The Baron and the Marquis

Also by John D. Bessler

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The Baron and the Marquis:

Liberty, Tyranny, and the Enlightenment Maxim That Can Remake American Criminal Justice

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Carolina Academic Press
Durham, North Carolina

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ISBN 978-1-5310-1305-9
e-ISBN 978-1-5310-1306-6

Library of Congress Cataloging-in-Publication Data
Names: Bessler, John D., author.
Title: The baron and the marquis : liberty, tyranny, and the enlightenment maxim that can remake American criminal justice / by John D. Bessler.
Description: Durham, North Carolina : Carolina Academic Press, LLC, [2018]
Identifiers: LCCN 2018044706 | ISBN 9781531013059 (alk. paper)
Subjects: LCSH: Punishment—United States—History. | Legal maxims—United States—History. | Criminal justice, Administration of—United States. | United States. Constitution. 8th Amendment | Enlightenment—United States—History. | Civil rights—France—History. | Despotism—History. | Liberty.
Classification: LCC KF9225 .B49 2018 | DDC 345.73/0773--dc23

Carolina Academic Press, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

From the past, for the present, about the future—

To a new American Enlightenment …

Baron de Montesquieu

Marquis of Beccaria

Every punishment, which does not arise from absolute necessity, says the great *Montesquieu*, is tyrannical. A proposition which may be made more general, thus. "Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical." It is upon this then, that the sovereign's right to punish crimes is founded; that is, upon the necessity of defending the public liberty, entrusted to his care, from the usurpation of individuals; and punishments are just in proportion, as the liberty, preserved by the sovereign, is sacred and valuable.

—Cesare Beccaria, *An Essay on Crimes and Punishments**

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

—"Publius," *The Federalist No. 51* (1788)**

If Montesquieu had not written, the distinction between the three powers of government would be yet unknown, and their limits undefined. If Beccaria had not written, the torture and its horrid concomitants would not have disappeared from the face of Europe, and sanguinary codes would not almost every where have given way to mild punishments.

—Peter Stephen Du Ponceau, Provost of the Law Academy of Philadelphia (1824)***

* An Essay on Crimes and Punishments, Translated from the Italian, with a Commentary Attributed to Mons. De Voltaire, Translated from the French (4th ed. 1775). The above excerpt is reprinted from Chapter 2, "*Of the Right to punish*," of the 1775 London edition of the Italian *philosophe* Cesare Beccaria's *An Essay on Crimes and Punishments*, a book owned by John Adams. That book, now in the Boston Public Library's rare book collection, was gifted by John Adams to his son, Thomas, as reflected in the handwritten notation, "Thomas B. Adams, From his Father, 1800," on the book's title page. Catalogue of the John Adams Library in the Public Library of the City of Boston 23 (1917). The underlining in the above excerpt is found in that book, which bears the Coat of Arms of John Adams. That Coat of Arms bears the Latin inscription "*Libertatem / Amicitiam / Retinebis / Et Fidem*," which translates as "You will retain liberty, friendship, and faith." Adolph Caso, We, the People . . . : Formative Documents of America's Democracy (2011).

** *The Federalist No. 51*, "To the People of the State of New York" (Feb. 6, 1788), *reprinted in* James Q. Wilson, John J. DiIulio, Jr. & Meena Bose, American Government: Institutions and Policies: The Essentials A27 (13th ed. 2013). *The Federalist No. 51* has been attributed to either James Madison or Alexander Hamilton, though "[t]he internal evidence presented by Edward G. Bourne ('The Authorship of the Federalist,' *The American Historical Review*, II [April, 1897], 449-51), strongly indicates Madison's authorship. Bourne printed in parallel columns sentences from essay 51 which correspond very closely, sometimes exactly, to earlier writings by Madison." 4 Harold C. Syrett & Jacob E. Cooke, eds., The Papers of Alexander Hamilton 497 (1962).

*** Peter S. Du Ponceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States, Being a Valedictory Address Delivered to the Students of the Law Academy of Philadelphia, at the Close of the Academic Year, on 22d April, 1824, at 131 (1824).

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About the Author

John D. Bessler teaches at the University of Baltimore School of Law and the Georgetown University Law Center. He is also of counsel at the Minneapolis law firm of Berens & Miller, P.A., which handles complex, commercial litigation. A two-time Minnesota Book Award finalist and the winner of an *Independent Publisher* Book Award, he is the author of multiple books on the subject of capital punishment. His 2014 book about Cesare Beccaria's influence on America's founders, *The Birth of American Law: An Italian Philosopher and the American Revolution*, was the gold winner of the IndieFab Book of the Year Award for history and received the first prize in the 2015 American Association for Italian Studies Book Award contest for a work focused on the eighteenth and nineteenth centuries. *The Birth of American Law* also won the prestigious Scribes Book Award, an annual award given out by The American Society of Legal Writers since 1961 for "the best work of legal scholarship published during the previous year." His new biography of Beccaria, *The Celebrated Marquis: An Italian Noble and the Making of the Modern World*, won the 2018 Next Generation Indie Book Award for biography and was a National Indie Excellence Awards finalist in that genre. He has also taught at the University of Minnesota Law School, The George Washington University Law School, Rutgers School of Law, and the University of Aberdeen in Scotland. In 2018, he was a visiting scholar at the Human Rights Center of the University of Minnesota Law School and received the University System of Maryland Regents' Faculty Award for Excellence in Scholarship, Research, or Creative Activity.

Acknowledgments

I live within walking distance of Open Book, a quiet, brick-and-mortar sanctuary in the City of Minneapolis for writers, editors, book artists, and the general public. The Open Book's building on Washington Avenue, on the edge of downtown Minneapolis not far from the Mississippi River, houses The Loft Literary Center, the Minnesota Center for Book Arts ("MCBA"), and a tiny new bookstore, Milkweed Books, part of a vibrant and extraordinary collection of local organizations and community gathering places that cultivate the literary arts. The coffee shop at Open Book, wedged between The Shop at MCBA and Milkweed's delightful, 750-square-foot bookshop, is the perfect spot for inspiration, daydreaming and contemplation, and, of course, writing.

After a recent, weekend stroll across the Mississippi River's iconic Stone Arch Bridge to Open Book for a little quality time with my laptop, I picked up a copy of a lovely book, Ella Frances Sanders' *The Illustrated Book of Sayings: Curious Expressions from Around the World*, at The Shop at MCBA. That fantastic, eye-pleasing shop bills itself as "a haven for the unabashedly bookish," and it is filled with products of wordsmiths and creativity: authors' broadsides, limited-edition poetry collections, fine art prints, greeting cards, zines, art supplies and marbled papers, colored pens and pencils, and hand-stitched artists' books. *The Illustrated Book of Sayings* is a wonderful, whimsically illustrated collection of more than fifty expressions from around the globe. And some of those sayings, it turns out, are actually quite well suited to the creation of a book and to the ebb and flow—to the inevitable trial-and-error and put-a-comma-in-one-day-take-a-comma-out-the-next—of the writing and revision processes.

From the looks of it, *The Illustrated Book of Sayings* was clearly a labor of love for its creator. It is a coffee-table-worthy book that imparts little, bite-size nuggets of wisdom. The Japanese "even monkeys fall from trees," Sanders writes of one of the sayings, is a pointed way "of pointing out that everybody gets it wrong sometimes." That's a good, healthy, and humbling reminder for anyone, especially a writer struggling—and earnestly trying and toiling away—to craft, appropriately structure, and put together a readable book. And the fabulous French idiom *pédaler dans la choucroute* ("To pedal in the sauerkraut"), she explains in another short description, "means to be at a complete loss or to have lost the train of one's thoughts." It can mean, she says of the feeling that is, sadly, all too familiar to writers, "that something is no longer progressing," "that the wheels are spinning." That quirky French idiom's origins, Sanders relays, "comes from the early Tour de France races" in which "[t]he broom wagons—the vehicles that follow cyclists and pick up stragglers or those who

are unable to finish the race within the allotted time—often featured billboards advertising sauerkraut."

One of my personal favorites from *The Illustrated Book of Sayings*: the Bulgarian "drop by drop, a whole lake becomes." That expression is, frankly, extremely *apropos* to an always-try-to-be-a-glass-half-full writer like me. "Little by little, humans can accomplish almost anything," Sanders observes of that powerful proverb's not-so-subtle meaning, providing excellent and sage advice for how to be patient as one goes about writing and editing a book. Other favorites of mine from Sanders' 2016 compilation, published by Ten Speed Press, for the "logophiles" and "linguists" she aims to reach: the Italian *avere grilli per la testa* ("To have a head full of crickets"), about having whimsical daydreams and flights of fancy amid big, high-leaping ambitions; the Turkish *üzüm üzüme baka baka kararir* ("grapes darken by looking at each other"), reflecting the idea that we mature by learning from those around us; the English "Mind your P's and Q's," a reminder to proofread carefully; and the delightful Spanish saying *tu eres mi media naranja* ("you are my orange half"), said to be "an informal, affectionate way" of referring to someone "as your soul mate or the love of your life."

Every writer needs encouragement, support, and good cheer over the course of writing a book, so the Spanish phrase of endearment goes to Amy, my beautiful, quick-witted wife, and to Abigail, our lovely, generous, and equally funny, whip-smart daughter. While I plodded along on my own on a daily basis to create *The Baron and the Marquis*, trying to connect one idea to another as they raced through my head at Mach 5 speed, often all at once, I got lots of help and guidance, some solicited and some not. That material assistance came from a host of fellow scholars and colleagues, from close friends, and even from total strangers in faraway lands via e-mail. These acts of human kindness, both big and small, made it possible—and at times, downright enjoyable—for me to finish the book you are now holding in your hands. At one lovely dinner in Minneapolis with Vivian Mason, the widow of Jack Mason, the late U.S. Magistrate Judge I had the honor to clerk for in the mid-1990s, I tapped the experience—and picked up some terrific leads—from Jack's son, Peter, and his wife, Melinda, as well as from Lane Ayers, a former prosecutor and public defender and—in his retirement—the Director of Books for Africa's Jack Mason Law & Democracy Initiative.

While many fiction writers pick a universal theme (love, good vs. evil, etc.) and aim to write what they hope will become the Great American Novel or an international or *New York Times* bestseller, this non-fiction book is intentionally built around (as strange as it sounds) a now obscure eighteenth-century *legal maxim*: that any punishment that does not arise from necessity is tyrannical. That maxim originated with the Baron de Montesquieu in France in the late 1740s; it then got popularized in the decades that followed, including in the 1760s by an Italian aristocrat, the Marquis of Beccaria. Although the maxim has largely been forgotten in modern American life, it articulates a principle that is eminently worthy of study and examination. The dividing line between tyranny and liberty is one that was of great concern to America's founders and framers, and that dividing line—set forth in the maxim in memorable language—should be of equal concern to modern-day American citizens.

This is especially so since Americans are now living in the Age of Mass Incarceration—the terminology used by sociologists, criminologists, and others to describe the marked increase in people serving time in American prisons. That verbiage, for example, shows up in the subtitle of an actual *New York Times* bestseller: Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. It also shows up in John Pfaff's *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* (2017), a book that points out—rounding up a bit—that "the United States is home to 5 percent of the world's population but 25 percent of its prisoners." An April 2015 fact check done by the *Washington Post* of that widely cited statistic (I, myself, have heard TV talking heads use it) pointed out that, as of July 4, 2014, per U.S. Census data, the U.S. population was 319 million, accounting for roughly 4.4 percent of the world's approximately 7.1 billion people. As regards the second half of the statistic, the *Washington Post* observed that the U.K.-based International Centre for Prison Studies—reportedly "the go-to source for the breakdown of global prison populations"—had, in the 10th edition of its World Prison Population List, analyzed global data from September 2011 through September 2013. That data revealed that there were 2.24 million prisoners in the U.S. as of December 31, 2011, accounting for approximately 22 percent of the global prison population (10.2 million). The *Washington Post* further noted in its April 2015 fact check that "[a]bout half of the prisoners in the world were in the United States, Russia or China."

