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# Beyond Proportionality: Thinking Comparatively About Constitutional Review and Punitiveness

Jacco Bomhoff\*

**Abstract:** US law is often cast as a notable outlier in two prominent fields of comparative studies. Among comparative constitutional lawyers, the US Supreme Court is famous for its apparent reluctance to embrace the kind of proportionality reasoning seemingly so familiar in Western Europe and in other liberal jurisdictions. And for scholars of comparative criminal justice, the United States stands out, as it has for the past 40 years or so, in terms of the numbers of individuals sent to prison, and in the harshness of the treatment meted out to offenders. Could these two phenomena be connected? By way of an indirect - and incomplete - answer to this question, this paper develops three lines of argument on the punitiveness-proportionality relationship. First, at least some of the factors that help explain cross-country variations in punitiveness, seem relevant also to an understanding of similarities and differences in relation to proportionality reasoning in constitutional jurisprudence. The paper discusses what comparative constitutional lawyers might take from leading work in this area by David Garland, Nicola Lacey, Michael Tonry, James Q. Whitman and others. Second, the comparative punitiveness literature shows how a more substantive understanding of ‘proportionateness’ could be developed, to move beyond the more formal, doctrinal preoccupations of much comparative constitutional law scholarship on proportionality. And third, the paper suggests that penal moderation and proportionality reasoning appear connected in terms of a deeper, underlying sensibility framed here as an ‘intolerance for wrong outcomes’. The paper proposes that future comparative work should aim to engage more directly with this underlying intolerance and its opposites.

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## 1. INTRODUCTION

Comparative constitutional law scholars commonly speak of a familiar range of legal systems - Germany, Israel, Canada, India, among others - as having embraced proportionality, as a principle or doctrine in their constitutional jurisprudence. What do such statements mean? In what ways, if at all, are these legal systems similar to each other, and different from those where proportionality has not been so 'embraced'? We have few firm answers to these questions, I would suggest, and this for three main reasons. First, it is not at all obvious that the discourse of proportionality, which undoubtedly *has* been enthusiastically adopted in many jurisdictions, has sufficiently comparable meanings across all the instances where it appears.<sup>1</sup> This means that it is often not clear what we are talking about when we talk about 'proportionality' across jurisdictional boundaries. Second, most comparative work on proportionality in constitutional jurisprudence focuses on relatively formal matters, such as doctrinal structure or coherence in case law. That means we know little about the concrete substantive effects and broader implications of whatever it is that courts, or other decision makers, in any particular jurisdiction are in fact doing under the label of 'proportionality'. Let alone about how to compare these effects and implications across systems. And third, the literature in comparative constitutional law commonly remains disciplinarily specific, in the sense that there is little work that tests our understandings of 'proportionality' in these constitutional settings against what we know about salient differences and similarities between legal systems in other contexts.

This Paper aims to make a contribution on each of these points, by way of an exercise in *comparative-comparative* law.<sup>2</sup> Its project is a comparison of two fields of comparative inquiry that both feature 'proportionality' as an explicit central theme. Each of these fields further has to contend with legal difference, in the form of a puzzling divergence between legal institutions and practices in the contemporary United States, and those in many other Western liberal jurisdictions, with Germany as a special example. The aim is to use this double comparison in three ways. First, to get a better sense of what the ideals of proportionality require locally, within different legal systems. Second, to develop a thicker understanding of the character of some key differences between legal thought and institutions in

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<sup>1</sup> Two basic examples may illustrate this: (1) Proportionality as a structured doctrine is commonly thought of as having a number of 'steps'. If courts in jurisdiction [A] 'rarely, if ever, move beyond step 1', and if in jurisdiction [B] step 2, 3, or *n* 'does all the work', are these courts 'doing the same thing', even broadly speaking, in any meaningful sense? (2) Just like any other element of legal discourse, proportionality's meaning depends in part on what it is thought *not* to be (any available alternative doctrines or principles, any doctrines or principles that proportionality is thought to have 'replaced', *etc.*). But what proportionality is *not* will inevitably differ from one place to another.

<sup>2</sup> For an analysis of proportionality across different doctrinal context mostly *within* one legal system - that of the United States - see E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW (2009) (labeling this 'a kind of interdoctrinal comparative law', at 9).

the United States and those prevalent elsewhere; again with particular reference to Germany. And third, to see whether some conception of ‘proportionality’ can ultimately be made suitable as a lens for capturing precisely these deeper differences, or whether comparative constitutional legal scholarship could, in some ways at least, be better off by moving beyond proportionality as one of its central preoccupations.

Introducing the two fields to be compared, there is, first, the prominent concern with proportionality in comparative constitutional law, as just mentioned. This literature tends to focus on the role of proportionality as a principle or a doctrine in the jurisprudence of constitutional rights adjudication. The character and extent of ‘US exceptionalism’ are contested in this field, as will be discussed further below.<sup>3</sup> But it is mostly agreed that US constitutional law is particular at least in the sense that explicit references to proportionality - and in particular to proportionality as a general principle of law - do not figure centrally in American case law on constitutional rights. The second field of inquiry is that of comparative criminal justice and punishment, also called comparative punitiveness. Here, the fact of ‘US exceptionalism’ is largely undisputed; it is rather the reasons for the divergence that constitute the puzzle. Much of this literature revolves around attempts to understand ‘the growing divide between the United States and other Western liberal democracies with regard to criminal punishment practices’.<sup>4</sup> The role of proportionality here, by contrast, is more difficult to circumscribe. But the theme appears explicitly and prominently at least in an assemblage of doctrines in criminal and constitutional law, as an element in theoretical justifications of punishment, and as part of the philosophical and political rhetoric that aims to legitimize punishment practices, or seeks to rein them in.<sup>5</sup>

Why, then, try to compare and relate these two fields of inquiry?<sup>6</sup> On a most ambitious level there is the tantalizing question of the two ‘exceptionalisms’. In short: Is there any relationship between the fact that the United States incarcerates

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<sup>3</sup> See Section 2.

<sup>4</sup> Carol S. Steiker, *Capital Punishment and Contingency (Book Review)*, 125 HARV. L. REV. 760, 760 (2012). On this divergence, see further Section 2. Two caveats: First, what matters here is the fact of significant variation between legal systems in terms of their punitiveness; there is no presumption that it is US distinctiveness that needs explanation. See on this point James Q. Whitman, *Response to Garland*, 7(4) PUNISHMENT & SOCIETY 389, 394 (2005). Second, there are signs that punitiveness may have reached some form of peak the US, at least in the sense that broad goals of reducing imprisonment rates and improving treatment of offenders appear now to be drawing bipartisan support. This very recent development will have to remain outside the scope of this Paper.

<sup>5</sup> For overviews see, e.g., Nicola Lacey, *The Metaphor of Proportionality*, 43(1) J. OF LAW & SOCIETY 27 (2016); Nicola Lacey & Hanna Pickard, *The Chimera of Proportionality*, 78 MODERN L. REV. 216 (2015); ROBERT A. FERGUSON, *INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT* (2014), 14, 28; ANDREW ASHWORTH & ANDREW VON HIRSCH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* (2005); Malcolm Thorburn, *Proportionate Sentencing and the Rule of Law*, in JULIAN V. ROBERTS & LUCIA ZEDNER (EDS.), *PRINCIPLES AND VALUES IN CRIMINAL LAW AND CRIMINAL JUSTICE: ESSAYS IN HONOUR OF ANDREW ASHWORTH* 269 (2012).

