# Sentencing Kids to Life: New approaches for challenging youth life sentences under Section 12 of the *Charter*

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*Despite significant changes in youth criminal justice legislation in recent years, sentencing a young person to life continues to be treated as a question of whether and when it is permissible to do so. Using Berger and Kerr's "two-track" framework for section 12 analysis, this paper considers new ways to argue that such sentences may be impermissible by their very nature. It examines two areas where support for this proposition can be found. First, in line with the "severity" track, it explores how current neurobiological and developmental science casts doubt on the appropriateness of the arbitrary 18-year threshold for adult criminal culpability. This suggests a court's decision to effectively assign adult culpability to a youth when sentencing them to life is out of step with the science and will always violate section 12 due to its inherent disproportionality. Second, using the lesser-known "methods" track of section 12, it argues that life sentences may be unconstitutional per se when applied to young people because of the particularly cruel and unusual effects the particular method of punishment has on this demographic. I argue this dual line of section 12 analysis creates space to advance novel arguments for the contention that sentencing a young person to life will always amount to cruel and unusual treatment, and that such sentences will continue to hamper meaningful juvenile justice efforts until they are outlawed.*

* This paper was written prior to the commencement of the author's judicial clerkship at the Court of Appeal for British Columbia and reflects her views alone.

# Introduction

The United Nations Committee on the Rights of the Child (UNCRC) has long recommended states abolish all forms of life sentences for children. In General Comment 10, the UNCRC made it clear that any form of life imprisonment for children—even where there is the possibility of release on parole—will make achieving the fundamental aims of juvenile justice and rehabilitation exceedingly difficult.[1] Until now, youth crime legislation and jurisprudence in Canada has approached life sentences for youth as a question of when it is *permissible* to impose one. This approach has stifled critical analysis by ignoring an important possibility: that sentencing a young person to life, as the UNCRC maintains, is always unacceptable.

Much of the North American scholarship on youth crime, life sentences, and cruel and unusual punishment has focused on the fact that, unlike the US, at least Canada does not use the death penalty or life sentences without the possibility of parole on youth.[2] Instead, we would do well to refocus our attention on how youth sentencing is approached relative to the constitutional protections that are owed to youth in Canada. With a view to eradicating them, this research canvasses new opportunities for arguing youth life sentences will always be grossly disproportionate and intolerable per se in Canada and, therefore, violate section 12 of the *Charter*.

1. See Committee on the Rights of the Child, *General Comment No. 10, Children's rights in juvenile justice*, UNOHCHR, 44th Sess, CRC/C/GC/10 (2007).

2. See Rick Ruddell & Justin Gileno, "Lifers Admitted as Juveniles in the Canadian Prison Population" (2013) 13:3 Youth Justice 234 at 243.

Following a brief review of the history of youth criminal justice legislation in Canada, this paper canvases two areas where support for this proposition can be found within section 12, which holds that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment."[3] To frame each of these arguments, I use what Benjamin Berger and Lisa Kerr have termed the two "tracks" of section 12 analysis.[4] The first track, called the "severity" track, focuses on whether a sentence is grossly disproportionate in relation to the nature of the offence, the circumstances of the case, and the personal context of the individuals responsible. Along these lines, the first part of this paper considers how recent neurobiological research on young people's capacity for rational decision-making casts doubt on the arbitrary age-based youth-adult culpability distinction in the Canadian justice system. In doing so, it suggests that a court's decision to effectively assign adult culpability to a youth when they are sentenced to life is out of step with science and will always be grossly disproportionate and severe, therefore amounting to a violation of section 12.

The second type of analysis available under section 12 is referred to as the "methods" track. This track assesses whether a sentence is unconstitutional purely because of the intolerable effects that a particular type of punishment has on those it is applied to. Rather than focusing on the proportionality between the circumstances of the crime and the individual responsible, the methods track invites us to consider whether life sentences are an inherently unacceptable form of youth punishment and will therefore always violate section 12. This track has been underutilized in the case law to date but has found expression in recent appeallate courts and Supreme Court of Canada decisions that strongly suggest a judicial openness to methods-based arguments.

3. *Canadian Charter of Rights and Freedoms*, s 12, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

4. Benjamin Berger & Lisa Kerr, "Methods and Severity: The Two Tracks of Section 12" (2020) 94:9 SCLR 235.

# I. A Short History of Juvenile Justice in Canadian Law

Before expanding on the two tracks of analysis, I explore the legal frameworks governing youth crime in Canada to understand the evolution of perceptions of youth culpability and punishment over time. I then discuss the impact of this on historical and current sentencing regimes for youth who commit serious offences. In doing so, I highlight the arbitrary nature of distinctions made between youth and adult culpability for criminal activity, showing there is potential for further inquiry into the appropriateness of this separation with respect to section 12 analyses.

Throughout the eighteenth century in Anglo-European jurisdictions, juveniles were rarely the subject of court proceedings and society did not tend to think of them as a separate, threatening problem requiring specialized attention.[5] European legal systems made little distinction between children and adults who committed crimes at this time, but this meant that some youth who did commit crimes received severe punishments, including the death penalty.[6] By the mid-nineteenth century, however, so-called "juvenile delinquency" had become a key source of anxiety among the wealthy and propertied classes.[7] Bolstered by a growing acknowledgement that youth were less culpable than adults for criminal behaviour on account of their age and (im)maturity, distinct penal policies and trial procedures began to be created for children who committed criminal acts.[8]

In Canada, approaches to youth crime prior to the 1900s largely mirrored those of England and France, though sanctions for youth were not consistently applied between provinces.[9] While Quebec was thought of as having a relatively

5. See Ruddell & Gileno, *supra* note 2 at 236.

6. See *ibid*. See also Marc Alain & Julie Desrosiers, "A Fairly Short History of Youth Justice in Canada" in Marc Alain, Raymond R Corrado & Susan Reid, eds, *Implementing and Working with the Youth Criminal Justice Act Across Canada* (Toronto: University of Toronto Press, 2016) 23 at 24.

7. See Ruddell & Gileno, *supra* note 2.

8. See Peter King, "The Rise of Juvenile Delinquency in England 1780-1840: Changing Patterns of Perception and Prosecution" (1998) 160:1 Past & Present 116 at 116.