These days, criminal justice reform is—perhaps not surprisingly given those very stark and startling figures—an extremely hot topic in the United States. And that is true across the political spectrum, with groups and individuals as diverse as the American Civil Liberties Union and the Koch brothers weighing in on penal reform. "It makes a lot more sense for us to be investing in jobs and education rather than jails and incarceration," former Democratic presidential candidate and U.S. Senator Bernie Sanders, of Vermont, has argued. Senator Cory Booker, the Democrat of New Jersey, has also decried mass incarceration, sentencing disparities between crack and powder cocaine, and practices such as juvenile solitary confinement. One of his Republican colleagues, the junior U.S. Senator from Kentucky, Rand Paul, has likewise observed, if somewhat less stridently: "The United States has the highest incarceration rate in the world. Many of those people deserve to be in prison; however, some of them do not." While another Republican senator, Rob Portman, has called for more money for prevention and education to combat drug use (and for less money to be spent on prosecution and incarceration in that arena), journalist Nicholas Kristof—a progressive commentator who has won two Pulitzer Prizes—has framed the criminal justice crisis this way: "Since the end of the 1970s, something has gone profoundly wrong in America. Inequality has soared. Educational progress slowed. Incarceration rates quintupled. Family breakdown accelerated. Median household income stagnated."

Given all of the facts, and everything that has been said about American criminal justice, it is certainly worth exploring whether a bit of eighteenth-century wisdom might suggest a better way forward for American law, culture, and society. *The Baron and the Marquis*, a study of the necessity-for-punishment principle developed by a famous Frenchman and then promoted by a now much less well-known Italian

aristocrat, does just that. Because the book focuses on criminal justice reform efforts during the Enlightenment *and* at present, it was particularly pleasing to encounter so many legal scholars, historians, and practicing lawyers who were passionate about both as I researched and wrote the book. At a recent conference of the Southeastern Association of Law Schools ("SEALS"), I got a chance to participate on panels on the U.S. Constitution's Eighth Amendment and about the death penalty—two topics that are of considerable importance to the debate over criminal justice reform.

Good ideas get better when you engage in dialogue with other experts, and bad ideas—at least that's the hope—get jettisoned through rigorous debate and intellectual exchange. To regularly meet people who share a passion for history and the principal subject of this book—*American* criminal justice reform—was, in fact, a very gratifying and reassuring experience as I toiled away on the book project week after week. For all those who, through their time or their own advocacy, writings, or scholarship, have made a difference or smoothed my own path in some way, shape, or form, I am very thankful, for it made the journey all the more pleasant and worthwhile. Plenty of books, articles, and op-eds have already argued persuasively for the need for criminal justice reform, and these should certainly be sought out and consulted by anyone interested more in this topic. *The Baron and the Marquis*, on the other hand, seeks to lay the underlying intellectual foundation for such reform efforts even as it attempts to make its own modest suggestions for change.

Every writer—to paraphrase Isaac Newton—sees a little further by standing on the shoulders of giants. For such criminal justice pioneers and prior penal reformers, I am, of course, extremely grateful. This book simply could not have been written without the benefit of all that talent, energy, and scholarship, and all of the studies and reports that have been published in the past few decades. And it most definitely could not have been written without the prior digitization of rare books and old newspaper articles, thus making those sources more easily accessible. All of the data, information, and analysis I located, whether from recent articles or old, searchable databases, informs *The Baron and the Marquis*, an exposé of days gone by but also of the present-day criminal justice system (with an ever-present eye on the future, of course). As the twentieth-century American writer William Arthur Ward, a columnist for the *Fort Worth Star-Telegram*, once offered in his own show of indebtedness: "Gratitude can transform common days into thanksgivings, turn routine jobs into joy, and change ordinary opportunities into blessings." Or as Voltaire, who opposed superstition, barbaric punishments, and religious intolerance, and who became famous for works such as *Candide* (1759) and *Dictionnaire philosophique* (1764), put it: "Appreciation is a wonderful thing. It makes what is excellent in others belong to us as well."

Intellectual and academic endeavors, like most things in life, are reliant on building upon the perceptive, sometimes transformative, ideas of others, so there are always plenty of people to thank and acknowledge by the time a book is finished. In this case, I am particularly grateful to a group of fantastic students I taught during the summer of 2017 at the University of Aberdeen in Scotland, an institution of higher learning that dates back to 1495, the year of its founding. I had a chance to teach a comparative criminal law course that summer, and the nearly twenty students I co-

taught with Dr. Susan Stokeld, of the University of Aberdeen, wrote on a wide array of topics. That class, which looked at differences in American and European sentencing policies and approaches to criminality, opened my eyes to the problem of unnecessary punishments and the possibilities for American criminal justice reform. The study of other countries' legal systems—in particular, the big differences in approaches to crime-and-justice issues (say, for example, between Scandinavia and the United States)—makes it clear that no one path is inevitable.

The summer class in Aberdeen—the Granite City—allowed me to explore how U.S. sentencing policy has, over time, diverged quite dramatically from the practices of other Western representative democracies. One of the guest lecturers that particularly impressed me: Scotland's dynamic Karyn McCluskey. She has devoted her adult life to focusing on criminal justice reform, taking on street crime and Glasgow's gangs, and she forthrightly sees violence as a public health issue. She gave our class a particularly inspiring presentation on the interconnectivity of social problems and crime. Recently tapped to lead Community Justice Scotland, that organization—under her leadership—has a simple, clearly stated, and very focused and admirable goal: "WE WANT SCOTLAND TO BE THE SAFEST COUNTRY IN THE WORLD." That goal—which might be reframed as making one's own country the safest in the world—is one that *every* nation in the world, including the U.S., should earnestly work toward and strive to achieve. Crime is undesirable and destructive, and every country's leaders should want to do whatever they can to combat it.

At the outset, I also need to extend a special thank you to two prominent Eighth Amendment scholars, Professor William Berry at the University of Mississippi School of Law and Professor Meghan Ryan at the Southern Methodist University Dedman School of Law. Their invitation for me to participate in the SEALS conference and to contribute a book chapter on the Eighth Amendment's history, a subject I'd explored extensively in a prior book, got me thinking again in earnest about the U.S. Constitution's Eighth Amendment, especially in light of all the writing I'd been doing since finishing that earlier book, *Cruel and Unusual: The American Death Penalty and the Founders' Eighth Amendment* (2012). I'd been writing more recently about capital punishment, about all the psychological torture associated with death sentences and executions, and about the Italian philosopher and criminal-law theorist Cesare Beccaria, though the subjects are, in reality, all connected.

In 1764, in addition to denouncing torture, Beccaria became the first Enlightenment thinker to make a comprehensive case against the death penalty. And it was Beccaria who, inspired by Montesquieu, the French jurist, had popularized the necessity-for-punishment maxim that I'd frequently run across in writing about the Eighth Amendment and in preparing a new biography of Beccaria. That maxim (one of many from that era) forms the core of—is, it could be said, at the very heart and soul of—*The Baron and the Marquis*. It was, in effect, through the thoughtful generosity of two colleagues at other institutions, that the concept for this new book began to percolate in my mind along with what began as the kernel of an idea for a promised new book chapter. One project frequently builds upon another, and that certainly proved to be the case here. The fact that Professor Berry and Professor Ryan

brought together such an extraordinary group of scholars for the discussion of the Eighth Amendment at the SEALS conference was, frankly, icing on the cake.

Another academic conference—one held in Indianapolis and hosted by the Liberty Fund and attended by Terry Anker, one of my law school classmates from Indiana University—also gave me the opportunity to reflect anew on the principle of liberty as I read the well-assembled packet of readings, ranging from Thucydides to Machiavelli's *The Prince* to Montaigne. That 2018 conference, titled "Moral Ideals, Political Necessities, and Liberty," allowed me to look with new eyes at the draft book manuscript that, in time, became this printed book. To Professor John Kekes for assembling the readings and moderating the conference, and to my long-time friend, Terry, and his friend (and my new friend), Emilio Pacheco, the President and CEO of Liberty Fund, many thanks for hosting a wonderful conference. Dialogue is extremely important in a representative democracy, and I went away from the conference thankful for having experienced a series of very engaging, enlightening, and highly respectful conversations.

There are, in truth, always a lot of people to thank by the time a book winds its way from inception to publication. I am especially grateful to Dean Ron Weich at the University of Baltimore School of Law and to all of my fantastic colleagues there. General exchanges with fellow attorneys and scholars about crime and punishment—about criminal justice issues, the concept of proportionality, and American sentencing policies—were very enlightening, as were very specific discussions with former Hennepin County Attorney Tom Johnson, lawyers Angela Bailey, Carrie Zochert and Lee Sheehy, Judge Mark Kappelhoff, University of St. Thomas law professor Mark Osler, and Professors Richard Frase and Susanna Blumenthal at the University of Minnesota Law School. The out-of-the-blue e-mail I got in October 2017 from Rob Warden, the Executive Director, Emeritus, of Northwestern's Center on Wrongful Convictions, also came at a particularly fortuitous and opportune time. The offered chance (quickly accepted) to contribute an article to a death penalty-themed symposium issue of the *Northwestern Journal of Law and Social Policy*—a journal I'd published in previously—led to the creation of yet another new article on the Eighth Amendment. Part of that 2018 article, which focuses on the difference between "usual" and "unusual punishments," and which thus intersects with the principal subject matter of this book, found its way, ultimately, into *The Baron and the Marquis*.

That lengthy law review article, titled "The Concept of 'Unusual Punishments' in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual," was first published in Volume 13, Issue 4, of the *Northwestern Journal of Law and Social Policy* and is available online. Most importantly, the journal's invitation to write that article kept me thinking about the role of the Eighth Amendment's Cruel and Unusual Punishments Clause in modern American life as I simultaneously researched Montesquieu and Beccaria's eighteenth-century legal maxim and wrote *The Baron and the Marquis*. A special thank you to Emilie O'Toole, the editor-in-chief of that journal, and to all of the journal's staff, for shepherding my lengthy law review article through the rigorous cite-checking and publication process. My retrospective apologies for all the student work that had to go into cite-checking all *608 footnotes*! Another much-shorter article, one published in the *Montana Law*

Review in 2018, also kept me thinking about Beccaria's contributions to the penal reform movement. That article, deftly guided to publication by Emily Gutierrez Caton and other staff members in Missoula, is titled "The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions." It, too, is available online.

To Carolina Academic Press, the publisher of *this* book, and to all of its hard-working, always diligent staff, another special thank you is in order. If writing, as E. B. White once aptly offered, is hard work, publishing books is too. A successful publisher needs great people with lots of organizational skills, smarts, and energy. To bring a new book into the world, it requires not only typesetting and the painstaking creation of proofs, but entering scores of corrections to those proofs, then spotting pesky typographical errors through careful proofreading. It also requires attention to detail when it comes to all the marketing and publicity efforts. Carolina Academic Press is a successful publisher because it has great people. Indeed, I do not want to neglect to extend a general thank you to *everyone* who helped me *at any time* and *in any way*—you know who you are and how you helped! As William Arthur Ward, who had a particular penchant for writing quotable aphorisms, once warned of the risk of leaving someone out, if only unintentionally: "Feeling gratitude and not expressing it is like wrapping a present and not giving it." To cover my bases (and because one's memory, I'm told, can fade a bit after fifty), I thus offer a blanket thank you.

Nonetheless, very specific shout outs are in order to various law librarians who were extremely helpful to me. Adeen Postar, the Director of the University of Baltimore's law library, is always incredibly responsive as regards any inquiry, no matter how large or small, I make. And I also want to thank Ryan Greenwood, the Curator of Rare Books & Special Collections at the University of Minnesota Law School's Riesenfeld Rare Books Research Center, and Loren Turner, the Law School's Foreign, Comparative & International Law Librarian. Both Ryan and Loren were equally responsive in answering my queries, and they provided me with a lot of useful information and important leads for this book project. "When in doubt go to the library," bestselling writer J. K. Rowling, of *Harry Potter* fame, once wisely observed, with the American Library Association offering this equally sage bit of advice (which I carefully followed): "When you absolutely positively have to know, ask a librarian." (As a side note, there is a *real* Harry Potter, a former prison chaplain who penned a book called *Hanging in Judgment: Religion and the Death Penalty in England from the Bloody Code to Abolition*, published in London in 1993. It discusses topics that will be taken up later in *The Baron and the Marquis*.)

