Siting Proportionality
Thinking comparatively about constitutional review and punitiveness

Jacco Bomhoff

1. Introduction

There is a lot we do not yet know about what it means for a legal order to embrace proportionality as a principle or doctrine of constitutional law.[1] In part this is a matter of time frame: In many cases it may well be, in those once famously misunderstood words, too early to tell.[2] Where history comes up short, comparative studies would seem an obvious way forward. And there is of course a rich and growing literature on proportionality in comparative constitutional law. This literature tends to remain disciplinarily specific, however, 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. It is this kind of exercise in comparative-comparative law that is attempted in this essay.[3] Its project is a comparison of two fields of comparative inquiry that both feature 'proportionality' as a 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 US, and those in many other Western liberal jurisdictions.

First, then, there is 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 review. The character and extent of 'US exceptionalism' are contested in this field, as will be discussed further below.[4] But it is mostly agreed that US constitutional law is peculiar at least in the sense that explicit references to proportionality do not figure centrally in case law on constitutional rights. The second field of inquiry is that of comparative criminal justice and penal policy, or comparative punitiveness. Here, the fact of 'US exceptionalism' is largely uncontested; it is rather the reasons for the divergence that constitute the puzzle. Much of the literature revolves around attempts to understand 'the growing divide between the United States and other Western liberal democracies

[1] This is especially relevant for comparative studies: When looking at a foreign system, we may be unsure whether, to what extent, in what form, in what period, or by whom 'proportionality' has been developed - or received from elsewhere - within the constitutional jurisprudence of that particular legal order, or parts thereof; and we may not know enough about the conditions for, or concrete effects and broader implications of such adoption. In any event, it would be dangerous for comparative lawyers, in relation to any of these elements, to project understandings based on their home system onto foreign practices.
[2] On claims of deep historical roots for proportionality in constitutional law, see further Section 3.
[3] For an analysis of proportionality across different doctrinal context but mostly *within* one legal system - that of the US - see E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW (2009) (labeling this 'a kind of interdoctrinal comparative law', at 9).
[4] See Section 2.

with regard to criminal punishment practices'.[5] The role of proportionality here, by contrast, is somewhat more difficult to circumscribe. But the theme appears prominently at least in an assemblage of legal and constitutional doctrines, as an element in prominent 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.[6]

Why try to relate and compare these two fields? On a most ambitious level there is the tantalizing question of two exceptionalisms - if that is what they are. In short: Is there any relationship between the fact that US incarcerates 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 adopt proportionality, at least as an overarching and explicit element of their jurisprudence on constitutional rights?[7] This is a difficult matter. Not only because, as already mentioned, both the premise of 'US exceptionalism' in comparative constitutional law and the factors explaining a punitive turn in the contemporary US are contested, but also because it is not obvious that references to proportionality will have similar enough meanings across the different relevant domains. It is, however, also a question that it seems worthwhile to ask. If scholars of comparative punitiveness have been exhorted 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',[8] studying the role 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,[9] 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 practices of constitutional review might - or, in the end, might not - really be distinctive in some deeper sense?

This essay can only suggest partial answers to this large question on the punitiveness-proportionality relationship, and it does so through the more modest project of simply projecting some of the questions typically asked in the comparative criminal justice field onto the study of proportionality in comparative constitutional law. Section 2 introduces the themes of proportionality in constitutional law, punitiveness and harshness in criminal justice, and the question of 'US exceptionalism' in relation to each. Against this background, Section 3 looks at

[5] Carol S. Steiker, *Capital Punishment and Contingency (Book Review)*, 125 HARV. L. REV. 760, 760 (2012). On this divergence, see further Section 2. This does of course not mean that it is necessarily *US practices* that need explaining; what matters is rather the uncontested fact of significant variation between legal systems in terms of their punitiveness. See on this point James Q. Whitman, *Response to Garland*, 7(4) PUNISHMENT & SOCIETY 389, 394 (2005).

[6] See e.g. Nicola Lacey, *The Metaphor of Proportionality* (forthcoming ***); Nicola Lacey & Hannah Pickard, *The Chimera of Proportionality*; Ferguson, Inferno: An Anatomy of American Punishment, 14, 28.

[7] It is significant to note that in framing US 'exceptionalism', both fields typically turn to Germany and German law for their principal comparative foil

[8] 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 insitutions').