<sup>6</sup> I use ‘fields’ here in the sense of academic disciplines. In jurisprudential and practical terms, the concerns of criminal justice and constitutional law will of course often overlap. The precise degree and character of the ‘constitutionalization of criminal justice’, however, is likely to differ between systems, for example due to differences in their judicial organization.

more people, for longer terms, and under generally harsher conditions than other Western countries, and the sense that US courts, in contrast to courts in these other countries, have been particularly reluctant to ‘embrace proportionality’, at least as an overarching and explicit element of their jurisprudence on constitutional rights?<sup>7</sup> This is a difficult question. Here are just a few immediate concerns. Both the premise of ‘US exceptionalism’ in comparative constitutional adjudication and the factors explaining a punitive turn in the contemporary United States are contested, as already mentioned. The two phenomena probably involve at least somewhat different sets of actors and driving forces. Legislatures are key drivers of punitiveness in the US, for example, while constitutional jurisprudence is mostly seen as primarily the work of courts. Another example: Racial disparities are a central concern in many accounts of US punitiveness, whereas race has mostly been ignored as a relevant issue in comparative studies of constitutional rights doctrine, certainly outside the penal context.<sup>8</sup> The two phenomena – variations in punitiveness, and in the role of proportionality in constitutional jurisprudence – could well also be of different orders of significance or permanence. And finally, as stated earlier, it is not at all obvious that references to proportionality will have meanings across the different relevant legal domains and legal systems that are similar enough to allow any kind of correlations to be established.<sup>9</sup> But the question of the punitiveness-proportionality relationship is also one that it seems worthwhile to ask. ‘Proportionality’ *as a theme*, for all its complexities, has the potential to at least open up a productive dialogue between scholars of punishment and those of constitutional legal doctrine. If students of comparative punitiveness have been urged to look more closely at ‘what one might broadly call legal or constitutional variables such as ... the specific shape which *Rechtsstaat*/rule of law conceptions assume in different countries’,<sup>10</sup> then studying the roles of proportionality in constitutional jurisprudence must be a good place to start. And, from the opposite direction, if it is now so widely agreed that ‘America has become a byword for harshness’ in criminal justice,<sup>11</sup> should this not stimulate comparative constitutional lawyers to go beyond the familiar, more formal, surface-level similarities and differences that they have tended to focus on with regard to proportionality, to try to get a clearer sense of how US ideas and

<sup>7</sup> It is noteworthy that in framing US ‘exceptionalism’, both fields often turn to Germany and German law for their principal comparative foil.

<sup>8</sup> For a recent critique of the neglect of race in studies of proportionality in constitutional legal doctrine, see David Schneiderman, *Proportionality and Constitutional Culture (Book Review)*, 13 I-CON 769, 772 (2015).

<sup>9</sup> To give one example: ‘Proportionality’ references in criminal justice will often invoke not just a familiar range of political ideals related to governmental overreach, but also a more particular pre-political morality – a morality of desert – that may well be absent from other areas of constitutional jurisprudence. I am indebted to Malcolm Thorburn for this suggestion.

<sup>10</sup> Nicola Lacey, *The rule of law and the political economy of criminalization: An agenda for research*, 15(4) PUNISHMENT & SOCIETY 349 (2013). See also, e.g., David Garland, *Capital Punishment and American Culture*, 7(4) PUNISHMENT & SOCIETY 347, 349 (2005) (‘sociology of punishment’ could benefit from the ‘identification of the USA’s distinctive governmental and legal institutions’).

<sup>11</sup> James Q. Whitman, *The Free Market and the Prison (book review)*, 125 HARV. L. REV. 1212, 1213 (2012).

practices of constitutional review might - or, after all, might not - really be distinctive in some deeper sense? Even if it turns out that 'proportionality' does not, in the end, best capture those deeper differences?

This Paper can only suggest partial answers to this large question on the punitiveness-proportionality relationship, and it does so through the more modest project of projecting some of the questions typically asked in the comparative criminal justice field onto the study of proportionality in comparative constitutional law. These questions help address the gaps in our understanding of proportionality's meanings, affinities and effects, identified at the outset of this piece. Section 2 introduces the theme of proportionality in constitutional law, that of punitiveness or harshness in criminal justice, and the question of 'US exceptionalism' in relation to each. Against this background, Section 3 looks at how some prominent explanations given for cross-country variations in punitiveness might be relevant to comparative understandings of proportionality in constitutional jurisprudence. This Section pays special attention to debates over the role to be accorded to 'culture' in explaining variations in penal harshness. It is important to note at the outset that the reason for this focus is not an assumption as to the significance of cultural factors as independent variables of any kind, but rather the fact that such factors have figured centrally in prominent recent work on 'proportionality and constitutional culture' in comparative constitutional law. The survey of criminal justice debates in this Section is intended in part to highlight not just the promise but also the difficulties that such efforts at culturalist explanations may bring. Section 4 then uses this same criminal justice literature to reflect on the possibilities for what I call a 'turn towards substance' in comparative studies of constitutional review. Studies of punishment practices and penal policy have found ways to compare legal systems in the powerfully substantive terms of 'harshness' or 'punitiveness', with all the difficulties of definition and measurement these concepts entail. This Section argues that comparative constitutional lawyers could use these examples to move beyond concern with form and doctrine alone, towards a comparison of constitutional-legal systems in terms of their 'proportionateness'. This initially awkward term, this Section claims, *can* be made meaningful for comparative legal studies, but only in a very specific and limited sense; as an indicator of relative elite and popular 'intolerance for wrong outcomes'. Future comparative legal studies, I suggest, should move beyond proportionality - even beyond 'proportionateness' - and engage more directly with differences between legal systems and cultures in terms of the character and strength of this tolerance and its institutional, political, social, economic, cultural, and historical determinants.

## 2. PROPORTIONALITY, PUNITIVENESS, 'EXCEPTIONALISM'

Both the jurisprudence of constitutional rights review and theories of criminal justice and punishment incorporate strategies intended to protect individuals from state violence and abuses of government power. A brief glance at the relevant scholarly literatures will show that 'proportionality' is a key concept in the former field, and 'punitiveness' in the latter. It will show too, that 'proportionality' also has an important, though contested, place in criminal justice thinking about limits to punishment.<sup>12</sup> And so the questions arise of how the two terms of 'proportionality' and 'punitiveness' are understood in their respective fields, and of how they might be related.

First: Proportionality in constitutional review. As Vicki Jackson has recently summarized, proportionality can be understood 'as a legal principle, as a goal of government, and as a particular structured approach to judicial review'.<sup>13</sup> It is a combination of the first two of these understandings - proportionality as abstract (constitutional-philosophical-legal-political) *principle* of adjudication and governing - that figures centrally in most work within the criminal justice and penal policy field on the impact of proportionality on limits to severity in punishment.<sup>14</sup> In a recent article Nicola Lacey and Hanna Pickard, reflecting on this connection, argue that '[t]he idea that appeals to proportionality as an abstract ideal can help to limit punishment' is 'a chimera'.<sup>15</sup> '[S]uch an appeal', they write, 'can by itself contribute little to the construction of norms adequate to limit state punishment', because the idea of proportionality is 'virtually indeterminate in its substantive implications'.<sup>16</sup> People may agree that proportionality is a good thing, but in late-modern societies they do not agree on what it requires. Proportionality, Lacey and Pickard argue, can only act as a limit on penal severity 'through substantive institutional frameworks under particular conditions'.<sup>17</sup>

As the third element in Jackson's summary shows, however, the abstract idea of proportionality *does* commonly appear in at least one specific institutional guise: that of a 'particular structured approach to judicial review' in constitutional law. This is the familiar explicit, multi-step structure of 'proportionality review' or 'proportionality analysis', invoked by courts engaged in the review of legislation or executive action. And it is in fact this level of proportionality - proportionality *as an institution* - that comparative constitutional legal scholarship has tended to focus

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<sup>12</sup> The overlap between these two fields can clearly be substantial, but it will hardly be complete: Typically, not all of criminal law and penal procedure will turn on invocations of constitutional rights and proportionality, and not all of constitutional rights law is concerned with limits on punishment. These are all contingent matters, depending in particular on the degree of constitutionalization of criminal law and the penal process.

