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Methods and Severity: The Two Tracks of Section 12

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The story of section 12 of the *Charter of Rights and Freedoms*, which protects against cruel and unusual treatment or punishment,[1] is overwhelmingly told — by judges and scholars alike — as a tale about proportionality. This is an artefact of the prominence of one problem that Canadian courts have famously employed a muscular approach to section 12 to address: the problem of mandatory minimum sentences. Since *Nur*,[2] the analytical path for evaluating the constitutionality of mandatory minimum sentences has been firmly and clearly set.[3] In *Lloyd*, the Court summarized the jurisprudence: "The question, put simply, is this: In view of the fit and proportionate sentence, is the mandatory minimum sentence grossly disproportionate to the offence and its circumstances? If so, the provision violates s. 12."[4] In this article, we argue that this focus on comparison and proportionality as the analytic heart of cruel and unusual treatment and punishment blurs a crucial distinction within section 12, and thereby enervates the courts' capacity to respond to the range of wrongs that the section should be able to address.

When judges describe the evil at which section 12 is directed, they use a welter of phrases. Section 12 prohibits state treatment or punishment that is "abhorrent or intolerable"; "incompatible with human

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [hereinafter "Charter"].

2 *R. v. Nur*, [2015] S.C.J. No. 15, 2015 SCC 15 (S.C.C.) [hereinafter "*Nur*"].

3 For the Court's most recent description of the test, see *R. v. Boudreault*, [2018] S.C.J. No. 58, 2018 SCC 58, at para. 46 (S.C.C.) [hereinafter "*Boudreault*"].

4 *R. v. Lloyd*, [2016] S.C.J. No. 13, 2016 SCC 13, at para. 23 (S.C.C.) [hereinafter "*Lloyd*"].

dignity"; or "so excessive as to outrage standards of decency".[5] When read within the world of the mandatory minimum sentence jurisprudence, it is natural enough that these phrases are generally taken to be synonymous with gross disproportionality. Grossly disproportionate treatment or punishment is, indeed, cruel and unusual and that's what's wrong with mandatory minimums. However, this equation of *the essential wrong addressed by section 12* with the *particular analytical approach appropriate to assessing the constitutionality of mandatory minimum sentences* obscures the important fact that two distinct species of wrongful state punishment can offend standards of decency, be abhorrent or intolerable to society, or violate human dignity. Otherwise put, there are two routes — two tracks — by which one can arrive at the fundamental wrong at the heart of section 12.The state can run afoul of section 12 by punishing excessively (the "severity track") or by using intrinsically unacceptable methods of treatment or punishment (the "methods track"). Importantly, each track demands a distinct method of analysis from reviewing courts. To date, this distinction, and its implications for section 12 analysis, has gone unrecognized in the case law and scholarship alike.[6]

Indeed, evidence of this crucial distinction being blurred, and its analytic consequences, can be found in the Court's most recent decision on section 12, *R. v. Boudreault*.[7] As we discuss below, at certain key argumentative points in the decision, the dissent and majority speak past one another because, at these points, they are moving on different section 12 tracks. In particular, when Côté J., writing in dissent, notes that the victim fine surcharge is quite unlike "the lash, the lobotomisation of certain dangerous offenders, and the castration of sexual offenders",[8] she introduces reasoning about intrinsically objectionable methods into a

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[5] *Lloyd*, *id.*, at para. 24; *R. v. Morrisey*, [2000] S.C.J. No. 39, 2000 SCC 39, at para. 26 (S.C.C.); *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045, at 1072 (S.C.C.) [hereinafter "*Smith*"]; and *R. v. Ferguson*, [2008] S.C.J. No. 6, 2008 SCC 6, at para. 14 (S.C.C.). Canadian judges have also often repeated that demonstrating a breach of s. 12 is "a high bar". *Lloyd*, *id.*, at para. 24; *Steele v. Mountain Institution*, [1990] S.C.J. No. 111, [1990] 2 S.C.R. 1385, at 1417 (S.C.C.).

[6] Debra Parkes implicitly distinguishes between these tracks in "The Punishment Agenda in the Courts" (2014) S.C.L.R. (2d) 589. While Parkes does not go so far as to argue that the two tracks should attract different tests, she separates prison condition cases from cases concerning mandatory minimums, and refers to the latter as "[a] dominant strand in the section 12 case law", *id.*, at 590.

[7] [2018] S.C.J. No. 58, 2018 SCC 58 (S.C.C.).

[8] *R. v. Boudreault*, at para. 183. Côté J.'s citation traces back to the 1987 *Smith* decision. See *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045, at 1073-74 (S.C.C.).

case that is properly about severity of punishment. In so doing, aspects of her reasons present certain of the analytic risks that arise when these two tracks are not distinguished.[9] *Boudreault* thus served as the provocation for this piece in which we insist on the importance of distinguishing the two tracks of section 12, even as our core motivation for so doing is forward-looking. Drawing this distinction, delineating the distinctive nature of the mischief with which each track is concerned, and understanding the questions and analysis appropriate to each, are essential to ensuring that judges are equipped to deal well with the variety of forms of section 12 claims coming before the courts.

The plan for this article is as follows: Part 1 explains the distinction between the two tracks in more detail, touching on why only one is well-developed in Canada. Part 2 makes the case for why drawing this distinction matters, by describing two of the analytic problems that flow from our current failure to distinguish between the two tracks of section 12. In this part, we demonstrate the importance of selecting the right track through discussion of three examples: the *Boudreault* decision; the constitutionality of section 745.1 of the *Criminal Code*,[10] which introduces the possibility of life sentences without the possibility of parole; and the assessment of prison conditions pursuant to section 12. Part 3 then puts the distinction, and its implications, on display through examination of another pressing jurisprudential issue: how to distinguish between and apply the two tracks to the specific topic of solitary confinement. Conceptual confusion has caused problems here in recent years, as Canadian courts have reflexively imported the severity frame generated in mandatory minimum sentence cases to resolve complaints that are not, at core, about proportionality. Finally, Part 4 addresses a question that is a consequence of our argument: does distinguishing between the two tracks assign prison conditions as relevant only to the method track? Our answer is "no". Consistent with arguments we have developed separately in other pieces, the qualitative dimensions of imprisonment should be understood as bearing directly on the character of a sentence, and as such have a role to play in a gross disproportionality analysis concerned with the severity of punishment.

