbc.ca/news/canada/british-columbia/pickton-verdict-evokes-elation-disappointment-from-victims-friends-family-1.638980.

initial disproportionate sentence, proper investigative practices would have provided evidence for the jury to convict Pickton of first-degree murder and minimize bias towards the witness' testimony.[125] The victims' families blame the police's investigative practices and failure to use all resources to help locate the missing woman and evidence to support Pickton's premeditation. Due to this, they believe Pickton should have received a more proportionate sense of first-degree murder to show that Pickton's actions were premeditated.

Analyzing this case after the judicial decision is philosophically interesting because Kant's strict retributivism can be regarded as the underlying punishment theory guiding the judicial decision. Although the jury decided Pickton would be convicted on six counts of second-degree murder instead of first-degree murder, Justice Williams disagreed with the jury's findings. He explained in court that due to the severity of Pickton's crimes and his intention to prey on vulnerable and marginalized women, Pickton deserved the maximum parole eligibility. Justice Williams' statement that Pickton's crimes against his victims were "senseless and despicable" resembles Kant's strict retributivism. As stated in Chapter One, Kant argues that whatever undeserving evil the offender has inflicted on their victim, in return, they will face the same degree of punishment. Justice Williams recognized the "evil" of Pickton's actions and provided a deserving punishment proportional to the severity of his crimes. The evidence established that Pickton frequently visited Downtown Eastside to engage with sex trade workers. He lured these

[125] Family members, social workers and community activists called for a public inquiry into the Downtown Eastside disappearances because they believed societal prejudice toward sex trade workers and Indigenous women "botched" the investigation resulting in them suing the British Columbia government on behalf of the Royal Canadian Mounted Police (RCMP) and the city of Vancouver on behalf of its police department due to investigative failures. The lawsuit alleged that the RCMP and the Vancouver police failed as an institution to investigate the missing women properly, use all resources at their disposal, such as Rossmo's CGT software and warn the women of a potential serial killer in Vancouver's Downtown Eastside. The lawsuit resulted in $50,000 awarded to each victim's children acknowledging that negligence and societal prejudice affected the case. See, Another 3 Victims' Families Sue Pickton, Police," *CBC News,* August 20, 2013, https://www.cbc.ca/news/canada/british-columbia/another-3-victims-families-sue-pickton-police-1.1397374.

women to his Port Coquitlam farm by offering additional money and drugs to sexually assault and murder his victims. Pickton consciously harmed his victims, taking away their freedom to live. Justice Williams' judicial decision connects to Kant's idea of imputation because he refers to Pickton's voluntary criminal intent, moral culpability and the severity of his wrongdoing. In court, an undercover officer testified that Pickton confessed to murdering forty-nine women and that his goal was to make it "an even fifty" but was "sloppy" in not hiding the evidence properly on his farm.[126] Although the jury did not recognize the true nature of Pickton's intent, he specifically chose these women as his victims, indicating his autonomy.

In response to Pickton's confession, Justice Williams imposed an equally fitting and deserving punishment hindering his freedom by preventing his possibility for parole until he served twenty-five years of his life sentence. Pickton's sentence is reciprocal and proportional to the crime's severity based on *ius talionis,* as his punishment equals the same amount and degree of his crime—essentially, his life, specifically the hindering of his freedom through physical incapacitation, for his victims' lives. Reciprocity makes the offender's sentence proportional, ensuring that whatever the offender has inflicted on their victim must be inflicted in return on them as their punishment.

One could argue that sentencing Pickton to the highest level of parole eligibility that second-degree murder offers is *not* the same kind and degree of punishment based on the severity of his crimes. Their question simply stated: How is twenty-five years without parole the same kind of "punishment" as the torture and murder of multiple victims? How is this perceived as retributivism? Kant's strict retributive theory states that when an offender murders another, they will be sentenced to death. However, there are instances where there are exceptions. As I

[126] "Crown Lays out Grisly Case against Pickton," CBC News, January 22, 2007, https://www.cbc.ca/news/canada/crown-lays-out-grisly-case-against-pickton-1.681180.

mentioned in Chapter One, an offender is punished based on *ius talionis.* Still, there are instances where an offender cannot be punished for the exact form of their crime. Rather, they can be punished based on the principle of the offence as it remains valid regarding its effect on the victim. Canada's criminal justice system does not have capital punishment, which means an offender like Pickton cannot be sentenced to death, although he committed murder. Thus, he will be punished based on the principle of his crime. Pickton's sentence is an example of *ius talionis* because by taking away the life of his victims, his life (freedom) is subsequently taken away through his conviction, making his sentence proportional and reciprocal, satisfying justice for the victims' families and the public.

Furthermore, an interesting observation is that the underlying compatible theory in the judge's judicial decision attempted to compensate for the mishandling of the investigation by the Vancouver police department and the RCMP due to their prejudice against sex trade workers and Indigenous women. The police ignored the fact that these women were missing and used their lifestyles to explain why they possibly disappeared, leading to Pickton continuing his criminal behaviour. Rossmo's CGT software system indicated that a serial killer was stalking the Downtown Eastside, but the police refused to warn the public. The police had evidence implicating Pickton in the disappearances of the sex trade workers as early as 1997 and 1998, but they did not act on the leads brought forward to the department. The police department failed to assign adequate resources to investigate each missing woman. If the police had fully handled the investigation, the jury would have determined Pickton's criminal intent and convicted him of first-degree premeditated murder.

Analyzing this case and the underlying compatible punishment theory is important because it shows how the theory guides judicial decisions. Kant's strict retribution is necessary to ensure

proportionality in sentencing since the same kind and amount of punishment are applied to the offender's punishment, ensuring they receive a proportional sentence to the crime's severity. This is contrary to what was observed in *R. v. Bernardo* (including (*R. v. Homolka*). Although Homolka's crimes were proved to be intentional, she did not receive a proportional punishment due to her plea bargain. However, I observed in *R v. Pickton* that although the jury provided an initially disproportionate sentence due to police and jury bias, Justice Williams rectified the jury's verdict to ensure proportionality in Pickton's sentence by recognizing his criminal intent and compensating bias that led to the initial disproportionate sentence.

However, this case also demonstrates that a judge can implement strict retributive tactics in an offender's sentence. Justice Williams, disagreeing with the jury's decision, is perceived as vengeful because he is following the strict demands of justice that ensure whatever the offender has inflicted on their victim must be inflicted in return on them as their punishment. This focuses on what is internal to the punishment, which is the crime itself, and how it impacts the victims, their families and the general public. But there could be cases where enforcing strict retribution in the offender's sentencing, although the crime is severe, could be vengeful because the sentence ignores mitigating external social factors that explain why the offender committed the crime, such as mental illness. Although not an issue in *R v. Pickton*, the case demonstrates that vengeful sentences due to the crime's severity can be applied through strict retribution. In the next subsection, I will discuss *R. v. Li* and explain that I interpret the underlying compatible punishment theory in the case as Morris's paternalism as rehabilitative measures because the judge focuses on mitigating social factors which lessens the offender's punishment by having the criminal justice system interfere in their sentence.

2.3. The Case of Vince Li (Morris' Paternalism as Rehabilitative Measures)

On July 8, 2008, Vince Li left Edmonton, Alberta, to return to Winnipeg, Manitoba, on a Greyhound bus under the instruction of God's voice. Before his trip and under the belief that he was the "Chinese Jesus," Li went to the Canadian Tire store and bought himself a knife to protect himself from "evil forces on his journey."[127] Once on the Greyhound bus, Li received messages from what he presumed to be God telling him that the man beside him, 22-year-old Tim McLean, was evil because "this man would tear his intestines out of his body" if he did not attack him first.[128] The voice instructed Li to attack McLean because if "he did not remove this person's various body parts, the evil would reanimate and kill him."[129] This resulted in the brutal stabbing, beheading and cannibalization of McLean.

In this subsection, I will discuss *R. v. Li* and explain that I interpret Morris' paternalistic punishment theory used as rehabilitative measures as the underlying compatible legal theory guiding the judge's judicial decision by deeming Li Not Criminally Responsible on account of Mental Disorder (NCRMD). This subsection will analyze the Li case and identify where the underlying paternalistic principles affected the case's judicial decisions and how this resulted in negative outcomes for the victims' families and the public. This analysis will also explain the reasoning behind Li's sentence and help us understand why Li's sentence and NCRMD status are perceived as lax and disproportionate by the victims' families and the public.