<sup>13</sup> Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3098 (2015).

<sup>14</sup> Lacey & Pickard (2015). The authors describe punitiveness as 'grade inflation' in sentencing (at 217).

<sup>15</sup> Ibid.

<sup>16</sup> Ibid., 232. See also FERGUSON (2014), 14, 28.

<sup>17</sup> Ibid., 216.

on. The general, unstated assumption in much of this field outside the US context is that the elements of proportionality as abstract idea and proportionality as institution will normally exist conjointly, in the sense that judicial proportionality analysis is seen as the direct manifestation of an underlying general ‘principle of law’, and that this institution will be of such general application that it will more or less exhaust the significance of the ideal of proportionality within a particular constitutional-legal order.<sup>18</sup>

Comparison with the United States complicates this picture, and this is where the difficult question of ‘US exceptionalism’ becomes relevant. US constitutional jurisprudence clearly is, and has long been, familiar with proportionality as an abstract ideal. It has also, for quite some time, incorporated a wide range of doctrinal structures that, among many other things, embody and reflect aspects of this ideal.<sup>19</sup> Where US jurisprudence seems distinctive, however, is in terms of its *disconnect* between these abstract ideals and their institutional-doctrinal operationalization.<sup>20</sup> Abstract principle and jurisprudential institution would show a neat, one-on-one fit in an ideal-typical representation of German constitutional jurisprudence, for example. The fact that they do not in US law suggests the possibility that elite legal thought in the United States operates with a conception of the meanings, roles and requirements of proportionality - as an ideal - that is less comprehensive (‘scope’), and less demanding, both across cases (‘consistency’) and in individual instances (‘intensity’) than elsewhere.

Looking at these elements in turn, and comparing US constitutional jurisprudence to that of other Western systems, it appears we know a fair bit about differences in terms of the first two of them: Scope and consistency. First, it is clear that that proportionality as a general principle of law is not part of US constitutional jurisprudence.<sup>21</sup> Second, there are pockets of US law, such as the interpretation of the clause prohibiting ‘cruel and unusual punishment’ in the Eighth Amendment, where courts have either explicitly, or tacitly in practice, refused to accord a comprehensive, primary, or even just a significant role to the

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<sup>18</sup> But see Jackson (2015), 3099 for nuance on this point, in relation to South Africa and Australia. This observation could be taken as the basis for a more general comment on the thesis developed by Lacey and Pickard: It is difficult to conceive in any abstract sense of an ‘appeal’ *simpliciter* to proportionality, certainly outside the context of theoretical scholarship (See Lacey & Pickard (2015), 219, referring to ‘proportionality, in itself’). There are *many kinds* of such appeals, and they always *already come* with distinctive associated principles, institutional structures, and expectations as to desirable outcomes. Not only the content of these expectations, but also the relative degree of societal agreement and disagreement over them, are likely to differ as between different settings.

<sup>19</sup> See Jackson (2015) for extensive illustrations of both these points.

<sup>20</sup> This claim is not foreclosed by argument that US law shares ‘the analytical structure of rights adjudication’ also found in other liberal legal systems. For that argument, see David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 695 (2005). See also Steven Gardbaum, *The Myth and Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391 (2008); Lorraine Weinrib, *The Postwar Paradigm and American Exceptionalism*, in: SUJIT CHOUDHRY (ED.), *THE MIGRATION OF CONSTITUTIONAL IDEAS* (2007), 84 (‘The constitutional jurisprudence of the United States stands apart from this shared legal paradigm’).

<sup>21</sup> Jackson (2015), 3101.



principle of proportionality.<sup>22</sup> Third, US courts have made ‘practically no use’ of proportionality in its institutional guise of the structured test familiar elsewhere.<sup>23</sup> And fourth, from within this structured test, it is especially the ‘third prong’ - the prong of ‘proportionality in the strict sense’ - that is ‘generally unfamiliar in the American rights context’.<sup>24</sup> All of this said, US law does know ‘functional equivalents’ to proportionality analysis in the sense of other ‘doctrinal structures’.<sup>25</sup> While this search for comparable doctrines has classically focused on tiered review and ‘strict scrutiny’, and on ‘balancing’,<sup>26</sup> one of the contributions of Jackson’s recent overview is that it identifies so many more pockets of ‘proportionality-like’ doctrines, such as narrow tailoring, less restrictive alternatives analysis, or the ‘undue burden’ analysis in First Amendment case law and in abortion cases.<sup>27</sup> Notwithstanding this ‘partial presence in some areas of US constitutional law’,<sup>28</sup> and because ‘US courts and policy makers have failed to implement proportionality review on a broader scale’, Thomas Sullivan and Richard Frase claim, ‘US courts have had a difficult time protecting citizens in a systematic and coherent fashion from excessive government encroachment’.<sup>29</sup>

Two related features are especially interesting about these discussions. They are, firstly, predominantly focused on questions of the analytical and doctrinal form of the institution of proportionality review (and its supposed ‘equivalents’).<sup>30</sup> And secondly, they have very little to say on cross-country variations in terms of the *intensity* of protection against excessive exercises of official authority - the third element listed above. Strikingly, there is an almost complete absence of any references to proportionality in any sense related to substantive outcomes. Vicki Jackson provides a revealing counter-example where she reminds us that

<sup>22</sup> For a well-known explicit statement, see: US Supreme Court *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991). On practical trends, see Jackson (2015), 3104, fn. 44 (noting that from 1983 till 2010 the Supreme Court ‘did not invalidate any sentence of imprisonment for disproportionality under the Eighth Amendment’).

<sup>23</sup> See, e.g., MOSHE COHEN-ELIYA & IDDO PORAT, *PROPORTIONALITY AND CONSTITUTIONAL CULTURE* (2013), 14.

<sup>24</sup> Gardbaum (2008), 429 (observing a ‘certain unease’ with this third prong in ‘several common law countries’, notably Canada and the United Kingdom). Cf. also the US reticence in relation to ‘balancing’, documented by COHEN-ELIYA & PORAT (2013), and in JACCO BOMHOFF, *BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE* (2013).

<sup>25</sup> Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 800 (2011).

<sup>26</sup> Ibid., 813 (‘doctrinal structures that approximate proportionality’); COHEN-ELIYA & PORAT (2013), 15 (‘striking analytical resemblance’ to balancing).

<sup>27</sup> Jackson (2015).

<sup>28</sup> Ibid., 3121 (also referring to proportionality’s ‘relative absence’ from US constitutional jurisprudence).

<sup>29</sup> SULLIVAN & FRASE (2008), 9.

<sup>30</sup> Note: Steven Gardbaum makes a helpful distinction between a ‘substantive exceptionalism’ and a ‘structural exceptionalism’ in the constitutional rights context. But even ‘substantive’ exceptionalism in his conception is more concerned with the kinds of rights protected in a given legal system, than the substantive intensity or effectiveness of rights protection in individual cases, or across the field of constitutional rights adjudication (the ‘intensity’ and ‘consistency’ dimensions identified above). See Gardbaum (2008), 395-397. See also Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere But Here?*, 22 DUKE J. COMP. & INT’L L. 291, 298 (2012) (adoption of proportionality in the United States ‘would sharpen American methods of balancing, scrutinizing, and rationalizing’).