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[9] As we discuss more fully below, Côté J. also gives considerable attention to the question of the severity and proportionality of the surcharge, differing from the majority in how she assesses the scheme and its effects on offenders. Thus, she discusses both tracks, but without attending to the differences between them and without making clear that the case at bar is about severity rather than an objectionable method.

[10] R.S.C. 1985, c. C-46.

I. PART 1: UNDERSTANDING THE TWO TRACKS

However uncultivated in the subsequent jurisprudence, one can find the seeds of the idea that there are two distinct tracks within section 12 in the first major Charter decision interpreting and applying the section, *R. v. Smith*. Justice Lamer's (as he then was) decision in *Smith* was attuned to the two species of concern that we point to here, though his opinion did not distinguish between them as sharply as we seek to here. Justice Lamer held that a sentence that is "grossly disproportionate to what the offender deserves"[11] would run afoul of section 12. Thus, if having considered "the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case",[12] a court concludes that the sentence would be "grossly disproportionate to what would have been appropriate, then it infringes s. 12".[13] In this, he anticipated the main line of the section 12 jurisprudence in the years that followed.

Yet Lamer J. also made clear that the ultimate concern under section 12 is "the effect of the sentence actually imposed".[14] Yes, the unconstitutional effect of a sentence could be the product of "its length alone", but Lamer J. was careful to recognize that "[t]he effect of the sentence is often a composite of many factors and is not limited to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied".[15] We see here an acknowledgment that conditions of punishment may matter in the evaluation of the proportionality of a sentence — a point to which we return at the end of this paper. But Lamer J. goes further, acknowledging that the method of punishment *alone* can drive the result under section 12. Some forms of punishment or treatment "will always be grossly disproportionate and will always outrage our standards of decency".[16] They will offend section 12 "by their very nature".[17]

Justice Lamer clearly understood the distinct concerns that can arise on each track. The severity of a sanction might exceed what is appropriate, in light of all of the circumstances, or it might be a sanction

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[11] *Smith*, at 1073.
[12] *Id.*, at 1073.
[13] *Id.*, at 1073.
[14] *Id.*, at 1073.
[15] *Id.*, at 1073.
[16] *Id.*, at 1073-74.
[17] *Id.*, at 1073.

that, in its nature, offends our sense of decency and thus violates limits on state action in the penal realm. Both concerns may well be present, but they are not both required so as to find an infringement of section 12, nor do they call for the same sets of considerations and questions from a court. They are alternatives. It is this feature of Lamer J.'s first pass at section 12 interpretation that we seek to recover and explore in this article. We argue that the clarity and rationality of this area of law would be improved, and the distinct harms recognized in *Smith* better protected against, if we more clearly distinguish the two tracks of section 12 jurisprudence and the analytic method appropriate to each.

And so how ought we to describe and think about these two tracks of section 12? How might the judicial lexicon for section 12 claims be refined to reflect this important distinction?

The methods track is concerned with whether a particular form of treatment or punishment is intrinsically cruel and unusual. In the language used in the governing case law to describe the wrong that section 12 is meant to address, such methods are *per se* abhorrent, incompatible with human dignity,[18] and outrage standards of decency.[19] The question for a court when a section 12 claim is made on this track is whether this particular form of sanction is, in its nature, one that the state may permissibly employ. Determining whether a given method is inherently objectionable in this manner will often require looking carefully at the effects of the punishment, in addition to (and informing) broader reflection on absolute normative standards.[20] Crucially, though, this is not an issue of proportionality between the sanction, on the one hand, and the gravity of the offence and degree of responsibility of the offender, on the other, nor does an assessment on this track depend on comparing or calibrating the treatment or punishment at issue to an

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[18] *Bacon v. Surrey Pre-trial Services Centre,* [2010] B.C.J. No. 1080, 2010 BCSC 805, at para. 300 (B.C.S.C.) [hereinafter "*Bacon*"].

[19] *Bacon*, *id.*, at para. 301; *Smith*, at 1072.

[20] While s. 12 was not directly engaged in *United States v. Burns*, [2001] S.C.J. No. 8, 2001 SCC 7 (S.C.C.) (except as a value to be considered in the s. 7 balance), the decision is instructive on what an examination of effects and reflection on normative standards involves. To decide whether the government can extradite individuals to places where they may face the death penalty, the Court noted that the problem is not only that capital punishment is inherently objectionable. The Court also analyzed the range of effects that flow from the institution of capital punishment, including the unique psychological impact of being held for long periods in the harsh conditions of death row (known as the "death row phenomenon"). At para. 122: "The finality of the death penalty, combined with the determination of the criminal justice system to try to satisfy itself that the conviction is not wrongful, inevitably produces lengthy delays, and the associated psychological trauma to death row inhabitants, many of whom may ultimately be shown to be innocent."

alternative, lesser sanction. The method of treatment is being challenged as, in its very nature, constitutionally offensive. This track would apply to section 12 challenges to capital punishment, corporal sanctions, and some forms of confinement.