[9] James Q. Whitman, *The Free Market and the Prison (book review)*, 125 HARV. L. REV. 1212, 1213 (2012).

how some of the most 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 two related issues: the role accorded to 'culture' in explaining variations in penal practices, and the question of the relevant time frame in explaining American penal exceptionalism more specifically. Section 4 then uses the literature on punitiveness to reflect on the possibilities for a 'turn towards substance' in comparative studies of constitutional review. Investigations of proportionality in this latter field have tended to focus on matters of legal form and doctrine; they have said relatively little about substantive legal outcomes, and even less about effects 'on the ground'. But if studies of criminal justice and penal policy have found ways to compare legal systems in the powerfully substantive terms of 'harshness' or 'punitiveness' - of course with all the difficulties of definition and measurement they entail -, should comparative constitutional lawyers not at least see if they might have something to say about different constitutional-legal systems in terms of their, well, 'proportionateness'?

2. Proportionality, punitiveness, exceptionalism

The overlapping fields of the jurisprudence of constitutional rights review and the jurisprudence of criminal justice and punishment both embody strategies designed to protect individuals from state violence and abuses of government power. A brief glance at the relevant literatures will show that 'proportionality' is a key concept in the former, and 'punitiveness' in the latter. It will show too, that 'proportionality' also has an important, though ambiguous, place in criminal justice thinking about limits to punishment.[10] And so the question could arise of how these two terms might be related. Answering this question will of course depend on how each of these concepts is defined.

First: Proportionality in constitutional jurisprudence. As Vicki Jackson has recently summarized the field, proportionality can be understood 'as a legal principle, as a goal of government, and as a particular structured approach to judicial review'.[11] It is a combination of the first two of these understandings - proportionality as abstract legal-constitutional-philosophical-political principle - that figures centrally in recent work within the criminal justice and penal policy field on the possible impact of proportionality reasoning on limits to severity in punishment.[12] Nicola Lacey and Hannah Pickard argue that '[t]he idea that appeals to proportionality as an abstract ideal can help to limit punishment' is 'a chimera'.[13] '[S]uch an appeal', they write, 'can by itself contribute little to the construction of norms adequate to limit state punishment', because the idea is 'virtually indeterminate in its substantive implications'.[14] People agree that proportionality is a good thing, but in late-modern societies they do not agree

[10] For an overview, see Lacey & Pickard, *The Chimera of Proportionality*.
[11] Jackson, *Age of Proportionality*, 3098.
[12] Lacey & Pickard, *The Chimera of Proportionality*. The authors describe punitiveness as 'grade inflation' in sentencing (at 217).
[13] Lacey & Pickard, *The Chimera of Proportionality*, 217.
[14] Ibid., 232. See also Ferguson, 14, 28.

on what proportionality requires. Proportionality, Lacey and Pickard argue, can only act as a limit on penal severity 'through substantive institutional frameworks under particular conditions'.[15]

As the third element in Jackson's summary shows, the abstract idea of proportionality *does* often 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' by courts engaged in the review of legislation or executive action. It is in fact this level of proportionality - proportionality *as an institution* - that comparative constitutional legal scholarship has tended to focus on. The general, unstated assumption in much of this field outside the US context is that the elements of abstract idea and institution will normally exist conjointly, in the sense that judicial proportionality analysis is seen as the direct manifestation of an underlying '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 within a particular constitutional-legal order.[16]

Comparison with the US complicates this picture, and this is where the difficult question of 'US exceptionalism' becomes relevant. It is important to state explicitly the limits of what is argued here: All that this Section claims is that the disconnect between abstract ideal and jurisprudential institution in the American context suggests - or at least leaves open - the possibility that elite legal thought in the US operates with a conception of the meanings, roles and requirements of proportionality (as an ideal) that is in some significant sense *less demanding* that found in many other Western countries.[17] This suggestion, first of all, is not foreclosed by claims that the idea of proportionality is 'as American as apple pie'.[18] It is also not excluded by suggestions that, on an analytical level, US law shares 'the analytical structure of rights adjudication' also found in other liberal legal systems.[19] It is rather in terms of the *connection between* abstract ideals, general legal principles, and institutional-doctrinal operationalization that US jurisprudence seems distinctive. That connection could well be less comprehensive (scope), and less demanding, both across cases and in individual instances (consistency and intensity) than elsewhere.[20] Looking at these elements in turn, 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.[21] 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 explicitly refused to accord a comprehensive, primary, or even significant role to the principle of proportionality.[22] Third, US courts have made 'practically no