It was especially gratifying when Ryan Greenwood—in looking through the editions of Montesquieu's and Cesare Beccaria's books in the Law School's extensive collections—discovered a 1778 edition of Beccaria's *An Essay on Crimes and Punishments*. That book was printed in Philadelphia in 1778 by the Scottish émigré, Robert Bell, the same printer who, just two years earlier, much more famously brought out Thomas Paine's *Common Sense*. On the title page of the book, one of the earliest American editions of *On Crimes and Punishments*, is the handwritten signature of one "Frans. L. Lee," almost certainly a reference to Francis Lightfoot Lee. There are, Ryan informed me, actually *two* men named Francis Lightfoot Lee—one a signer of the

Declaration of Independence and the other his nephew, the son of Richard Henry Lee. It was Richard Henry Lee who, in June 1776, made the motion for America's independence in the Second Continental Congress. While Richard Henry Lee and his brother, Francis Lightfoot Lee, are special because they were the only *brothers* to sign the Declaration of Independence, the other Francis Lightfoot Lee—the nephew—was himself a part of the highly influential Lee family. No matter who first owned the book, to find a Revolutionary War era copy of Beccaria's book in the University of Minnesota's rare book collection was a great find, and highlights just how much early Americans valued Beccaria's book (and Montesquieu's work, which is cited in it).

Legal historians and enterprising policymakers must be detectives, and researching and writing a book such as this is a little like putting together a 1,000-piece puzzle, only it takes far, far longer to complete. When assembling a puzzle of that size (as I've done with my daughter, Abigail, on a few occasions during the interlude between Christmas and New Year's Day), or when crafting a book of this magnitude (as I've done in years past), it helps—and is, I recognize, a whole lot more fun—to have some pleasurable company. During my 2018 stint as a visiting scholar at the University of Minnesota Law School, Ryan continually directed me to useful sources, and the sources provided by both Ryan and Loren set me on the path to further discoveries as I drafted and revised the manuscript for *The Baron and the Marquis*. Bottom line: I am extremely thankful for all of the amazing assistance I received from incredibly smart and highly professional law librarians. There is, in fact, great sagacity in the signs I've seen in libraries describing librarians as the first search engines.

Though this book's acknowledgments come first, these acknowledgments—as you might've guessed—were actually written last. As one writer, Judith McCormack, wrote in her book, *The Rule of Last Clear Chance*, of her own musings on an author's innermost thoughts on book acknowledgments: "I have been daydreaming about writing acknowledgments since I started writing this book. Of course, this was largely to avoid doing any work on the book itself." That was—and remains—a good reminder: that before any acknowledgments could be written, the *book itself* had to be written. The actual writing of a book of this size and scope requires hundreds (if not thousands) of hours, plenty of cups of coffee (no decaf, please), lots of fits and starts (hopefully no computer crashes), and, inevitably, lots of planned and unplanned interruptions (many good, some bad) for life itself. In Judith McCormack's case, she playfully admitted in her own book's acknowledgments that her own daydreams "didn't produce any actual acknowledgments" because—in her words—"when my mind started to wander from the book, the next step was to lie down on the floor with my eyes closed, hoping fervently for a bolt of creative energy to strike." (Sounds eerily familiar!)

Periodic bouts of procrastination aside, I was especially blessed during the writing of this book for, of late, I've developed a fairly dependable, more-or-less daily rhythm to my writing. Plus (and this is a big plus), I had a one-semester sabbatical from teaching, and sabbaticals and writing go hand in hand like ice cream and cake or ice dancers at the winter Olympics (okay, that was just one of many, many distractions I faced during a multi-day stretch—actually, *binge* might be the better word choice—of watching NBC's coverage of the 2018 Pyeongchang games). As I researched, wrote

and revised *The Baron and the Marquis*, often leading to more research angles to explore, there were, to be sure, plenty of early mornings, long afternoons, and late nights, as well as a fair amount of pedaling in the sauerkraut. But day by day, sentence by sentence, paragraph by paragraph, and chapter by chapter, the book manuscript got written with a little grit and determination.

A special, now *post*-sabbatical thanks is owed to Fionnuala Ní Aoláin, a University Regents Professor at the University of Minnesota Law School and the faculty director of the Law School's Human Rights Center. Fionnuala's generous offer of a visiting scholar position and an office to work out of during my sabbatical made all the difference to a productive spring semester. Founded in 1988 by Professor David Weissbrodt, an expert on torture and corporate responsibility, and a pioneering human rights scholar, the Human Rights Center promotes vital research on real-world challenges. Amanda Lyons, the Executive Director of Walter F. Mondale Hall's Human Rights Center and herself a specialist in international human rights law and advocacy, was, like Fionnuala, an incredibly gracious host, as were Robyn Skrebes, the Outreach Director, and Sarah Thune, the Administrative Coordinator. To David Weissbrodt and Barb Frey, the Director of the University of Minnesota's Human Rights Program, and to everyone else at the university, my alma mater, who made my academic visit an intellectually stimulating one, I offer my heartiest thanks.

I have spent more than twenty-five years now advocating against the death penalty, but *The Baron and the Marquis*—making the argument that only necessary punishments should be authorized or imposed—has a much broader scope and broader implications for America's criminal justice system. That system, without question one of the most punitive and costly in the world, is badly in need of serious reform, with the goal of the death penalty's abolition being, in my judgment, simply the low-hanging fruit to be plucked. Tens of billions of dollars are spent annually on America's correctional system, yet all too often there is too little corrections being done as lives are irrevocably destroyed, shattered, or adversely affected by overly punitive measures. Bail bonding and private prison companies, to use just two examples, are often far more interested in profit taking and filling up their coffers and their prisons than with helping or rehabilitating offenders. Issues of poverty and race—as well as issues pertaining to education and a lack of job skills and suitable employment opportunities—are entangled in the debate, though the reforms suggested in this book, hard as they will be to accomplish, would clearly help to address those issues and bring greater equity, justice, and equality.

I believe strongly, and long have, that the American death penalty is just the tip of an overly vindictive criminal justice iceberg that, in my view, must go the way of floppy disks and dot matrix printers. The death penalty, abandoned in most of the rest of the world, is, certainly, emblematic of the country's long-standing problem with revenge- and retaliation-driven punishments that are incredibly costly and that all too often only exacerbate, not solve, the underlying social ills that lead to crime. Crime victims are entitled to justice, but it is unjust to resort to cruel or torturous practices. The RMS *Titanic* sank in 1912, at a time when the vast majority of the world's countries still made use of the death penalty. But times have changed, just

as our understanding of ship design, correctional practices, and human rights principles have through the ensuring decades. Other countries abolished the death penalty long ago, in many cases *decades* ago, putting the United States in an increasingly isolated position in the world community. If countries such as Albania, Moldova, South Africa and Rwanda can see fit to rid themselves of capital punishment (as they have), I believe Americans can and will—at least in time—take that progressive step. *Killing people* in an effort to convince others *to stop killing people* is a misguided endeavor that only sets a bad example—and that inflicts needless and gratuitous, indeed torturous, suffering.

Indeed, I believe (as do many others) that the infliction of *any* unnecessary punishments is, more broadly speaking, extremely degrading, inhumane, and wasteful (both financially and in terms of human capital). Punishing people too severely or when it is not necessary to do so is not only bad policy, it is morally wrong, unconscionable, and ultimately corrosive to any criminal justice system in which it takes place. The infliction of unnecessary punishments, I would argue after examining the history and the current state of affairs, should be found to run afoul of the Eighth Amendment prohibition against "cruel and unusual punishments." That prohibition, derived by the seventeenth-century English Bill of Rights (1689), was adopted and ratified at a time when America's founders well understood that the concept of necessity was the dividing line between liberty, on the one hand, and tyranny, on the other. America's founders despised tyranny and arbitrary governmental actions, and unnecessary punishments are not only cruel and unusual, they are—almost by definition, really—disproportionate and excessive. Along with judges and prosecutors, lawmakers and those who sit on sentencing commissions also have important roles to play in reforming American law and ensuring that only necessary punishments are authorized and imposed.

The history explored in *The Baron and the Marquis*, whether related to the death penalty, prolonged periods of solitary confinement, the pillory, the whipping post, or the bizarre, once-extant punishment for *scolds* known as *ducking*, gives credence to the idea that unnecessary punishments should be abandoned. This book, as noted, is about the history and present-day implications of a now largely obscure eighteenth-century legal maxim—one that originated with Montesquieu in France, and that then found a loyal Italian friend and follower in Beccaria in Milan. That maxim, quickly translated into English, was embraced by the likes of English penal reformer Jeremy Bentham and leading American revolutionaries such as John Adams and Thomas Jefferson. The idea of only meting out those punishments seen as "absolutely necessary" actually shows up in a draft constitution that Jefferson himself wrote for Virginians in the 1770s. But the prohibition against unnecessary punishments, through the French Revolution, also became the law of the land in France, with the idea of jettisoning unnecessary punishments embraced in other societies, too. Because of its multi-cultural, multi-lingual origins and development, I choose here to express my own gratitude in three ways to everyone—past and present, dead or alive—who, in helping me or in pointing the way, conferred some tidbit, or tidal wave, of wisdom: *Merci beaucoup. Molte grazie. Thank you.*

I hope you enjoy and find enlightening this mostly Made-in-Minnesota book, a project facilitated by my sabbatical and largely written during my time as a visiting scholar at the University of Minnesota Law School. Most importantly, I hope the ideas in it stay with you as much as the Enlightenment vision of a French baron and an Italian marquis have stayed with me. Eighteenth-century thinkers, if I may generalize, did not mince words or like to prevaricate, and the straightforward maxim they popularized about unnecessary punishments being "tyrannical" captured a powerful idea pertaining to human liberty using powerful prose. The simple logic of that maxim, which made perfect sense then, is still right on target, and the maxim's implications are broad in scope and continue to resonate and reverberate—and should be given currency today as they were immediately after they first appeared. As the great French novelist, poet, and anti-death penalty campaigner Victor Hugo once emphasized: "There is one thing stronger than all the armies in the world, and that is an idea whose time has come."

Although members of modern societies must always confront the problem of crime and punishment, the foundational idea—that unnecessary punishments are cruel and unjust, indeed tyrannical—has long existed, and that idea has been percolating in plain sight for more than 250 years, if only we care to listen. That basic notion, to safeguard liberty, I contend, was a lucid one at the time of its germination in Europe and should now be given a chance for a major comeback on American soil. While the notion of barring unnecessary punishments can actually be found in an *existing* provision of the U.S. Code, that idea must be given greater attention and traction—and be treated much more seriously—in the twenty-first century. It will never be possible to get everyone to agree on exactly *what* is necessary when it comes to bail determinations or punishments in individual cases, but that doesn't mean it isn't worth arguing about. I am reminded of American economist Edgar Fiedler's quip: "Ask five economists and you'll get five different answers—six if one went to Harvard." In fact, in a liberty-loving country, such as the United States of America, everyone *should* be able to agree (as America's founders appear to have in their time) with the maxim that any punishment that goes beyond what is necessary is tyrannical and, thus, an infringement on liberty. "Your right to swing your fist stops short of my nose," is a common adage on the subject of liberty, but the well-articulated maxim developed by Montesquieu and fostered by Beccaria—one created to apply in the context of punishment—should not be forgotten either.

There is a lot of material presented in *The Baron and the Marquis*, and that, naturally, creates a risk of error (just as juries sometimes make mistakes, even in death penalty cases, as people now know all too well because of the outstanding work of organizations such as the Innocence Project and all of the DNA testing that has led to death-row exonerations). Of course, any mistakes (any of those monkeys falling from trees) in the actual execution of *The Baron and the Marquis* are all mine and mine alone, as are the ideas expressed herein. But if this book—a look at early American law and how, since the 1970s, American law and policy have badly gone awry—can contribute at least in some small way to the in-progress movement for long-overdue criminal justice reform, it will have served its intended purpose. Criminal justice reform,

centuries of history proves, is hard to achieve and hard to sustain; it can take a lot of time and effort to change hearts and minds, and since people are, by nature, creatures of habit, making meaningful change is sure to encounter many obstacles and much opposition. Progress is hardly inevitable, and setbacks can be expected.