The severity track asks whether the extent of the use of a particular treatment or punishment renders it cruel and unusual. On this track it is the extent or amount — not the kind — of punishment or treatment that might be intolerable, incompatible with human dignity, or an outrage to standards of decency. The question a court must ask when assessing a claim on this track is whether the severity of the punishment or treatment being challenged is grossly disproportionate, when compared to a fit or appropriate sanction.[21] In answering this question, a court is interested in the relationship to a particular (or reasonable hypothetical) offender's wrongdoing, culpability, and circumstances, and the degree to which the challenged treatment or punishment is out of proper calibration with those factors.[22] We will argue that the effects of a punishment will also matter here, insofar as they inform an assessment of severity and proportionality.[23] This is the form of analysis that our courts have developed through the mandatory minimum sentence jurisprudence.[24] Note that, on the severity track, the method of punishment employed is assumed to be acceptable, at least in some measure — the method (for example, incarceration in *Nur*, or fines in *Boudreault*) is not *per se* offensive. For this reason, the two tracks have a logically sequential relationship: where both are at issue, a court must first resolve the question of whether there is a constitutional problem with the method of punishment or treatment before switching to the severity track.[25]

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[21] *R. v. Safarzadeh-Markhali*, [2016] S.C.J. No. 14, 2016 SCC 14, at para. 71 (S.C.C.), resolved that the Charter protects against grossly disproportionate punishment only. Proportionality is a fundamental principle of sentencing, but it does not have constitutional status as a stand-alone principle of fundamental justice.

[22] The full list of relevant factors has been stated often in the cases: the gravity of the offence, the personal characteristics of the offender, the particular circumstances of the case, the actual effect of the treatment or punishment on the individual, relevant penological goals and sentencing principles, the existence of valid alternatives to the treatment or punishment imposed, and a comparison of punishments imposed for other crimes in the same jurisdiction. See, *e.g.*, *Smith*, at 1073; *R. v. Morrisey*, [2000] S.C.J. No. 39, 2000 SCC 395, at para. 28 (S.C.C.).

[23] *Boudreault* is, indeed, a good example of the way that effects of a sentence may inform an assessment on the severity track.

[24] See *R. v. Nur*, in which the Court asks whether the statutorily-imposed minimum carceral term is "grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender".

[25] In cases challenging the amount of a fine (*Boudreault*) or the length of a prison sentence (*Lloyd*, *Nur*), the reality is that the analysis need only proceed on the severity track alone. Fines and

In the United States, for historical and institutional reasons, the methods track is well-developed under Eighth Amendment jurisprudence. This is largely because the U.S. federal system and many states continue to rely on the death penalty. While the U.S. Supreme Court has declined the opportunity to abolish capital punishment as a matter of constitutional law, it has articulated a complex jurisprudence that narrows and restrains the institution of capital punishment. As Rachel Barkow observes, the idea that "death is different" has been used to justify a separate jurisprudence for the penalty of death: the Court will scrutinize whether the penalty of death is proportionate to the crime and the defendant, exempting certain crimes and certain offenders from a capital sentence.[26] In non-capital cases, by contrast, "the Court has done virtually nothing to ensure that the sentence is appropriate."[27] Barkow laments the near-absence of proportionality review — the other track — in Eighth Amendment law.

The opposite situation is present in Canada. The methods track has received little attention in Canadian law, largely because the death penalty for all non-military offences was abolished by Parliament in 1976. In response to the proliferation of mandatory minimum sentences in the early 2000s, Canadian courts and scholars have instead focused on issues of severity and proportionality. But the failure to acknowledge and develop the methods track has left critical facets of state punishment unexamined through the lens of section 12. Of particular interest in this piece, as Debra Parkes observed in 2014, is that section 12 has had "relatively little application in relation to prison conditions".[28] As Canadian courts increasingly hear arguments under section 12 that reach beyond conventional challenges to mandatory term-of-years prison sentences, including cases like *Boudreault* and claims concerning prison conditions, it is crucial that Canadian courts acknowledge and breathe life into this important distinction. We therefore now turn to explain why, as a practical matter of sound constitutional analysis, drawing this distinction matters so very much.

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imprisonment are the paradigmatic methods of punishment in contemporary society. The norms of acceptable punishment will evolve over time, but there is no doubt that neither fines nor imprisonment will be considered inherently objectionable by a contemporary Canadian court.

[26] Rachel Barkow, 'The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity" (2009) 107:7 Mich. L. Rev. 1145.

[27] *Id.*, at 1146.

[28] Debra Parkes implicitly distinguishes between these tracks in "The Punishment Agenda in the Courts" (2014) S.C.L.R. (2d) 589, at 605.

II. Part 2: Why the Distinction Matters

Clearly understanding and insisting on drawing the distinction between the two tracks of section 12 matters because running them together creates the risk that section 12 claims will fail as a result of analytic confusion, rather than for principled reasons. Blurring the two tracks can make it more difficult for a section 12 claim — on either track — to succeed, and for reasons that are not linked to the fundamental purpose of the right. There are two problematic effects at work here, both distortions in reasoning that are produced by judges searching for the answer to the wrong kind of question. First, if a judge hunts for an abhorrent method of punishment in a case that is really about a grossly disproportionate use of an otherwise legitimate method, she may become insensitive to the relevant wrong. Portions of Côté J.'s dissenting opinion in *Boudreault* suggest this kind of error. Second, if a judge treats a case about *per se* intolerable methods as a severity case, she may begin to engage in inapt comparisons and measuring, seeking to answer a proportionality question that is simply not posed. Doing so not only raises the risk of misdirected analysis, it may also set up bad incentives for prison officials. We expand on these two analytic risks below.

1. Treating Severity Cases like Methods Cases Makes the Wrong Difficult to Locate

The first distortion arises when a judge allows questions and standards appropriate to the methods track to blur into cases that are properly about severity alone. When this occurs, a judge may unfairly reject a plaintiff's claim about gross disproportionality because the method of punishment is generally acceptable. Hunting for the kinds of wrongs associated with intrinsically intolerable methods of treatment or punishment and not finding them, the case for a breach of section 12 can seem weaker than it ought to if the focus remains fixed where it should in a severity case: on the proportionality of the (otherwise acceptable) punishment.