By analyzing the underlying compatible punishment theory, I will argue that Li's NCRMD status is consistent with Morris' theory. Morris's theory argued for a parental-relationship model where, like a parent interferes in a child's actions for their well-being, the State's criminal justice

[127] Thomas J. Dalby and Lorene Shyba, *Shrunk: Crime and Disorders of the Mind: True Cases by Forensic Psychologists and Psychiatrists* (Calgary, Alberta: Durvile Productions, 2016), 172.
[128] Dalby and Shyba, *Shrunk: Crime and Disorders of the Mind: True Cases by Forensic Psychologists and Psychiatrists,* 172.
[129] Ibid.

system intervenes to promote the offender's well-being. Their punishment as a communicative act will indicate the nature of their wrongdoing by having them (1) appreciate the nature of their actions, (2) feel remorse, (3) reject the disposition to re-offend, and (4) take responsibility for their actions. These steps help the offender appreciate the nature of their wrongdoing and develop morally. This is seen with Li's NCRMD status by having the State, specifically the court system, interfere to help Li seek treatment, allowing him to be rehabilitated and reintegrated into the public once deemed no longer a threat by the Criminal Code Review Board. Upon reviewing the legal theory's compatibility with the case, a concern is prioritizing the offender's treatment without considering the needs of the public and the victims' families.

When Li was arrested, he underwent a court-ordered assessment completed by Dr. Stanley Yaren due to the crime's nature. Additionally, Ontario psychiatrist Dr. Jonathan Rootenberg conducted additional reports and assessments at the request of Li's lawyer, Alan Libman. Dr. Yaren and Rootenberg concluded that Li suffered from a severe mental disorder to the extent that he did not appreciate his wrongdoing.[130] The mental illness distorted his sense of reality, and he believed he was enforcing God's will. Although Li was charged with second-degree murder, this evidence explained that Li acted involuntarily without intent, discrediting the crime's *mens rea*. Based on the evidence provided by the expert psychiatrists, the judge deemed Li NCRMD, specifically because he suffered from an undiagnosed Schizophrenia-Catatonic State. The experts testified that his mental illness influenced his sense of reality: he did not have conscious awareness of his actions when killing McLean and did not realize he had killed an innocent bystander.[131] Instead, he feared that McLean would have killed him based on his paranoia.

[130] Dalby and Shyba, *Shrunk: Crime and Disorders of the Mind: True Cases by Forensic Psychologists and Psychiatrists*, 171.
[131] Ibid., 172-3.

After being found NCRMD, Li remained at a Forensic Assessment unit at the Health Science Centre for a year until he was transferred to the Forensic Unit at Selkirk Mental Health Centre in Manitoba, a provincially run long-stay rehabilitation unit focusing on inpatient psychiatric treatment.[132] Li spent six years at the facility under the supervision of psychiatrist Dr. Stephen Kremer. Near the end of Li's sixth year, Dr. Kremer considered providing his opinion to the Criminal Code Review Board that Li showed signs of improvement, no longer posed a threat to the public, and could safely be reintegrated into the community.[133] Winnipeg's Forensic Services program provided a second opinion by completing a comprehensive multidisciplinary assessment transferring Li to the Forensic Unit at the Health Sciences Centre in Winnipeg. This hospital was a teaching and transitioning hospital that helped individuals like Li better understand their illnesses.[134] The Medical Director of Forensic Services, Dr. Jeffrey Waldman, was Li's psychiatrist. Dr. Waldman, when evaluating Li, observed the following:

> Vince was warm and engaging. The cold stare he'd had around the time of his offence was replaced by a warm smile. He has a way of making people feel relaxed and comfortable just being around him. He has taken advantage of all the opportunities provided to him, working with his treatment team to fully understand his illness and his need for medication. He had demonstrated a clear commitment to his recovery and ensuring that he never becomes ill again. He continues to demonstrate profound remorse for what occurred when he was ill and has used this to motivate himself towards achieving a full recovery. He quickly went from being one of the most notorious offenders in our program to being extremely well-liked and posing essentially no risk to the public.[135]

Dr. Waldman's observation indicates that Li, through his education regarding his mental illness and wrongdoing, has successfully recovered to the extent that he poses no risk to the public. This

[132] Dalby and Shyba, *Shrunk: Crime and Disorders of the Mind: True Cases by Forensic Psychologists and Psychiatrists*, 172.
[133] Ibid., 173
[134] Ibid.
[135] Ibid.

gradually gave Li more freedom during his stay at the facility until he was granted by the Criminal Code Review Board an absolute discharge, allowing him to reintegrate without supervision.

When evaluating Canada's NCRMD sentencing practices in Li's case after the judicial decision, we see Morris's theory as the underlying compatible punishment theory as rehabilitative measures in Li's sentence. In his works, Morris advocated for a parental-relationship model approach where, like a parent interferes in a child's actions for their well-being, the State intervenes to promote the mentally ill offender's well-being. The State's interference communicates to the mentally ill offender that due to their disorder, they must be detained and seek treatment to understand and appreciate the nature of their wrongdoing.

The underlying compatible punishment theory in the judicial decision makes Li's punishment a communicative act by mediating in his efforts to help him understand the full significance of his wrongful conduct and the NCRMD status imposed on him.[136] Interfering with Li's wrongdoing, like a parent who interferes with their child, protects Li from hurting himself and others. This will allow Li, like a child, to learn from his mistakes and gain a sense of personal responsibility.[137] Li's NCRMD status will aid him in developing a sense of limitations in his conduct and appreciate the seriousness of his wrongdoing through treatment.

Using Morris's paternalism as an underlying rehabilitative principle in NCRMD cases shows that Canada's sentencing practices recognize that only those who appreciate their wrongdoing are punished. In contrast, those with particular mental disorders that inhibit their ability to understand or appreciate the nature of their wrongdoing during the crime will not be "punished." Rather, they are detained and treated to help the offender understand their actions. Mentally ill offenders such as Li, being deemed NCRMD, demonstrate that although he committed

[136] Morris, "A Paternalistic Theory of Punishment," 265.
[137] Ibid., 266.

an indictable crime, he is not criminally responsible because of his mental disorder. NCRMD recognizes that mitigating factors affected Li's judgment at the time of the crime, altering his criminal sentence to treatment at a psychiatric facility. Li's NCRMD status recognizes that his mental health must be intervened to maximize his well-being, gain the necessary resources to cope with his mental illness and aid him in reintegration by becoming morally autonomous.

The underlying guiding compatible punishment theory within the judicial decision allows Li to learn from his wrongdoing and aid the development of his moral autonomy to reintegrate into the public by (1) appreciating the nature of his evil actions, (2) feeling remorse, (3) rejecting the disposition to re-offend, and (4) taking responsibility for his actions.[138] The idea of Li learning about his mental illness and how this contributed to his wrongdoing shows that he appreciates the nature of his actions and accepts his punishment by being sent to a psychiatric facility.[139] In treatment, Li reflected on his crime and how it impacted himself, the McLean family and those close to the case. Evaluating the implication of his actions fosters the need for him to stay committed to his treatment out of fear that he will relapse and re-offend. These steps are essential for Li's moral status because he comprehends, as Morris argues, the "evil of his actions."[140] In his observation, Dr. Waldman indicated that Li felt remorseful and guilty, rejecting any disposition to relapse in his treatment. Li's inner reflection subjected him to understanding his guilt, indicating that he is rehabilitated and can be granted an absolute discharge without supervision.

However, although the underlying rehabilitative principle of Morris' paternalism within his judicial decision created a positive outcome for Li, the societal impact of the punishment type creates concerns for those involved in the case, such as the victims' family and the public, while

[138] Morris, "A Paternalistic Theory of Punishment," 265.
[139] Ibid.
[140] Ibid.

also questioning elements of Canada's criminal justice system such as the concept of an absolute discharge. Although Li's doctors and the Criminal Code Review Board believed that he had been rehabilitated and no longer posed a threat to society, the perception of McLean's family and the public is that they did not agree with his release. Former RCMP officer and forensic psychologist Matt Logan argues that Li's absolute discharge is not in the public's interest because there is a likelihood that he will relapse because he cannot receive the 24/7 care he once received in the treatment facilities.[141] Although Li lived in a group and independent living centre, he had supervision, counselling, medication checks and doctors monitoring his progress. Logan argues that although Li may have progressed well in a structured environment, an absolute discharge could mean Li will not have the ability to access mental health resources. Overall, Logan asserts that the public interest needs to be prioritized, and allowing Li to reintegrate without supervision does not prioritize public safety.