‘sometimes the most “proportionate” results’ may be achieved by doctrinal means other than a structured proportionality test.<sup>31</sup> But the unease is palpable: ‘proportionate’ appears in scare quotes, and no generalized explanation is given as to what ‘proportionate’ outcomes would be.<sup>32</sup> In short, comparative constitutional lawyers talk about proportionality a great deal. But they are rarely comfortable talking about ‘proportionateness’.<sup>33</sup>

It is here that a turn to the comparative criminal justice and penal policy literature could be helpful. Because despite some very real difficulties of definition and measurement, work in this broad scholarly field has become accustomed to comparing different countries in the decidedly substantive terms of ‘punitiveness’ and ‘harshness’.<sup>34</sup> It is important to note at the outset that punitiveness is commonly seen as a general attribute of a social field - ‘the structured field of crime control and criminal punishment’.<sup>35</sup> This is of course markedly different from the common focus on proportionality analysis as one individual doctrine or institution in comparative studies of constitutional judicial review. Punitiveness instead encompasses a wide range of institutions, actors, doctrines, preferences and policies. Some of these, such as practices surrounding the death penalty, are sometimes studied in relative isolation. But even then, the search is often on for correlations with other dimensions of punitiveness.<sup>36</sup> To a significant extent, punitiveness has been defined in quantitative terms, most commonly through imprisonment rates (or execution rates) per capita.<sup>37</sup> Analogous quantification would seem difficult for any notion of ‘proportionateness’ in general constitutional jurisprudence, although there may well be exceptional areas where the effects of

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<sup>31</sup> Jackson (2015), 3103.

<sup>32</sup> Jackson’s article does discuss practical examples of how in the Fourth and Eighth Amendment context a structured proportionality review might produce decisions that would be ‘both better reasoned and more protective of rights’ (at 3136). The key contribution of the structured proportionality test, Jackson suggests, would be a more individualized, case-by-case approach to exercises of public authority (e.g. at 3132, and at 3135). On the relationship between individualized assessment and ‘proportionateness’, see further below, Section 4.

<sup>33</sup> For a discussion of the claim by Lacey & Pickard that substantive talk of proportionality as ‘proportionateness’ would be meaningless, see Section 4.

<sup>34</sup> For such a comparative statement, see, e.g., Whitman (2005), 389 (‘American punishment is far harsher than punishment in France and Germany’). The two terms will be treated as synonyms here. ‘Punitiveness’ is the term used more often in literature that draws on political economy and sociology; harshness more in work that has a historical and/or cultural focus.

<sup>35</sup> Joachim J. Savelsberg, *Cultures of Control in Contemporary Societies*, 27 *LAW & SOC. INQUIRY* 685, 686 (2002); David Garland, *Concepts of Culture in the Sociology of Punishment*, 10(4) *PUNISHMENT & SOCIETY* 419, 437 (2006). Recent work also uses ‘punitiveness’ as a measure of popular opinion, expressing ‘the public’s preferences for being tough on crime and criminals’. See Peter K. Enns, *The Public’s Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58(4) *AMERICAN J. OF POLITICAL SCIENCE* 857, 860 (2014).

<sup>36</sup> See, e.g., Tapio Lappi-Seppälä, *Trust, Welfare, and Political Culture: Explaining Differences in National Penal Policies*, 37(1) *CRIME & JUSTICE* 313, 332 (2008) (‘It should be no surprise that the same structural, political, and social factors that explain differences in the use of imprisonment also explain the use of the death penalty’, quoting Garland); Enns (2014), 861. But see Whitman (2005), 389 for a cautionary note.

<sup>37</sup> For an excellent overview of the difficulties of defining and measuring penal severity through imprisonment rates, see Lappi-Seppälä, *ibid.*

judicial decisions could be measured in such a way.<sup>38</sup> But the literature on cross-country variations in penal harshness is especially interesting because it normally takes in so many more factors than merely quantitative indicators such as prisoner numbers or sentence-lengths. This broader range comes out very clearly in investigations of US penal exceptionalism. Consider these two overviews, from Carol Steiker and Michael Tonry:

American imprisonment rates have soared, increasing fivefold between 1972 and 2007, reflecting and accompanying other punitive criminal justice policies such as “zero tolerance” policing initiatives, expansions of the scope of the substantive criminal law, “three strikes” statutes enhancing punishment for recidivists, increased use of criminal sanctions for juvenile offenders, widespread authorization of sentences of life without possibility of parole — and, of course, increased use of the death penalty.<sup>39</sup>

Between 1975 and 1995, policymakers enacted a wide range of laws meant to make punishments severer, and practitioners applied those laws. These included three-strikes-and-you’re-out laws requiring minimum 25-year sentences; 10-, 20- and 30-year minimum sentences for violent, firearms and drug offenses; LWOPs [Life Sentences Without Parole, JB]; laws permitting prosecutions of tens of thousands of young people each year as adults; and laws extending the reach of capital punishment. Independently of policy changes, practitioners became more punitive and risk-averse: prosecutors charged and bargained more aggressively, judges sent more people to prison and for longer, parole boards released fewer prisoners, and later, and returned parolees to prison more often.<sup>40</sup>

There is an important further dimension to punitiveness not yet mentioned in these lists; one to which Section 4 will return later. This is the treatment of individuals once they come into contact with law enforcement authorities, and especially once they are inside jails and prisons. On this point, as Marie Gottschalk summarizes in her authoritative overview, ‘the US carceral state is exceptional not just because it locks so many people up but also because of the inhumane and

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<sup>38</sup> Notably in cases where the costs imposed by governmental acts can be measured in a reasonably direct way (e.g. takings of property), or in areas where decisions typically follow a binary pattern (e.g. asylum applications).

<sup>39</sup> Steiker (2012), 760.

<sup>40</sup> Michael Tonry, *Explanations of American Punishment Policies: A National History*, 11(3) PUNISHMENT & SOCIETY 377, 379 (2009). By way of contrast: In other work, Tonry has summarized the German position as follows: ‘German imprisonment rates fell somewhat by the early 1970s from their average level during the 1960s and were broadly stable during the 1970s, 80s, and 90s’. See Michael Tonry, *Why Aren’t German Penal Policies Harsher and Imprisonment Rates Higher?*, 5 GERMAN LAW J. 1187, 1188 (2004). For more detail, see Savelsberg (2002). As Savelsberg writes, it important to note that Germany also experienced significant increases in crime rates during some of this period, notably in the 1970s (at 693-694).

degrading conditions that are unexceptional in jails and prisons throughout the United States'.<sup>41</sup>

Here, in outline then, are two ways of looking at cross-country variations in how the force of governmental authority is brought to bear on individuals. In the literature on comparative criminal justice, penal policy and punishment, such variations are well documented, multifarious and striking. By contrast, in studies of constitutional review in comparative constitutional law, differences and resemblances in how courts review legislation and executive action have mostly been discussed in terms of analytical and doctrinal form. As a result, we know relatively little about their meaning and significance. To begin to change that, we should consider studying proportionality in comparative constitutional law *a little bit more like* harshness in comparative criminal justice and penal policy. That could mean two things, for starters. First, if there are such strong suggestions that the United States is so different from other Western legal systems in terms of the harshness of its criminal justice, then comparative constitutional lawyers should revisit the question of 'US exceptionalism' in relation to the role of the principle of proportionality, and of proportionality- and proportionality-like doctrines, in constitutional review. The range of smaller and bigger technical differences summed up earlier might in fact add up to something more substantively meaningful. And second, to capture this substantive difference, it may be necessary to develop understandings that go beyond proportionality as the form of one specific institution, towards 'proportionateness' as an attribute of a broader institutional field. The next two Sections discuss what taking up these two new challenges for the study of proportionality in comparative legal studies could look like.