9. See Ruddell & Gileno, *supra* note 2 at 236.

"enlightened" approach to the treatment of youth who committed crimes, other provinces such as British Columbia had a reputation for being far less tolerant of youth crime—especially when it came to violent offences.[10] According to the Department of Justice Canada, the first federal legislation on youth crime was enacted in 1894: *The Act Respecting Arrest, Trial and Imprisonment of Youthful Offenders*.[11] In response to growing consensus in the international community about the need to create a separate juvenile justice system,[12] the Act was extended in 1908 by the introduction of the *Juvenile Delinquent's Act* (*JDA*).[13] Both of these early legislative approaches to youth crime prioritized guidance, treatment, and rehabilitation, focusing on the young person and their needs, rather than on the nature or seriousness of the crime as the primary determinant of an appropriate sentence.[14] Nonetheless, the *JDA* still exposed youth to the possibility of severe sanctions such as life sentences and the death penalty (at least until capital punishment was abolished in 1976).[15] Section 9(1) of the Act allowed children 14 years and older to be tried in adult courts where they were accused of committing an indictable offence, and where the court was "of the opinion that the good of the child and the interest of the community demanded it".[16] These sentencing options were not otherwise available for youth tried and sentenced directly under the *JDA*.[17]

Over time, the rehabilitative focus of the *JDA* was tested by youth who committed serious and violent crimes or who appeared "impervious to rehabilitation" (though critics note that this perspective was more due to the use of weak rehabilitation strategies, rather than an innate lack of capacity for some youth to benefit from rehabilitation).[18] Although the *JDA* offered diverse

10. See *ibid*.

11. See "The Evolution of Juvenile Justice in Canada" (2004) at 2. online (pdf): *Department of Justice Canada* <publications.gc.ca/collections/Collection/J2-248-2004E.pdf> [Justice Canada].

12. See Julian Mack, "The Juvenile Court" (1909) 23:2 Harv L Rev 104 at 109.

13. *Juvenile Delinquents Act*, SC 1908, c 40 [*JDA*].

14. See *ibid*. This is most clearly evident in section 38 of the *JDA*, which stated "as far as practicable every juvenile delinquent shall be treated not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance".

15. See Correctional Service Canada, "Abolition of the Death Penalty 1976" (5 March 2015), online: *Correctional Service Canada* <www.csc-scc.gc.ca/text/pblct/rht-drt/08-eng.shtml>.

16. Ruddell & Gileno, *supra* note 2 at 236–37.

17. See *ibid* at 236.

18. *Ibid*.

sentencing options, and although restrictions on the range of available punishments created considerable space for individualized sentences, this was also the basis of its core critique that it allowed for too much discretion in sentencing and produced inconsistent treatment among youth.[19] For instance, the *JDA* allowed provinces to define the maximum age of "youth", meaning a 17-year-old convicted in Quebec would receive a lighter sentence than someone convicted of the same offence in Ontario. The latter would be automatically transferred to an adult court.[20] A lack of due process, failure to balance youth welfare and rights with legal, political, and other priorities, and the overuse of custodial sentences quickly became defining features of the *JDA* era.[21] Following the enactment of the *Canadian Bill of Rights*[22] in 1960 and the *Canadian Charter of Rights and Freedoms* ("*Charter*")[23] in 1982, it became apparent that major changes were needed to address the inconsistencies between the *JDA* and the protections recognized in the *Charter*, including equality before the law (section 15) which was undermined by the interprovincial variation in the age of criminal culpability, among other things.

After a number of successful *Charter* challenges against various parts of the *JDA*,[24] it was replaced by the *Young Offenders Act* (*YOA*) in 1984.[25] The *YOA* responded to the limitations of the *JDA* by emphasizing children's procedural and substantive rights, better aligning youth crime legislation with the *Charter*.[26] Age-based inequalities between provinces were alleviated by the creation of a uniform national age bracket for youth culpability, from 12 to 18 years old.[27] The *YOA* also better protected children's due process rights and emphasized community-based solutions to youth convicted of crimes.[28]

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19. See Justice Canada, *supra* note 11 at 21.

20. See Jean Trepanier, "Juvenile Delinquency and Youth Protection: The Historical Foundations of the Canadian Juvenile Delinquents Act of 1908" (1999) 7:1 Eur J Crime, Crim L & Crim J 41 at 41–42.

21. See John Minkes, "Change, Continuity, and Public Opinion in Youth Justice" (2007) 17:4 Intl Crim Justice Rev 340 at 343.

22. *Canadian Bill of Rights*, SC 1960, c 44.

23. *The Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

24. See generally Nicholas C Bala, "Constitutional Challenges Mark Demise of Juvenile Delinquents Act" (1983) 30 CR (3d) 245.

25. *Young Offenders Act*, RSC 1985, c Y-1.

26. See Minkes, *supra* note 21 at 343.

27. See Nicholas Bala, "Youth as Victims and Offenders in the Criminal Justice System: A Charter Analysis—Recognizing Vulnerability" (2008) 40:19 SCLR 595 at 597.

28. See *ibid*.

Indeterminate sentencing was prohibited, and sentences for crimes that would ordinarily be met with a life sentence if committed by an adult were capped at three years.[29] However, some scholars say this cap may have contributed to an increase in relatively young individuals being transferred to adult courts if they had committed serious crimes, given that fourteen years remained the minimum age for adult court transfers.[30] Finally, although one of the stated goals of the *YOA* was diversion from custodial and residential sentences, detention was used even more frequently by judges in youth sentencing than it had been under prior legislation. According to Minkes, "[c]ourts still saw custodial sentences as an appropriate response to adverse home circumstances," and short custodial sentences were regularly imposed for minor offences.[31]

Throughout the late 1990s, the Canadian government conducted a lengthy review of the *YOA*, culminating in the enactment of the *Youth Criminal Justice Act* (*YCJA*) in 2002, which remains in force today.[32] Its objectives include preventing crime, rehabilitating and reintegrating youth, and ensuring meaningful consequences for offences that meet the individual needs and circumstances of each young person.[33] The *YCJA* caps maximum sentences for serious offences committed by youth (who are sentenced as youth) at ten years for the most serious offence. A key change in the *YCJA* is that youth can no longer be tried in adult courts, although they can be sentenced as adults. Notably, life sentences are available when a youth is sentenced as an adult.[34]

### *A. Adult and Life Sentences Under the YCJA*

Section 64(1) of the *YCJA* states that adult sentences are available where a youth 14 years or older has committed an offence for which an adult would be liable to imprisonment for a term of more than two years.[35] Life sentences may apply for youth found guilty of committing serious offences, including first degree murder, second degree murder, manslaughter, and aggravated sexual assault, when they were between the ages of 14 and 18.[36] For those aged 14 or

29. See Marge Reitsma-Street, "Implementation of the Young Offenders Act: Five Years Later" (1990) 7:2 Can Social Work Rev 137 at 137–38.

30. See Ruddell & Gileno, *supra* note 2 at 237.

31. For example, failure to comply with a community sentence made up 23 per cent of all custodial sentences imposed in 2000. See Minkes, *supra* note 21 at 343.

32. *Youth Criminal Justice Act*, SC 2002, c 1 [*YCJA*].