Furthermore, McLean's family, specifically his mother Carol de Delley, argued the same sentiments. In an interview with *CBC News*, she told reporters that "A killer is a killer, if you take a life, you forfeit your freedom for the rest of your life" and that "[t]he only thing that should change with a mentally ill killer is that they should serve their sentence in a place where they can also receive treatment."[142] de Delley believes that Li's absolute discharge does not seem proportionate to the crime that was committed against her son. She implicitly argues for a retributive sentence proportional to the crime's severity. Additionally, along with the McLean family, the Greyhound bus driver, the passengers, and the witnesses are upset about this outcome because they suffer long-term effects such as PTSD. Chris Alguire, a truck driver who stopped to

[141] "Vince Li, Man who Beheaded Passenger on Greyhound Bus, Given Absolute Discharge," *CBC News*, February 10, 2017, https://www.cbc.ca/news/canada/manitoba/vince-li-discharge-1.3977278.
[142] "Mother of Tim McLean Ends Petition to Change Law," *CBC News*, January 20, 2014, https://www.cbc.ca/news/canada/manitoba/mother-of-tim-mclean-ends-petition-to-change-law-1.2502104.

aid the passengers, explained that the absolute discharge grants Li freedom that he does not have because he suffers from PTSD, rage and alcoholism. He explained in an interview with *CBC News* that "he can't understand why Li was given an absolute discharge and given the freedom to repeat his actions."[143] The public and the McLean family feel they did not receive the same support Li received and that his sentence is disproportionate to the crime's severity. The underlying guiding principle of Morris' paternalism as rehabilitative measures in the judicial decision allowed Li to receive the necessary treatment to reintegrate into society without providing the same support to the public and the McLean family.

Li's case has led to questions regarding whether someone who has committed an indictable offence should be allowed to reintegrate into the public without medical supervision. Reintegration is part of rehabilitation under Morris' theory. Thus, it is incorporated when used as a guiding legal, philosophical principle in judicial decisions when a mentally ill offender, like Li, is sentenced, as it is an important aspect for these individuals to receive the help they need. However, it is unclear whether unsupervised reintegration in Li's case would suit the purposes of proportionality. From a legal perspective, the absolute discharge is correct because the Criminal Code Review Board must release individuals such as Li who are no longer a threat to the public. During his evaluation, the doctors explained that he had shown improvement and understood he needed to take his medication and follow up with his doctors. However, the checks and balances that once legally existed by going through the gradual treatment process under constant supervision are no longer available because of the absolute discharge. There is no legal recourse or procedure to intervene if he refuses his medication or stops seeing his psychiatrist.

[143] Karen Pauls, "10 Years After Greyhound Beheading, Family of Victim and Bystanders Still Suffering," *CBC News,* July 30, 2018, https://www.cbc.ca/news/canada/manitoba/greyhound-beheading-10th-anniversary-1.4760074.

Analyzing this case and the underlying compatible punishment theory is important because it shows how it guides judicial decisions for mentally ill offenders deemed NCRMD in Canada's sentencing practices. Morris's theory prioritizes mentally ill offenders' treatment by providing the necessary resources to help their well-being and reintegrate them into society. However, the public and the victims' families demanded proportional justice to the crime's severity because they were concerned that the mentally ill offender would re-offend without supervised treatment. Therefore, it could be argued that a traditional punishment theory that does not focus on the offender's well-being should guide Canada's sentencing practices for mentally ill offenders deemed NCRMD, such as Kant's strict retribution or Bentham's utilitarianism. However, a concern with Kant's strict retribution is that instead of Canada's criminal justice system interfering to help the mentally ill offender, the underlying theory's guidance would exclude external mitigating factors that explain why the offender committed the crime, such as mental illness leading to a vengeful sentence. On the other hand, Bentham's utilitarian theory would instrumentalize the mentally ill offender by using their sentence to deter future criminal behaviour, whether by the mentally ill offender or potential offenders for social utility. Therefore, there needs to be a balance between prioritizing the mentally ill offender's treatment and meeting the public and victims' families' demands for justice and concern for public safety during the reintegration process.

Chapter Three: An Alternative Kantian Punishment Theory for Canada's Sentencing Practices: A Victim-Centred Approach to Punishment

In the previous Chapter, I applied the theoretical analysis of Chapter One to Canada's legal practice by drawing on influential Canadian court cases such as *R. v. Bernardo* (including *R. v. Homolka*), *R. v. Pickton*, and *R. v. Li* to explore the societal impact of the different punishment types in judicial decisions, that is, how the public and the victims' families perceive the justice of the sentencing. Through this analysis, I determined that by identifying the underlying punishment theories, we can determine why the victims' families and the public feel that the sentence is disproportionate and how the sentence would have to be to avoid this in future. Specifically, an issue is that by having three punishment theories guiding Canada's sentencing practices, proportionality in sentencing is not consistently emphasized due to the regulatory function of the

punishment theory (what governs the offender's punishment), such as deterrence for social utility or paternalism as a form of rehabilitation. Additionally, although strict retribution ensures proportionality, it cannot justly guide cases where the offender is deemed mentally ill since it does not include external social factors like mental illness that must be recognized in the offender's sentence. Thus, in this Chapter, I propose an alternative punishment theory emphasizing proportionality through retribution (not strict interpretation) with space for deterrence (without instrumentalizing the offender) and rehabilitation (not paternalistic) to evaluate proportionality in sentencing.

3.1 An Alternative Kantian Punishment Theory

In this subsection, I propose my alternative punishment theory based on a reinterpretation of Kant's retributive punishment theory that can be a lens through which we can evaluate proportionality in sentencing, providing a victim-centred approach to punishment. Kant's punishment theory is frequently regarded as strictly retributivist. Much of Kant's language in General Remark E of the *Doctrine of Right* supports this interpretation, as Chapter One mentions. The common perception of Kant's punishment theory is that his notion of punishment is inflexible, as offenders must be punished for their crimes equivalent to the losses they inflicted on their victims. The perception of his beliefs include that all offenders found guilty should be punished regardless of deterrent or rehabilitative value. The offender's punishment must be proportional to the crime's severity based on *ius talionis,* as their punishment must equal the amount and degree of their crime.

However, recent scholarship indicates that Kant argues for a hybrid punishment theory that combines retribution and deterrence, indicating that he is not arguing for revenge.[144] Thomas E. Hill Jr. explains there are two types of retributivists: "*deep retributivists"* and retributivists who

[144] Several scholars have argued this idea in recent years. See B. Sharon Byrd, "Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution," *Law and Philosophy* 8. no. 2 (1989): 151-200. https://doi.org/10.1007/BF00160010.; Thomas E. Hill, Jr., "Kant on Punishment: A Coherent Mix of Deterrence and Retribution?" in Jahrbuch fur Recht und Ethik: *Annual Review of Law and Ethics* 5 (1997): 291-314; Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy*. (Cambridge, Mass: Harvard University Press, 2009). Another interpretation includes Jean-Christophe Merle's "A Kantian Critique of Kant's Theory of Punishment" *Law and Philosophy* 19, no. 3 (2000): 311–38.

advocate for "*mixed theories*."[145] *Deep retributivists* argue for the common interpretation of Kant's work by arguing that the offender deserves to suffer for their offence in proportion to their crime morally. In contrast, retributivists who advocate for *mixed theories,* such as Hill Jr., argue that the "retributive policies are justified by principles of a different kind."[146] I interpret "retributive policies" as principles that guide the offender's punishment, such as all offenders deemed guilty will be punished, the offender's punishment should "fit" the crime in terms of the degree and amount of punishment, and the punishment's severity should be proportionate to the crime. In a mixed theory, several retributive principles regarding who and how they will be punished are invoked and combined with utilitarian notions, such as deterrence. Mixed theories scholars, such as Hill Jr., explain that Kant's retributive principles are not moral requirements as to why an offender deserves punishment. Instead, they are features of punishment that require justification through principles of a "different kind," such as deterrence.[147] These deterrent features explain why these retributive principles will be implemented in the offender's punishment.

Upon reviewing General Remark E of the *Doctrine of Right* and Kantian scholarship, I agree that Kant is not arguing for strict retributivism but a hybrid punishment theory that includes retribution and deterrence. The deterrent features of Kant's theory explain why these retributive principles will be implemented in the offender's punishment. This is viewed in the State's right to punish offenders by upholding a justice system that deters potential offenders and enforces the State's security. However, I will also argue that rehabilitation is included in this hybrid punishment theory along with principles of deterrence and retribution. Special considerations or social factors, which Kant calls "extraneous considerations," indicate that he is not a strict retributivist allowing

[145] Thomas E. Hill, "Kant on Wrongdoing, Desert, and Punishment." *Law and Philosophy* 18, (1999): 412 https://doi.org/10.1023/A:1006321822276.
[146] Hill, "Kant on Wrongdoing, Desert, and Punishment,"412.
[147] Ibid.

for rehabilitation. This is demonstrated by his example of an individual's honour being disparaged. In this scenario, Kant does not enforce strict retributivist punishment, although a murder has occurred, indicating mitigating factors that allow the offender to reintegrate into society as a citizen.