### 3. PROPORTIONALITY, PUNITIVENESS, 'CULTURE'

What sorts of factors might explain both cross-system similarities and differences when it comes to the role of proportionality in constitutional jurisprudence? In other words: What variables should we look to if we want to understand not only the spread of proportionality as a principle and as a mode - or a range of modes - of constitutional review across so many liberal jurisdictions, but also the cross-country variations and historical developments in the role accorded to proportionality in constitutional jurisprudence, such as those documented in the previous Section?<sup>42</sup> And how might we relate such similarities and differences at

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<sup>41</sup> MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2014), 120-121, 135. See also JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

<sup>42</sup> Formulated in this way, the question assumes that there is in fact *something*, appropriately named 'proportionality', that *has* spread to a great many jurisdictions. As indicated in Section 1, that assumption still needs to be tested, and the double comparison carried out in this Paper is intended to contribute to that project. Stripped of this underlying assumption, the relevant questions for this Section could read

the formal, doctrinal level, to any substantive implications? In their influential book on *'Proportionality and Constitutional Culture'* (2013), Moshe Cohen-Eliya and Iddo Porat try to answer these questions by looking at variations in constitutional, legal, scientific and political 'culture'.<sup>43</sup> Taking this work as a starting point, this Section looks at how cultural variables are invoked in the literature on comparative punitiveness, in order to highlight both the promise and the difficulties of cultural analyses of proportionality.

Borrowing a distinction formulated by David Garland in the sociology of punishment, the notion of studying proportionality-and-culture could refer both to an emphasis on 'distinctly cultural factors as a causal force' in shaping institutions of constitutional review ('culture as opposed to *not* culture'), and to an analysis of 'different cultures (*this* culture as opposed to *that* culture)' that seeks to show how 'contrasting cultures produce different patterns' of constitutional review.<sup>44</sup> Both meanings figure in Cohen-Eliya and Porat's account. The authors look principally to more narrowly 'cultural' variables, as opposed to more typically social, economic, or political-institutional factors, and they seek to identify two contrasting overarching 'cultures' - of 'justification' and of 'authority' - that they associate with different conceptions of proportionality and balancing in constitutional jurisprudence. Cohen-Eliya and Porat's argument can, I think, be distilled to the following propositions. First, differences in the roles accorded to proportionality and balancing in constitutional review open a window on a significant substantive divergence between US constitutional jurisprudence, and ideas and practices in liberal democracies elsewhere, with Germany, Canada and Israel as principal examples. Second, this divergence is best explained in terms of constitutional, legal, and political culture. Third, tracing this divergence requires constructing genealogies that, at least in the German case, must go back to the 19<sup>th</sup> century: To Prussian administrative law doctrine, and to longstanding intellectual traditions in German scholarship. Fourth, the divergence is best captured in terms of a distinction between two 'cultures' in Garland's second sense: A 'culture of authority', operative in the United States, and a 'culture of justification' dominant elsewhere. The 'culture of justification' has proportionality review as its centrepiece. The 'culture of authority' is deeply sceptical of the judicial 'weighing' associated with proportionality review. And fifth, these two cultures are in turn principally related to differences in levels of trust in elite and expert knowledge, and in government more broadly.<sup>45</sup>

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'What sorts of factors might explain differences in the formal features of constitutional rights jurisprudence - whether or not expressed in terms of 'proportionality' - as between German and US law? Are there reasons to think that these formal differences will have any broader substantive implications?'

<sup>43</sup> For alternative explanations of proportionality's (near) global appeal, see esp. Law (2005); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 73 (2008); Mark V. Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985 (2009).

<sup>44</sup> Garland (2006), 422 (emphases added).

<sup>45</sup> COHEN-ELIYA & PORAT (2013), 53ff, 82ff, 90ff.

This agenda-setting narrative contains much that is suggestive. It inevitably also raises questions. In particular: How would we know whether an explanation of this kind concentrates on the right causal processes, the right variables, and the right historical periods? These questions, it turns out, neatly parallel some that have been raised with regard to similarly focused studies of variations in punitiveness.<sup>46</sup> Cohen-Eliya's and Porat's work is, in its approach, particularly close to a pioneering strand in that literature that has also sought to establish *direct* causal connections, to *distinctively cultural* forces and commitments, operative at *deep* historical levels. A leading example of this type of scholarship would be Franklin Zimring's argument linking execution rates in the United States of the 1990s to a 'vigilante tradition' of mob violence, pervasive a century earlier across the American South and said to still be 'deeply imbedded in the culture and experience of the United States'.<sup>47</sup> The leading explicitly comparative study of this kind is James Q. Whitman's book *Harsh Justice* (2003). Whitman claims that there is 'something in the American idiom, something in American culture' drives the 'harsh justice' of his book's title - the severe and often degrading character of US punishment practices. Germany and France, by contrast, as 'the two dominant legal cultures of northern continental Europe', are marked by equally deep-seated 'traditions of mildness'.<sup>48</sup> The first of Whitman's two main arguments goes back to the European and American revolutions of the 18<sup>th</sup> century for the origins of two contrasting 'traditions of social status' and a corresponding divide between 'dignity' and 'degradation' not just in punishment but in other areas of law as well. Pervasive anti-aristocratic sentiment provided the foundations for a longstanding attachment to dignity - a general 'culture of dignity', even - in France and Germany. In American law, by contrast, a 'comparative lack of concern for personal dignity' is traced to a 'creed' of liberal egalitarianism consecrated in that same revolutionary era.<sup>49</sup> Whitman's second main claim is that punishment in America is the 'product of a weaker state tradition', in which criminal justice has become 'highly politicized'. Germany and France, by contrast, have long been 'strong states' in the sense that they are 'relatively free', or 'autonomous', to 'intervene in civil society without losing political legitimacy'. These strong bureaucracies and cultures of expertise have kept values of mercy alive in the face of the 'vagaries of public opinion'.<sup>50</sup> Stronger states, Whitman concludes, 'can, paradoxically, sometimes produce milder punishment'.<sup>51</sup>

These explanations of variations in punishment, focussed on a causally direct impact of deep seated cultural factors, have been powerfully criticized for their

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<sup>46</sup> Cf. Garland (2005), 349.

<sup>47</sup> FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (2003), 66, 123.

<sup>48</sup> WHITMAN (2003), 6, 81.

<sup>49</sup> Whitman (2005), 390; WHITMAN (2003), 89, 93-94; Garland (2005), 349.

<sup>50</sup> Whitman (2005), 389; WHITMAN (2003), 13-14; DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* (2012), 155.

<sup>51</sup> Whitman (2005), 390. See also WHITMAN (2003), 201 ('A relatively weak state, like the American one, is much more prey to a harsh retributive politics ... and less able to forbid acts without branding them as evil').

‘invocation of cultural traditions that are supposedly unchanging’, and for ‘assuming, without evidence, that this underlying culture somehow finds expression in legal statutes and judicial decisions’.<sup>52</sup> There are three, partly contradictory, main strands to these critiques. As I will argue below, all three could productively be transposed to the proportionality context.<sup>53</sup>

A first criticism is that these studies are ‘*inappropriately deep*’, as attempts to understand phenomena that are in fact ‘much more recent and much more contingent’ than the 18<sup>th</sup> or 19<sup>th</sup> - or even early 20<sup>th</sup> - century frames of reference they invoke.<sup>54</sup> What really requires explanation, as Whitman also acknowledges, is rather a divergence in penal practices between the United States and other Western countries that dates largely to the beginning of the 1970s, and grew into a true chasm over the course of the 1980s and 1990s.<sup>55</sup>

Secondly, it has been argued that the best way to frame the impact of ‘typically cultural’ factors on penal harshness has to be, not as direct causal variables, but *indirectly*, as mediating or filtering conditions. This argument has been elaborated in two principal versions. The first starts with pressures and anxieties felt by all or many Western societies - the conditions of ‘late Modernity’ in David Garland’s well-known vocabulary - and then introduces ‘nation-specific’ institutional and cultural filters to explain why these transnational pressures and anxieties have not everywhere produced the same punitive responses.<sup>56</sup> Such filters could include ‘historically sedimented religious cultures’, ‘historical contingencies, like the experience of dictatorship and war’, and distinctive ‘cultural commitments’ such as ‘populism’, ‘localism’, ‘antistatism’, ‘individualism’, ‘social solidarity’, or ‘moralism’ in popular culture.<sup>57</sup> A second version of this argument looks not to global trends, but to ‘distinctively local’ political and institutional environments in which penal harshness or moderation take hold, and invokes ‘deeper elements of ... culture and history’ as a necessary ‘further level of explanation’ for those environments.<sup>58</sup> This approach has been developed in great detail by Michael Tonry. As he summarizes, moderation in punishment is ‘associated with low levels of income inequality, high levels of trust and legitimacy, strong welfare states, professionalized as opposed to politicized criminal justice systems and consensual

<sup>52</sup> Cf. Garland (2005), 349; Tonry (2009).