33. See *ibid*, s 3(1).

34. See Ruddell & Gileno, *supra* note 2 at 238.

35. See *YCJA*, *supra* note 32, s 64(1).

36. See *Criminal Code*, RSC 1985, c C-46, s 745.1 [*Criminal Code*]; *YCJA*, *ibid*.

15 at the time the crime was committed, parole eligibility begins between five and seven years after sentencing and after seven to ten years for those aged 16 or 17.[37] Data on how many people are currently serving life sentences for crimes committed while they were below the age of 18 is not publicly reported by Statistics Canada or the Correctional Service of Canada, though the most recent data suggests that, as of 2012, this figure was 121.[38]

The purpose of youth sentencing is found in section 38(1) of the *YCJA* and focuses on "hold[ing] a young person accountable for an offense through the imposition of just sanctions that have meaningful consequences for the young person and that promote [their] rehabilitation".[39] The entire *YCJA* framework is guided by the fundamental sentencing principle of accountability.[40] The Court of Appeal for British Columbia has said this principle must always consider whether a given sentence will ensure a young person can be rehabilitated and reintegrated into society.[41] Beyond accountability, rehabilitation, and reintegration, other relevant principles include the prevention of crime through programs addressing the circumstances underlying offending behaviour,[42] as well as deterrence and denunciation.[43] Section 38(3) of the *YCJA* sets out the factors sentencing judges must consider when seeking to impose a fit sentence more broadly (i.e., not only for adult sentences), including the young person's degree of participation in the offence, the harm done to victims, whether the harm was intended or at least foreseeable, and whether the individual has taken steps to remedy the harm done to the victim and community.[44]

In 2008, the Supreme Court of Canada in *R v DB* (*DB)* recognized the presumption of diminished moral blameworthiness and culpability of youth as a principle of fundamental justice under section 7 of the *Charter*.[45] This overturned the *YCJA*'s former presumption of an adult sentence for select serious youth

37. See *Criminal Code*, *supra* note 36, s 745.1.

38. See Ruddell & Gileno, *supra* note 2 at 234.

39. *YCJA*, *supra* note 32, s 38(1).

40. See *R v O(A)*, 2007 ONCA 144 at para 59 [*O(A)*]; Clayton Ruby, *Sentencing*, 10th ed (Toronto: LexisNexis, 2012) at para 22.9.

41. See *R v S(SNJ)*, 2013 BCCA 379 at para 29.

42. See YCJA, *supra* note 32, s 3(1)(a)(iii).

43. Section 38(2) of the *YCJA* was amended by Bill C-10 in 2012 to add paragraph (f) which expressly includes denunciation and deterrence as objectives of sentencing for young persons. See C-10, *Safe Streets and Communities Act*, 1st Sess, 41st Parliament, 2012, c1 (assented to on March 13, 2012).

44. See Ruby, *supra* note 40 at para 22.15.

45. 2008 SCC 25 [*DB*].

crimes.[46] Section 72(1) of the *YCJA* articulates a revised test for imposing an adult sentence since *DB*: the Crown has the burden of establishing that (a) the presumption of diminished moral blameworthiness is rebutted in the case at issue and (b) that a youth sentence would not be sufficient in length to hold the young person accountable.[47]

The *YCJA* does not directly specify how the Crown can rebut this presumption or what evidence is needed, though the relevant case law gives some guidance. In *DB*, the Supreme Court of Canada said it can be rebutted if the "seriousness of the offence and the circumstances of the offender justify it notwithstanding [their] age".[48] The young person's age, maturity, character, background, level of culpability, and potential prior record are relevant.[49] An individual's potential for successful rehabilitation and reintegration into society is also critical, though an offender with strong rehabilitation prospects will not necessarily avoid an adult sentence.[50]

The Court of Appeal for Saskatchewan has explained the overall analysis as follows:

> The jurisprudence is clear that for a youth sentence to hold a young person accountable, it must achieve two objectives: 1) It must be long enough to reflect the seriousness of the offence and the young person's role in it; and 2) It must be long enough to provide reasonable assurance of the young person's rehabilitation to the point where he can be safely reintegrated into society. If the Crown demonstrates that either objective of accountability is not met, an adult sentence must be imposed.[51]

46. See *ibid* at paras 41, 91–94. "Serious offence" is defined in section 2(1) of the *YCJA* as "an indictable offence under an Act of Parliament for which the maximum punishment is imprisonment for five years or more. (*infraction grave*)." *YCJA*, *supra* note 32 at s 2(1) [emphasis in original].

47. See *YCJA*, *supra* note 32 at s 72(1).

48. *DB*, *supra* note 45 at paras 68, 77.

49. See *R v X*, 2014 NSPC 95 at para 7; *R v MM*, 2012 ABPC 153 at paras 74, 80; *R v Joseph*, 2016 ONSC 3061 at para 22, aff'd 2020 ONCA 73; Ruby, *supra* note 40 at paras 22.47–48.

50. See *R v Anderson*, 2018 MBCA 42 at para 106.

51. *R v McClements*, 2017 MBCA 104, at para 70, leave to appeal to SCC refused, *AM v Her Majesty the Queen*, 37895 (26 April 2018) [emphasis on the original].

In *R v MW* (*MW*), the Court of Appeal for Ontario held that rebutting the presumption requires the Crown to demonstrate that "at the time of the offence, the evidence supports a finding that the young person demonstrated the level of maturity, moral sophistication and capacity for independent judgment of an adult such that an adult sentence and adult principles of sentencing should apply".[52] The standard of proof does not rise to the level of "beyond a reasonable doubt". Rather, the sentencing judge must simply be "satisfied" an adult sentence is appropriate "after a weighing and balancing of all the relevant considerations".[53]

These changes to the *YCJA* and its development throughout the case law suggest it has become more difficult for life sentences to be imposed upon youth. Unlike in the *JDA* and *YOA* eras, youth can no longer be tried as adults, and the Crown must meet a higher threshold before a youth can be sentenced as such (and thus, exposed to the possibility of a life sentence for serious crimes). However, these positive changes risk obscuring a critical detail: legislators and lawyers alike continue to engage in a very circumscribed discussion of whether and when it is *permissible* to sentence a child to life. In the sections that follow, I canvas new opportunities to consider whether such sentences for youth are problematic as a rule through an expanded, "two-track" approach to section 12 *Charter* analysis.

## II. The "Two Tracks" of Section 12 Analysis

Section 12 of the *Charter*, which protects against cruel and unusual punishment, has been used to challenge the constitutionality of life sentences in Canada (albeit unsuccessfully).[54] In each case, the Supreme Court of Canada considered whether the sentence resulted in excessive or grossly disproportionate punishment because its length was too severe relative to the level of culpability of the individual and the surrounding circumstances, such that the punishment was cruel and unusual.

However, Berger and Kerr,[55] along with others,[56] have observed that the line of thinking in these cases only speaks to one of the modes of analysis within the

52. 2017 ONCA 22 at para 98 [*MW*].

53. *Ibid* at para 61; *O(A)*, *supra* note 40 at para 33.