Therefore, my Kantian theory is divided into two parts: the ideal theory and the applicable theory. The ideal theory will implement punishment foregrounded on retribution and will be executed to uphold the initial threat of the law's promulgation as it did not deter the offender. This specific aspect of the theory would be mainly used when sentencing an offender, specifically those aware of their actions. In contrast, the applicable theory still emphasizes deterrence in the law's threat and proportionality through retribution in the offender's punishment. However, I argue that it will take into account empirical considerations, specifically social factors like mental illness, that would explain why the offender committed the crime. This aspect of the theory will help rehabilitate mentally ill offenders but under the condition that their rehabilitation will restore security and the public's faith in justice. This aspect of my theory can be used to guide mentally ill offenders' sentencing who are deemed NCRMD. My hope is that my alternative punishment theory can be a lens through which we can evaluate proportionality in sentencing, providing a victim-centred approach to punishment.

Sharon Byrd first reinterpreted Kant's punishment theory by arguing that he is not a strict retributivist, contrary to popular perceptions. Byrd, in her 1989 article "Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution", along with her 2010 commentary on Kant's *Doctrine of Right* with Joachim Hruschka, considers the theoretical and historical connections of Gottfried Achenwall's influence on Kant.[148] These works argue that Kant

[148] Achenwall's punishment theory describes the distinction between the punishment's threat as a form of deterrence and the punishment's execution as a form of retribution. These factors are from the State's authority because the

is not discussing one but rather two punishment principles: deterrence and retribution. According to Byrd, Kant's hybrid theory reflects Achenwall's because he emphasizes the punishment's *threat* through deterrence by having laws promulgated to the public and the punishment's *execution* on the offender through retribution when the law does not deter them from criminal activity. The State has the right and authority to implement the threat of the offender's punishment through fear and coercive force, deterring potential offenders. When the offender is not deterred, the State will execute the offender's punishment through retributive principles. Byrd's reinterpretation of Kant's theory has influenced many other retributive mixed theorists, such as Hill Jr. and Arthur Ripstein, to reinterpret his theory. Still, these mixed theories are based on Byrd's idea that the State uses deterrence to justify retributive principles to punish the offenders.

For instance, Hill Jr. argues that an offender's punishment must be for external acts deemed intentional and assessed by a public law court. He explains the law itself cannot assess the offender's "inner" moral worth because that would require additional information about the offender's motive, which is difficult to determine with confidence.[149] I interpret that Hill Jr. argues that the punishment cannot make the offender suffer based on what they morally deserve in relation to their crime. Hence, he argues that punishment is based on "external acts." Like Byrd and Ripstein, he explains that the State's authority holds coercive powers where the right to punish is grounded on the authority to "hinder hindrances to freedom."[150] Kant's idea of "hinder hindrances

sovereign enforces the punishment's threat for the law's violation through fear. The use of fear and the punishment's threat ensures that the citizens are deterred from committing prohibited acts that violate the state's laws. However, Achenwall asserts that if fear is insufficient, the punishment's threat will be executed through retributive principles to ensure that the punishment will be proportionate to the offender's unlawful act. Gottfried Achenwall and Pauline Kleingeld, *Natural Law: A Translation of the Textbook for Kant's Lectures on Legal and Political Philosophy* (London: Bloomsbury Academic, 2020).

[149] Hill, "Kant on Wrongdoing, Desert, and Punishment," 429.

[150] Ibid.; See also Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant,* 387; Byrd, "Deterrence in its Threat, Retribution in its Execution,"169-173; and Ripstein, *Force and Freedom*, 314-318.

to freedom" is based on the universal principle of justice, which determines that every individual in the State has a right to freedom and freedom from the constraints of others.

According to Kant, the State has a duty and right to honour this freedom by protecting their citizens' freedom through coercion, which hinders those who interfere with the freedom of others. With this idea, I argue that for this to happen, the State threatens their citizens with legal sanctions for violating and transgressing the law. These threats intend to provide a disincentive to potential offenders who feel inclined to interfere with the freedom of others. Considering the State's threats through the law's promulgation and enforcement of these threats through the offender's punishment, rational individuals, possibly even those who are self-interested and inclined to interfere with the freedom of others, will be deterred. The State's threats are intended to protect the freedom of others to ensure rightful relations among the State's citizens. The State's threats would appear useless if not implemented, especially if the intended use of the threats is to deter potential offenders. Thus, the State's threats must be implemented to deter potential offenders.

When analyzing these ideas presented by Byrd, Hill Jr, Ripstein and other retributive mixed theorists regarding how deterrence is used in Kant's theory, it is perceived that deterrence justifies the State's practice and retributive implementation of the offender's punishment. This is an important observation, and I agree with this notion. Hence, I include this notion in my reinterpretation of Kant's punishment theory and will now describe in detail how this notion is included in my theory of punishment in the following paragraphs.

I argue that Kant's theory is premised on security through State coercion, which means preventive and deterrent steps must be taken before a crime occurs through promulgating laws and criminal sentences. Deterrence plays an integral role in the justification of punishment and must be compatible with retributive principles implemented by the State and legal officials, such as

judges, lawyers, juries, and legislators within the justice system. These retributive principles, or what Hill Jr. called "retributive policies," are those that I mentioned and interpreted above that guide the offender's punishment, such as all offenders deemed guilty will be punished, the offender's punishment should "fit" the crime in terms of the degree and amount of punishment, and the punishment's severity should be proportionate to the crime. These retributive practices act as *rules* to guide the execution of the State's threat of punishment.

When the State implements an offender's punishment, it is justified because the punishment's threat did not deter the offender. The offender violated the law and interfered with the freedom of others. Due to this, they committed a crime and deserved to be punished. The offender is not punished to deter themselves from criminal behaviour or to be used as an example to deter others from potential criminal activity, as this will instrumentalize them as mere means. In Kant's account, deterrence through the law's promulgation excludes instrumentalizing the offender for social utility (as seen with *R. v. Bernardo* (including *R. v. Homolka*)). Deterrence, as a preventive measure instead of exemplary, allows the offender to be properly and proportionally sentenced, preventing them from being used as an example or having their punishment staged to appease the public. The law's promulgation provides security instead of leading the public to feel a false sense of security by providing a staged disproportionate sentence.

Instead, the offender's punishment is implemented to uphold the State's initial legitimate threat toward them to hinder their criminal activity since they interfered with their victim's freedom. Executing the punishment's threat on the offender re-secures the victim's freedom and the freedom of everyone, including the offender, because imposing the punishment shows that the threat will be executed. Upholding the offender's punishment secures the freedom of all by hindering hindrances to freedom and affirming the State's security. The punishment's threat allows

the offender to avoid criminal activity, therefore avoiding punishment. Since the offender committed a crime, the offender, based on their reason, hindered the freedom of another, resulting in their freedom being hindered. The offender cannot argue that they have been unjustly punished because they are not being instrumentalized for the sake of others. The offender's punishment will be guided by retributive principles, which acts are rules when punishing the offender such as all offenders deemed guilty will be punished, the offender's punishment should "fit" the crime in terms of the degree and amount of punishment, and the punishment's severity should be proportionate to the crime's severity.

Retribution (*ius talionis*) is the regulatory function within an offender's punishment because it determines the punishment's type and degree, ensuring reciprocity and proportionality within sentencing. Retribution instead of deterrence as the regulatory function ensures that the offender is not instrumentalized for the sake of social utility, as seen in *R. v. Bernardo* (including *R. v. Homolka*). Instead, by having retribution regulate the offender's punishment, the following will be prevented: 1) The offender's punishment is not instrumentalized to deter themselves from future criminal behaviour or others from criminal activity. This will prevent the emphasis on one offender's punishment (such as Bernardo's) over the possibility of another (such as Homolka's), although both were involved in the crime. Instrumentalizing an offender's punishment over the other creates a trade-off between proportional justice for appeasing the public and 2) that no staged punishment of a lax and disproportionate sentence would be used to appease the public and the victims' families into a false sense of security, such as through a plea bargain. The law of retribution is applied within the offender's sentencing through the courts to ensure proportionality in the punishment's quality and quantity. I argue that the State's security is reinforced by upholding the State's initial legitimate threat toward the offender to hinder their criminal activity and

inference against their victim's freedom. Executing the punishment's threat on the offender shows that the threat will be executed, securing the freedom of all by hindering hindrances to freedom. Therefore, this provides security and justice to the public and the victims' families by executing a punishment proportional to the crime's severity based on retributive principles.