However, good ideas have great power, and if good ideas—whether from the Enlightenment or modern-day thinkers—can be translated into action by highly committed individuals, those ideas can bring about positive and lasting change. *The Baron and the Marquis*, by compiling some of those ideas, and then contextualizing them through the frame of the Enlightenment, seeks to make its own contributions—to the understanding of the U.S. Constitution's Eighth Amendment and to the broader public discourse over American criminal justice reform. "A pile of rocks," a famous French poet, the pioneering aviator Antoine de Saint-Exupéry, once declared, "ceases to be a rock pile when somebody contemplates it with the idea of a cathedral in mind." In the United States, given the current state of affairs, we clearly need to build *more* cathedrals, to embrace rationality and best practices, and to imprison *fewer* people as we seek to promote liberty and to reject tyranny.

Introduction

In the mid-eighteenth century, the Enlightenment produced scores of revolutionary ideas—in science, medicine, economics, political philosophy and law.[1] It was a time of great debate about slavery,[2] serfdom,[3] and torture,[4] yet when the English "Bloody Code"—a set of laws heavily laden with capital offenses—was, simultaneously, in full force.[5] The iron-fisted reign of European monarchs and royal dynasties, replete with gruesome executions, torturous corporal punishments, and talk of the "divine right of kings,"[6] was gradually giving way to intense discourse on the natural rights of man[7]—and of women.[8] "Man is born free, and everywhere he is in chains," the Genevan philosopher Jean-Jacques Rousseau memorably wrote at the outset of his bestselling book, *The Social Contract* (1762).[9] "Women have the right to mount the scaffold; they should likewise have the right to mount the rostrum," the French playwright and outspoken feminist activist Olympe de Gouges later famously proclaimed in 1791.[10]

From Rousseau's pioneering work, to Voltaire's influential 1763 writings on religious tolerance,[11] to the American Declaration of Independence (1776), America's Revolutionary War (1775–1783), and the French Revolution (1789–1799), the eighteenth century was a time of tremendous social upheaval. It was a time when European monarchs and aristocrats still controlled the levers of power, though "We the People"—the first words of the U.S. Constitution's preamble—would ultimately take control of the reins of government in the newly forged United States of America.[12] By then, the varied titles of European aristocrats, many of whom has vast land holdings and fortunes, had centuries-old origins. As one source notes: "Words designating English titles of nobility except for *king*, *queen*, *earl*, *lord*, and *lady*—namely, *prince*, *duke*, *marquess*, *viscount*, *baron*, and their feminine equivalents—date from the period when England was in the hands of a Norman French ruling class."[13] "In France," another source observes, "the titles were almost the same: *duc*, *marquis*, *comte*, *vicomte* and *baron*."[14] And in southern Europe, on Italian soil, the titles of nobility—*e.g.*, *Duca* (Duke), *Conte* (Count), *Visconte* (Viscount), *Marchese* (Marquess), along with their feminine counterparts (*Duchessa*, *Contessa*, *Viscontessa*, and *Marchesa*)—had likewise long conferred considerable status within Italian society.[15]

The Enlightenment, pulsing with new ideas and ideologies, produced entirely new forms of government, ones never before seen in human history. The U.S. Constitution, marking a distinct break from the past, when people spoke of lords and commoners and when coats of arms and hereditary titles were, like property, bequeathed from father to son, itself guaranteed that "[n]o title of nobility shall be granted by the United States."[16] Not only did the American Declaration of Independence declare

that "all men are created equal,"[17] but in the liberty- and rights-focused eighteenth century, the U.S. Constitution and the U.S. Bill of Rights audaciously guaranteed—as they still do today—a number of individual rights, including for those accused of crimes or facing punishment. The right to trial by jury, the right to assistance of counsel, and the right to a grand jury in certain cases, for example, are all enshrined in the U.S. Bill of Rights. The Constitution's Eighth Amendment, one of those important checks on abusive governmental power, contains just sixteen words, though because it is phrased in such general terms, it has spawned much litigation over its proper interpretation. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," the Eighth Amendment reads.[18] In fact, the Eighth Amendment's three specific clauses—the Excessive Bail, Excessive Fines, and Cruel and Unusual Punishments Clauses—have generated almost endless scholarly debate, with a long line of legal commentators weighing in on their meaning, whether in treatises, monographs, or law review articles.[19]

American jurists have, themselves, fiercely argued about what the sixteen words of the Eighth Amendment mean, with some U.S. Supreme Court Justices looking primarily to the eighteenth century to understand their import.[20] Others, meanwhile, finding it extremely troubling that many gruesome punishments were still in existence when the Bill of Rights was ratified in 1791, look to more contemporary approaches or evidence.[21] The debate over the Eighth Amendment's meaning has been intense, especially in death penalty cases and in disputes dealing with the treatment of prisoners. For example, during his nearly thirty years on the U.S. Supreme Court, Justice Antonin Scalia continually upheld the death penalty's constitutionality, with Scalia once writing: "It is entirely clear that capital punishment, which was widely in use in 1791, does not violate the abstract moral principle of the Eighth Amendment."[22] In support of that view, the late Justice Scalia frequently pointed to the U.S. Constitution's Fifth Amendment and a 1790 act of Congress. The Fifth Amendment, adopted at a time when the *mandatory* death penalty was still in use, provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury … ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; … nor be deprived of life, liberty, or property, without due process of law." The Crimes Act of 1790, formally titled "An Act for the Punishment of certain Crimes against the United States," provided that treason, murder, piracy and other felonies "shall" be punished with death. That federal statute was typical of other state laws at the time providing for the mandatory death penalty.[23]

In sharp contrast, Justice William Brennan, during his time on the U.S. Supreme Court, took a far different approach than Justice Scalia. Justice Brennan—like his colleague, Justice Thurgood Marshall—repeatedly called the death penalty a *per se* violation of the Eighth Amendment. "The Framers," Justice Brennan emphasized, "surely understood that judging would not be easy or straightforward: no doubt that is why they took such great pains to ensure the independence of judges by providing life tenure and protecting against diminution of judges' compensation." What is "cruel and unusual," Brennan observed, should not be "frozen in time" because that would violate "the Framers' vision—which was to leave to future judges and future

generations the right to decide for themselves what constitutes 'cruel and unusual' punishment."[24] That view, obviously, contrasts quite dramatically—diametrically even—with Justice Scalia's approach. As Scalia once offered: "For me, the constitutionality of the death penalty is not a difficult, soul-wrenching question. It was clearly permitted when the Eighth Amendment was adopted. And so it is clearly permitted today." Although Justice Scalia, in 1988, memorably called himself a "faint-hearted originalist" because of his unwillingness to return to the days of public lashing and branding, he later retracted that statement in 2013, choosing to take a down-the-line-originalist stance. With both lashing and branding in use in the founding period, Scalia decided in 2013 to embrace a purist originalist view of the Constitution, saying of flogging at that time: "And what I would say now is, yes, if a state enacted a law permitting flogging, it is immensely stupid, but it is not unconstitutional."[25]

The Supreme Court's Eighth Amendment cases—as well as the shifting history of punishment practices—thus raise an important series of questions: What punishments are truly necessary? How should non-violent offenders be handled? What kind of bail or parole practices should be used? Is prolonged solitary confinement necessary, or even advisable? How should prisoners be treated? When do punishments that were once thought to be *necessary* become *unnecessary*? When do once accepted punishments become obsolete? And in the Eighth Amendment context in particular, at what point do once *usual* punishments become *unusual* ones? Other related questions also present themselves. What should the criteria or factors be for gauging whether a punishment is necessary or unnecessary? When should a punishment be adjudged to be unusual? And what consequences, if any, do such criteria or factors have for American courts evaluating the constitutionality of punishments such as the death penalty or, say, long-term sentences for non-violent offenders?

These are particularly important questions given what we know now about the effects of solitary confinement and long-term incarceration,[26] as well as about the American death penalty's sordid and error-prone administration since its inception.[27] "On any given day in the United States," one 2016 book notes, "supermax prisons and solitary confinement units hold at least eighty thousand men, women, and children in conditions of extreme isolation and sensory deprivation, without work, rehabilitative programming, or meaningful human contact of any kind."[28] Whether the routine or frequent use of solitary confinement makes American prisons less safe—and opposed to more safe—is also a subject worth taking up, especially since one judge in British Columbia, in 2018, declared the prolonged use of solitary confinement in Canada—America's northern neighbor—to be unconstitutional.[29] In June 2012, the U.S. Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Human Rights held its own, first-ever congressional hearing on solitary confinement. Chaired by Senator Dick Durbin of Illinois, it was noted at the outset of the hearing that there has been a rise in the use of solitary confinement for vulnerable groups, including juveniles, those with mental health issues, and immigrants.[30]

The routine use of harsh prison sentences—some the result of "three strikes" laws or mandatory minimums—itself raises important questions about the best way to protect the public and whether all-important recidivism rates actually fall—or stay

the same or rise—with the use of more draconian sentences.[31] Harsh drug sentences have become a particular flashpoint in the criminal justice reform debate. Whereas those inmates released from American prisons in 1986 after serving time for a federal drug offense had spent an average of 22 months behind bars, by 2004 people convicted of a federal drug offense were expected to serve nearly three times that amount: an average of 62 months in prison.[32] On the death penalty front, a clear majority of the world's nations have already abandoned the state's ultimate sanction, turning away from death sentences and executions entirely.[33] The continent of Europe (with the notable exception of Belarus, which still carries out executions in secret) is now essentially a death penalty-free zone, with two protocols to the European Convention on Human Rights—Protocols No. 6 and No. 13—absolutely barring the death penalty's use in both peacetime and wartime, respectively.[34]

History shows that punishments change over time, sometimes dramatically, so it should not be too surprising that what were once seen as usual and necessary punishments were later understood to have been, or to have become, unusual and unnecessary. Punishments that were once usual can even be reclassified as torturous acts. Punishments that are absolutely necessary to protect society, I would argue, cannot be properly described as Eighth Amendment violations, because members of society have a legitimate right to expect, as part of the social compact, that truly necessary measures will be taken to protect them. Punishment, in fact, is part and parcel of justice; a person who transgresses society's norms must be held accountable. But no society should be permitted to torture people or to inflict *unnecessary* human suffering. And that is especially so in a country such as the United States, which explicitly outlaws cruel and unusual punishments and which has ratified the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which bars such conduct.[35] Indeed, it seems crystal clear from examining the arc of history that once usual punishments can clearly become unusual and unnecessary over time, whether through disuse, technological developments, or a greater awareness of the ill-effects, or torturous or cruel nature, of certain punishments.

With that backdrop in mind, *The Baron and the Marquis* explores the necessity-for-punishment principle as well as the difference between "unusual" and "usual" punishments. The infliction of unnecessary, unduly severe punishments, *The Baron and the Marquis* argues, not only infringes on *liberty* (a concept at the very core of America's creed as articulated in the Declaration of Independence), but can be counterproductive to fighting or reducing crime and runs counter to human rights principles. In the case of the Eighth Amendment, its language can be traced all the way back to the English Declaration of Rights and its statutory counterpart, the English Bill of Rights (1689). That seventeenth-century enactment proclaimed in these hortatory words, ones crafted as part of the Glorious Revolution of 1688 that saw a new king and queen, William and Mary, rise to power: "That excessive baile ought not to be required nor excessive fines imposed nor cruell and unusuall punishments inflicted."[36] Those words, a condemnation of the abuses of the Stuart dynasty, including those of King James II and his judges, help to explain why James II was driven from power and forced to abdicate his throne.[37]

The necessity or lack of necessity for a particular punishment, of course, may be dependent on time, place and context. In the Eighth Amendment arena, to better understand what "cruel and unusual punishments" are, it may be helpful—and, in truth, actually seems rather intuitive—to try to better understand the history of that designation and to figure out *what they are not*. By examining and thinking about the concept of necessity, as well as the difference between "unusual" and "usual" punishments, perhaps lawmakers and twenty-first century American judges will gain some insight—whether profound or not—into their own duties, which, for judges, includes Eighth Amendment decision-making. The natural, binary opposite of "unusual punishments" is "usual punishments." While at least a few scholars have written about "unusual punishments,"[38] very little has been written about "usual punishments" or the dividing line between the two.[39] *The Baron and the Marquis* seeks to fill that scholarly void by examining, from an historical perspective, not only "unusual punishments," but the flip side of the "unusual punishments" coin. The book thus surveys historical developments, showing the use and abandonment of particular penal practices through the centuries, exploring, in particular, early English and American sources referencing either "unusual" or "usual" punishments. By gaining insight into the difference between the two, *The Baron and the Marquis* seeks to shed new light on what punishments are truly necessary in twenty-first century America.