54. See e.g. *R v Luxton*, [1990] 2 SCR 711, 6 WWR 137; *R v Latimer*, 2001 SCC 1.

55. Berger & Kerr, *supra* note 4 at 2.

56. See Dirk van Zyl Smit & Andrew Ashworth, "Disproportionate Sentences as Human Rights Violations" (2004) 67:4 Mod L Rev 541. Smit and Ashworth discuss the two

section 12 guarantee. In their view, there are two tracks of analysis possible under section 12: the severity track (as described above in the unsuccessful challenges to life sentences) and the methods track. They argue that the latter has been largely forgotten in the case law and that, in some cases, the Supreme Court of Canada has inadvertently blurred the two tracks together, thus limiting the court's ability to respond to the full range of wrongs that section 12 can address.[57] Unlike the severity track, the methods track has not been the subject of serious judicial consideration—until recently. Methods-based arguments were recently used to challenge the constitutionality of administrative segregation regimes in British Columbia and Ontario, as well as consecutive parole ineligibility periods for people serving life sentences for multiple murders.[58] Rather than proportionality and severity, arguments along these lines focus on whether a particular *method* of punishment is inherently cruel and unusual, and is therefore unconstitutional per se, irrespective of context and circumstance.

In the sections that follow, I will elaborate on how each of these two tracks of section 12 might be engaged in new ways to argue that life sentences are always disproportionately severe, and inherently cruel and unusual when applied to youth. First, I consider how the proportionality and culpability analysis embedded in the severity track is impacted by scientific evidence about the true capacity of young people for culpability. In particular, I discuss recent studies on adolescent neurobiological progression which indicate they may be

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branches of analysis available under the "gross disproportionality" framework of section 12 in the following way:

> The various constitutional provisions and human rights protections outlawing certain forms of punishment may be interpreted literally in one or both of two ways. One interpretation would be to state that a particular type of punishment is 'cruel and unusual' or 'inhuman and degrading', and should therefore never be imposed. On this first meaning, the seriousness of the offence committed is not a relevant factor. The question is: should this type of penalty be permissible for any crime?

*Ibid* at 544.

57. For evidence of this blurring, see the discussion of *R v Boudrealt,* 2018 SCC 58, in Berger & Kerr, *supra* note 4 at 2–3. However, according to Smit & Ashworth, *supra* note 56 at 544–45, it may not be possible (or necessary) to neatly separate the two tracks. This will be explored in greater detail in the "Methods" section of this paper.

58. The possibility of consecutive parole ineligibility periods for life sentences was introduced by the Harper Government's *Protecting Canadians by Ending Sentencing Discounts for Multiple Murders Act*, SC 2011, c 5.

incapable of possessing the level of rationality and decision-making capacity that a life sentence should require. Second, I explore how the under-utilized methods track could be used to show that sentencing a youth to life may be inherently cruel and therefore unconstitutional, in part because of the particularly serious effects life sentences have on this demographic.

## III. The Severity Track and the Science of Youth Culpability

The severity track of section 12 is primarily concerned with "the relationship between the challenged treatment or punishment and a sanction that would be a fit response to the hypothetical offender's wrongdoing, culpability, and circumstances."[59] Berger and Kerr explain the severity track as being concerned with "the extent or amount—not the kind—of punishment or treatment".[60] In *R v Smith* (*Smith*), the Supreme Court of Canada interpreted and applied section 12 of the *Charter* for the first time.[61] Justice Lamer, as he then was, held that a sentence "grossly disproportionate to what the offender deserves" will violate section 12.[62] The Court said gross disproportionality was a function of "the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case".[63] Though severity-based section 12 challenges to life sentences have been unsuccessful in Canada, this approach has never been used to challenge life sentences for youth.

An assessment of the young person's level of culpability is only one element within the section 12 severity analysis, but it plays a particularly crucial role when considering youth life sentences. This is because giving a youth a life sentence requires a rebuttal of the presumption of diminished blameworthiness that applies to youth and is a principle of fundamental justice under section 7 of the *Charter*.[64] Once this presumption has been successfully rebutted, it becomes possible to sentence a youth as an adult, and thus to sentence a youth to life. However, recent neurobiological research suggests a young person likely cannot possess the kind of decision-making and self-regulation abilities that are at the heart of the culpability analysis and the overturned presumption of diminished moral blameworthiness. On this basis, there may be room to argue

59. Berger & Kerr, *supra* note 4 at 10.

60. *Ibid* at 6.

61. [1987] 1 SCR 1045, 40 DLR (4th) 435 [*Smith*].

62. *Ibid* at para 56.

63. *Ibid*.

64. See *DB*, *supra* note 45 at paras 45, 93; *MW*, *supra* note 52 at para 23. See also *YCJA*, *supra* note 32 at s 72(1).

that even where the presumption has been rebutted in court, the bare scientific fact of their diminished capacity for rational decision-making remains, such that sentencing a youth to life is always disproportionately severe.

### *A. Historical Perspectives on Youth Culpability for Criminal Acts*

Despite culpability being at the heart of every decision to sentence a young person to life, determinations of culpability in Canada are too often divorced from the circumstances of individuals.[65] The line between youth and adult culpability in Canada's justice system is drawn solely on the basis of age, with those aged 14 to 17 years being tried under the *YCJA*, and those aged 18 years and over being tried under the *Criminal Code*. These age brackets have largely developed as a result of historical, political, and religious perspectives on moral blameworthiness, rather than through a reliance on sound scientific research about one's capacity for culpability.

Indeed, the question of what should be considered an appropriate minimum age for a child to be held legally responsible for their acts remains one of the most controversial aspects of juvenile justice policy around the world.[66] Some countries do not place any age limit on criminal responsibility, while others begin trying children in juvenile courts at 14 or 16 years. The majority of countries set their minimum age for legal responsibility in juvenile justice systems at between 7 and 14 years, and their minimum age for adult criminal culpability at between 14 and 19.[67] This wide range in age brackets of juvenile and adult criminal liability around the world suggests that "age determination has had little or nothing to do with child developmental considerations".[68] Instead, for most Western countries, responsibility for criminal acts has been predominantly shaped by social and religious—predominantly Roman Catholic–ideas about children's capacity for "mortal" or "cardinal" sin (deliberate, grave acts such as worshipping other Gods, blasphemy, or murder which are believed

65. This has been extensively (and largely unsuccessfully) argued in the context of mandatory minimums. See Raji Mangat, "More Than We Can Afford: The Costs of Mandatory Minimum Sentencing" (2014) online: *British Columbia Civil Liberties Association* <bccla.org/our_work/more-than-we-can-afford-the-costs-of-mandatory-minimum-sentencing/>.

66. See Nigel Cantwell & Jaap Doek, "Foreword", in Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (New York: Routledge, 2009) at IX.