Aspects of the dissenting opinion in *R. v. Boudreault* illustrate exactly this problem. At the heart of Côté J.'s dissent is a view that the impugned mandatory victim surcharge at issue in the case — $100 for a summary offence, $200 for indictable — was "not exorbitant".[29] Most Canadians,

[29] *Boudreault*, at para. 137.

she observes, would not find payment to be "particularly onerous".[30] On their own, these observations could tuck comfortably into a proportionality analysis appropriate to a case on the severity track: they might simply inform an assessment of the severity of the punishment, a step along the way to assessing whether it is grossly disproportionate. And, indeed, much of Côté J.'s reasons engage with these questions of proportionality, informed by the test established in *Nur*. In this dimension of her judgment, her key points of difference with the majority judgment arise from the kinds of burdens and deprivations each are willing to consider as forming part of the "punishment" under constitutional review. In the portion of her analysis focused on proportionality, Côté J. points to certain features that ameliorate the severity of the scheme, including that offenders who are unable to pay are entitled to an extension of time to pay,[31] are not to be imprisoned if they default due to poverty,[32] and will only rarely be deprived of liberty where necessary to compel attendance at a committal hearing.[33]

But there is something else going on in Côté J.'s judgment and shaping her view of the case. When she arrives at the end of her analysis, she summarizes her assessment by comparing the victim fine surcharge to custodial sentences, and crucially, to forms of treatment and punishment that will *always* violate section 12: "the lash, the lobotomisation of certain dangerous offenders, and the castration of sexual offenders".[34] Those comparisons in mind, she concludes as follows: "my view is that the requirement that all offenders pay a surcharge of only $100 or $200 per offence — a surcharge which cannot be enforced against the liberty or property of an offender who is simply too poor to pay — *does not rise to this level*".[35] And of course she is right: a fine pales in comparison to these abhorrent corporal sanctions. But this is the wrong kind of comparison for the severity track. On this track, a court is 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. Reaching for a comparison to *per se* unconstitutional methods of punishment overwhelms the proper inquiry, introducing

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30 *Id.*

31 *Id.*, at paras. 117 and 143.

32 *Id.*, at para. 120.

33 *Id.*, at para. 163.

34 *Id.*, at para. 183. As noted earlier in this article, Côté J.'s citation traces back to the 1987 *Smith* decision. See *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045, at 1073-74 (S.C.C.).

35 *R. v. Boudreault*, at para. 183.

analytic noise that makes it difficult to detect the wrong at issue in the case. Justice Côté's examples are from a track of section 12 jurisprudence that should have little application in a case concerned with excessive levels of an otherwise legitimate form of sanction. In this way, failure to distinguish the two tracks leads to an excessively narrow understanding of the harm that section 12 prohibits.

Perhaps part of what makes *Boudreault* difficult to categorize is that, unlike the typical case on the severity track, there is no particular offence to ground the analysis. In *Nur*, the analysis of proportionality directed the court to grapple with the offence of possessing a loaded prohibited firearm. In *Lloyd*, the court had to grapple with the offence of possessing controlled substances for the purpose of trafficking. There is no such analysis of a particular offence in *Boudreault*, due to the odd design of the provision. The amounts of either $100 or $200 that judges had to impose were not connected to a particular offence, but only to whether the offender committed a summary or indictable offence. This feature is part of why the provision was so uniquely unable to ensure proportionality between the nature of the offence and the circumstances of the offender. This feature posed challenges for both Côté J. and the majority, but the majority's analysis stays firmly on the severity track.

Justice Martin shows that the surcharge becomes abhorrent when you see that it will be an unpayable and indefinite burden for the highly marginalized offenders who appear with "staggering regularity in our provincial courts".[36] As Martin J. explains, "the effects of the same surcharge will be experienced differently by those who are differently situated".[37] The central problem is that sentencing judges had no ability under the challenged provision to address the disproportionate financial consequences that the fines would deliver to the indigent, regardless of their moral culpability. Unable to pay, poor offenders subject to the fine had to live with the threat of detention in relation to ongoing court appearances and the administrative hassle of committal hearings. Sentencing judges had no ability to craft a sentence in light of applicable legislative principles, such as proportionality, rehabilitation, and *Gladue* factors.[38] All of this adds up, Martin J. reasons, to a breach of section 12 because of a problem of *too much* punishment for at least a subset of offenders.

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[36] *R. v. Boudreault*, at para. 55.

[37] *Id.*, at para. 66. As James Foord put it in his oral argument for appellant Garrett Eckstein at the Supreme Court: "This case is all about context, if it's not about context then it's only 100 bucks. Green fees."

[38] *R. v. Boudreault*, at paras. 81-83.

The majority could have responded to Côté J.'s reference to the corporal, bodily sanctions that will always violate section 12 by observing that *Boudreault* is a case on the severity track. Justice Côté's move at this point in her reasons jumped the tracks, wrongly treating as relevant the question of whether a fine is as intrinsically offensive to human dignity and *per se* abhorrent to community standards as the lash and lobotomization. This is a distorting move because, of course, a fine is a highly legitimate form of sanction in general. The issue was whether the victim surcharge could be grossly disproportionate, or too severe, in at least some cases, having regard to the nature of the offence and the circumstances of the offender. Justice Côté invoked the standard from the methods track, and in so doing, arguably made it harder to locate the wrong that was actually at issue. The risk of analytical distortion this presents is one reason it is time to clearly recognize that section 12 of the Charter covers two distinct tracks and to ask judges to be assiduous in distinguishing the analysis appropriate to each.

2. Treating Methods Cases like Severity Invites Inapt Comparisons and Measuring

The second distortion appears when, in a case properly on the methods track, a judge allows severity reasoning to seep into the analysis. When this occurs, a judge casts out looking for a standard against which to measure the proportionality of the impugned punishment or treatment when, in fact, the court is being called upon to decide whether the nature and effects of the penal method are such that it is constitutionally unavailable to the state. The comparative pole that the judge reaches for in assessing proportionality might be the offender's wrongdoing, culpability, and circumstances, or it might be other existing penal methods. And of course such comparison might play some role in informing an assessment of whether a given method is intrinsically beyond the normative pale — such comparison might help to illuminate societal standards. But, unlike severity analysis, on the method track proportionality assessments do not answer the question posed. Indeed, they can be badly misleading. Very simply, the blurring of the two tracks in this direction can lead a judge to answer the wrong question.