Constitutional interpretation is—and perhaps always will be—a contentious subject. But in the modern era and in litigation before the nation's highest court, America's living constitutionalists have, in fact, largely won the broader debate over the Eighth Amendment's interpretation in spite of the fact that the death penalty—a common eighteenth-century punishment—continues to survive in twenty-first century America. "Current justices read the Constitution in the only way we can: as twentieth-century Americans," Justice William Brennan observed in his own time, reflecting the long-prevailing view that rejects a rigid, Justice Scalia-style originalism.[40] From the seventeenth century to the present, each generation has had to grapple with whether particular punishments crossed the line and constituted "excessive" or "cruel and unusual" ones. Though used extensively in America's founding era, capital punishment itself has gradually fallen into disrepute, decline, and—in many places—disuse, and, more and more, appears to be on life support. Already, mandatory death sentences of the kind embraced by the First Congress and early American lawmakers have been replaced by discretionary ones, and the number of death-eligible offenses has been greatly curtailed at the state level.

In terms of the U.S. Supreme Court's Eighth Amendment interpretive methodology, though, originalism—at least in practice, as reflected by the Court's own decisions interpreting the Cruel and Unusual Punishments Clause—has long been a dead letter. The early American constitutions and declaration of rights that outlawed excessive penalties and cruel and unusual punishments borrowed from the text of the English Bill of Rights, but those provisions were informed by the Enlightenment and its focus on progress. America's Founding Fathers, were they still alive today, would, I would venture to say, be horrified by the mere prospect that modern-day thinkers would blindly embrace centuries-old practices without questioning the

underlying justification for them. Indeed, since 1958, the Supreme Court—rebuffing an originalist approach—has consistently held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[41] That test reflects a clear rejection of originalism and a decisive victory for living constitutionalism.

That oft-invoked "evolving standards of decency" test shows up in countless American judicial decisions, though it, like the meaning of the Eighth Amendment's sixteen-word text, is still subject to much modern commentary, controversy, and debate. In any event, the "evolving standards" test is the one that the Supreme Court has consistently employed for decades even as it resorts to other interpretive tools, such as looking for evidence of a "national consensus" (or examining trends) against a particular practice. In an effort to identify a consensus, or a lack thereof, the Court frequently does a nose count of states that use—or that have abandoned—the practice.[42] For example, in 2005, in *Roper v. Simmons*, the Court—in a five-to-four-decision—specifically used that test in declaring unconstitutional the death penalty for juvenile offenders. In overruling *Stanford v. Kentucky* (1989), which had previously upheld death sentences for offenders aged sixteen or higher, Justice Anthony Kennedy—writing for the majority in *Roper*—referred to history but found that the Court was not bound by eighteenth-century practice or, for that matter, the late twentieth-century precedent it overruled. "The prohibition against 'cruel and unusual punishments,' like other expansive language in the Constitution," Justice Kennedy wrote in outlawing the death penalty's use for those younger than eighteen, "must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design." "To implement this framework," he continued, though, setting forth the long-standing majority view, "we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."[43]

The Baron and the Marquis encourages Americans, in their roles as citizens, policymakers, lawmakers, prosecutors and judges, to pay close attention to the lessons of history without being trapped by the cruelty and torturous barbarity that one finds so often in history books. In thinking about the Eighth Amendment, the book highlights the importance of reading the U.S. Constitution *as a whole* and in its context, much as lawyers and judges do with contracts.[44] The Constitution is itself a social contract or compact that has survived for many generations,[45] though its interpretation—because it governs the lives of people not yet born at its creation—naturally presents unique, and much more complicated, challenges than the interpretation of a run-of-the-mill commercial contract.[46] The *text* of the U.S. Constitution and its amendments—as well as the *principles* and *values* undergirding those textual provisions—should be of primary importance in deciding how modern judges should read it. Thus, a proper understanding of the foundational, Enlightenment-era necessity-for-punishment principle is of critical importance, as is a proper understanding of the meaning of the words *cruel* and *unusual*. The Constitution, as legal scholars such as Ronald Dworkin have pointed out,

conspicuously guarantees various individual rights, often employing broad and general language (*e.g.*, "due process," "equal protection," etc.).[47] Such rights, central to the protection of liberty, frequently protect those accused of crimes and, in the case of the Eighth Amendment's Excessive Fines and Cruel and Unusual Punishments Clauses, safeguard convicted offenders themselves.[48] It is, of course, now *twenty-first century* judges who must decide how to interpret the Constitution, and nothing less than individual liberty and the Rule of Law—and, in death penalty cases, life or death—are at stake.[49]

While the English "Bloody Code" and a wide assortment of draconian punishments (both lethal and non-lethal) are an indelible part of Anglo-American history,[50] *The Baron and the Marquis* specifically discusses the special relevance of Enlightenment thought to America's twenty-first century criminal justice debate. It was, after all, the Enlightenment that gave birth to the American Revolution and America's representative democracy, not to mention early criminal law reforms and subsequent revolutions that occurred elsewhere throughout the world. The U.S. Constitution's Due Process Clauses,[51] as well as the Fourteenth Amendment's Equal Protection Clause,[52] must also be carefully considered in assessing whether a punishment is—or has become—*unnecessary*, *cruel and unusual*, or *torturous*. *The Baron and the Marquis* thus argues that the language of the Constitution's Due Process and Equal Protection Clauses should be fully taken into account as part of the Eighth Amendment analysis and calculus. For example, the arbitrary, discriminatory, error-prone, and torturous nature of death sentences and executions should be fully considered in evaluating whether capital punishment is unnecessary or—in the words of the Eighth Amendment itself—"cruel and unusual." After exploring the history and specific language of the U.S. Constitution, *The Baron and the Marquis* concludes that the American death penalty is arbitrarily applied, unequally and unfairly administered, and is—if fairly judged—not only incredibly "cruel," but unnecessary, torturous, and highly "unusual." The book's analysis also calls into question other penal practices, such as the routine use of extended periods of solitary confinement and the current treatment of various juvenile offenders. A society's approach to crime and punishment is a mirror that reflects that society's beliefs and values, so how a society treats its offenders—whether violent or non-violent, and whether young or old—is of no small consequence.

Often overlooked by American lawmakers and judges, including in the jurisprudential debate over the Eighth Amendment, is the Enlightenment-era *context* in which the protections for individual criminal suspects and defendants were included in the U.S. Bill of Rights.[53] The Eighth Amendment's actual words may have been derived from the English Bill of Rights (1689) and its first American counterpart, the Virginia Declaration of Rights (1776), but how those words were understood in the eighteenth century was materially shaped by the Enlightenment and its leading writers, including French, Italian, English and Scottish *philosophes*. For example, in 1748, decades after the Glorious Revolution of 1688 and the promulgation of the English Bill of Rights, but decades before the start of America's Revolutionary War and the Eighth Amendment's adoption and ratification, a French baron, Charles Louis de Secondat, better known as Montesquieu, published a landscape-changing

treatise. That book, published in French as *De l'esprit des loix* (1748) or *De l'esprit des lois*, was later translated into English as *The Spirit of the Laws*.[54] In that extremely popular book, Montesquieu specifically declared: "Every penalty that does not derive from necessity is tyrannical."[55] That particular sentence appeared in Book 19, chapter 14 of *The Spirit of the Laws*. While Book 19 is titled "On the laws in their relation with the principles forming the general spirit, the mores, and the manners of a nation,"[56] chapter 14 is titled "What are the natural means of changing the mores and manners of a nation."[57] In Book 19, chapter 3, "On tyranny," Montesquieu further explained: "There are two sorts of tyranny: a real one, which consists in the violence of the government, and one of opinion, which is felt when those who govern establish things that run counter to a nation's way of thinking."[58]

The concept of liberty, at the center of the extended argument in *The Baron and the Marquis*, is itself discussed at length in *The Spirit of the Laws*. For example, in Book 11, chapter 2, Montesquieu stressed: "No word has received more different significations and has struck minds in so many ways as has *liberty*." As Montesquieu wrote of liberty—and the many varied views of its proper usage—in that section of his book: "Some have taken it for the ease of removing the one to whom they had given tyrannical power; some, for the faculty of electing the one whom they were to obey; others, for the right to be armed and to be able to use violence; yet others, for the privilege of being governed only by a man of their own nation, or by their own laws." "For a certain people," Montesquieu continued, "liberty has long been the usage of wearing a long beard." In Book 11, chapter 3, titled "*What liberty is*," Montesquieu further observed: "In a state, that is, in a society where there are laws, liberty can consist only in having the power to do what one should want to do and in no way being constrained to do what one should not want to do." He then gave this definition, one tied to the rule of law: "Liberty is the right to do everything the laws permit; and if one citizen could do what they forbid, he would no longer have liberty because the others would likewise have this same power."

In the following chapter of Book 11, Montesquieu went on to emphasize that "[p]olitical liberty is found only in moderate governments." "It is present," he said, "only when power is not abused," with Montesquieu quick to point out that "it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits." "So that one cannot abuse power, power must check power by the arrangement of things," Montesquieu wrote there, aware that the structure of government and the laws thereof could make a difference in checking human nature. "A constitution," Montesquieu added, "can be such that no one will be constrained to do the things the law does not oblige him to do or be kept from doing the things the law permits him to do." Turning his attention, in particular, to "*the constitution of England*," what Montesquieu called the only constitution which "has political liberty for its direct purpose" and which was very much on the minds of America's eighteenth-century founders and framers, Montesquieu wrote, among other things, in a lengthy chapter on that subject:

> Political liberty in a citizen is that tranquillity of spirit which comes from the opinion each one has of his security, and in order for him to have this

> liberty the government must be such that one citizen cannot fear another citizen.
>
> When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.
>
> Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.[59]

Just as America's Founding Fathers had in mind the Glorious Revolution of 1688 and the English Bill of Rights when they decided to foment their own rebellion, Montesquieu's ideas, especially those on checking and preventing abuses of power, played a pivotal role in American constitution-making. North Carolina's 1776 constitution provided that "the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other"; Virginia's 1776 constitution stated that "the legislative and executive powers of the State should be separate and distinct from the judiciary"; and Georgia's 1777 constitution made clear that "[t]he legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." In the Massachusetts Constitution of 1780, John Adams—its principal drafter—set out the separation of powers principle this way, making it crystal clear where he stood and what he was worried about: "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men."[60]

Just as Montesquieu's ideas clearly shaped state constitutions, including the Massachusetts Constitution of 1780 (the oldest continuously functioning written constitution in the world), they shaped the U.S. Constitution, too.[61] In *The Federalist No. 47*, James Madison, writing as "Publius," explicitly declared that "the celebrated Montesquieu" is "[t]he oracle who is always consulted and cited" on the subject of separation of powers. As Madison added in *The Federalist No. 47*: "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."[62] "Montesquieu," one source notes, "is the most quoted authority in the *Federalist Papers*." As that source observes of Montesquieu: "He is appealed to by Alexander Hamilton, in #9 and #78, and James Madison, in #43 and #47, with his name being mentioned twelve times."[63] In *The Political Theory of Montesquieu*, Melvin Richter, the book's author, tellingly observes of the famed French thinker's broad scope of influence in revolutionary times: "At the time of the American Revolution, few other theorists could rival Montesquieu's

prestige in the English-speaking world. In England, the most widely accepted interpretation of its law and constitution was that of Blackstone, of whom it has been said that his plagiarism of Montesquieu 'would be nauseating if it were not comic.' " "During the debate about adopting the American Constitution," Richter adds, "both federalists and anti-federalists argued their cases on the basis of their respective interpretations of Montesquieu."[64]