67. See *ibid*.

68. *Ibid*.

to separate the "sinner" from God's grace permanently unless repentance is sought).[69] Children were believed not to be capable of committing such acts with the requisite level of intention and were, therefore, typically insulated from criminal liability for their actions.[70] This was reflected in the inherited Roman common law principle of *doli incapax*—an "all-or-none rule for determining criminal liability of the young and immature"—which applied to children under the age of 14.[71]

### *B. Biological Perspectives on Youth Culpability for Criminal Acts*

Biological science has played a surprisingly limited role in delineating the age of legal and criminal culpability.[72] Recent neurobiological research suggests the age-based distinction between youth and adult liability in our justice system is not aligned with the science on youth capacity for culpability. Much is known about early cognitive development during infancy, but comparatively little is known about the period of maturation during late childhood and adolescence.[73] Most studies dealing with adolescent development have focused on drawing a line between childhood and adolescence. Researchers have only recently begun specifically analyzing the psychological and developmental transition that occurs between adolescence and adulthood.[74] This research suggests that an individual's "youth" (typically conceived of as mid-teens to early or mid-twenties)[75] is a distinct developmental phase of its own and should be treated as such in science and law.[76] Processing speed, voluntary response suppression,

69. See Office of Juvenile Justice and Delinquency Protection, *Justice for Juveniles*, by Charles E Springer, (Nevada: US Department of Justice, 1986) at 18; Romanus Cessario, "Charity, Mortal Sin and Parish Life" (2016) 19:4 Logos: J of Catholic Thought & Culture 86 at 86.

70. *Ibid* at 19.

71. *Ibid* at 19–20.

72. See *ibid* at 18.

73. See Beatriz Luna et al, "Maturation of Cognitive Processes From Late Childhood to Adulthood" (2004) 75:5 Child Development 1357 at 1358.

74. See Laurence Steinberg, "Adolescent Development and Juvenile Justice" (2009) 5:1 Annual Rev Clinical Psychology 459 at 465.

75. See "Adolescent health in the South-East Asia Region", online: *World Health Organization* <www.who.int/southeastasia/health-topics/adolescent-health>. The World Health Organization defines "adolescence" as being between the ages of 15 and 24. Youth is defined as being between 10 and 19 years.

76. See Steinberg, *supra* note 74 at 465.

and working memory continue to mature from early adolescence until an individual is in their mid-twenties.[77] These functions are at the core of an individual's cognitive control of behaviour.[78] In turn, this is foundational to the question of criminal culpability.

The effects of this gradual functional maturation process on behaviour are most evident in risk-taking, which often goes hand in hand with youth crime.[79] Recent neuroscientific research has suggested that an individual's willingness to participate in, and ability to assess the consequences of, risky behaviour are the product of two distinct neurobiological systems that largely mature independently of one another.[80] The first is the socio-emotional system, which controls behavioural and emotional responses including the "fight or flight" tendencies.[81] The second is the "cognitive control system", which is significantly affected by reward and self-satisfaction.[82] As Steinberg explains, the increase in dopaminergic activity in the socio-emotional system during puberty is likely to heighten reward- and sensation-seeking behaviours among those in this age bracket.[83]

However, the two systems do not develop in tandem. The cognitive control system, which is responsible for more advanced self-regulation and impulse control, matures at a much later stage, from late adolescence to early adulthood. According to Steinberg, "changes in the socioemotional system at puberty may promote reckless, sensation-seeking behavior in early and middle adolescence, while the regions of the prefrontal cortex that govern cognitive control continue to mature over the course of adolescence and into young adulthood."[84] This phenomenon produces a significant gap between when these two neurobiological systems fully mature, resulting in a period of heightened

77. See Luna et al, *supra* note 73 at 1357.

78. See *ibid*.

79. See Anne-Marie Iselin, Jamie DeCoster & Randall Salekin, "Maturity in Adolescent and Young Adult Offenders: The Role of Cognitive" (2009), 33:6 L & Human Behavior 455 at 455.

80. See Steinberg, *supra* note 74 at 466. For more on the ability of adolescents to assess long term consequences of actions, see Nicholas Bala, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2004) at 2.

81. See Steinberg, *supra* note 74 at 466.

82. Helen Barbas, "Prefrontal Cortex: Structure and Anatomy" in Larry R Squire, ed, *Encyclopedia of Neuroscience* (Boston: Elsevier, 2009).

83. Steinberg, *supra* note 74 at 466.

84. *Ibid* at 467; See also Nitin Gogtay et al, "Dynamic mapping of human cortical development during childhood through early adulthood" (2004) 101:21 PNAS 8174 at 8176. See generally

vulnerability to risk-taking behaviour during middle adolescence (approximately 17 to 22 years of age).[85] This period of development is akin to "starting the engines without a skilled driver behind the wheel."[86]

Adding another layer of complexity, we also know that an individual's neuro-development is closely linked to environmental factors like poverty, parenting, and exposure to violence.[87] There is a strong correlation between these factors and youth offending, and it has been argued that it is only as this correlation begins to fade over time that we can reasonably justify the position that young people autonomously choose to commit crime based on rational and competent decision-making.[88]

While giving a youth an adult sentence (and thus exposing them to a life sentence for some crimes) requires the Crown to rebut the presumption of diminished moral blameworthiness, this section has suggested that science, not the courts alone, should have a role to play in determining when this presumption is overturned. In short, "[i]t is one thing to say that adolescents don't control their impulses, stand up to peer pressure, or think through the consequences of their actions as well as adults; it is quite another to say they don't because they can't."[89] This perspective lends weight to the contention that life sentences will always violate section 12 when applied to youth because youth are generally incapable of possessing the level of culpability that is ostensibly required for a life sentence to be considered a "proportionate" response. Despite being in a significant developmental period at the time when their crime was committed, youth sentenced to life will live with the severe stigma and life-long impact of a criminal conviction for the entirety of their late adolescent and adult life.

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Benjamin Casey, Adriana Galvan & Todd Hare, "Changes in cerebral functional organization during cognitive development" (2005) 15:2 Current Opinion in Neurobiology 239; Sarah Durston et al, "A shift from diffuse to focal cortical activity with development" (2006) 9:1 Developmental Science 1.

85. See Steinberg, *supra* note 74 at 467.

86. Ronald Dahl, "Affect regulation, brain development, and behavioral/emotional health in adolescence" (2001) 6:1 CNS Spectrums 60 at 8.