<sup>53</sup> For an insightful parallel critique emphasizing dangers attendant to monolithic and ahistorical conceptions of culture, see Adam Shinar, *Method and Culture in American Constitutional Law: A Critique of Proportionality and Constitutional Culture*, 10 JERUSALEM REVIEW OF LEGAL STUDIES 137 (2014).

<sup>54</sup> Garland (2005), 349 (with specific reference to the death penalty) (emphasis added). See also Steiker (2012), 775.

<sup>55</sup> Cf. Whitman (2005), 391.

<sup>56</sup> Savelsberg (2002), 694-695, 707-708.

<sup>57</sup> Ibid., 696; Steiker (2012), 772; Tonry (2004), 1199, 1204.

<sup>58</sup> Tonry (2004); Tonry (2009). Tonry 2009, 389: ‘the story of American penal policy since 1973 is ... not about globalization, neo-liberalism or conditions of late modernity any more than it is about rising crime rates or harsher public attitudes’. Instead, it was politicians who pushed for harsher punishment, and their appeals succeeded ‘because of deeper elements of American culture and history’. See also Whitman (2005), 389 (‘No sociology of “modernity” can provide any explanation for this striking, and often deeply disturbing, divergence’ between US and European harshness in punishment).

rather than conflictual political cultures. For each of those factors, the United States falls at the wrong end of the distribution. The question is, Why?<sup>59</sup> Tonry invokes a number of broad deeper cultural and historical variables in response. First, a ‘paranoid style’ in American politics – an outlook in which social conflict is not ‘something to be mediated and compromised’, since ‘what is at stake is always a conflict between absolute good and absolute evil’.<sup>60</sup> Second, the influence of Protestant fundamentalism on American politics, which is said to manifest itself in a powerful ‘moralism’ and a perennial ‘quest for certainty, exclusiveness, and unambiguous boundaries’.<sup>61</sup> And third, like Whitman, Tonry invokes a ‘weak’ American state, with ‘obsolete’, 18<sup>th</sup>-century constitutional arrangements that fail to isolate political decision-making and the criminal process from ‘short-term emotions and politics’.<sup>62</sup>

These arguments on the relevance of ‘cultural’ factors as indirect, mediating or filtering conditions shade into a more fundamental third strand of critique. This third view challenges the idea of culture as a ‘genuinely independent variable’.<sup>63</sup> As David Garland has written, ‘[c]ultural categories, habits and sensibilities are embedded in, and constitutive of, our political and economic institutions. The study of culture does not begin where the study of power and economics leaves off—it is a constituent part of any political or economic analysis.’<sup>64</sup> More attention needs to be paid to the economic, institutional, and other ‘structural arrangements’ that foster and stabilize ‘cultural forces’, that are in turn important in sustaining those arrangements themselves.<sup>65</sup> This perspective does not at all deny the relevance of many of the factors listed earlier. But it does considerably enrich – and complicate – their analysis. So, for example: Whitman’s theory of ‘dignity’ and ‘degradation’, Nicola Lacey has argued, will have to be ‘articulated with a theory of the structure of political economy’, in which ‘the power of anti-degradation sentiments is itself a function of their resonance and consistency with broader dynamics of socio-economic organisation’.<sup>66</sup> Similar arguments in relation to the institutional embeddedness of cultural forces or contexts could be made with regard to, for example, the relative ‘weakness’ of states, the influence of religion-infused ‘moralistic’ popular sentiments, or the persistence and impact of deeply conflictual styles of politics.<sup>67</sup>

These works by Whitman, Tonry, Garland, Lacey and others, hold, I think, some valuable suggestions for culture-centered studies of proportionality across

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<sup>59</sup> Tonry (2009), 377.

<sup>60</sup> Ibid., 381. Tonry claims that the paranoid style’s influence on punitiveness has come about in particular through pervasive ‘attacks on “activist”, “lenient” and “liberal” judges’ (at 382).

<sup>61</sup> Ibid., 383 (citing the work of Judith Nagata).

<sup>62</sup> Tonry (2009), 377, 379ff. Tonry cites ‘the distinctive history of American race relations’ as a fourth principal factor.

<sup>63</sup> NICOLA LACEY, *THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008), 73.

<sup>64</sup> Garland (2006), 425–426 (quoting Clifford Geertz).

<sup>65</sup> Cf. LACEY (2008), 88 (with reference to a ‘culture of solidarity’ in relation to the welfare state).

<sup>66</sup> Ibid., 84.

<sup>67</sup> Cf. Garland (2005), 155; LACEY (2008).



jurisdictions. The remainder of this Section focuses on two important issues. First, the difficulties involved in identifying the appropriate time frame for causal explanations of divergence. And second: the different possible ways of integrating ‘cultural’ contexts and forces familiar from work on punitiveness, into cross-country studies of proportionality, with particular reference to the ‘weak state’ factor highlighted in some form in almost all accounts of punitiveness cited above.

First, there is the question of the appropriate time frame for understanding similarities and differences. Divergence in penal harshness between the US and Europe goes back principally to the late 1960s - early 1970s, and has accelerated through the 1990s, possibly reaching a peak around the late 2000s.<sup>68</sup> This time frame invites a reconsideration of the increasingly popular historical narrative in comparative constitutional law that locates the roots for proportionality review in its contemporary manifestations in Prussian administrative law of the late 19<sup>th</sup> century.<sup>69</sup> If such deep historical factors are to play a significant role in explaining why one country - the United States - appears to be an outlier in relation to an institutional practice that has, during the past few decades, spread to many other jurisdictions, then the example from comparative punitiveness studies suggests that this would probably have to be in some indirect form, as part of an environment of stabilizing and filtering conditions for more contemporary pressures. The third strand of the critiques outlined above further suggests that we would need to know much more about their relationship to institutional, political, and economic contexts, both at the time of their original articulation and with regard to their continued contemporary relevance. This raises the question of whether the vaunted ‘Prussian connection’ might not, in fact, rest too heavily on formal resemblances, rather than on any deeper substantive similarity. The search for this connection may also have been unduly influenced by an a-historical, German scholarly jurisprudential effort at retrospective legitimization and rationalization of the early constitutional jurisprudence of the Federal Constitutional Court.<sup>70</sup> Based on the debates set out above, I would argue that more emphasis should, instead, probably be placed on post-war phenomena that parallel proportionality’s constitutional trajectories. Examples could include the growth of the Administrative State and the corresponding search for new forms of ‘legal rationality’ to satisfy new kinds of rule of law demands,<sup>71</sup> or the extension of rights granted to criminal defendants during the Warren Court’s ‘criminal procedure revolution’,<sup>72</sup> or the rise of the religious right in the United States.

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<sup>68</sup> See, e.g., Tonry (2009), 379, 389; GOTTSCHALK (2014), 128.