Reviewing commonly described passages that associate Kant as a strict retributivist provides clarity that he offers a mixed theory. The passages I will describe below build on Kant's justification of State coercion through threats of punishment to promote deterrence, which justifies the retributive principles in the offender's punishment. These passages have been described in Chapter One with the common interpretation of Kant's punishment theory. However, I will now describe them assuming Kant offers a mixed punishment theory. The first passage has been commonly cited to show that Kant is a strict retributivist in enforcing the death penalty:

> Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.[151]

The common perception of this passage is that Kant is applying a very strict interpretation of his retributive punishment theory by explaining that all those deemed guilty must be punished based on *ius talionis*. But as Hill Jr. explains, this passage reaffirms that the State and legal officials such as juries, judges, lawyers and legislators within the justice system are responsible for enforcing the law and must provide sentences without considering if the sentence will deter the offender or others.[152] I agree with Hill Jr. because revisiting Kant's idea of "hindering hindrances to freedom" justifies that the punishment's threat must be executed on the offender to uphold the

[151] Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant,* 474.
[152] Hill, "Kant on Wrongdoing, Desert, and Punishment,"433.

freedom of all. The punishment's threat will be executed using retributive principles of *ius talionis* to authorize the punishment of guilty offenders. Although "blood guilt" appears controversial by promoting Kant's notion of the death penalty, he argues that those who release the offender without punishment commit a wrong against the State. The State aims to "hinder hindrances to freedom" by first threatening punishment to deter individuals from criminal activity and executing the punishment if the offender is not deterred. If the State and its citizens fail to execute the offender's punishment, i.e. execution in this particular instance, the State and its citizens fail to ensure the freedom of all. The citizens who release the offender do not hinder them in interfering with the freedom of others, making them accomplices after the fact in the offender's crime. They would possess some of the offender's guilt by failing to prevent hindrances to freedom.

The second commonly cited passage is the following:

> Punishment … can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only because he has committed a crime…. He must previously have been found punishable before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens. The law of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaimonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantage it promises, in accordance with the Pharisaical saying, "It is better for one man to die than for an entire people to perish."[153]

Reviewing this passage, I interpret that Kant outlines what I mentioned before, the retributive principles or what Hill Jr. classified as the retributive "policies" guide an offender's punishment such as all offenders deemed guilty will be punished, the offender's punishment should "fit" the crime in terms of the degree and amount of punishment, and the punishment's severity should be proportionate to the crime's severity. These principles would guide juries, judges, lawyers and legislators within the justice system when imposing penalties on the offender. These legal officials

[153] Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant*, 473.

within the justice system must impose sentences outlined by the law without deviating from these retributive principles. These legal officials would not impose a sentence that would instrumentalize the offender for the greater good, such as using the offender for medical experiments, as I outlined in Chapter One. The offender must be deemed "punishable" by the court of law and found guilty of their criminal activity before any consideration of reform or deterrence of others can be considered. This idea of the offender potentially being reformed and rehabilitated is a very important observation. I will expand on this idea in the next passage.

In the third commonly cited passage, Kant argues the following:

> Accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself. But only the law of retribution (*ius talionis*) - it being understood, of course, that this is applied by a court (not by your private judgment) - can specify definitely the quality and the quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them.[154]

The initial perception of this passage is that Kant strictly focuses on ensuring proportionality and reciprocity within the offender's punishment. Specifically, the same kind and amount of punishment on the offender, demonstrating a vengeful application of punishment by ensuring what is inflicted on the victim is inflicted on the offender. However, this is another instance of Kant explaining how the retributive principles guide an offender's sentence. The retributive principles keep the offender's sentence reciprocal and proportional since it does not consider principles such as deterrence or rehabilitation within the sentence ensuring "pure and strict justice."

For Kant, "pure and strict justice" can only be administered through retribution because it ensures proportionality when executing the offender's punishment. Deterrence or rehabilitation as the regulatory function in the offender's sentence will not ensure proportionality since retributive

[154] Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant*, 473.

principles are not executed in the offender's punishment. These principles will create a punishment that will not pass Kant's theory, leading to a lax and disproportionate sentence. Principles of deterrence or rehabilitation are classified as "fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them." Thus, the conclusion is strict justice is purely retributivist, as all other principles are impure to justice. For example, if deterrence guided the offender's sentencing by utilitarian standards, the offender would be instrumentalized. Kant would reject this idea of punishment because utilitarian principles are unsuited for "pure and strict justice" since the offender is used as a mere means and an example to deter others. The offender's punishment does not conform to retributive principles of proportionality. The principles of deterrence and rehabilitation are unsuited and impure and, thus, are ruled out when sentencing an offender. Retribution is the only principle as the regulatory function when sentencing and executing the offender's punishment to ensure proportionality.

Mixed theorists such as Byrd, Hill Jr., and Ripstein focus on how deterrence is a factor in Kant's theory, specifically that promulgating a specific law should deter the offender. The fact that deterrence is an element makes him not a strict retributivist. If the offender is not deterred, the offender's sentence will be executed through the retributive principles I have mentioned. Although deterrence is considered in their interpretation of Kant's theory, deterrence is not guiding the execution of the offender's punishment. Thus, their theories ensure "pure and strict justice" by Kant's standards since retributive principles of proportionality sentence the offender. As stated, I agree that deterrence is part of Kant's theory through the law's promulgation to justify retributive principles in the offender's punishment, ensuring "pure and strict justice."

However, I would like to propose another aspect of Kant's punishment theory. Along with the idea that deterrence is seen in the punishment's threat to justify the use of retributive principles

in the offender's punishment, I believe that Kant, nevertheless, allows for "extraneous considerations" to be taken into account, meaning that we are no longer discussing "pure and strict justice" but moving into the domain of empirical considerations. The shift from "pure and strict justice" to the domain of empirical considerations occurs with particular instances where external social factors impact a case, thus impacting the offender's sentence. Retributive principles of proportionality are still part of the offender's punishment. Still, Kant is making space for empirical considerations, specifically social factors that will force the offender's punishment not to be equivalent to "pure and strict justice." This would mean the offender would not receive a punishment equivalent to their criminal actions. For instance, if the offender murdered their victim, they will not be sentenced to death. These "extraneous considerations" are social factors which mitigate the offender's sentence. These mitigating social factors sentence the offender differently than strict retributivist means, leading to a lesser but moderately proportional sentence to the crime's severity.

I interpret that Kant provides two punishment theories: an ideal theory and an applicable theory (which could be perceived as a non-ideal theory). The ideal theory would be foregrounded on retribution or "pure and strict justice," where the offender receives a proportional punishment in terms of the quantity and quality of the crime inflicted on their victim. The punishment will be executed to uphold the initial threat of the law's promulgation as it did not deter the offender. I argue that the ideal theory would be mainly used when sentencing an offender, specifically those aware of their actions. In contrast, the applicable theory still emphasizes deterrence in the law's threat and proportionality through retribution in the offender's punishment. However, I argue that it will take into account these empirical considerations, specifically social factors that would explain why the offender committed the crime. In this version of the theory, Kant does not accept

"unsuited principles" in the execution of the offender's punishment since retribution is the regulatory function of the offender's punishment. Kant emphasizes proportionality but makes space for applying the theory to account for social factors that explain the offender's actions and reasoning during the crime.

Kant's recognition of social factors allows for a fairer form of proportionality due to the case's circumstances. These social factors act as mitigating factors based on the public perception of the particular element that influenced the case. Retribution concerns what is internal to the punishment, such as the crime itself, while mitigation comes from extraneous considerations, which are external social factors that led to the crime, such as mental illness. I argue that the applicable theory will be used when social factors such as mental illness must be considered in the offender's sentence, deeming them NCRMD. For instance, these will be cases where the offender had an undiagnosed mental illness at the time of the crime, resulting in them not appreciating the nature of their wrongdoing. These considerations allow the offender to be rehabilitated and reintegrated into the public. Kant provides the social factor of honour in his examples of a soldier who committed murder and a mother who committed infanticide.[155]

As mentioned in Chapter One, Kant argues that the law's violation, such as murder, deems the offender unfit to be a citizen, losing their civil personality, which is their citizen status. However, Kant's retributive stance regarding murder and citizen status is ambiguous. Although an offender commits a crime, he does not specify the duration the offender loses their status or if it will be restored. I argue that Kant's ambiguity is intentional. Although Kant asserts that offenders must be punished, he explains that their punishment can aid them once convicted, indicating rehabilitation and the opportunity for reintegration.[156] I argue that once the offender has completed

[155] Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant*, 476-77.
[156] Ibid., 473.

their sentence, their citizen status is reinstated based on these "extraneous considerations," which are social factors. These social factors mitigate their sentence, allowing them to be rehabilitated to reintegrate into society.

Although Kant does not specify an offender's rehabilitation, he does not exclude the option. Kant acknowledging social factors and recognizing that they play a role in the offender's crime shows that he recognizes that "pure and strict justice" cannot be implemented to its fullest extent. These social factors mitigate the offender's sentence, allowing them to reintegrate due to a reduced sentence. Kant provides two examples where he argues against capital punishment, although a murder has occurred: two soldiers in a duel and a mother who has committed infanticide.