---

[15] Ibid., 216.
[16] But see Jackson, 3099 for nuance on this point in relation to South-Africa and Australia.
[17] This is the basis for a more general comment on Lacey & Pickard: There are no 'appeals' - in any abstract sense - to proportionality. There are *many kinds* of such appeals; they always already come with distinctive expectations as to desirable outcomes, associated principles, institutional structures, *etc.* And 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. See also Weinrib, *Postwar Paradigm*, 84 ('The constitutional jurisprudence of the United States stands apart from this shared legal paradigm').
[18] Beatty (2004), 187. See also Schlink, *Why Everywhere but Here?*.
[19] Law (2005), 695. See generally Gardbaum, *Myth of Exceptionalism*; Jackson, *Age of Proportionality*.
[20] See e.g. Sullivan & Frase;
[21] Jackson, 3101.
[22] See famously: US Supreme Court *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991).

use' of proportionality in its institutional guise of the structured test familiar elsewhere.[23] 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'.[24] All of this said, US law does know 'functional equivalents' to proportionality analysis in the sense of other 'doctrinal structures'.[25] While this search for comparable doctrines has classically focused on tiered review and 'strict scrutiny' and on 'balancing',[26] one of the virtues of Vicki Jackson's recent overview is that it identifies 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.[27] Notwithstanding these alternatives, 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'.[28]

Two related features are especially interesting about these discussions. They are predominantly focused on questions of the analytical and doctrinal form of the institution of proportionality review (and its alleged 'equivalents');[29] and they have very little to say on cross-country variations in terms of the intensity of protection against excessive exercises of governmental authority. 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 'sometimes the most "proportionate" results' may be achieved by doctrinal means other than a structured proportionality test.[30] The unease is palpable: 'proportionate' appears in scare quotes, and no further explanation is given.[31] In short, comparative constitutional lawyers talk about proportionality a great deal; they almost never talk about proportionateness.[32]

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, this broad scholarly field has become accustomed to comparing different countries in the decidedly

---

[23] Cohen-Eliya and Porat, 14.
[24] Gardbaum, 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, and in JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE (2013).
[25] Mathews & Stone-Sweet, *All Things in Proportion*, 800.
[26] Mathews & Stone-Sweet, *All Things in Proportion*, 813 ('doctrinal structures that approximate proportionality'); Cohen-Eliya & Porat, *Proprtionality and Constitutional Culture*, 15 ('striking analytical resemblance' to balancing).
[27] Jackson ***.
[28] Sullivan & Frase, 9.
[29] *** Note: Even Gardbaum's 'substantive exceptionalism', which he contrasts with a 'structural exceptionalism' in the constitutional rights context, 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. See Gardbaum, 395-397.
[30] Jackson, 3103.
[31] Compare also Sullivan and Frase's undeterminate reference to US courts 'having a difficult time' protecting citizens, cited above.
[32] For a defense against the claim by Lacey & Pickard that substantive talk of proportionality as 'proportionateness' would be meaningless, see Section 4.

substantive terms of 'punitiveness' and 'harshness'.[33] It is important to note first of all that punitiveness is commonly seen as a general attribute of a societal field - 'the structured field of crime control and criminal punishment'.[34] This is of course markedly different from the common focus on the individual institution of proportionality analysis in comparative studies of constitutional judicial review. Punitiveness rather encompasses a very wide range of institutions, such as different actors, doctrines, 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.[35] To some extent, punitiveness can be captured in quantitative terms, most commonly through imprisonment rates (or execution rates) per capita.[36] This may largely be impossible for 'proportionateness' in general constitutional law, although there may well be exceptions.[37] But the literature on cross-country variations in penal harshness is especially interesting because it normally takes in so many more factors; factors that go far beyond merely counting prisoners, difficult enough though that can be. 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, in- creased 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'.[38]

> '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

[33] For such a comparative statement, see e.g. Whitman, *Response to Garland* (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 (e.g. Garland; Lacey); harshness more in work that has a historical and/or cultural focus (e.g. Whitman; Tonry; Savelsberg).
[34] Savelsberg, 686; Garland, Concepts of Culture, 437.
[35] See e.g. Lappi-Seppala, *Trust, Welfare, and Political Culture: Explaining Differences in National Penal Policies* (2008), 332 ('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). But see Whitman, *Response to Garland* (2005), 389 ('There is good reason to expect the death penalty to develop somewhat differently from other forms of punishment').
[36] For an excellent overview of the difficulties of defining and measuring penal severity through imprisonment rates, see Lappi-Seppala (2008).
[37] Perhaps in cases where the costs imposed by governmental acts can be measured (e.g. takings of property), or in cases with typical binary outcomes (e.g. asylum applications).
[38] Steiker, 760.