But Montesquieu was not alone in shaping American views of tyranny and liberty. Thomas Hobbes could not conceive "that there is any liberty greater than for a man to do what he will, and to forbear what he will," and John Locke wrote that liberty "is the power a man has to do or forbear doing any particular action, according as the doing or forbearance has the actual preference in the mind, which is the same thing as to say, according as he himself wills it."[65] And less than two decades after the appearance of Montesquieu's language on tyrannical punishments in *The Spirit of the Laws*, the once much-celebrated Italian aristocrat, Cesare Beccaria, often commonly referred to by his title, the "Marquis Beccaria" or the "Marquis of Beccaria," very similarly proclaimed in *Dei delitti e delle pene* (1764) that "every punishment that does not derive from absolute necessity is tyrannical."[66] Beccaria's book, translated into English three years later, in 1767, as *An Essay on Crimes and Punishments*, built upon the French baron's keen observation. In *A Defence of the Constitutions of the Government of the United States*, John Adams himself rails against "tyrannical laws" and "tyrannical measures" and cites the works of both Montesquieu and Beccaria, so those political theorists were plainly very much on his mind.[67] In *On Crimes and Punishments*, Beccaria—giving attribution to the late Frenchman he so admired—specifically wrote of his intellectual muse and gave his own take-away from that observation: "As the great Montesquieu says, every punishment that does not derive from absolute necessity is tyrannical. This proposition can be stated more generally in the following manner: every act of authority of one man over another that does not derive from absolute necessity is tyrannical."[68]

Those perceptive words, appearing in "The Right to Punish" section of Beccaria's popular, much-translated book, were followed by these, setting out Beccaria's philosophy of liberty and law: "This is the foundation, therefore, upon which the sovereign's right to punish crimes is based: the necessity to defend the depository of the public welfare from individual usurpations; and the more just the punishments, the more sacred and inviolable the security and the greater the liberty the sovereign preserves for his subjects."[69] Beccaria, a Milanese philosopher, legal theorist, and economist whose *On Crimes and Punishments* became a bestseller, forthrightly opposed the death penalty and torture, with his book seeking proportionality between crimes and punishments and a scale of crimes and a corresponding scale of punishments.[70] For Beccaria, the dividing line between tyranny and liberty, between justice and cruelty, was whether the governmental act was truly necessary. "The masterly Beccaria observes that mankind, when influenced by first impressions, love cruel laws, although, being subject to them themselves, it is the interest of every person that they should be as mild as possible," one barrister, James Paterson, summarized the Italian philosopher's views, writing in 1877 in his own book, *Commentaries on the Liberty of the Subject and the Laws of England Relating to the Security of the Person*.

"Voltaire and Montesquieu," Paterson wrote in the century after both of those men had died, "exposed" the severity of draconian sentences, with Paterson then emphasizing: "Beccaria at length grappled closely with the subject, and succeeded in shaking the faith of those, who had so long blindly believed in them."[71]

Historical context matters, even if history, with all its indignities, warts, and sheer barbarities, cannot be allowed to dictate the future. It cannot be forgotten that the second half of the eighteenth century brought enormous social, political and legal change, and that penal reform was part of that change. The French and Indian War (1754–1763), North America's fragment of Europe's broader Seven Years' War (1756–1763), was fought between the French and the English and their respective allies. After George III ascended to the British throne in 1760, the Stamp Act was passed by the British Parliament in 1765, infuriating North American colonists, just as the revenue-raising Townshend Acts, named after Charles Townshend, the Chancellor of the Exchequer, did, leading to American cries of "No taxation without representation." After the Boston Massacre on March 5, 1770, the Sons of Liberty—originally formed to protest the Stamp Act—fomented and carried out the Boston Tea Party on December 16, 1773. The Declaration of Independence (1776) itself resembled the English Declaration of Rights in that both declarations laid out the causes for revolution and took aim at abusive monarchs—in the American case, at George III, and in the English case, at James II. The Enlightenment period in which America's founders lived shaped institutions and societies, and just as Beccaria had an intellectual debt to the "immortal Montesquieu," John Adams owed one to political theorists such as Montesquieu and Beccaria. The American revolutionaries writ large were indebted to both Montesquieu and Beccaria as regards reshaping of their thinking in the criminal-law arena.

John Adams himself memorably quoted Beccaria in the opening line of his courtroom oration on December 3, 1770, at the historic Boston Massacre trial itself. John Adams' son, John Quincy Adams, later reported that he had "often heard, from individuals, who had been present among the crowd of spectators at the trial, the electrical effect produced upon the immense and excited auditory, by the first sentence with which he opened his defense." John Adam's well-chosen opening line: "I am for the prisoners at the bar, and shall apologize for it only in the words of the Marquis Beccaria: 'If I can but be the instrument of preserving one life, his blessings and tears of transport, shall be a sufficient consolation to me, for the contempt of all mankind.'" With liberty as the watchword of American revolutionaries, it wasn't long, in the wake of the Boston Massacre and the Boston Tea Party, before America's Revolutionary War (1775–1783) began transforming the whole world. The onset of the Revolutionary War quickly led to the issuance of the Declaration of Independence (1776), then the Articles of Confederation (1781–1789). When those Articles of Confederation failed to do the job, the ratification of the U.S. Constitution (1788) and its Bill of Rights (1791) followed. The ratification of the U.S. Constitution also led to the election and administration of the oath of office of George Washington—the revered military man—as the first President of the United States. The French Revolution (1789–1799) and the Haitian Revolution (1791–1804) capped off the eighteenth century's turbulent end, with other revolutions throughout the world soon to follow.[72]

In the eighteenth century, a battle of ideas—between monarchical power and tyranny and individual liberty and freedom—was waged in books, periodicals, and newspapers, even as real battles, on battlefields such as Bunker Hill and at places like Quebec, Trenton, and Saratoga, took place. Looking back at the law's development, James Paterson—writing in his two-volume treatise on liberty and security of persons—contrasted the ideas of John Locke and Cesare Beccaria, explaining: "Locke says that the end of law is not to abolish or restrain, but to preserve and enlarge freedom, and where there is no law there is no freedom." "Beccaria, in his masterly way," Paterson wrote in the first volume of his treatise, "explains his notion of liberty thus: 'The opinion, that every member of society has a right to do anything, that is not contrary to the laws, without fearing any other inconveniences than those which are the natural consequences of the action itself, is a political dogma which should be defended by the laws, inculcated by the magistrates, and believed by the people—a sacred dogma, without which there can be no lawful society—a just recompense for our sacrifice of that universal liberty of action common to all sensible beings, and only limited by our natural powers.' " "Locke and Beccaria," Paterson observed, "are the writers, who seem to look with the steadiest eyes at the central idea involved" in discussing the concept of liberty. "Beccaria," Paterson added, "also says it is better to prevent crimes than to punish them; that this is the fundamental principle of good legislation, which is the art of conducting men to the maximum of happiness and to the minimum of misery."[73]

Like Montesquieu's ideas, Beccaria's ideas thus profoundly shaped the Enlightenment and America's founding, as well as the post-Revolutionary War period. In the wake of the writings of Enlightenment authors, *virtue* and *happiness* were in and *cruelty* and *misery* were to be on their way out. The American Revolution—something few twenty-first century Americans know—was itself closely tied up with penal reform in addition to political liberty, self-determination, the pursuit of happiness, economic justice, and freedom from oppression. Indeed, the need for penal reform was seen then not as a separate subject, but as an important adjunct to maximizing individual liberty, freedom, and happiness. "While the War for Independence from Britain looms large in its impact on late eighteenth-century American politics and culture," Jen Manion writes in *Liberty's Prisoners: Carceral Culture in Early America*, "older forces, including the Enlightenment and the Great Awakening, inspired a great deal of social transformation as well." As Manion relays: "The Enlightenment was characterized as 'the age of reason,' in which human progress would be measured through advances in science, medicine, technology, culture, and politics. Enlightenment writers from Cesare Beccaria to Montesquieu produced progressive theories of criminal justice that rejected the legacy of European brutality and aimed to put logic, predictability, and fairness at the heart of punishment." "In part because of the tremendous importance of these writings," Manion continues, "the revolutionary generation relished the opportunity to craft laws fit for democracy" and the ideas in those writings "inspired many people to question long-standing practices of violent, corporal, and excessive punishment."[74] The emergence of American penitentiaries—the subject that Alexis de Tocqueville and his traveling

companion, Gustave de Beaumont, came to America from France to carefully study and analyze—came only *after* the appearance of Beccaria's famous treatise and after Beccaria's many followers, from John Howard to Thomas Eddy, had inspired their construction.[75]

Consequently, it is apparent that Cesare Beccaria's *On Crimes and Punishments*, like Montesquieu's *The Spirit of the Laws*, was nothing short of transformative.[76] For his part, Beccaria broke with prevailing societal custom and sought the death penalty's complete abolition, in part on utilitarian grounds and in part on the basis that it was simply not necessary—an application of the general necessity-for-punishment maxim that he and Montesquieu espoused. "[I]f I can demonstrate that the death penalty is neither useful nor necessary," Beccaria wrote, "I will have won the cause of humanity."[77] Indeed, Beccaria's short and pithy summation of his views on crimes and punishments in *Dei delitti e delle pene* made direct reference to the necessity-for-punishment principle, with Beccaria drawing the following "general and very useful theorem" in his *On Crimes and Punishments* after addressing a number of topics in separate chapters: "*In order that punishment should not be an act of violence committed by one or many against a private citizen, it is essential that it be public, prompt, necessary, the minimum possible in the given circumstances, proportionate to the crime, and established by the law*."[78] His conclusion that punishments be "the minimum possible in the given circumstances" reinforced his assertion that punishments must be absolutely necessary in order not to be tyrannical.

More than twenty-five years after penning *On Crimes and Punishments*, Beccaria was still emphasizing his emphatically made point on the absolute necessity for punishment, reiterating that view in a 1790s report on capital punishment written to encourage criminal justice reform—and the death penalty's abolition—in Austrian Lombardy.[79] As Beccaria and two of his colleagues, Francesco Gallarati Scotti and Paolo Risi, stressed in that minority report: "The three of us were of the same opinion that the death penalty should not be prescribed except in the case of absolute necessity, and in the peaceful circumstances of our society, and with the regular administration of justice, we could not think of any case of absolute necessity other than the situation in which the accused, in plotting the subversion of the state, was capable, either through his external or internal relationships, of disturbing and endangering society even while imprisoned and closely watched."[80] In other words, unless the very overthrow of the government was seen to be at stake, Beccaria and his two colleagues could conceive of no need for capital punishment. As law professor David Luban, of the Georgetown University Law Center, encapsulates Cesare Beccaria's Enlightenment-era views: "Beccaria condemns punishments that are more cruel than is absolutely necessary to deter crime, arguing on classical-liberal grounds that people in the state of nature will surrender only the smallest quantum of liberty necessary to secure society: 'The aggregate of these smallest possible portions of individual liberty constitutes the right to punish; everything beyond that is abuse and not justice, a fact but scarcely a right.'"[81]

When the U.S. Constitution and its Bill of Rights were ratified by the American people, Montesquieu and Beccaria—thanks to their own books and the writings of

their many, many fervent disciples[82]—were celebrities in Europe and throughout the Americas.[83] Montesquieu was regularly hailed as "celebrated" and "immortal," and Beccaria—his Italian successor-in-spirit who rose to fame after Montesquieu's death—was similarly praised as the "celebrated" marquis, a "benevolent" and "sublime" philosopher, and as "immortal" and a man of "genius."[84] Montesquieu's name appears multiple times in *The Federalist Papers*[85] and his famous book, *The Spirit of the Laws*, was purchased, owned, and frequently cited and quoted by America's founders and framers.[86] Benjamin Franklin, an early reader of Montesquieu, bought a copy of *The Spirit of the Laws* in 1750.[87] America's first commander-in-chief, George Washington, ordered it from Mount Vernon,[88] John Adams read it as early as 1759,[89] and Alexander Hamilton and Thomas Jefferson quoted and recommended it to others.[90] James Madison, Jefferson's fellow Virginian, had access to the book as a young man and, in his work, made extensive use of it,[91] with Madison also specifically recommending Cesare Beccaria's works for the Library of Congress in 1783.[92] Madison once called Beccaria "a Philosophical Legislator."[93]

In many ways, the American Revolution would not have been the revolution it was *but for* Montesquieu's and Beccaria's writings. Thomas Jefferson, the American lawyer and deft politician, was clearly drawn to Montesquieu's and Cesare Beccaria's ideas—something evident from his own writings. In a draft constitution he wrote for the Commonwealth of Virginia in 1776, Jefferson fully embraced the absolute-necessity-for-punishment principle, though his application of the principle differed somewhat from Beccaria's ideal. As Jefferson wrote in his draft constitution: "The General assembly shall have no power to pass any law inflicting death for any crime, excepting murder, & those offences in the military service for which they shall think punishment by death absolutely necessary: and all capital punishments in other cases are hereby abolished. Nor shall they have power to prescribe torture in any case whatever."[94] In an 1820s autobiographical sketch, Jefferson—in a telling acknowledgment—specifically wrote that Beccaria and other writers had "satisfied the reasonable world of the unrightfulness and inefficacy of the punishment of crimes by death."[95] Elsewhere, Jefferson, who recommended in writing that others read both Montesquieu's and Beccaria's writings,[96] singled out and praised Beccaria's *On Crimes and Punishments* for "the demonstrative manner in which he has treated that branch of the subject."[97]

Not surprisingly given their wide circulation, the ideas of Montesquieu and Beccaria, those megastars of the transatlantic Enlightenment, helped to catalyze and inspire the American and French Revolutions and the other revolutions that ensued, if not as a cascading waterfall then at least as a rapidly flowing river. In October 1774, the Continental Congress—as an entire body—explicitly invoked the names of both men on the very cusp of the Revolutionary War (1775–1783).[98] In the Continental Congress's 1774 address to the inhabitants of Quebec, drafted by a committee composed of Richard Henry Lee, Thomas Cushing, and John Dickinson, one finds reference to "the immortal *Montesquieu*." One also finds these stirring words:

> "In every human society," says the celebrated marquis *Beccaria*, "there is an effort continually tending to confer on one part the heighth of power and happiness, and to reduce the other to the extreme of weakness and misery.