Consider the question of the constitutionality of section 745.51 of the *Criminal Code*, which introduced the possibility of consecutive periods of parole ineligibility for multiple convictions for murder. These "stacked"

parole ineligibility periods can lead to sentences that amount to life imprisonment without parole — so-called "whole life sentences". Analyzed using assessments of proportionality drawn from the severity track, a section 12 challenge to this provision would have little hope of success. Employing the framework developed in the mandatory minimum sentence cases, a judge would ultimately ask whether the possibility of a whole life sentence is grossly disproportionate to the harm caused by the offences and the degree of responsibility and circumstances of the offender. By that metric, the challenge would be consigned to fail; indeed, section 745.51 might help to generate a scheme of *greater* proportionality, given our existing sentencing framework. As Campbell J. explained in just such a constitutional challenge to this provision, multiple murders "cause greater harm, with greater moral culpability, than cases involving but a single murder, and therefore are often deserving of greater punishment".[39]

But the comparison is inapt because the real complaint about section 745.51 is a concern about methods. Whether such sentences are proportional or not, the gravamen of the section 12 concern about this section is that there is something intrinsically abhorrent about consigning a person to die in prison, stripping them of any hope of future liberty. For this reason, and though he did not draw the sharp distinction that we urge here, Campbell J. was right, in *Granados-Arana*, to move past the question of proportionality and to also ask the fundamental question on the methods track: whether this provision, which allows the possibility of a life sentence without parole eligibility, "demean[s] or violate[s] human dignity in violation of s. 12 of the *Charter*".[40] Although we might quarrel with his conclusion that it does not, and in particular with his view that the royal prerogative of mercy is sufficient to stave off those unconstitutional effects, this is the right question. In cases on the methods track, questions of proportionality, of the existence of discretion and safety-valves,[41] and comparisons with harms and culpability all

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[39] *R. v. Granados-Arana*, [2017] O.J. No. 5964, 2017 ONSC 6785 at para. 141 (Ont. S.C.J.) [hereinafter "*Granados-Arana*"].

[40] *Granados-Arana, id.*, at para. 142, *per* Campbell J.

[41] In *Granados-Arana*, *id.*, at para. 143, Campbell J. lays heavy emphasis on the fact that s. 745.51 is a discretionary provision, and as such, "where such a consecutive parole ineligibility period order would be excessive, grossly disproportionate, or otherwise inappropriate, the sentencing judge can simply order the parole ineligibility periods to be served concurrently". In this, he falls back into thinking drawn from the severity track. If the method is inherently violative of s. 12, it can never lie in the hands of the state. On the adequacy of the royal prerogative as one such safety-valve for this issue, see Derek Spencer, "Does the Royal Prerogative of Mercy Offer Hope for Murderers?

distract from that essential focus: whether this is a penal method that is *per se* objectionable. That must be the analytic focus in any future challenges to this provision.

Another form of inapt comparison resulting from treating methods cases like severity cases arises from an example that draws us closer to the focus of the next section of this paper: solitary confinement. The example is an Ontario Court of Appeal decision on the constitutionality of prison conditions experienced at Maplehurst Correctional Complex.[42] In this case, Laskin J.A. attempted to measure the proportionality of an impugned punishment in a case that was really a complaint about an unacceptable penal method. Once again, a blurring of the tracks makes a section 12 challenge more difficult to prove, for reasons unlinked to the underlying wrongs that the section seeks to avoid.

During two years of pre-trial detention at Maplehurst, Jamil Ogiamien and Huy Nguyen were often held in lockdowns: confined to their cells for most of the day and night for several months. The application judge held that the lockdowns violated section 12, and awarded Charter damages in the amount of $60,000 and $25,000 to Ogiamien and Nguyen, respectively.[43] In overturning that decision, the Ontario Court of Appeal held that the frequency and duration of these lockdowns, which it said were caused largely by staff shortages, did not violate section 12.

The litigants in *Ogiamien* did not ask the court to distinguish between the two tracks in the way we do here, but this case was clearly a complaint about the method of state treatment. Indeed, as remanded prisoners, Ogiamien and Nguyen did not even stand convicted of an offence. As such, they were not in a position to allege a lack of proportionality between the punishment or treatment they experienced when compared to a fit or appropriate sanction. Still, the *Ogiamien* court used the severity lens to analyze the complaint; and, since there was no convicted offence to ground the analysis, the court thought it had to first decide what were "proportionate" or "ordinary" prison conditions. Rather than asking whether extensive lockdown is a constitutionally available method of state treatment in pre-trial facilities in contemporary Canada, it asked whether the lockdowns departed from a norm.

Further International Guidance for Interpreting the Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act" (2019) 24 C.C.L.R. 313.

[42] *Ogiamien v. Ontario (Community Safety and Correctional Services)*, [2017] O.J. No. 4401, 2017 ONCA 667, at para. 10 (Ont. C.A.) [hereinafter "*Ogiamien* Ont. C.A."].

[43] *Ogiamien v. Ontario*, [2016] O.J. No. 2444, 2016 ONSC 3080 (Ont. S.C.J.) [hereinafter "*Ogiamien* Ont. S.C.J."].