<sup>69</sup> See, e.g., Stone Sweet & Mathews (2008); COHEN-ELIYA & PORAT (2013), 24ff; Paul Yowell, *Proportionality in United States Constitutional Law*, in: LIORA LAZARUS, CHRISTOPHER MCCRUDDEN & NIGEL BOWLES (EDS.), *REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT* (2014).

<sup>70</sup> Early post-war studies of proportionality in German law do not appear to have made much of this Prussian connection. See, e.g., PETER LERCHE, *ÜBERMAß UND VERFASSUNGSRECHT* (1961).

<sup>71</sup> Ibid.

<sup>72</sup> Steiker (2012), 769ff (referring to the work of the criminal law scholar William Stuntz).

There is also far more we would want to know, I suspect, about proportionality's relationship to forms of neoliberal rationality.

Such a focus on more recent developments could lend renewed force to Lorraine Weinrib's account of a shared 'postwar paradigm' of which US constitutional law at the time of the Warren Court was a leading manifestation rather than an outlier in any sense.<sup>73</sup> The puzzle then becomes rather why '[c]urrent constitutional thinking in the United States tends to accord little understanding or sympathy' to a brand of jurisprudence that perhaps it once appeared to share.<sup>74</sup> James Whitman's summary would seem to capture the ensuing challenge for understandings of both punitiveness and proportionality: 'Matters changed beginning in the 1970s, for reasons that none of us find it easy to explain. Continental Europe and the United States experienced the aftermath of the 1960s differently, in ways that no one could have predicted circa 1970'.<sup>75</sup>

A second theme is the incorporation, into studies of proportionality, of the kinds of factors that figure in leading accounts of penal harshness. Religious traditions and commitments, for example, would seem one important avenue for further research.<sup>76</sup> The predilection for certainty, and the binary morality that Michael Tonry has linked to Protestant Evangelicalism, could well be associated in some way with the character of American constitutional jurisprudence, perhaps in a way similar or related to the common strand of 'literalism' that anthropological work has found to run through both US constitutional law of the 1980s and 1990s and American Protestant theology.<sup>77</sup> Racial disparities would be a second area in which much more work seems necessary. Here, though, I want to focus on one further factor highlighted in many leading accounts of punitiveness: the contrast between 'weak' and 'strong' states, whether articulated in more historical-cultural or in more institutional-political terms. Here the puzzle is similar to the one identified by James Whitman: the paradox of how 'weak states' might occasion harsher punishment, while 'stronger states' could be more lenient. In their account of proportionality, Cohen-Eliya and Porat make much of the role of a near-global 'culture of justification', to which the United States is said to be an outlier. 'When courts apply proportionality in constitutional law', they write, 'they are asking governments to justify their actions on substantive grounds'.<sup>78</sup> The culture of justification is a culture 'in which every exercise of power is expected to be

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<sup>73</sup> Weinrib (2007), 111.

<sup>74</sup> Ibid. In my view if there was an initial shared postwar 'constitutional conception' with its 'companion juridical paradigm' (cf. Weinrib (2007), 111), then the reasons for later divergence should be sought more in relation to the 'juridical paradigm', rather than merely in relation to different 'constitutional conceptions'. This is the focus also in BOMHOFF (2013). This focus on later divergence from a shared starting point would also fit with leading views on US death penalty exceptionalism. See Steiker (2012).

<sup>75</sup> Whitman (2005), 391.

<sup>76</sup> See, e.g., Joachim Savelsberg, *Religion, Historical Contingencies, and Institutional Conditions of Criminal Punishment: The German Case and Beyond*, 29 LAW & SOC. INQUIRY 373 (2004); Tonry (2009).

<sup>77</sup> See VINCENT CRAPANZANO, *SERVING THE WORD: LITERALISM IN AMERICA, FROM THE PULPIT TO THE BENCH* (2000).

<sup>78</sup> COHEN-ELIYA & PORAT (2013), 111.

justified'.<sup>79</sup> The question that arises is how such a demand for justification would emerge - and be answered - in a 'strong' state, like Germany, and not in a 'weak' state like the US. Intuitively at least, one would expect demands for justification to be especially robust precisely in a system dominated by a 'suspicion-based conception of the state', such as the United States.<sup>80</sup> But just in the way that moderation in punishment appears to thrive especially where public authorities are relatively strong and secure in their autonomy, so too, apparently, does the practice of justification associated with proportionality review. In other words, the correlation between 'high levels of trust and legitimacy' on the one hand, and milder forms of punishment on the other, may also hold for trust, legitimacy and proportionality in constitutional review. The causal dynamics by which this would come about, however, are far from clear. Further research on this question might consider two dynamics in particular. First, the effect of popular dispositions like anti-statism or distrust of expertise will have to be considered not just in relation to the public authorities subject to judicial demands of justification, but also in relation to the courts themselves. And as the ways in which these two dynamics - justification *through* courts, and justification *of* courts - relate to each other is likely to differ as between jurisdictions, there is much more we would need to know about how this might affect the development of legal doctrine. Secondly, the strong states - justification paradox suggests that we would need to know more about how, in the adoption and diffusion of standards of review and justification, courts will respond not only to what we might call 'vertical' demands - calls for justification, voiced by rights-claimants, civil society or elite and popular opinion, but also to different kinds of more 'horizontal' pressures emanating from co-equal branches and other defendant public authorities.<sup>81</sup>

#### 4. PROPORTIONALITY AND 'PROPORTIONATENESS'

Is there any way to make sense of 'proportionateness' as a concept to describe substantive differences between systems of constitutional rights review? Section 2 showed how scholars of proportionality in constitutional law tend to refrain from talking about 'proportionate results' in any substantive sense; how scholars of criminal justice do resort to substantive notions of 'harshness' or 'punitiveness'; but also how recent work in this field is sceptical about the prospects of societal

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid., 54. See also LACEY (2008), 62 (arguing that the 'tolerance of and indeed public support for "harsh justice" in the USA ... discloses a weaker popular disposition to question the state's exercise of its power to punish', and this is 'on the face of it paradoxical, given the American disposition to be suspicious of state power').

<sup>81</sup> Cf. Alec Stone-Sweet's work on the juridicalisation of political discourse in France and Europe more generally. The discussion here suggests that this responsive dynamic may not be a universal phenomenon.

agreement on meaningful, thick notions of proportionality as a limit on punishment. More specifically, as was seen, Nicola Lacey and Hanna Pickard have recently argued that empirical studies show a lack of consensus about the appropriate length of sentencing for particular crimes (what they call ‘cardinal’, as opposed to ‘ordinal’, proportionality).<sup>82</sup> This absence of consensus could turn out to be a more contingent issue than they suggest. More importantly, however, work on punitive harshness shows how a substantive notion of ‘proportionateness’ could be developed that does not rely on forms of quantification or relational ranking, and so would be less vulnerable to the argument from a lack of consensus.

Going back to the summaries of American penal harshness set out earlier - in Section 2, what is striking is how much of what they depict is not - or at least not solely - related to ideas about excessiveness in the sense of a proportionate fit between offence and punishment. Granted, ‘three-strikes-you’re-out’ laws, mandatory minimum sentencing (‘determinate sentencing’), Life-Without-Parole, or treating juveniles under adult sentencing rules, will have an inflating effect on imprisonment rates, just as sentences that are allegedly ‘excessively’, ‘disproportionately’ long.<sup>83</sup> But that hardly captures the full extent of their meaning. These measures are significant rather in that they deliberately foreclose *any* discussion of proportionality, of fit between offense and punishment. In this sense, one could say that a system that relies heavily on these types of laws is *less proportionate* than another jurisdiction, even if that second jurisdiction imposes longer sentences on average for particular offenses. Such a system shows less regard for proportionality in individual cases as one valuable objective among others. The same could be said in relation to the fact that in the United States, 97% of federal convictions and 94% of state convictions are the result of guilty pleas.<sup>84</sup> Here too, the issue is not the alleged excessiveness of the resulting sentences but rather the fact that the system, in its actual operation, often does not even allow for such substantive judgments on excessive length to be voiced and tested.