> There are, however, two crimes deserving of death, with regard to which it still remains doubtful whether legislation is also authorized to impose the death penalty. The feeling of honor leads to both, in one case *the honor of one's sex*, in the other *military honor*, and indeed true honor, which is incumbent as duty on each of these two classes of people. The one crime is a *mother's murder of her child* (*infanticidium maternale*); the other is *murdering a fellow soldier* (*commilitonicidium*) in a *duel*.[157]

Kant specifies that although these two crimes are perceived to deserve capital punishment, he takes into account "extraneous considerations," specifically the social factor of honour, to mitigate the offender's punishment to a lesser but proportional sentence to reintegrate them as a citizen. The idea of honour, in the first instance, military honour and the second, the honour of one's sex, must be maintained due to external social pressures. In the first instance, a junior officer murdered his fellow soldier, while a mother murdered her child in the second.[158] The social pressure of preserving their honour forced the junior officer and the mother to commit murder. When evaluating these examples, Kant considers how the association between honour and external social pressures affects these individuals.

[157] Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant,* 476.
[158] Ibid., 477.

In the first instance, Kant explains that a junior officer of a higher rank was insulted by a lower-ranking soldier, leading them to a duel.[159] The junior officer is constrained by public perception to preserve his honour. If the junior officer did not participate in the duel, he would be perceived with shame for not conforming to society's view of an ideal brave man. The social factor of military honour leads the junior officer to engage in the duel, murdering his comrade. In the second instance, Kant explains that a mother has given birth to her child outside of marriage. Due to this, the woman is treated with shame because pregnancy outside of wedlock undermines the proper image and reputation of a chaste woman.[160] Like the junior officer, the mother must preserve her honour and conform to gender expectations to avoid public scrutiny. The mother's fear of scrutiny forces her to commit infanticide to conceal her pregnancy. The external social factor of honour explains why both individuals commit murder.

In both instances, the strict retributive principle of proportionality should act as the regulatory function when sentencing the junior officer and the mother to the exact letter of the law. This would mean that because they committed murder, they would be sentenced to death. Although this is the assumption, Kant questions whether capital punishment should be implemented on the junior officer and the mother when assessing these two instances. He realizes the external social factor of preserving their honour explains why the crime was committed. Kant shows clemency and strays from his strict retributivist stance regarding murder. Yet, his discussion of possible punishments for these crimes indicates that their actions are still punishable and that they would lose their citizen status and civil personality. However, once they are deemed punishable by a court or go through the court's formal process of evaluating the offender based on the social factor, the State will take into account "extraneous considerations" to mitigate their sentence. These

[159] Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant*, 477.
[160] Ibid.

"extraneous considerations" will help reduce their sentence from capital punishment but with an equally fitting sentence that remains proportional to the crime's severity. This will allow them to have their citizen status and civil personality restored to reintegrate as rehabilitated citizens.

Kant's recognition of honour as a social factor allows for a fairer form of proportionality due to the case's circumstances. Recognizing these social factors shifts the perception of punishment from "pure and strict justice" to the domain of empirical considerations. Although retribution is in the punishment execution, these social factors mitigate their punishment based on the public perception of the particular element, which, in this case, is the social factor of honour. Kant recognizes the weight of social factors on an offender's actions and reasoning in their crime. Thus, this means that additional social factors, such as mental illness, are recognized and will mitigate the offender's sentence. Kant is making space for applying the theory that accounts for a mentally ill offender who is not equally accountable for their actions compared to one who appreciates the nature of their wrongdoing during the crime. The idea of recognizing social factors leads to Kant's idea of imputation.

A fundamental principle of Kant's imputation is that to do something deemed morally wrong, an individual's rationality and freedom will be questioned. Hill Jr. explains that necessary elements such as "memory, foresight, reflection, and self-control" are evaluated when determining the individual's role in the imputed action.[161] Taking into account "extraneous considerations," these social factors show that Kant is looking at how these factors impact an offender's actions during the crime and the resulting punishment. A traditional idea of Kant's imputation focused on why an offender "deserves" punishment. In Chapter One, I discussed that imputation recognizes an offender's free will and autonomy by enforcing punishment because they committed a crime,

[161] Hill, "Kant on Wrongdoing, Desert, and Punishment,"415.

thus making them deserving of punishment. Therefore, imputation is the judgment of an individual's legally relevant actions to see if their conduct was a “free action” or voluntary at the time of the offence from the law’s perspective.

Conversely, the contrary can be true: if the offender's actions were involuntary at the time of the crime, they do not “deserve” punishment to the exact proportionality to the crime’s severity as one who appreciates their actions. In this interpretation of imputation, by shifting from “pure and strict justice” to empirical considerations, imputation determines if the offender acted voluntarily and appreciated the nature of their wrongdoing during the crime. The aspect of imputation analyzes if the social factor affects the offender’s “memory, foresight, reflection, and self-control,” determining if the offender acted voluntarily. This creates a space to determine mentally ill offenders who are not equally accountable for their actions compared to those who are aware and appreciate the nature of their wrongdoing during the crime.

My alternative interpretation of Kant’s punishment theory recognizes that external social factors, such as mental illness, will lead the offender to receive a different sentence than offenders who are in control of their actions. The theory recognizes that when a mentally ill offender is deemed NCRMD, the court will impose a sentence, which is treatment at a facility, allowing them to gain the necessary resources to help them rehabilitate and reintegrate into society. The courts will interfere in the mentally ill offender’s well-being to ensure they gain the resources necessary to help them become productive citizens to reintegrate, such as court-ordered assessment for them to receive psychiatric treatment under the supervision of the Criminal Code Review Board.

The treatment process allows the mentally ill offender to gain moral awareness and appreciate the nature of their wrongdoing. For instance, Hill Jr. proposes an “intrinsic liability

thesis" where individuals acknowledge and recognize what they have done is wrong.[162] In this case, I argue that the mentally ill offender will learn how their actions affect others and why those affected hold them liable. The courts do not hold them legally liable because they are deemed NCRMD. The mentally ill offender did not appreciate the nature of their wrongdoing at the time of the crime due to their undiagnosed mental disorder, sentencing the offender as NCRMD. However, the public and the victims' families hold them liable because they have committed a wrong against them by endangering the public. With this, it is important to have the mentally ill offender appreciate their wrongdoing through the treatment process and gain resources to help with their illness. The mentally ill offender learning about their mental illness and why they are held liable by the public and the victims' families is beneficial as it leads to rehabilitation and restored relations. It is perceived as a sign that the mentally ill offender recognizes their wrongdoing and develops morally.

What I have outlined above is very similar to Morris's theory as I am focusing on the moral development and well-being of the offender by ensuring they appreciate their wrongdoing and are provided with resources needed to be rehabilitated and reintegrated into society. However, this is where my theory departs from Morris'. I am not taking a paternalistic approach by strictly focusing on the offender, like a parent-child relationship. Rather, they are being rehabilitated to restore the State's security and ensure the public and the victims' families feel safe. His theory's guidance emphasizes the offender's well-being over the concerns of the public and the victims' families regarding the offender's reintegration. There must be a balance between providing the offender with the necessary resources and ensuring that the public and the victims' families feel safe and receive justice. Although my reinterpretation of Kant's theory recognizes social factors when

[162] Hill, "Kant on Wrongdoing, Desert, and Punishment," 424.

shifting from "pure and strict justice" to the domain of empirical consideration, retribution regulates the execution of the offender's sentence.

Therefore, proportionality is the main emphasis when sentencing the mentally ill offender. Although the mentally ill offender will be released once rehabilitated, the public's security and the victims' families are the main priority in my theory. Although the mentally ill offender will receive the treatment needed for rehabilitation, the ultimate goal is restoring security and the public's faith in justice.[163] The mentally ill offender's actions harmed the security of the State. Their moral development helps them reintegrate into society by restoring their place through treatment that helps them appreciate the nature of their wrongdoing. However, since the State's security is the priority, additional steps will be included in their treatment process to provide public security, such as longer treatment times and additional steps in the treatment process.

Since retribution is the regulatory function in the mentally ill offender's punishment, when the Criminal Code Review Board allows the offender to be granted an absolute discharge, I argue that before this occurs, a conditional discharge would be proportional based on the case's circumstances regarding the offender's medical history and the public's well-being. A conditional discharge will enforce rules to address the mentally ill offender's conduct by ensuring that they meet these conditions for a specified time before they are granted an absolute discharge. If the mentally ill offender fails to meet these conditions, they will re-enter treatment, specifically the last step before they enter the conditional discharge treatment phase. A conditional discharge will allow a mentally ill offender like Li to be released under supervision to ensure they follow their doctor's medical advice and maintain their treatment plan by regularly reporting to a psychiatrist.