Justice Laskin said there is a two-step process to determine whether treatment is cruel and unusual:

> The first step establishes a benchmark. In this case step one looks at the treatment of [the inmates] under "appropriate" prison conditions — that is their treatment under ordinary conditions in the remand units when there were no lockdowns. Step two assesses the extent of the departure from the benchmark. In this case step two looks at the effect of the lockdowns on [the inmates'] treatment. If the effect of the lockdowns resulted in treatment that was grossly disproportionate to their treatment under ordinary conditions then their s.12 rights would be violated.[44]

Justice Laskin continued by noting that ordinary prison conditions at Maplehurst, absent lockdowns, allow inmates six hours of daily access to the dayroom to socialize, shower, watch television, read and make telephone calls. Inmates can also access an exercise yard for 20-30 minutes each day, participate in programming and receive visits. Lockdowns occurred for about 50 per cent of the time in 2014, and 55 per cent in 2015, but Laskin J.A. emphasized that the lockdowns that affected Ogiamien and Nguyen directly were slightly less than that, averaging 20-30 per cent of the time from 2014-2016. Approximately 1/3 of those lockdowns affected them for only part of the day. For the other 2/3, they were confined to their cells for 24 hours per day, in a small cell with another person. The court accepted their evidence that a lockdown involved stress, no stimuli, no exercise, no family visits, no telephone, no clean linen, and no access to programming.[45] Ultimately, the court concluded that "[t]he treatment of Ogiamien and Nguyen under lockdowns compared to their treatment under ordinary conditions may have been excessive or disproportionate, but it was not grossly disproportionate. Thus their treatment did not meet the high bar required to establish a s.12 violation."[46]

We do not argue that the *Ogiamien* appeal was rightly or wrongly decided (there were several more issues before the Court that we do not discuss here). Rather, we want to emphasize that the legal framework developed in the mandatory minimum context is a poor fit for resolving a complaint about extensive periods of cellular confinement in a pre-trial facility. The inmates in *Ogiamien* raised a complaint about intolerable methods. By treating that complaint like a severity case, Laskin J.A. tried

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[44] *Ogiamien* Ont. C.A., at para. 10.

[45] *Id.*, at para. 42. Both inmates said that staff tried to maintain access to essential services, including medical and lawyer visits. Showers were inconsistently available during lockdowns.

[46] *Id.*, at para. 57.

to answer a proportionality question that was simply not posed. The lens of "gross disproportionality" does not help to resolve a complaint brought by remanded inmates about conditions of confinement. The complaint is not about excessive responses to wrongdoing but about penal methods alleged to be, in their nature, objectionable.

Along with the risk of misdirected analysis, this approach may set up bad incentives for prison officials. Notice how Laskin J.A. tries to compare "ordinary" prison conditions with the impugned conditions, in order to satisfy the comparative demand inherent in the gross disproportionality analysis. Prison officials will soon realize that ensuring austere norms as part of ordinary conditions will help to protect against successful complaints asserting deviation from the norm. If we handle prison condition cases by comparing impugned treatment to "ordinary" conditions in a particular institution, institutions can avoid constitutional review by ratcheting down general standards.[47] Prisons and jails could simply work to ensure that ordinary conditions are austere and punitive in order to put a finger on the comparative scales. Consider *Ogiamien*: What if "ordinary" conditions at Maplehurst involved leaving a cell just once per week so as to access a brief shower? If lockdowns result in the loss of that minimal weekly reprieve from extreme solitary, would we say there is no constitutional problem because the new treatment is not a significant deviation from an established norm?[48] Let us say more about the need to distinguish these two tracks and properly apply the method track in the context of ongoing cases challenging the constitutionality of solitary confinement.

III. PART 3: HOW THE METHODS TRACK APPLIES TO SOLITARY CONFINEMENT

The *Ogiamien* approach is followed, to a degree, in *Canadian Civil Liberties Association v. Canada (Attorney General)*.[49] The *CCLA* case

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[47] This is the same incentives problem that arises under *Sandin v. Connor*, 515 U.S. 472 (1995), in which the U.S. Supreme Court holds that inmates only have a liberty interest protected by the Due Process clause when a prison regulation "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life". Austere hardships across the board can work to dilute or extinguish Due Process protections for incarcerated people.

[48] At the very least, the comparison should not be to 'ordinary' prison conditions in the institution under consideration. The application judge in *Ogiamien* Ont. S.C.J., referred extensively to the Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), at paras. 211-215, as an "aid in interpreting the rights conferred by the *Charter*". (Thanks to Anthony Sangiuliano for offering this point.)

[49] *Canadian Civil Liberties Association v. Canada (Attorney General)*, [2019] O.J. No. 1537, 2019 ONCA 243 (Ont. C.A.) [hereinafter "*CCLA*"]. The Supreme Court of Canada has

was a constitutional challenge to the federal legislative provisions that authorize "administrative segregation", otherwise known as solitary confinement and defined as the practice of locking inmates in cells for 22 or more hours a day, indefinitely.[50] In one part of her judgment on the constitutionality of these provisions, Benotto J. says that section 12 requires her to compare solitary to conditions in general population. Drawn to precedents like *Ogiamien* that blur the two tracks, Benotto J. writes that "a proper comparative exercise must consider the effects of prolonged administrative segregation against incarceration in an ordinary prison range".[51]

In the crucial part of her analysis, however, Benotto J. is clear that solitary violates section 12 because of its harmful effects — because placement in a cell for most of the day and night exposes inmates to a risk of "severe and often enduring negative health consequences".[52] Her analysis is not comparative in substance. There is no discussion of the particular conditions or health effects that flow from ordinary maximum-security confinement.

In a move that helps to free her analysis from comparisons to ordinary imprisonment, Benotto J. Cites *Toure v. Canada (Public Safety & Emergency Preparedness)*, in which LaForme J.A. rejects an argument that judges must strictly follow a two-step comparative proportionality test in what is effectively a complaint about a penal method.[53] In the context of indefinite and prolonged immigration detention, LaForme J.A. reminds us that section 12 claims involving penal methods must be analyzed primarily by looking at the nature and effects of the state treatment at issue. As he puts it: "a determination of whether treatment is cruel and unusual requires a focus on *the effect* of the conduct in question — does it give rise to cruel and unusual treatment?"[54]

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been asked to adjudicate an appeal of the *CCLA* decision, which will likely be paired with an appeal of the B.C. decision declaring the law that governs solitary to be unconstitutional: *British Columbia Civil Liberties Association v. Canada (Attorney General)*, [2019] B.C.J. No. 1151, 2019 BCCA 228 (B.C.C.A.) [hereinafter "*BCCLA*"].