> people to prison and for longer, parole boards released fewer prisoners, and later, and returned parolees to prison more often'.[39]

There is one crucial further dimension not yet mentioned in these lists. 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 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 degrading conditions that are unexceptional in jails and prisons throughout the United States'.[40]

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 US is *so different* from other liberal systems in terms of the harshness of its criminal justice, 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.[41] The range of smaller and bigger differences summed up earlier might after all add up to something more meaningful. And second, to capture this substantive difference, it will be necessary to develop understandings that go beyond proportionality as the form of an institution, towards proportionateness as a characteristic of a field. The next two Sections discuss what taking up these two new challenges for the study of proportionality could look like.

3. Proportionality, culture, history

What sorts of factors might explain both the spread of proportionality, as a principle and as a mode of constitutional review, across so many liberal jurisdictions, as well as cross-country variations in the role accorded to proportionality in constitutional jurisprudence? In their

---

[39] Michael Tonry, *Explanations of American Punishment Policies* (2009), 379. 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 JOURNAL 1187, 1188 (2004). For more detail, see Savelsberg, *Cultures of Control* (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).

[40] Gottschalk, 120-121, 135. See also Whitman, *Harsh Justice*.

[41] *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).

innovative book '*Proportionality and Constitutional Culture*' (2013), Moshe Cohen-Eliya and Iddo Porat issued 'a call to take context and culture into consideration' in trying to answer these questions.[42] Cohen-Eliya and Porat themselves take up this challenge in a comparative study of proportionality in German constitutional jurisprudence and what they call 'its counterpart in American constitutional law - balancing'.[43] Their aim is to understand why the US has remained an outlier in relation to the global spread of proportionality review. To this end, Cohen-Eliya and Porat look primarily to the register of what they label a form of 'general global constitutional culture': the '*culture of justification*', which they contrast with a '*culture of authority*' operative in the US. But they also draw on a rich array of other registers, including a '*European-based legal and political culture*, particularly in Germany' that is said to be 'generally characterized as epistemologically optimistic', as a opposed to a more sceptical 'American legal and political culture'; differences in the way '*political culture* ... shaped the meaning of the respective constructions of [constitutional] rights in Germany and the USA'; and differences between 'German and American *legal cultures*'.[44]

While this 'turn to culture' certainly sets out an important agenda for further research, the way Cohen-Eliya and Porat operationalize this turn also raises a great number of questions. What exactly is a 'culture of justification', and when and how did it become a significant force? What are the factors that might explain how the US with its 'culture of authority' could be a holdout in relation to this allegedly near-global trend? Do 'epistemological optimism' and 'scepticism' characterize all of German (and European?) and American thinking - both at the elite level and in popular opinion? - or just their constitutional-legal thought? And speaking of constitutional-hyphen-legal thought: can these cultural domains of the constitutional, the legal, and the political, be conflated, or do we need to be more specific as between, say, more typically constitutional and more narrowly legal factors?[45] In short: It is not clear how the different levels and fields of cultural formation Cohen-Eliya and Porat invoke relate to each other; how these cultural complexes relate to further, less typically 'cultural' variables; and what their underlying ideational and causational mechanisms of development and transmission are. This Section argues that comparative studies of punishment practices can be helpful on all these points.[46] In making that comparison, the focus will be on the following claims made by Cohen-Eliya and Porat: (1) Differences in the role accorded to proportionality open a window on a significant divergence between US and Western-European - principally German - constitutional jurisprudence, and this divergence is best explained in terms of 'culture'; (2) tracing this divergence requires constructing genealogies that, on the German side, have to go back to 19th Century Prussian administrative law; (3) the divergence is best captured in terms of a distinction between a 'culture of authority' and a 'culture of justification', in turn related to, among other things, differences in levels of trust in government authority.