87. See Luna et al, *supra* note 73 at 1358.

88. See Catherine Elliot, "Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice" (2011) 75:4 J Crim L 289 at 297.

89. Steinberg, *supra* note 74 at 481.

Some scholars have used this scientific research to suggest the age of adult criminal culpability be raised to a minimum of 21 years.[90] This is a welcome approach for ensuring those in their late adolescence are subject to penalties more appropriate to their level of development and which may more accurately reflect their capacity for rational decision-making during their developmental years. However, this approach ultimately fails to address the heart of the section 12 issue: the need for true proportionality between the severity of the sentence imposed and the individual's actual capacity for culpability (among other considerations). While it would be a welcome change in some respects, raising the age bracket of criminal culpability reflects incrementalist rather than reformist thinking by replacing one arbitrary age cut-off with another—neither of which is entirely in step with the science on this issue. Based on the science discussed above, the ideal approach would be to fundamentally reimagine a system where legal culpability for crime is truly individualized because each person's capacity for culpability can meaningfully shape the sentencing decision. This approach would measure a young person's culpability based on a sliding scale from adolescence until a person is in their mid-twenties, rather than treating culpability as something an individual either has or does not have at a predetermined age. Ultimately, complementing traditional sentencing approaches with neuro-biological insights offers the possibility of shifting sentencing regimes "away from retribution toward an approach more finely tailored to the individual, [their] needs, and [their] future".[91]

This approach is not without its challenges: performing a truly individualized analysis in each case can be logically complex and time sensitive, which may ultimately privilege youth who have the resources to make such arguments.[92] It may also risk downplaying or entirely ignoring important considerations about the social and environmental determinants of crime as relating to poverty, parental criminality, gender, the effect of childhood trauma, and personal agency.[93] Nevertheless, there is undoubtedly more room to explore how

90. See Carly Loomis-Gustafson, "Adjusting the Bright-Line Age of Accountability within the Criminal Justice System: Raising the Age of Majority to Age 21 based on the Conclusions of Scientific Studies Regarding Neurological Development and Culpability of Young-Adult Offenders" (2017) 55:1 Duq L Rev 221.

91. Nancy Gertner, "Neuroscience and sentencing" (2016) 85:2 Fordham L Rev 533 at 544.

92. See *ibid* at 545.

93. See Karin Eriksson et al, "The importance of family background and neighborhood effects as determinants of crime" (2016) 29 J Population Economics 219 at 235–40; Paolo Buonanno, "The socioeconomic determinants of crime: a review of the literature" (2003) 63 Working Papers, University of Milano-Bicocca, Department of Economics 1 at 24–26; Candace Kruttschnitt, "Gender and crime" (2013) 39 Annu Rev Sociol 291 at 294–303. See generally

neuro-biological science can complement section 12 severity arguments against youth life sentences.

## IV. The Methods Track and the Inherent Cruelty of Youth Life Sentences

The second type of section 12 analysis that Berger and Kerr discuss—the methods track—was first identified in the foundational section 12 case of *Smith*.[94] In that case, Lamer J, as he then was, canvassed the idea that some *methods* of punishment "will *always* be grossly disproportionate and will always outrage our standards of decency".[95] In doing so, he planted the seeds of the methods approach, even though he did not delineate the distinction between the two tracks as sharply as Berger and Kerr do. To him, the ultimate inquiry in section 12 cases should be "the effect of the sentence actually imposed" with respect to its nature and conditions.[96] While he acknowledged the unconstitutional effect of a sentence might be solely due to its length, he also said it can result from a "combination of factors which, when considered in isolation, would not in and of themselves amount to gross disproportionality".[97] He indicated that some kinds of sentences will offend section 12 "by their nature" irrespective of the individual responsible, the crime committed, and its circumstances.[98] The concurring opinion of Wilson J echoed this sentiment, highlighting that section 12 was "concerned primarily with the nature or type of a treatment or punishment".[99]

The methods track has found recent expression in court of appeal decisions from Ontario and Quebec. In a challenge to the federal government's use of administrative segregation in prisons, the Court of Appeal for Ontario in *Canadian Civil Liberties Association v Canada (Attorney General)* held that section 12 was violated when administrative segregation exceeds 15 consecutive days.[100] While the context of this case was different—conditions of imprisonment

David Zembroski, "Sociological Theories of Crime and Delinquency" (2011) 21:3 J Human Behavior in Soc Environment 240.

94. See *Smith*, *supra* note 61.

95. *Ibid* at para 57 [emphasis added].

96. *Ibid*.

97. *Ibid*.

98. *Ibid* at para 85.

99. *Ibid* at para 115.

100. 2019 ONCA 243 at para 119.

rather than sentencing—the Court's commentary on section 12 analysis is helpful. The Court expressly rejected the Attorney General's argument that the section 12 analysis must be "fundamentally individual" in nature–i.e., confined to an analysis of how prolonged segregation affects the individual in question (a severity analysis), and whether that individual effect is grossly disproportionate.[101] Rather, it said the proper approach considers the effect of the prolonged segregation in comparison to the rest of the non-segregated prison population.[102] On this basis, it held that "the effect of prolonged administrative segregation is thus grossly disproportionate treatment because it exposes inmates to a risk of serious and potentially permanent psychological harm" that is not experienced to the same degree as others in prison.[103] Subjecting an individual to administrative segregation for longer than 15 consecutive days was deemed per se unconstitutional.[104] Similar section 12 arguments were advanced but were ultimately rejected in a challenge to administrative segregation in British Columbia.[105] The Supreme Court of Canada granted leave to appeal in both cases; however, the parties withdrew their appeals after the federal government ended the particular administrative segregation program in question.[106]

101. *Ibid* at para 93.

102. See *ibid* at para 97.

103. *Ibid* at para 99.

104. See *ibid* at para 61. The Canadian Civil Liberties Association also used a methods-based section 12 argument about the effect of administrative segregation on young persons aged 18–21. They contended that segregation of persons in this age bracket for any length of time exposed them to "termination of brain development". However, due to a lack of evidence, this was unsuccessful at the Superior Court and unchallenged on appeal. It remains possible that, with the right evidence, such an age-based methods argument could be successful in the future.

105. See *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228 at paras 79, 95.

106. See Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*, 1st Sess, 49th Parl, Canada, 2019 (assented to 21 June 2019). When the court of appeal decisions were released in Ontario and British Columbia, the government passed Bill C-83 which created new rules for administrative segregation in prisons, and termed the new regime "Structured Intervention Units". See also Jane B Sprott and Anthony N Doob, "Solitary Confinement, Torture, and Canada's Structured Intervention Units", (2021), online (pdf): *University of Toronto Centre for Criminology & Sociolegal Studies* <www.crimsl.utoronto.ca/sites/www.crimsl.utoronto.ca/files/Torture%20Solitary%20SIUs%20%28Sprott%20Doob%2023%20Feb%202021%29.pdf>.Advocates argue the so-called 'Structured Intervention Units' which have replaced the program continue to violate the rights of incarcerated persons.