[50] See ss. 31-37 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, which have been amended in the wake of *CCLA* and *BCCLA* decisions.

[51] *CCLA*, at para. 97.

[52] *Id.*, at para. 97.

[53] *Toure v. Canada (Public Safety & Emergency Preparedness)*, [2018] O.J. No. 4230, 2018 ONCA 681, at para. 57 (Ont. C.A.), dismissing an argument that the judge below failed to strictly ask: (1) what treatment would have been appropriate, and (2) measure the actual treatment against this benchmark.

[54] *Id.*, at para. 61 (emphasis added).

Like Lamer J. in *Smith,* LaForme J.A. is attuned to how a sanction might, in its nature, offend our sense of decency and thus violate limits on state action in the penal realm. Justice LaForme reminds us that it is often the effects of a punishment that will disclose whether a given method is inherently objectionable, and this is precisely the approach that the solitary confinement cases require. Beneath the surface of her citation to *Ogiamien*, that is the approach Benotto J. takes in *CCLA*. Her opinion is not, in fact, predicated on a view that solitary is a problem because it departs from ordinary prison conditions. Rather, she points to the powerful findings of the application judge on these issues, showing that the problem with solitary is that it causes foreseeable and expected harm when it extends beyond 15 days.[55] The substance of Benotto J.'s approach accords with that required for a case on the methods track.[56]

To return to the distinction we are pressing in this article, it is clear that the problem with solitary is not a lack of proportionality with the nature of an offence or the circumstances of an offender, nor is it a problem with the degree of departure from treatment unfolding elsewhere in the prison. The acceptability of solitary confinement, at least as it has been legislated and practiced in Canadian prisons and jails in recent decades, is best revealed by pursuing analysis on the methods track: asking whether it is an unacceptable penal method that outrages our standards of decency.[57] Justice Benotto was convinced that solitary infringes section 12 because of its negative effects on health, which has

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[55] *CCLA*, at para. 73.

[56] In British Columbia, the trial judge opted to decide a challenge to the laws authorizing solitary confinement under s. 7 rather than s. 12. See the reasoning on this issue set out at *BCCLA*, at paras. 524-534, Leask J. appeared to accept the government's argument that s. 12 fundamentally requires an individual analysis, and that the absence of a personal plaintiff in that case precluded a sufficient factual record to determine whether the "conditions, duration and reasons for segregation" of a particular inmate violate s. 12 (at para. 527, citing *R. v. Marriott*, [2014] N.S.J. No. 139, 2014 NSCA 28, at para. 38 (N.S.C.A.)). In *CCLA*, Benotto J. rejected that same argument, noting that while many cases are brought by individuals and thus turn on detailed evidence of the treatment they endured, that does not preclude the application of s. 12 to other contexts (paras. 94-95). The Supreme Court of Canada is likely to address this issue, along with a number of related issues regarding the availability of Charter remedies in the context of public interest litigation arising from both the B.C. and Ontario solitary appeals.

[57] See, for example, the discussion in *R. v. Prystay*, [2019] A.J. No. 7, 2019 ABQB 8 (Alta. Q.B.), which awards a significant sentencing discount in recognition of time spent in pre-trial segregation. "Societal views on what is acceptable treatment or punishment evolve over time. Forced sterilization, residential schools, lobotomies to treat mental disorders, corporal punishment in schools and the death penalty are all examples of treatment once considered acceptable. Segregation ravages the body and the mind. There is growing discomfort over its continued use as a quick solution to complex problems." (para. 128).

been a powerful line of concern about solitary confinement for many years.[58] Others might emphasize that indefinite solitary in the absence of procedural fairness is what gives rise to an experience of isolation that violates section 12. The point is that the wrong of solitary is not disclosed by examining the degree to which it departs from ordinary prison conditions, whatever those may be.

IV. PART 4: THE RELATION BETWEEN PRISON CONDITIONS AND PROPORTIONALITY

Our discussion of solitary confinement as a type of case on the methods track raises an important question that we wish to address before concluding this article: are prison conditions only relevant to the methods track of section 12? Otherwise put, are the conditions and effects of imprisonment ever relevant to a complaint about severity? Our view is that they are. We have insisted here that the essential question for the severity track — proportionality — is not a central concern for the methods track, focused as it is on the normative evaluation of the lived effects of a given treatment or punishment. But the converse cannot be said: the effects of an otherwise acceptable method of imprisonment are indeed relevant when assessing whether a given punishment is grossly disproportionate, in violation of section 12. This position follows naturally from an argument that we have each advanced versions of elsewhere, namely that the qualitative features, consequences, and experience of incarceration — not just the quantitative issue of duration — must be considered when assessing the individualized circumstances of the offender and the true gravity of a given sanction.[59] If it is true that prison conditions and their individualized impact on an offender help us understand the severity of a sentence, and with this, the proportionality of the punishment, they must also be relevant to evaluations of gross disproportionality under the section 12 severity track.

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[58] This line of concern is particularly prevalent when it comes to isolating mentally ill inmates. David Fathi, director of the ACLU National Prison Project, says that a rule against placing the seriously mentally ill in solitary is no longer in dispute under American law: every federal court to consider the question has held that supermax-style confinement of the seriously mentally ill is unconstitutional. David C. Fathi, "The Common Law of Supermax Litigation" (2004) 24:2 Pace L. Rev. 675, at 681-84.

[59] See Benjamin L. Berger, "Sentencing and the Salience of Pain and Hope" (2015) 70 S.C.L.R. (2d) 337; and Dwight Newman & Malcolm Thorburn, eds., *The Dignity of Law: The Legacy of Justice Louis LeBel* (Markham: LexisNexis Canada, 2015); Lisa Kerr, "How the Prison is a Black Box in Punishment Theory" (2019) 69:1 University of Toronto L.J. 85; Lisa Kerr, "Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Punishment" (2017) 32:2 C.J.L.S. 187.