[42] Cohen-Eliya & Porat, 9.
[43] Ibid., 3.
[44] Ibid., 90, 103, 111, 154..
[45] Different systems might well share a legal culture, while having very different political or constitutional cultures.
[46] This should largely be the case regardless of whether one accepts any substantive connection between the role of proportionality in constitutional review and the scope and intensity of punishment practices.

In studies of punishment, the idea of culture is invoked in two different senses. As explained by David Garland: 'In the first sense, the analysis asserts the importance of distinctly cultural factors as a causal force in shaping penal institutions (culture as opposed to not culture) while in the second, the analysis points to different cultures (this culture as opposed to that culture) and seeks to show that contrasting cultures produce different patterns of penality'.[47]

Studies of US-European divergence in penal practices that accord a prominent role to specifically cultural factors have taken one of broadly three different approaches.[48] First, 'deep seated cultural differences' may be relied on *directly* to explain cross-country variations in punishment. The leading example of this type of work is James Q. Whitman's book '*Harsh Justice*' (2003).[49]Alternatively, 'basic characteristics of national culture and political values', foundational ideals and long-range historical developments can be invoked *indirectly*, to explain distinctive contemporary political and institutional arrangements that in turn explain variations in punitiveness. This is the approach taken by Michael Tonry.[50] Thirdly, 'nation-specific institutions' and 'nation-specific sedimented cultural traditions, including religious roots' can be see to *filter* 'inter- and transnational pressures', felt by all or many Western societies, to produce 'distinct cultural and structural outcomes', as in Joachim Savelsberg's reworking of David Garland's influential thesis on a modern 'culture of control' as a response to conditions of 'late modernity'.[51]

In '*Harsh Justice*', James Whitman aims to uncover the 'cultural roots of harsh punishment' in the United States, as compared with Western Europe.[52] '[T]here is something in the American idiom, something in American culture', he writes, 'that is driving us toward harsh punishment'.[53] The two key factors singled out in this study are 'American patterns of egalitarian social status' and 'American patterns of resistance to state power', as two features of a more general 'American liberalism'.[54]On the first point, Whitman finds that 'American punishment is more degrading, in ways that reflect a much broader American pattern: American law generally shows a comparative lack of concern for personal dignity. This is as true of the law of tort as it is of the law of punishment'.[55] Explaining the 'concern for personal dignity' in Europe, Whitman goes back as far as the 18th century anti-aristocratic revolutions, and a process of 'leveling up' whereby the milder forms of punishment and more respectful treatment formerly reserved for the elites were extended to all offenders.[56] On the second point, Whitman notes that Germany and France have

[47] Garland, *Concepts of Culture*, 422. Cohen-Eliya and Porat rely on both these meanings. They look principally to more narrowly 'cultural' variables, as opposed to social, economic, or political-institutional factors, and they seek to identify two contrasting 'cultures' - of 'justification' and of 'authority'.
[48] *** Note that there are important approaches to comparative punitiveness that do *not* focus on cultural factors (culture in the first sense). A leading example is Nicola Lacey's work on the comparative political economy of punishment.
[49] Whitman, *Harsh Justice*; Whitman (2005). Garland (2005). 'Culture' is used here in both of the senses identified by Garland.
[50] Tonry (2004); Tonry (2009).
[51] Savelsberg, *Cultures of Control* (2002), 707-708.
[52] Whitman focuses on Germany and France, the two 'dominant legal cultures of northern continental Europe'. Whitman (2005), 389.
[53] Whitman (2003), p. 6.
[54] *Ibid.*
[55] Whitman (2005), 389.
[56] Whitman (2003), 11.

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'.[57] Whitman concludes: 'stronger states can, paradoxically, sometimes produce milder punishment'.[58]

David Garland has criticized Whitman's approach as 'inappropriately deep and deterministic'.[59] Whitman's mistake, Garland alleges, is the 'invocation of cultural traditions that are supposedly unchanging constituents of the American way and assuming, without evidence, that this underlying culture somehow finds expression in legal statutes and judicial decisions'. '[S]uch an approach directs attention to the wrong historical period and the wrong historical processes'.[60] Garland himself has famously focused on the much more recent conditions of 'late modernity' to explain punitive turns in the US and the UK.[61] In Garland's account, the punitive turn taken in the US and the UK since the 1970s is explained by various related forms of popular anxiety, or a 'loss of faith', in particular over the capacity of governments - and of elites more generally - to protect citizens against the consequences of rapid economic and social change, and the forces of 'globalization' most generally.[62] Late modernity, in this work, describes a form of 'existential angst', leaving individuals 'both more conscious of and more unwilling happily to accept all sorts of risk'.[63] It is this anxiety that is then addressed through a wide range of expressive punitive strategies.