The important point here is that proportionateness can be understood as a relative ‘intolerance for wrong answers’, in a way that does not depend on precise substantive agreement on what the ‘right answers’ would be. In comparative perspective, US criminal justice seems exceptional in its tolerance for wrong answers in this sense.<sup>85</sup> What I would suggest is that the patchy, partial role of proportionality as a principle and a doctrine in constitutional law is a manifestation of this same tolerance. Much more would have to be said about this, including about the definition of ‘wrong answers’ in law. I should emphasize that what is

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<sup>82</sup> Lacey & Pickard (2015), 227.

<sup>83</sup> Cf. FERGUSON (2014), 104 (noting that by 1993 ‘nearly half the states and the federal government adopted some version of a “Three Strikes and You’re Out Law”, quoting Marc Maurer; WHITMAN (2003), 9 on the ‘triumph of determinate sentencing’).

<sup>84</sup> FERGUSON (2014), 113.

<sup>85</sup> Cf. the status of trial by jury, and the role of elected officials in the criminal process.

meant here is ‘wrong answers’ in a sociological and phenomenological sense. What matters is individual and communal apathy and institutional inaction - ‘malign neglect’, in Tonry’s term - in the face of outcomes that are felt, by individuals and communities, to lie outside even a fairly broad range of ‘right’ answers, defined according to these individuals’ and communities’ own standards. It is also true that this claim may seem to go against some other familiar claims about the character of US ways of law, such as the ‘devotion to individualized justice’, with an intense ‘focus on the particularity of each dispute’, and the desire to grant everyone their ‘day in court’; or the fear of ‘arbitrary power’ already documented by Tocqueville.<sup>86</sup> But then again, when looked at in light of actual outcomes, rather than just stated ideals, the ‘tolerance for wrong answers’ thesis does look plausible. ‘American courts set high goals and only haphazardly deliver’, Mark Ramseyer has written recently, in a comparative study of litigation patterns in US and Japanese private law. In his view, Japanese law seems to adhere to a contrasting ideal of ‘standardized, homogenized’ actuarial justice.<sup>87</sup> In American private law too, the ideals, for trial by jury and for individualised justice, are set high - in some cases higher than elsewhere. But what is striking from a comparative perspective is the apparent acquiescence when this system, just like the criminal justice system, fails to deliver individualised justice to specific individuals. In that limited sense, then, could we not say that US law in these areas is less demanding, less ‘proportionate’, than law elsewhere?

## 5. CONCLUSION: PROPORTIONALITY, ‘PROPORTIONATENESS’, AND BEYOND

There is a pervasive assumption in comparative constitutional law that courts in the many jurisdictions in which the discourse of proportionality is prominent are engaged in practices that are roughly comparable. A second widespread assumption is that US jurisprudence stands somewhat apart from this ‘shared paradigm’. Taken together, these two claims raise difficult puzzles, in relation both to efforts to explain the relevant underlying causal factors, and to any assessment of the wider implications of these similarities and differences. We have a range of familiar variables that *could* be of some significance - *Lochner*; a reaction against law under Fascism; Prussian administrative law; Weimar-era philosophies of objective

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<sup>86</sup> MARK J. RAMSEYER, SECOND-BEST JUSTICE: THE VIRTUES OF JAPANESE PRIVATE LAW 4 (2015). I take the idea of ‘tolerance for wrong answers’ from Frederick Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847, 847 (1987). Schauer in fact claimed that the ‘tolerance for wrong answers’ had ‘evaporated’ from contemporary - in 1987 - American legal theory. But on a more general level, his account suggests that ‘tolerance for wrong answers’ could at least potentially be a useful category for jurisprudential analysis, and that such tolerance may well vary as between different periods, and, I would add, places.

<sup>87</sup> RAMSEYER (2015), 9.

values; popular distrust of government, both historically and today; popular trust in courts; different conceptions of legal formality, or different requirements for ‘rational’ or ‘convincing’ legal reasoning within elite legal thought; the rise of the administrative state and the welfare state; the way global competition among countries for capital and skilled labour might drive up standards of fundamental rights protection; the age and peculiar structure of the US constitution; *etc.* But we know little about their real significance, or the relationships between them. We still do not know, that is, what it really means to live in ‘an age of proportionality’.

In this setting, we should expect benefits from a comparative-comparative approach - one that looks to learn from comparative projects in other fields. The most developed field for the comparative study of both the form of legal institutions and their real-world effects, certainly as between Western European countries and the United States, is arguably that of comparative criminal justice and penal harshness. These studies have a lot to offer to comparative constitutional law, for example on how to integrate jurisprudential and doctrinal analysis of legal and constitutional categories, with the careful causal inference of political economy, or the rich texture of studies of culture. At the very least, comparing with other comparative studies in this way should enable greater coherence between views on proportionality, and what we already know about persistent differences between legal systems, periods, and cultures. If an account of proportionality in constitutional review relies on, say, attitudes of commitment or suspicion towards courts in the constitutional sphere, then we have to think about how this relates to those attitudes in relation to private law litigation, or in criminal or administrative law. If we rely on the influence of specificities stemming from a particular earlier era, we need to think about whether other facets of such older understandings have also survived, and if not, why not. Or about how similar historical connections have played out very differently in other systems, or why the same contemporary global pressures do not have the same effect in all settings. Comparing with the comparative study of penal harshness can also identify new angles for research. There may be new factors to consider. Religion, for example,<sup>88</sup> or racial disparities, or work on the varieties of capitalism. Taking a cue from this type of work: The spread of proportionality-based review as a potential limit on virtually *all* exercises of *public* authority could well be an emanation of a form of neo-liberal rationality.<sup>89</sup> But proportionality review could also be a form of institutional resistance against neoliberalism. Or there could be no significant correlation between the two, quite possibly because it is impossible to identify, on either side, what is to be correlated here with any precision.<sup>90</sup>

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<sup>88</sup> See, e.g., Joachim Savelsberg, *Religion, Historical Contingencies, and Institutional Conditions of Criminal Punishment: The German Case and Beyond*, 29 LAW & SOC. INQUIRY 373 (2004); Tonry (2009). See also John L. Comaroff, *Reflections on the Rise of Legal Theology: Law and Religion in the Twenty-First Century*, 53 SOCIAL ANALYSIS 193 (2009).

<sup>89</sup> See, e.g., Comaroff (2009). The invocation of proportionality reasoning - and its imposition on the activities of trade unions - in the CJEU cases of *Viking* and *Laval* has been read in this way.

<sup>90</sup> See, e.g., Whitman (2012).

The role of proportionality in constitutional review and punitiveness in criminal punishment may turn out to be very different phenomena, driven by different principal actors and causal factors, and of different orders of salience. But they could also be related. Not just in the sense that a constitutional rights jurisprudence that actually employs some form of proportionality review of sentences and other criminal justice matters *could* act as a limiting force on excessive punishment. But also in the sense that they might express very similar cultural commitments as to how demanding a constitutional-legal order should be. The ‘cumulative weight’ of studies of constitutional review and of punitiveness in criminal justice may help us get a better understanding of what these commitments might be.<sup>91</sup> Proportionality is a good starting point for this kind of comparative conversation. But this Paper has argued that the real action probably lies beyond proportionality - beyond proportionateness even - in the way law embodies and shapes, not simply our deep ideals and our mundane practices, but our individual and collective responses when ideals and practice do not match.

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<sup>91</sup> Cf. Whitman, *Response to Garland* (2005), 393 (on the ‘cumulative weight’ of studies of US-European legal difference across a range of different areas of law).