> The intent of good laws is to oppose this effort, and to diffuse their influence universally and equally."[99]

In *The Causes of the War of Independence*, it is noted that American revolutionaries such as John Adams, Samuel Adams, Benjamin Franklin, and Alexander Hamilton read Montesquieu, and that John Hancock owned "Beccaria on Crimes." While Richard Henry Lee of Virginia made the formal motion for independence at the Second Continental Congress on June 7, 1776, John Dickinson—a prominent lawyer—referred to "[t]he genius" and "the masterly hand of a Beccaria."[100]

The writings of Montesquieu and Beccaria were, in fact, extremely well-known—and often quoted and cited in speeches, newspapers, periodicals, and books—before, during, and after the American and French Revolutions.[101] Montesquieu and Beccaria's ideas were, in fact, frequently discussed side by side,[102] with Zephaniah Swift, in *A System of the Laws of the State of Connecticut* (1795), saying that Montesquieu and Beccaria "had immortalized their names in pleading the cause of humanity."[103] One source notes that while Montesquieu was "the father of the philosophy of institutions," Beccaria was "the father of the philosophy of law."[104] In pursuit of the proper historical and modern understanding of the U.S. Constitution's Eighth Amendment, *The Baron and the Marquis* thus endeavors to trace the origin, importance, and impact, in both Europe and America, of the eighteenth-century legal maxim—the one laid down so forcefully by Montesquieu and Beccaria—that unnecessary punishments are tyrannical. After discussing the history of that maxim, as well as examining the evidence pertaining to its many adherents and promotors and its transmission over geography and time from one thinker to another, *The Baron and the Marquis* turns its attention to ongoing American criminal justice reform efforts and the U.S. Supreme Court's modern Eighth Amendment jurisprudence.

In recounting the necessity-for-punishment maxim's eighteenth-century history, *The Baron and the Marquis* specifically recalls the interwoven natures of the American and French Revolutions. The American Revolution, which had its origins in 1763 and which culminated in the Treaty of Paris (1783) after the American Declaration of Independence (1776) and the hard-fought Revolutionary War, arose out of extreme discontentment with British authorities and policies.[105] American revolutionaries, like those in France who fomented the decade-long French Revolution, were extremely well read and versed in Enlightenment writers, including, of course, Baron de Montesquieu and the Marquis Beccaria.[106] While the Declaration of Independence was drafted by a Committee of Five, with Thomas Jefferson, with his felicity with words, taking on the primary role, the French Declaration of the Rights of Man and Citizen (1789) was the work of a committee of more than twenty members of France's National Assembly. The latter declaration was adopted in very close proximity to the U.S. Bill of Rights and, like the Eighth Amendment itself, specifically addresses the issue of punishments.[107] The French Declaration—inspired by both Enlightenment writers and the American Revolution itself—was written into the French Constitution, and it states in no uncertain terms that "[t]he law ought to establish only penalties that are strictly and obviously necessary."[108] This history should not be lost on modern thinkers, just as the influence of the text of the English Bill of Rights (which sought

liberty for British subjects) on the drafting of the U.S. Bill of Rights (which sought to secure liberty for American citizens) should not be lost on historians.

The second half of *The Baron and the Marquis* sketches out the implications of reintroducing and incorporating Montesquieu and Beccaria's necessity-for-punishment maxim into the lexicon of American lawmakers and into the U.S. Supreme Court's Eighth Amendment jurisprudence in particular. In opposing tyranny, both Montesquieu and Beccaria were promoting liberty—the concept that, more than any other, drove eighteenth-century revolutionary fervor. The book concludes that American citizens, prosecutors and lawmakers, as well as the U.S. Supreme Court, state supreme courts, and lower courts, should return to first principles. Only necessary punishments should be put in place, and lawmakers, prosecutors and judges should use the necessity-for-punishment principle as a beacon or guiding light—and as a gut check—as they legislate, prosecute and adjudicate. Though it raises some complex and thorny separation-of-powers issues, *The Baron and the Marquis* concludes that Eighth Amendment jurisprudence should pay greater homage to the necessity-for-punishment principle. "In general terms, the principle of necessity," one source observes, "imposes a clear limitation on the intervention of public powers linked to a democratic State living under the rule of law: the attacks on the legal positions of individuals should not go any further than whatever the object that they serve might require."[109] The Eighth Amendment—as part of the foundational law of the U.S. Constitution—clearly establishes a *counter-majoritarian* check on power, and it should be respected and given life and vitality by modern American judges in the pursuit of safeguarding individual liberty.

Already, one provision of the U.S. Code—18 U.S.C. § 3553(a)—states that federal courts shall only impose sentences "sufficient, but not greater than necessary," to serve the goals of punishment.[110] That the necessity-for-punishment principle is already enshrined in federal law is a start. But given the current state of affairs in the United States, more must be done to ensure that the fundamental right to liberty is better protected. Punishments are necessary and can be very just, to be sure. And sometimes long sentences, even life-without-parole sentences, are warranted and necessitated by the facts of a particular case. But reflexively sentencing offenders, even non-violent offenders, to long terms of incarceration may not always be the best way to keep the public safe, and such a strategy should not be seen as the be-all-and-end-all for judges—jurists who, while carrying out their roles to interpret the law and keep the public safe from criminality, must also safeguard individual rights and liberties. A one-size-fits-all approach is not the right answer, and just as the often overly harsh United States Sentencing Guidelines are no longer mandatory but are discretionary, more nuance, fairness, equity, and humanity must be injected into America's criminal justice system. Americans may, in fact, be able to both save taxpayer money and make society safer by being smarter about crime and punishment and about how legislation is crafted and the laws are administered. The bottom line: if a punishment is not serving a legitimate purpose, or if a punishment is actually counterproductive and serves no valid penological objective, it is unnecessary and unjustifiable and should not be inflicted.

Judges, like lawmakers and law enforcement officials, have an important role to play in America's constitutional democracy. The language of the Eighth Amendment is short and simple, but Eighth Amendment jurisprudence, sadly, has grown increasingly complex—and, it must be said, noticeably unprincipled—over the last few decades. Existing Eighth Amendment precedents articulate a wide variety of legal standards—one ("deliberate indifference") for prisoners challenging prison conditions[111] or a lack of medical attention,[112] another ("maliciously and sadistically" using force) for inmates bringing excessive force claims,[113] and still others (gauging the proportionality of punishments or deciding whether sentences are "grossly disproportionate") to evaluate the constitutionality of capital or non-capital offenses.[114] In a number of judicial decisions, the U.S. Supreme Court has explicitly held that punishments must not be "excessive"[115] or "incompatible with 'the evolving standards of decency that mark the progress of a maturing society.' "[116] Though the "excessive" language comes from the Eighth Amendment itself and the "evolving standards of decency" phraseology is, as worded, a lofty sounding legal standard that originates in the 1950s, the actual outcome of Eighth Amendment cases has often not been very decent and has not reflected the kind of well-informed, reasoned decision-making that one should expect from a forward-thinking, liberty-loving republic.

To date, American lawmakers have all too often viewed the criminal system as a one-way ratchet: regularly *increasing* penalties, but hardly ever *decreasing* penalties; regularly *building* prisons, but hardly ever *decommissioning* them. When is the last time you heard about, or read about, a prison being demolished? (Occasionally, it actually does happen, with the Riverfront State Prison, which opened in 1985 in Camden, New Jersey, for example, torn down in 2009 and then redeveloped into a waterfront park because of its prime location. The inmates at the prison, however, were simply transferred to facilities elsewhere in the state.)[117] The State of California, under pressure from the U.S. Supreme Court itself, has taken some concrete steps recently to deal with the problem of overcrowded prisons, but American society, as a whole, needs to grapple much more forthrightly with the problem of mass incarceration.[118] Modern American judges, in fact, have been overly deferential to legislative and executive-branch judgments when it comes to draconian punishments such as the death penalty or prolonged solitary confinement, as well as in their evaluation of the constitutionality of punishments for various non-violent offenders. The *unprincipled* nature of existing Eighth Amendment case law is itself clear. Under existing law, while *lethal* punishments (think executions) are still permitted, *non-lethal* punishments (think whipping or the lash) are no longer tolerated within prisons. Instead, only punishments found to violate the Supreme Court's nebulous, highly deferential "evolving standards" test, to involve the "unnecessary and wanton infliction of pain,"[119] or to be disproportionate (or, in some cases, "grossly disproportionate") to the severity of the crimes,[120] have been declared to be "cruel and unusual punishments."[121]

Despite the growing complexity of Eighth Amendment case law, part of that ever-expanding jurisprudence is, the evidence shows, actually not well-grounded in Enlightenment principles and values. At least some of the Justices of the Supreme

Court have misread the Enlightenment and what it wrought by way of criminal justice reform. In a concurring opinion in *Glossip v. Gross*, Justice Scalia—joined by Justice Clarence Thomas—wrote: "Capital punishment presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia. The Framers of our Constitution disagreed bitterly on the matter." (That's true. The founders, inspired by Montesquieu and Beccaria's writings, were deeply ambivalent about the use of capital punishment.) "For that reason," Justice Scalia then concluded, "they handled it the same way they handled many other controversial issues: they left it to the People to decide." (Not exactly, as various provisions of the U.S. Bill of Rights obviously *restrain* majority action in particular contexts.) Then taking aim at Justice Stephen Breyer's dissent in that case, in which Justices Breyer and Ginsburg jointly concluded that it is highly likely that capital punishment constitutes a cruel and unusual punishment, Justice Scalia wrote in his concurring opinion in *Glossip*: "By arrogating to himself the power to overturn that decision, Justice Breyer does not just reject the death penalty, he rejects the Enlightenment."[122] (That's simply wrong.) That statement by Justice Scalia oversimplifies—indeed, grossly misconstrues—the history of the Enlightenment, part of which focused on core principles of liberty and punishment developed by Montesquieu, Beccaria, and many others.