One major difficulty for Garland's account, as Michael Tonry explains, is that 'if it is right, it should explain why *all western countries* have experienced steeply rising imprisonment rates and steadily harshening penal policies'.[64] One response to this critique would be to identify 'filtering' factors, including cultural variables, that might explain why the conditions affecting other countries as well have had such harshening effect on penal policies in the US specifically.[65] The alternative conclusion, and the one Tonry adopts, is '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'.[66] Tonry's own account focuses on this 'level of explanation'. Noting first that 'moderate penal policies and low imprisonment rates are associated with low

[57] *Ibid.*, pp. 13-14.
[58] 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').
[59] Garland (2005), 349.
[60] Ibid.
[61] Garland, *Culture of Control* (2001).
[62] Garland (2001). See also Gottschalk, Caught, 148; Tonry (2009), 380.
[63] Tonry (2004), 1196. See also Lacey, *Research Agenda*, 356 (noting how 'the mixed results of risk-oriented 'actuarial justice' have occasioned 'declining trust in governmental competence').
[64] Tonry (2009), 380 (emphasis added).
[65] See Savelsberg (2002). Garland himself has also invoked factors including American political traditions (anti-elitism) and 'cultural commitments' such as antistatism, individualism, and religiosity. See the comments in Whitman (2005), 390 (in relation to '*The Culture of Control*'), and Steiker (2012), 772 (referring to '*Peculiar Institution*', Garland's book on the death penalty).
[66] Tonry (2009), 389. 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).

levels of income inequality, high levels of trust and legitimacy, strong welfare states, professionalized as opposed to politicized criminal justice systems and consensual rather than conflictual political cultures', Tonry summarizes that '[f]or each of those factors the United States falls at the wrong end, the end associated with more punitive policies and practices'.[67] To explain this, he turns to 'basic characteristics of national culture and political values'.[68] One of these is the so-called 'paranoid strain' in American politics. This is 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'.[69] The paranoid style's influence on punitiveness has come about in particular through pervasive 'attacks on "activist", "lenient" and "liberal" judges'.[70] Secondly, Tonry points to the influence of Protestant Fundamentalism on American politics. 'Fundamentalists are 'characterized by a quest for certainty, exclusiveness, and unambiguous boundaries.[71] And thirdly, Tonry looks to 18th century 'constitutional arrangements' that 'place the United States at one end of a continuum distinguishing consensual from conflictual systems'.[72]

The theses developed by Whitman, Garland, Tonry raise a number of intriguing questions for efforts to understand the importance of cultural factors in explaining variations in the role of proportionality in constitutional jurisprudence.

To begin with, there is the issue of the appropriate time frame. Penal divergence between the US and Europe goes back no further than the late 1960s - early 1970s, and has accelerated through the 1990s.[73] This time frame, first of all, raises doubts with regard to the increasingly popular historical narrative that locates the roots for proportionality as a constitutional principle and a doctrine of constitutional law in Prussian administrative law of the late 19th century.[74] That connection may rest too heavily on formal resemblances - rather than any deeper substantive similarity - and, in particular, on an a-historical German scholarly jurisprudential effort at retrospective legitimization and rationalization of the early constitutional jurisprudence of the Federal Constitutional Court.[75] Instead, more emphasis should be placed on parallel post-war phenomena, such as the growth of the Administrative State in Germany and the corresponding search for new forms of 'legal rationality' to satisfy new kinds of rule of law demands,[76] or, in the US, the extension of rights granted to criminal defendants during the

[67] Tonry (2009), 381.
[68] Ibid., 389.
[69] Tonry (2009), 381.
[70] Ibid., 382.
[71] Ibid., 383, quoting Nagata.
[72] Ibid., 384. The dynamics of how different political systems produce different penal policies are explored in the work of Nicola Lacey.
[73] See e.g. Tonry (2009), 379, 389; Gottschalk, 128;
[74] ***; Cohen-Eliya & Porat, Harvard paper; S-S & M, Proportionality Balancing and Global Constitutionalism, 101). See also Yowell, 101-102, 113; Weinrib, 106 (on striking resemblance to police power jurisprudence).
[75] Early post-war studies of proportionality in German law clearly did not make much of this Prussian connection. See e.g. Lerche (1961).
[76] Lerche (1961). Compare, critically, Forsthoff.