[163] Jean-Christophe Merle offers an argument that rehabilitation for the offender relies on if their rehabilitation will not create further tension in restoring the citizens' security. See "A Kantian Critique of Kant's Theory of Punishment," *Law and Philosophy* 19 (2000): 311-338.

The conditional discharge is another step for Li, and mentally ill offenders deemed NCRMD to transition to living alone without supervision before an absolute discharge while meeting specific conditions.

This additional step helps the victims' families and the public feel comfortable that measures are in place to prevent the mentally ill offender from re-offending. The gradual reintegration allows Li to reintegrate with those who do not have a mental disorder, gain a sense of independence, and help them establish a routine with their therapy, counselling and medication checks. This allows reintegration while being monitored. Once the conditional discharge is completed, they receive an absolute discharge with the necessary tools since the Criminal Code Review Board must release individuals who are no longer a threat to the public. The added steps help the victims' families and the public feel more comfortable with the mentally ill offender being released since the sentence was extended. Morris's theory does not provide such an option because its guidance strictly focuses on the offender's well-being and does not consider the public's concerns or the victims' families.

However, in my reinterpretation, the goal is to balance the offender's and the public's needs. I aim to ensure proportionality by restoring the State's security affected by crime and helping the offender gain treatment to reintegrate them into the public. Lengthening their treatment will help the public and the victims' families feel that adequate time has passed before their reintegration, lessening anxiety if the mentally ill offender would re-offend. There must be a balance between providing the offender with the necessary resources and ensuring that the public and the victim's families feel safe and receive justice.

Conclusion

To conclude, I will recap my thesis's argument. I explained that there had been controversy surrounding high-profile Canadian court cases due to the victims' families and the public asserting that justice was not delivered in the offender's sentencing since they received a lighter sentence. In response, I reviewed high-profile cases such as *R. v. Bernardo* (including *R. v. Homolka*), *R. v. Pickton* and *R. v. Li* as case examples to see why the public and the victims' families perceive these offenders' sentencing as lax and disproportionate. I argued that the underlying compatible punishment theory must be discovered to understand and determine why this is their perception. I proposed that reading these cases through the lens of philosophical punishment theories will (1) determine the underlying compatible legal theory guiding these sentences that are perceived as lax and disproportionate, (2) explain the reasoning behind these sentences, and (3) help us understand why the public and the victims' families perceive these sentences as lax and disproportionate to crime's severity.

With this, I argued that Canada's criminal justice system could be understood as incorporating various punishment theories for criminal offender sentencing, such as Immanuel Kant's strict retributive punishment theory, Jeremy Bentham's utilitarian punishment theory, and Herbert Morris' paternalistic punishment theory. The underlying compatible punishment theories determined where the judicial decision was perceived as flawed by the public and the victims' families and how to understand the effect of these theories in future judicial decisions. This is accomplished by tracing and extrapolating evidence of the punishment theory within the case.

Thus, I proposed an alternative Kantian punishment theory that foregrounded retribution in the offender's sentencing for a proportionate punishment to the crime's severity. Although retribution regulates the offender's punishment, additional factors, such as deterrence (without instrumentalizing the offender for social utility) and rehabilitation (not paternalistic), are

considered. My alternative Kantian punishment theory is divided into two aspects: the ideal theory and the applicable theory. The ideal theory will implement punishment foregrounded on retribution and will be executed to uphold the initial threat of the law's promulgation as it did not deter the offender. This specific aspect of the theory would be mainly used when sentencing an offender, specifically those aware of their actions. In contrast, what I called the applicable theory still emphasizes deterrence in the law's threat and proportionality through retribution in the offender's punishment. However, I argue that it will take into account empirical considerations, specifically social factors like mental illness, that would explain why the offender committed the crime. This aspect of the theory will help rehabilitate mentally ill offenders but under the condition that their rehabilitation will restore security and the public's faith in justice.

My hope is that my alternative punishment theory can be a lens through which we can evaluate proportionality in sentencing by providing a victim-centred approach to punishment. Based on my analysis, there is a perceived disconnect between the court's stated aims of safety and faith in the justice system and the stakeholders' perception and experience in these cases. Although the court's stated aims are to reinforce safety through the offender's sentencing, the victims' families and the public do not have this perception. Through the case examples, the victims' families and the public feel insecure regarding their safety and faith in the justice system due to lax and disproportionate offender sentencing. In order to bridge the gap in their perceptions, stakeholders and legal officials can potentially use the theory to address the perceived disconnect between the court's stated aims and the stakeholders' perceptions and experience in these cases. Bridging the gap through my theory foregrounded on retribution is significant to ensure proportional sentencing of the offender and the post-sentencing phases.

For instance, although the trials of Bernardo and Homolka concluded in the 1990s, their cases have recently been in the news. In June 2023, news emerged that Bernardo, sentenced to life and deemed a dangerous offender, was transferred from Millhaven Institution, a maximum-security prison in Ontario, to Quebec's medium-security prison, La Macaza Institution.[164] The transfer is to aid Bernardo in receiving treatment for sex offenders. Outrage over Bernardo's transfer sparked conversations about whether he would be released like his ex-wife in 2005 due to her plea bargain. The public and the victims' families demand answers regarding why Bernardo's transfer occurred. If retribution were foregrounded, it would be inconceivable that Bernardo would have been transferred to a medium-security prison. Thus, we can understand why the victims' families and the public are outraged by his transfer.

Additionally, Li's case has set a judicial precedent for other NCRMD cases, such as *R. v. de Grood,* who is on the path toward unsupervised reintegration. Matthew de Grood was found NCRMD in 2014 for stabbing five friends at a house party. He had undiagnosed Schizophrenia during the crime. Since 2014, de Grood, through his treatment, has had increased privileges. In 2022, the Calgary Review Board explained that although he still poses a risk to the public, he can have unsupervised visits to Calgary and Edmonton. [165] Like the McLean family, de Grood's victims' families argued that there must be a balance between prioritizing the mentally ill offender's treatment and meeting the public and families' demands for justice and concerns for public safety during the reintegration process. Due to these recent examples, we see that the ramifications of the underlying punishment theory can reverberate years after the sentencing. The

[164] Aaron D'Andrea and Sean Boyton "Paul Bernardo Transfer to Medium-Security Prison was 'Sound': Review," *Global News*, July 20, 2023. *https://globalnews.ca/news/9845049/paul-bernardo-transfer-update/*.
[165] "Alberta Review Board says Matthew de Grood Still a Risk, But Allows Some Freedoms," *CTV News*, October 13, 2022, https://calgary.ctvnews.ca/alberta-review-board-says-matthew-de-grood-still-a-risk-but-allows-some-freedoms-1.6107758.

public and the victims' families' perception of lax and disproportionate sentencing remains relevant. This thesis provided a theoretical lens to review lax and disproportionate sentencing. Future research areas include evaluating current and future laws by gaining stakeholders' perceptions to improve our criminal justice system.

Bibliography

Achenwall, Gottfried and Pauline Kleingeld, *Natural Law: A Translation of the Textbook for Kant's Lectures on Legal and Political Philosophy*. London: Bloomsbury Academic, 2020.

Altman, Andrew. *Arguing About Law: An Introduction to Legal Philosophy*. 2nd ed. Belmont, CA: Wadsworth/Thomson Learning, 2001.

Bentham, Jeremy. *The Rationale of Punishment*. R. Heward, 1830. Print.

Birks, David. "Paternalism as Punishment." *Utilitas* 33, no. 1 (2021): 35-52. https://doi.org/10.1017/S0953820820000254.

Butts, Edward. "Paul Bernardo and Karla Homolka Case." in *The Canadian Encyclopedia*. Historica Canada. Article Published June 20, 2016; Last Edited October 31, 2018. https://www.thecanadianencyclopedia.ca/en/article/paul-bernardo-and-karla-homolka-case.

Butts, Edward. "Robert Pickton Case." In *The Canadian Encyclopedia*. Historica Canada. Article Published July 26, 2016; Last Edited April 24, 2017. https://www.thecanadianencyclopedia.ca/en/article/robert-pickton-case.

Byrd, B. Sharon, and Joachim Hruschka. *Kant's Doctrine of Right: A Commentary*. Cambridge: Cambridge University Press, 2010.

Byrd, B. Sharon. "Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution." *Law and Philosophy* 8, no. 2 (1989): 151-200. https://doi.org/10.1007/BF00160010.

Canadian Criminal Code, RSC 1985, c C-46, s 16(1). https://laws-lois.justice.gc.ca/eng/acts/C-46/section-16.html.