The recent decision in *R. v. Sharma* is one powerful illustration of how prison conditions can impact a case on the severity track.[60] In *Sharma*, Hill J. strikes down the mandatory minimum penalty of two years for importing cocaine under section 6(3)(a.1) of the *Controlled Drugs and Substances Act*,[61] on the basis of gross disproportionality. In the course of his analysis, he points to several concerns about the impact of penitentiary confinement on some offenders, including those with pre-existing health problems,[62] those who will be incarcerated far from home,[63] and Indigenous people who experience disproportionate burdens of incarceration.[64] Justice Hill is clear that the lens of "gross disproportionality" under section 12 requires judges to consider more than the length of sentence alone: "the s. 12 *Charter* protection is not confined to one-dimensional focus upon sentence duration but rather the quality and effect of the punishment on the offender including the nature and conditions under which it is applied".[65]

In this respect, *Sharma* draws from *Smith*. As we discuss above, *Smith* makes clear that the nature or quality of punishment can be grounds for finding a section 12 breach. *Smith* was a challenge to a mandatory length of confinement of seven years for a broadly defined drug trafficking offence. This case is clearly on the severity track, but in his majority reasons Lamer J. said that when analyzing whether a sanction will be grossly disproportionate, courts should consider not only length but also the effect and conditions of a sentence. He noted that the "effect of the sentence is often a composite of many factors"; that it is "not limited to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied".[66] Justice Lamer describes a hypothetical scenario to show how decisions made in the correctional context may combine to create an unacceptably severe sentence:

> Sometimes by its length alone or by its very nature will the sentence be grossly disproportionate to the purpose sought. Sometimes it will be the result of the combination of factors which, when considered in isolation, would not in and of themselves amount to gross disproportionality. For example, twenty years for a first offence against property would be grossly disproportionate, but so would three months

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60 *R. v. Sharma*, [2018] O.J. No. 909, 2018 ONSC 1141 (Ont. S.C.J.) [hereinafter "*Sharma*"].
61 S.C. 1996, c. 19.
62 *Sharma*, at paras. 216-220.
63 *Id.*, at para. 121.
64 *Id.*, at paras. 121-123.
65 *Id.*, at para. 146.
66 *Smith*, at 1073.

> of imprisonment if the prison authorities decide it should be served in solitary confinement.[67]

This passage from *Smith* suggests that a sentence may become grossly disproportionate in light of the conditions experienced by an offender. Justice Lamer's *obiter* suggestion has not received much attention, but it serves as an example of how penal treatment might inform a complaint on the severity track. His use of the example of solitary confinement is particularly instructive for purposes of this piece. The effects of certain prison conditions might be the basis for a claim that the treatment at issue is inherently abhorrent and that the state may never use it. But even in the absence of a finding that the method is *per se* impermissible, taking account of those same effects might render the punishment excessive to the point of gross disproportionality. As in *Sharma*, and when it comes to the penal method of incarceration, which will never be ruled inherently cruel and unusual, the implication is important and provocative: the actual effects and conditions of imprisonment are relevant to section 12, no matter the track.

V. CONCLUSION

The wrong that section 12 is ultimately concerned with is the same under both tracks: treatment or punishment that is abhorrent or intolerable, offends standards of decency, or violates human dignity. While the end point is the same, we have argued here that complaints about penal methods require a specific analytical approach, distinct from that employed to assess the proportionality of an otherwise acceptable kind of punishment.

It may be helpful to conclude by returning to McIntyre J.'s rich dissenting opinion in *Smith*, which offers clarifying historical perspective. Justice McIntyre reminds us that the two tracks emerged at different points in our legal history. Originally, he writes, the prohibition against cruel and unusual treatment or punishment was aimed at "punishments which by their nature and character were inherently cruel".[68]

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[67] *Id.*, at 1073.

[68] *Smith*, at para. 85, citing *R. v. Miller*, [1976] S.C.J. No. 91, [1977] 2 S.C.R. 680 (S.C.C.), *R. v. Shand*, [1976] O.J. No. 2178, 30 C.C.C. (2d) 23 (Ont. C.A.); *R. v. Konechny*, [1983] B.C.J. No. 2244, 10 C.C.C. (3d) 233 (B.C.C.A.); *R. v. Langevin*, [1984] O.J. No. 3159, 11 C.C.C. (3d) 336 (Ont. C.A.), and the American cases; *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion); *People v. Broadie*, 371 N.Y.S. 2d 471 (1975); *Carmona v. Ward*, 576 F.2d 405 (2nd Cir. 1978); and *Solem v. Helm*, 463 U.S. 277 (1983).

Here one can imagine the medieval punishment of drawing and quartering in the town square or, today, the sensory and social deprivation that inheres in many forms of solitary confinement. The limit on cruel and unusual punishment has since been extended, McIntyre J. writes, to punishments which, though not inherently cruel, are "so disproportionate to the offence committed that they become cruel and unusual".[69] Punishment that is not *per se* cruel and unusual, "may become cruel and unusual due to excess or lack of proportionality".[70] Examples from our jurisprudence include the large fines imposed on indigent offenders for minor wrongdoing in *Boudreault*, or seven-years imprisonment for a first-time importer of a single marijuana cigarette in *Smith*. Justice McIntyre disagreed with the majority on whether the latter violated section 12 and, on that front, his views have been clearly rejected in the subsequent jurisprudence. But his careful attention to the distinct paths of section 12 is what we have sought to recover in this article. If our goal is to draw meaningful limits on state punishment that are responsive to the realities of our practices of punishment, courts should recognize and embrace this distinction and its analytic consequences.

[69] *Smith*, at para. 84.
[70] *Id*.