Warren Court's 'criminal procedure revolution'.[77] Such a postwar focus could also 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.[78] The puzzle then becomes rather why '[c]urrent constitutional thinking in the United States tends to accord little understanding or sympathy to that jurisprudence'.[79]

Secondly, there is the substance of the cultural factors invoked in the literature on punishment, in relation to those at the heart of Cohen-Eliya and Porat's account of proportionality. Here the puzzle is similar to the one identified by James Whitman: the paradox of how 'weak states' might occasion harsh punishment, and vice versa. Cohen-Eliya and Porat make much of the role of proportionality in a near-global 'culture of justification', to which the US 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'.[80] The culture of justification is a culture 'in which every exercise of power is expected to be justified'.[81] The question is how such a demand for justification would arise - and be answered - in 'strong' states, like Germany, and not in a 'weak' state like the US. Intuitively at least, would one not expect demands for justification to be especially strong precisely in a system dominated by a 'suspicion-based conception of the state', such as the US?[82] In other words, the correlation between 'high levels of trust and legitimacy' and milder forms of punishment may also hold for proportionality in constitutional review, the causal dynamics by which this would come about are not clear. This suggests there is more we would need to know about how in the adoption and diffusion of standards of review and justification, courts respond not only to what is 'demanded' by rights claimants, but also to what is 'granted', by defendant public authorities.[83]

[77] Steiker (2012), 769ff (referring to the work of William Stuntz)
[78] Weinrib, 111.
[79] Ibid. In my view if there was an initial shared postwar 'constitutional conception' with its 'companion juridical paradigm' (Weinrib, 111), then the reasons for later divergence should be sought more in relation to the 'juridical paradigm' more so than 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), and Garland, Peculiar Institution.
[80] Cohen-Eliya & Porat, 111.
[81] Ibid., quoting the South African scholar Etienne Mureinik.
[82] Ibid., 54.
[83] *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.

4. Proportionality and 'proportionateness'

Is there any way we could make sense of 'proportionateness' as a concept to describe substantive differences as between systems of constitutional 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 agreement on meaningful, thick notions of proportionality as a limit on punishment. More specifically, Nicola Lacey and Hannah Pickard argue that empirical studies show a lack of consensus about the appropriate length of sentencing for particular crimes (what they call 'cardinal proportionality'.[84] This absence of consensus may well be a more contingent issue than they suggest.[85] More importantly, however, work on penal harshness shows how a substantive notion of 'proportionateness' could be developed that do not rely on forms of quantitative or relational ranking. On that view, proportionateness is understood as an intolerance for 'wrong answers', in a way that does not depend on precise substantive agreement on what the 'right answers' would be. If we go back to the summaries of American penal harshness set out earlier, what is striking is how much of what they depict is not - or at least not solely - related to ideas about excessiveness. True, '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' long.[86] 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 actually say that a system that relies heavily on these types of laws is *less proportionate* than another system, even if that second system imposes longer sentences on average for particular offenses. It shows less regard for proportionality in individual cases as a valuable objective among others. The same could be said in relation to the fact that in the US, 97% of federal convictions and 94% of state convictions are the result of guilty pleas.[87] Here too, the issue is not the alleged excessiveness of the resulting sentences but rather the fact that the system, in its actual operation, does not even allow for such substantive judgments on excessive length to be voiced and tested. In comparative perspective, then, it would seem that US criminal justice is exceptional in its tolerance for wrong answers.[88]

Much more would have to be said about this, including about the definition of 'wrong answers' in law. It should be emphasized that what is meant here is 'wrong answers' in a sociological and phenomenological sense: What matters is individual and communal apathy - 'malign neglect', in Tonry's term - in the face of outcomes that are felt, by individuals and

[84] Lacey & Pickard, 227.
[85] *Cf.* Tonry, Victims Survey data ***.
[86] *Cf.* Ferguson, Inferno, 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 Mauer); Whitman, book *** on 'triumph of determinate sentencing'; and comment Garland (2005).
[87] Ferguson, 113.
[88] *Cf.* also the status of trial by jury, and the role of elected officials in the criminal process.