CBC News. "Another 3 Victims' Families Sue Pickton, Police." August 20, 2013, https://www.cbc.ca/news/canada/british-columbia/another-3-victims-families-sue-pickton-police-1.1397374.

CBC News. "Crown Lays out Grisly Case against Pickton." January 22, 2007, https://www.cbc.ca/news/canada/crown-lays-out-grisly-case-against-pickton-1.681180.

CBC News. "Mother of Tim McLean Ends Petition to Change Law." January 20, 2014, https://www.cbc.ca/news/canada/manitoba/mother-of-tim-mclean-ends-petition-to-change-law-1.2502104.

CBC News. "Pickton Gets Maximum Sentence for Murders." December 11, 2007, https://www.cbc.ca/news/canada/british-columbia/pickton-gets-maximum-sentence-for-murders-1.650944.

CBC News. "Pickton Verdict Evokes 'Elation,' 'Disappointment' from Victims' Friends, Family." December 9, 2007. https://www.cbc.ca/news/canada/british-columbia/pickton-verdict-evokes-elation-disappointment-from-victims-friends-family-1.638980.

CBC News. "Victims' Families Want to Keep Homolka Leashed: Lawyer." July 5, 2005, https://www.cbc.ca/news/canada/victims-families-want-to-keep-homolka-leashed-lawyer-1.525031.

CBC News. "Vince Li, Man who Beheaded Passenger on Greyhound Bus, Given Absolute Discharge." February 10, 2017, https://www.cbc.ca/news/canada/manitoba/vince-li-discharge-1.3977278.

Coughlan, Stephen Gerard, Catherine Cotter, and John A. Yogis. *Canadian Law Dictionary*. Seventh Edition. Hauppauge, New York: Barrons Educational Series, Inc., 2013.

CTV News. "Alberta Review Board says Matthew de Grood Still a Risk, But Allows Some Freedoms." October 13, 2022, https://calgary.ctvnews.ca/alberta-review-board-says-matthew-de-grood-still-a-risk-but-allows-some-freedoms-1.6107758.

D'Andrea, Aaron and Boyton, Sean. "Paul Bernardo Transfer to Medium-Security Prison was 'Sound': Review," *Global News,* July 20, 2023. https://globalnews.ca/news/9845049/paul-bernardo-transfer-update/.

Dalby, J. Thomas and Lorene Shyba. *Shrunk : Crime and Disorders of the Mind : True Cases by Forensic Psychologists and Psychiatrists*. Calgary, Alberta: Durvile Productions, 2016.

Dietz, Park Elliott, Robert R. Hazelwood, and Janet Warren. "The Sexually Sadistic Criminal and His Offenses." *Bulletin of the American Academy of Psychiatry and the Law* 18, no. 2 (1990): 163-178.

Dolinko, David. "Morris on Paternalism and Punishment." *Law & Phil.* 18 (1999): 343-361. https://doi.org/10.2307/3505229.

Dubber, Marcus Dirk. "The Pain of Punishment." *Buffalo Law Review* 44, no. 2 (1996): 545–612.

Dworkin, Ronald. *Laws Empire*. Cambridge, Mass: Belknap Press, 1986.

Gregor, Mary. *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant.* Cambridge: Cambridge University Press, 1996.

Hall, Neal. "Former VPD Detective Kim Rossmo Testifies Bosses Nixed Serial Killer Warning." *Vancouver Sun, January 15, 2012,* https://vancouversun.com/news/former-vpd-detective-kim-rossmo-testifies-bosses-nixed-serial-killer-warning.

Hampton, Jean. "The Moral Education Theory of Punishment." *Philosophy & Public Affairs* (1984): 208-238.

Harwood, Sterling. “Eleven Objections to Utilitarianism.” In *Moral Philosophy: A Reader* 4th ed. edited by Louis P. Pojman and Peter Tramel 189-191. Indianapolis: Hackett Pub. Co., 2009.

Häyry, Heta. “A Critique of the Paternalistic Theories of Correction.” *Canadian Journal of Law & Jurisprudence* 4, no. 1 (1991): 187-198. https://doi.org/10.1017/S0841820900001326.

Hazelwood, Roy, John Warren, and Patrick Dietz. “Compliant Victims of the Sexual Sadist.” *Australian Family Physician* 22, no.4 (199): 474-479.

Hill, Thomas E. "Kant on Punishment: A Coherent Mix of Deterrence and Retribution?" in Jahrbuch fur Recht und Ethik: *Annual Review of Law and Ethics* 5 (1997): 291-314.

Hill, Thomas E. “Kant on Wrongdoing, Desert, and Punishment.” *Law and Philosophy* 18, (1999): 407–441. https://doi.org/10.1023/A:1006321822276.

Hunter, Brad. “Deal With The Devil: 25 Years since Karla Homolka Skated.” *Toronto Sun*, June 28, 2018, https://torontosun.com/news/local-news/deal-with-the-devil-25-years-since-karla-homolka-skated.

Koritansky, Peter Karl. “The Problem with the Utilitarian Theory of Punishment,” in *Thomas Aquinas and the Philosophy of Punishment*, 11-38. Washington: Catholic University of America Press, 2011.

Mellor, Lee. *Cold North Killers: Canadian Serial Murder*. Toronto, Ont: Dundurn, 2012.

Mellor, Lee. “Sexually Sadistic Homicide Offenders.” In *Homicide*, 141-178. Routledge, 2016.

Merle, Jean-Christophe. “A Kantian Critique of Kant's Theory of Punishment.” *Law and Philosophy* 19, no. 3 (2000): 311–38.

Morris, Herbert. “A Paternalistic Theory of Punishment.” *American Philosophical Quarterly* 18, no. 4 (1981): 263-271.

Morris, Herbert. “Persons and Punishment.” *The Monist* (1968): 475-501.

Pauls, Karen. “Vince Li OK’d to Move to Winnipeg Group Home.” *CBC News*, May 08, 2015, https://www.cbc.ca/news/canada/manitoba/vince-li-ok-d-to-move-to-winnipeg-group-home-1.3064950.

Pron, Nick. *Lethal Marriage: The Unspeakable Crimes of Paul Bernardo and Karla Homolka*. Ballantine Books, 2010.

Proudfoot, Michael, and Alan Robert Lacey. *The Routledge Dictionary of Philosophy*. Routledge, 2009.

R. v. Bernardo, 2000 CanLII 5678 (ON CA), <https://canlii.ca/t/1fb38>, retrieved on 2023-07-27.

R. v. Pickton, 2010 SCC 32 (CanLII), [2010] 2 SCR 198, <https://canlii.ca/t/2bttm>, retrieved on 2023-07-21.

Ripstein, Arthur. *Force and Freedom: Kant's Legal and Political Philosophy*. Cambridge, Mass: Harvard University Press, 2009.

Ross, Selena. "Karla Homolka, After Moving Again Near Montreal, Can't Expect Privacy: Quebec Press Council." *CTV News*, December 15, 2020, https://montreal.ctvnews.ca/karla-homolka-after-moving-again-near-montreal-can-t-expect-privacy-quebec-press-council-1.5232444.

Sarver, V.T. "Kant's Purported Social Contract and the Death Penalty." *The Journal of Value Inquiry* 31, no. 4 (1997): 455–72. https://doi.org/10.1023/A:1004201120831.

Stavropoulos, Nicos, "Legal Interpretivism," *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), Edward N. Zalta (ed.), URL = https://plato.stanford.edu/archives/spr2021/entries/law-interpretivist/.

The Canadian Press, "Karla Homolka will No Longer Volunteer at Montreal Elementary School." *CTV News*, June 1, 2017, https://www.ctvnews.ca/canada/karla-homolka-will-no-longer-volunteer-at-montreal-elementary-school-1.3440179.

Thomason, Krista K. "The Symbol of Justice: Bloodguilt in Kant." *Kantian Review* 26, no. 1 (2021): 79–97. https://doi.org/10.1017/S1369415420000345.

Wahi, Namita. "A Study of Rehabilitative Penology as an Alternative Theory of Punishment." *Student Bar Review* 14 (2002): 92-104.

Williams, Stephen. *Karla: A Pact with the Devil*. Seal Books, 2010.

Williams, Stephen. *Invisible Darkness: The Strange Case of Paul Bernardo and Karla Homolka*. Bantam, 2009.

Wilton, Katherine. "Homolka's Ex-Prison Beau Goes Before Parole Board." *Global News*, June 1, 2011, https://globalnews.ca/news/122187/homolkas-ex-prison-beau-goes-before-parole-board/.

Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1711/index.do.

Young, Simon. "Kant's Theory of Punishment in a Canadian Setting." *Queen's Law Journal* 22, no. 2 (1997): 347–559.