The methods argument was also invoked by legal counsel in *Bissonnette v The Queen*.[107] Bissonnette was convicted of six counts of first-degree murder and six counts of attempted murder after he opened fire in a Quebec City mosque in 2017. Bissonnette was sentenced to life in prison. The sentencing judge considered whether Bissonnette should be sentenced to a parole ineligibility period of 25 years, as is statutorily required for all first-degree murders, or to a period of consecutive parole ineligibility of 50, 75, or more years. The possibility of sentencing individuals who commit multiple murders to consecutive parole ineligibility periods was added to the *Criminal Code* in section 745.51 by the former Harper government's *Protecting Canadians by Ending Sentencing Discounts for Multiple Murders Act* in 2011.[108]

At trial, Huot J said that while one 25-year parole ineligibility period would not be sufficient to hold Bissonnette accountable for his actions, he was concerned that two consecutive 25-year periods (50 years in total) would be cruel.[109] Searching for middle ground, his remedy was to read into the *Criminal Code* the discretion to create a sentence of 40 years parole ineligibility, comprised of five 25-year periods served concurrently, and an additional 15-year life sentence for the sixth murder.[110]

On appeal, the Court overturned the sentence of a 40-year parole ineligibility period. The Court held that section 745.51 of the *Criminal Code* violated section 12 of the *Charter* and was therefore unconstitutional.[111] The Court of Appeal of Quebec cited Berger and Kerr's methods track as support for the idea that, beyond offering protection against disproportionately long sentences, "[s]ection 12 also seeks to prevent sentences whose very nature is unacceptable, such that Canadians would find the punishment abhorrent or intolerable."[112] The Court reasoned that sentencing anyone to life without parole for 50 years (i.e., two consecutive parole ineligibility periods, as would have been permitted by section 754.51) would leave "no real room for the goal of rehabilitation"[113]

107. 2020 QCCA 1585 [*Bissonnette* 2020].

108. Protecting Canadians Ending Sentencing Discounts for Multiple Murders Act, *supra* note 58.

109. This would result in a parole ineligibility period of 50 years. See *Bissonnette v The Queen*, 2019 QCCS 354 at paras 838, 843.

110. See *ibid* at para 1227.

111. *Bissonnette* 2020, *supra* note 107 at para 186.

112. *Ibid* at para 7.

113. *Ibid* at para 109.

because it "prevent[s] a reformed accused from having genuine access to the parole application process"[114] on account of their advanced age at the time of initial parole eligibility. It held that section 745.51 "is therefore excessive and its effect will be grossly disproportionate because it renders inapplicable certain fundamental components of Canadian criminal law, including the objectives of rehabilitation and proportionality".[115]

The case was further appealed to the Supreme Court of Canada. In its May 2022 reasons, the Court unanimously dismissed the Crown's appeal and largely upheld the Court of Appeal of Quebec's findings on section 12: the possibility of imposing stacked parole ineligibility periods for multiple murders was contrary to section 12 of the *Charter* and could not be saved under section 1.[116] In doing so, the Court expressly referenced Berger and Kerr's two tracks of section 12 analysis. Describing the first track (severity), the Court explained that whether a punishment violates section 12 is determined by reference to the circumstances of the crime and offender: "[a] grossly disproportionate sentence is cruel and unusual in that it shows the state's complete disregard for the specific circumstances of the sentenced individual and for the proportionality of the punishment inflicted on them."[117] By contrast, the second track (method) "concerns a narrow class of punishments that are cruel and unusual by nature; these punishments will "always be grossly disproportionate" because they are intrinsically incompatible with human dignity".[118] Whether a punishment conflicts with human dignity is determined by asking if it is, by its nature, "degrading or dehumanizing".[119] Lashings, lobotomization, castration, and corporal punishment fall into that category in Canadian law and have accordingly been outlawed.[120] In concluding that the potential for stacked parole ineligibility periods was unconstitutional, the Court emphasized that this sentencing method was inherently incompatible with human dignity—and the fundamental sentencing principle of rehabilitation—because it expressly allows for the possibility that an individual would be barred from re-entering

114. *Ibid* at para 111.

115. *Ibid* at para 109.

116. Arguments were also advanced under section 7 of the *Charter*, but the Supreme Court of Canada declined to address those given its findings on section 12.

117. *R v Bissonnette*, 2022 SCC 23 at para 61 [*Bissonnette* 2022].

118. *Ibid* at para 64.

119. *Ibid* at para 67.

120. See *ibid* at para 66.

society altogether.[121] Turning to the justification stage, the Court noted the appellants had made no submissions on how section 1 would apply to the impugned provision and therefore had failed to discharge their onus in that regard.[122] Regardless, they observed it was difficult to foresee how an inherently cruel method of punishment could be justified in a free and democratic society.[123]

In *Bissonnette*, both the Court of Appeal of Quebec and Supreme Court of Canada said that even though a sentencing judge ultimately retains the discretion to impose such a sentence or not under section 745.51, this does not make it presumptively valid: "[i]n other words, notwithstanding the existence of a discretionary power by which the judge can refrain from imposing a cruel and unusual sentence, the provision is invalid simply because it *authorizes* a judge to impose such a sentence."[124] This judgment could provide significant guidance for future arguments on this track against the use of life sentences for youth. Although the burden is on the Crown to justify why a youth who commits a homicide offence should be sentenced as an adult to life imprisonment, the fact that the judge has the discretion to reject the Crown's justification does not save an otherwise cruel method of punishment.

### *A. Effects-based Analysis of Youth Life Sentences*

As with the administrative segregation decision in Ontario, the focus in *Bissonnette* was on the grossly disproportionate *effect* of the chosen punishment method on those subjected to it. That is the analysis at the heart of the methods track.[125] To be clear, the effects-based analysis is not achieved by questioning the proportionality between the sentence, the crime committed, and the culpability of the youth in question; again, the methods track asks whether a method of punishment is constitutionally offensive *as a rule* due to the effect it has on offenders. I note that Berger and Kerr favour a sharp distinction between the two tracks and warn against their blurring. In his recent article entitled "Tying Down the Tracks: Severity Method, and the Text of Section 12 of the Charter", Colton Fehr discusses the two tracks in the context of the Alberta jurisprudence and agrees this distinction is required to bring more analytical clarity to the

121. See *ibid* at para 73.

122. See *ibid* at para 121.

123. See *ibid.*

124. *Bissonnette* 2020, *supra* note 107 at para 79; See *Bissonnette* 2022, *supra* note 117 at para 68.

125. See Berger & Kerr, *supra* note 4 at 5.

section 12 case law.[126] On the other hand, Smit and Ashworth, writing some 15 years prior to Berger and Kerr's article, suggested it may not be possible—or even desirable—to neatly segregate the two tracks. Drawing on the example of the death penalty in the US, they explain:

> [I]n practice it seems that the two interpretations are often interwoven and that, even where they are distinguished, they may operate in combination. Thus Article 6 of the *International Covenant on Civil and Political Rights* provides inter alia that the sentence of death may only be imposed for the most serious crimes, and there is considerable jurisprudence in the United States to the effect that, even if the death penalty is not inherently 'cruel and unusual', it may contravene that standard if it is imposed for an offence that is not in the highest category of seriousness. Thus those who take the view that the death penalty should always be regarded as contrary to fundamental rights may nevertheless give a qualified welcome, at least as a temporary *pis aller*, to reasoning that restricts its use by reference to the seriousness of the offence(s) of conviction.[127]

I am not convinced that *for the purpose of the present analysis* it is necessary to draw a sharp line between the two tracks. Instead, I prefer to delineate the two simply as a way to draw out their significance in the section 12 analysis and allow for a fuller discussion of what constitutes cruel and unusual treatment. Therefore, focusing on the methods track (while still allowing the analysis to be informed by contextual considerations—namely, an offender's age), the appropriate question here is as follows: are the effects of life sentences on youth grossly disproportionate to their effects on adults, such that imposing them on young people is inherently cruel and unusual?