communities, to be wrong on the ground that they do not do justice to the individual circumstances of a particular case, with 'doing justice' defined according to these invididuals' and communities' own standards.[89] It is also true that this claim goes 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.[90] But then again, when looked at in light of actual outcomes - rather than 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. Japanese law, by contrast, seems to adhere to an ideal of 'standardized, homogenized justice'.[91] In this area of American law too, the ideals, for trial by jury and for individualised justice, are set high, perhaps 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

Many puzzles remain in comparative accounts of differences in the roles and meanings of proportionality, as a principle and a doctrine, in constitutional judicial review. We have a range of familiar variables that *could* be of some significance - *Lochner*; the Nazis; Prussian administrative law; Weimar-era philosophies of objective values; popular distrust of government, both historically and today; popular trust in courts; different conceptions of legal formality, or changes in requirements for 'rational' or 'convincing' legal reasoning within elite legal thought; the rise of the administrative state and/or the welfare state; global competition among countries for capital and skilled labour. But we still know little about their real significance, or the relationships between them.

In this setting, we should expect benefits from a comparative-comparative approach - one that looks to learn from comparative projects in other fields. Arguably the most developed of these is the comparative study of criminal justice, criminalisation and penal harshness. There is

[89] For a significant and interesting recent invocation of proportionality in political discourse, see Speech by President Obama to the NAACP, 14 July 2015 ('In far too many cases, the punishment simply does not fit the crime. If you're a low-level drug dealer, or you violate your parole, you owe some debt to society. You have to be held accountable and make amends. But you don't owe 20 years. You don't owe a life sentence. That's disproportionate to the price that should be paid'), available at: [Speech to the NAACP]. The curious, indirect wording - 'disproportionate to price that should be paid' - rather than the more familiar and direct 'disproportionate to the offense' points in the same direction as the 'tolerance for wrong answers claim' developed. Obama's wording suggests that agreement on 'cardinal proportionality' does not matter; what matters is agreement that this particular punishment is disproportionate in the circumstances of this particular case, even if there is no agreement on what sort of punishment precisely *would* be proportionate.

[90] Ramseyer, *Second-Best Justice*, 4; Tocqueville, cited in Shklar. See also Schauer, *The Jurisprudence of Reasons* (claiming that 'tolerance for wrong answers' has 'evaporated' from contemporary American legal theory)

[91] Ramseyer, 9.

a lot we could learn from these studies, notably on how to integrate careful jurisprudential and doctrinal analysis in terms of legal and constitutional categories, with the careful causal inference of political economy, or the rich textures of studies of culture. At the very least, comparing with other comparative studies in this way should enable us to achieve greater coherence between our 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 and litigation 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 legal or constitutional era, we need to think about whether other facets of such earlier understandings have also survived, and if not, why not. Or about how similar historical connections have played out very differently in other systems.

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,[92] or work on the varieties of capitalism. The spread of proportionality-based review of virtually all exercises of public authority could be an emanation of 'neo-liberal rationality'. But it could also be a form of institutional resistance against neoliberalism. Or there could be no significant correlation between the two, perhaps because it is impossible to identify what we are trying to correlate here with any precision.[93] There are also relations to be explored within more typical legal domains. One example could be the turn to 'proceduralism' in American interpretations of constitutional guarantees in criminal law. This proceduralisation, especially during the tenure of the Warren Court, is an important theme in the criminalisation literature and its explanations of US/Europe difference. Proceduralism could be an expression of dynamics very similar as those underpinning attitudes towards proportionality and balancing, but the phenomena could also be diametrical opposites.[94]

The role of proportionality in constitutional review and punitiveness in criminal punishment may turn out to be very different phenomena. They certainly seem driven by different principal actors (legislators, and elected officials, in the case of punishment; courts in relation to constitutional review), and they may turn on completely different causal factors. And yet, they could also be related. Not just in the sense that a constitutional rights jurisprudence that actually employs 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 legal order should be. This essay has argued that it is at least worthwhile to explore their connection.

---

[92] For a recent exploration of proportionality review in relation to Weberian 'disenchantment', see Schneiderman ***. *** Savelsberg on religion and punitiveness.

[93] *Cf.* *** Lacey & Pickard (suggestion that 'resistance'? but not elaborated, and 'emanation of' seems at least as plausible). See also the debate between Whitman and Harcourt ***.

[94] For discussion of the 'flight from substance' in US constitutional jurisprudence, and its relevance in comparisons with European law, see Bomhoff, *Perfectionism in European Law*.