Incarceration has been shown to produce intense feelings of alienation among youth with respect to their family and community, and this can lead to cyclical recidivism in the future.[128] While research shows that involvement in the carceral system (both in custody and on parole) has long-term negative impacts upon adults, these impacts are more pronounced among youth. This is

126. See Colton Fehr, "Tying Down the Tracks: Severity, Method, and the Text of Section 12 of the Charter" (2021) 25 Can Crim L Rev 235 at 242–43.

127. van Zyl Smit & Ashworth, *supra* note 56 at 544–45.

128. See Jon Laxer, "The Constitutionality of Mandatory Minimum Sentences for Youth" (2013) 60:1 Crim LQ 71 at 77.

because they are incarcerated while they are in their formative years and, in the context of life sentences, are faced with the prospect of lifelong ties to the carceral system while they are still in their teens.[129]

While these negative impacts affect youth facing all lengths of sentences, those serving life sentences are susceptible to the most intense and ongoing forms of stigma, alienation, and social isolation. This is due to their constant monitoring and ongoing risk of return to prison for even minor parole violations. The fact that youth sentenced to life receive shorter parole ineligibility periods than adults does nothing to allay these concerns or render a nonetheless cruel method of punishment acceptable. As the Supreme Court of Canada noted in *Bissonnette*:

> The idea that parole puts an end to an offender's sentence is a myth. Conditional release only alters the conditions under which a sentence is served; the sentence itself remains in effect for its entire term, that is, until the offender's death . . . Contrary to popular belief, "[a] person on parole is not a free man".[130]

Parole eligibility is also experienced differently by different youth. Between 2017 and 2018, the federal full parole grant rate for Indigenous incarcerated persons was 23.2 per cent—approximately half the rate of their non-Indigenous counterparts.[131] This figure is especially concerning when we consider that almost half of all youth sentenced as adults to life between 1984 and 2012 identified as Indigenous.[132] This suggests that the effect of a life sentence on a youth—especially an Indigenous youth—is particularly egregious relative to the experiences of adults serving the same sentences. Although more data is needed on the specific social, psychological, and other effects of life sentences on youth in the Canadian context as compared to adults, it is apparent that methods-based section 12 arguments have significant yet under-explored potential to

129. See Robert J Sampson & John H Laub, Crime in the Making: Pathways and Turning Points Through Life (Cambridge: Harvard University Press, 1993) at 162–68.

130. *Bissonnette* 2022, *supra* note 117 at para 89 [citations omitted].

131. See Statistics Canada, *Corrections and Conditional Release: Statistical Overview*, Catalogue No PS1-3E-PDF (Ottawa: Statistics Canada, 2018) online: <www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2018/index-en.aspx#sectiond3> at Figure D4.

132. See Ruddell & Gileno, *supra* note 2 at 239–40. Between the introduction of the YOA in 1984 and 2012, 48.6% of all youth sentenced as adults to life imprisonment were Indigenous, up from 15% in the *JDA* era.

inform constitutional challenges against youth life sentences in the future.

## Conclusion

Tracing the development of youth criminal justice law in Canada from the *JDA* to the *YCJA* reveals that, for the most part, it has become increasingly difficult to impose harsh penalties on youth who commit crimes. However, this should not be permitted to distract lawmakers, lawyers, and scholars from adequately critiquing intolerable forms of youth punishment that remain available under the *YCJA*. I have suggested that youth life sentences are an example of this and, with a view to eradicating them, this paper has canvassed new opportunities for arguing that they violate section 12 of the *Charter*.

After a brief discussion of perspectives on youth culpability within Canada's juvenile justice system, I considered how Berger and Kerr's two-track approach to section 12 analysis could be used to support this proposition. With respect to the severity track, recent neuro-biological research suggests that legal distinctions between youth and adult crime are fundamentally out of step with the science on youth culpability and capacity for rational decision making. Allowing the courts to determine when youth are deemed to have an "adult" level of blameworthiness—and therefore whether and when a life sentence is available—effectively assigns a level of culpability to the youth which neuro-biological science suggests may be factually impossible. This observation lends weight to the contention that a life sentence will always be disproportionately severe (and therefore will violate section 12) when applied to youth.

The lesser-explored "methods" track also holds promise for eradicating youth life sentences. Recent *Charter* litigation has revived the idea that some sentences will offend section 12 by their very nature due to their serious and deleterious effects. Youth sentenced to life are subject to immense alienation, stigma, and isolation for the remainder of their teenage and adult lives and, even when released on parole, face constant monitoring and risk of reincarceration. Further data is needed to fully demonstrate the abhorrent and intolerable effects of life sentences on youth as compared to adults facing the same sentences; however, there is significant and under-utilized potential to use this methods-based analysis in challenging their constitutionality.

Developing the arguments proposed in this paper would encourage a movement away from circumscribed discussions of when it is *permissible* to sentence a youth to life and instead invite more creative and principled discussion of whether this type of punishment might be considered fundamentally impermissible. As we consider the future of youth life sentences, the guidance of the Supreme Court of Canada in *Bissonnette* is instructive:

> Since a society's standards of decency are not frozen in time, what constitutes punishment that is cruel and unusual by nature will necessarily evolve, in accordance with the principle that our Constitution is a living tree capable of growth and expansion within its natural limits so as to meet the new social, political and historical realities of the modern world. As Cory J. pointed out more than 30 years ago while dissenting on another point in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, "[w]hat is acceptable as punishment to a society will vary with the nature of that society, its degree of stability and its level of maturity" (p. 818). Punishments that we regard as incompatible with human dignity today were common and accepted in the past. Professor A. N. Doob rightly states that "[t]he reason we no longer whip or hang people is not that we ran out of leather or rope. Rather, it is because those punishments are no longer congruent with Canadian values".[133]

It has been said that the truest measure of society's progress is how it treats its most vulnerable members. In this sense, the first step on the pathway to outlawing youth life sentences is a question of values: despite the science on young people's capacity for culpability, and despite the cruel effects of life sentences on young offenders, is it *still* consistent with Canadian values to sentence kids to life? The answer to that question says much about who we are and, perhaps more importantly, where our society will go from here.

133. *Bissonnette* 2022, *supra* note 117 at para 65 [citations omitted].