While a big part of the Enlightenment was, certainly, about *legislative* primacy and obtaining the consent of the governed,[123] the *necessity-for-punishment principle* was also a major focus of Enlightenment thought.[124] That principle has come to be known as "the minimal severity principle" or the "parsimony" or "minimum necessary punishment" principle, with the idea being that societies should inflict "the least possible punishment necessary" under the applicable circumstances.[125] Indeed, the American Revolution—itself driven by the Enlightenment—produced state constitutions and, ultimately, the U.S. Constitution and its Bill of Rights. All of those legal instruments set forth *written* constitutional rights that are, by their very character, *anti*-majoritarian in nature. That is, they guarantee *individual* rights in the face of potentially *tyrannous* majorities—and those individual rights are *not* tied to majority rule or any particular legislative action. To use the oft-quoted words of U.S. Supreme Court Justice Robert Jackson, known, like Thomas Jefferson, for his felicity for words: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts."[126]

The enforcement of individual rights is, of course, highly dependent on the bench and bar and on impartial and independent judges in particular. The creation of an independent judiciary—a pillar of the Rule of Law, and one that Montesquieu and America's framers cared so deeply about—was itself a product of the Enlightenment and was reflected in the U.S. Constitution, namely, in Article III, which set up America's judicial branch.[127] Article III states that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[128] Just as Montesquieu understood that there would be no liberty if the power of judging were not separate

from legislative and executive power, it is equally clear that if the judiciary's "evolving standards of decency" test degenerates into a stick-one's-finger-in-the-air-and-see-which-way-the-wind-is-blowing test—one that blindly or excessively defers to executive or legislative power—abuses of power, and arbitrariness and overreaching, are sure (indeed, certain) to occur. That kind of unthinking veneration for legislative or executive power is not what America's framers had in mind at all. Indeed, American courts would become totally impotent—and the power of judicial review, explicitly recognized in *Marbury v. Madison* (1803), would be a total farce or a nullity—if those courts constantly, and without questioning, deferred to legislative or executive judgments.[129]

In a real sense, Montesquieu and Beccaria *were* the Enlightenment, or at least a major part of it, with their names continually invoked by American revolutionaries. Moreover, the Enlightenment itself was all about human progress, so the notion that America's founders would have wanted *twenty-first century* jurists to focus on figuring out what punishment practices were prevalent in the *eighteenth century*—and then to reflexively defer to such antiquated practices—is totally absurd and illogical. Thomas Jefferson—one of those founders—himself famously wrote to James Madison from Paris in September 1789, analyzing whether past generations should, through their actions, tie the hands of future ones: "The question Whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water. Yet it is a question of such consequences as not only to merit decision, but place also, among the fundamental principles of every government." Jefferson's answer: "I set out on this ground, which I suppose to be self evident, '*that the earth belongs in usufruct to the living*': that the dead have neither powers nor rights over it. The portion occupied by any individual ceases to be his when himself ceases to be, and reverts to the society." As Jefferson added later in that 1789 letter: "On similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation." "This principle that the earth belongs to the living, and not to the dead, is of very extensive application and consequences, in every country," Jefferson continued, laying out his views.[130] No less a figure than Richard Posner—the famous American jurist, legal scholar, and law-and-economics-driven thinker who sees Beccaria as a foundational figure—has argued that to be "ruled by the dead hand of the past is not self-government in any sense."[131]

The U.S. Constitution, of course, has endured since the 1780s, and it has only been amended infrequently despite Jefferson's desire for what, today, we might call more regular tune-ups. Article V of the Constitution requires Congress to "call a Convention for proposing Amendments" only if "two thirds of both Houses shall deem it necessary" or "two thirds of the several States" submit an "Application" to that effect. And even then, a proposed amendment must be "ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof" in order to take effect.[132] Because it is so hard to amend, the Constitution, with the exception of its first ten amendments, adopted rather quickly (and ratified in 1791), has been amended only sporadically. Indeed, constitutional amendments have often come about only as a result of large-scale social movements (e.g., the suffrage

movement produced the Nineteenth Amendment guaranteeing women the right to vote) or tragic events, such as the Civil War (which produced the Reconstruction Amendments).[133] The difficulty of amending the U.S. Constitution, however, does not mean modern-day judges should not do their level best to protect the individual rights *already protected by* that Constitution, including the rights enshrined in the Eighth and Fourteenth Amendments. Judges are duty-bound to uphold and defend the Constitution, the provisions of which require the safeguarding of liberty, the equal protection of the laws, and the prohibitions of excessive bail, excessive fines, and cruel and unusual punishments.

Initially, Thomas Jefferson's compatriot, James Madison, was actually skeptical—essentially lukewarm—about how efficacious the U.S. Constitution's initial ten amendments, now known as the U.S. Bill of Rights, would be. "My own opinion," he told Jefferson, "has always been in favor of a bill of rights; provided that it be so framed as not to imply powers not meant to be included in the enumeration." (The U.S. Constitution's Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." And the Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.") "At the same time," Madison wrote, "I have never thought the omission a material defect, nor been anxious to supply it by *subsequent* amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disservice." Madison pointed out that, in every state, "[r]epeated violations of these parchment barriers have been committed by overbearing majorities in every State." In his home state of Virginia, Madison confessed that he had witnessed the state's bill of rights "violated in every instance where it has been opposed to a popular current." But America's founders were optimistic about the country's future, a country in which they wanted liberty, not tyranny, to reign supreme, and it was felt that a Bill of Rights was necessary and that, over time, the Bill of Rights would engender greater and greater respect.

Indeed, James Madison knew that the future would bring changes, and—in examining the past—he himself expressed a self-awareness of the shortcomings of the seventeenth- and eighteenth-century thinkers who had preceded him. As he wrote in 1793, after the ratification of the U.S. Bill of Rights and the start of the French Revolution: "Writers, such as Locke, and Montesquieu, who have discussed more the principles of liberty and the structure of government, lie under the same disadvantage, of having written before these subjects were illuminated by the events and discussions which distinguish a very recent period. Both of them, too, are evidently warped by a regard to the particular government of England, to which one of them owed allegiance; and the other professed an admiration bordering on idolatry." "Montesquieu, however," Madison lavishly praised the French jurist while recognizing his particular foibles, "has rather distinguished himself by enforcing the reasons and the importance of avoiding a confusion of the several powers of government, than by enumerating and defining the powers which belong to each particular class."[134] By

the time the U.S. Constitution was proposed and ratified by the American people (or at least *a portion* of them) in the 1780s, and by the time the U.S. Bill of Rights was proposed and then ratified on December 15, 1791, the writings of Montesquieu and Beccaria, not to mention those of Voltaire, Locke and Blackstone, had been around for quite some time. And they clearly had been put to good use, including by America's Founding Fathers, though systemic racism and massive gender inequality remained disturbing eighteenth-century facts of life.

The U.S. Bill of Rights, like the English Bill of Rights before it, represented an important step forward for the protection of individual rights. Notably, because America's founders believed in God-given or *natural* rights, rights that one was born with and that one had, simply, as a result of one's birth, some founders had initially seen no need at all for a bill of rights. "As we enjoy all our natural rights from a pre-occupancy, antecedent to the social state," Dr. Benjamin Rush, the Pennsylvania patriot, declared, it would be "absurd to frame a formal declaration that our natural rights are acquired from ourselves." But Thomas Jefferson, James Madison, and many other American leaders wanted—and wisely insisted upon—a bill of rights, one that would, among other things, condemn excessive bail and fines and cruel and unusual punishments. "A bill of rights," Jefferson asserted, "is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse or rest on inference." In commenting on Virginia's declaration of rights, the predecessor of the U.S. Bill of Rights, Edmund Randolph saw "the formation of" that state's bill of rights as serving "two objectives": first, "that the legislature should not in their acts violate" any of its canons; and second, "that in all the revolutions of time, of human opinion, and of government, a perpetual standard should be erected around which the people might rally, and by a notorious record be forever admonished to be watchful, firm and virtuous." In other words, society should always be vigilant about the abuse of power and a bill of rights, if properly framed, could accrue its own force and power over time.

Seeing a U.S. Bill of Rights as a practical necessity and as something that might be of lasting value to the country, Madison took on the task of putting a federal bill of rights in place, one that would include the prohibitions against excessive bail and fines and against cruel and unusual punishments. "The political truths declared in that solemn manner," Madison once observed, "acquire by degrees the character of fundamental maxims of free government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion." "[A]mendments, if pursued with a proper moderation and in a proper mode," Madison argued, "will be not only safe, but may serve the double purpose of satisfying the minds of well meaning opponents, and of providing additional guards in favour of liberty." "It is my sincere opinion," Madison wrote to a Baptist minister after much thought and consideration, "that the Constitution ought to be revised, and that the first Congress ... ought to prepare and recommend to the States ... the most satisfactory provisions for all essential rights." Madison—who personally pushed for the adoption of the U.S. Bill of Rights in that First Congress—himself spoke of "independent tribunals of justice" serving as the "guardians" of constitutional rights and being "an

impenetrable bulwark against every assumption of power" by the legislative or executive branches. His Virginia colleague, Richard Henry Lee, best known for making the motion in the Second Continental Congress calling for the colonies' independence from Great Britain, likewise specifically saw the prohibitions against excessive bail, excessive fines, and cruel and unusual punishments as necessary and indispensable "to prevent oppression" and to restrain "the wicked & tyrannic."[135]

The Baron and the Marquis—a detailed examination of the past and present, with watchful eyes on the future—is, fundamentally, about the promise of American criminal justice reform. It argues that amidst ongoing, high-profile efforts to reform the country's existing criminal justice system (*systems*, actually, is the proper word as different practices exist at the federal level and in each of the states and U.S. territories), policymakers and lawmakers—and yes, prosecutors and courts—would be wise to keep in mind a principle developed centuries ago: that only necessary (or, as Beccaria put it, only *absolutely* necessary) punishments are just and intellectually defensible. Many present-day criminal justice policies throughout the country, from pre-trial detention and bail practices to sentencing and the conditions of confinement for inmates, are in need of reform, and that is what this book aims to shed light on and to help address. In trying to illuminate a path forward, *The Baron and the Marquis* contends that criminal justice practices should be driven by the concept of necessity and guided by the values of proportionality, empathy, compassion, non-discrimination, and human dignity.

As part of the modern application of the now centuries-old necessity-for-punishment maxim, the American death penalty, for starters, should finally meet its end and be declared unconstitutional by the U.S. Supreme Court.[136] The death penalty, though it affects only a tiny percentage of the U.S. prison population,[137] epitomizes an overly vindictive approach to American criminal justice. Capital punishment has an incredibly corrosive effect on the law itself, and it has certainly badly corrupted American law—and America's Eighth Amendment jurisprudence in particular—for far too long. In addition to bidding good riddance to capital punishment,[138] prolonged solitary confinement and the unduly severe punishment of nonviolent offenders (to give a couple of additional examples) should be much more carefully scrutinized by legislators, prosecutors, and the courts in light of viable alternatives to long-term isolation in cells and long-term incarceration. The use of lengthy terms of incarceration—as necessary as that is for certain violent offenders, such as murderers and rapists—should be seen as a last resort to solving America's most pressing social problems, from alcoholism, drug abuse, and poverty, to chronic unemployment or underemployment, the need for more job training, and the opioid crisis. Putting in place sensible, long-overdue gun legislation, including universal background checks, would, all by itself, prevent some criminals and people with severe mental illnesses from getting access to lethal weapons (e.g., AR-15s), and thus potentially prevent some very heinous crimes (e.g., mass shootings at schools or workplaces) from happening in the first place.

Tackling social ills on the front end, instead of merely reactively dealing with their extreme adverse consequences on the back end, would, certainly, be a major step forward. With the advent of technology and a greater awareness of the pitfalls and

costs and risks of incarcerating non-violent offenders for long periods of time, greater consideration should be given to more effective, and frankly more cost-effective, measures, such as substance abuse treatment, electronic home monitoring, job and apprenticeship and skills training, and education. The United States, one scholar, Travis Pratt, has lamented, "has become 'addicted to incarceration' "—an addiction "fueled by policies legitimized by faulty information about the crime problem in the United States, American citizens' opinions about crime and punishment, and the efficacy of incarceration as a means of social control."[139] Breaking addictions is hard, as any alcoholic or recovering drug addict would readily admit. But trying to break bad habits—and trying to fix the ills in America's criminal justice system—is worth the fight.

In June 2016, a Gallup poll showed that only 23% of Americans had "a great deal" or "quite a lot" of confidence in the criminal justice system.[140] That poll, and others like it, should be a wake-up call to twenty-first century Americans as they think about the country's institutions and how best to reform them. *The Baron and the Marquis* discusses the best way forward in light of where we stand now and what we know now, though more criminal justice research must be done to fully understand the issues we face. The concept of necessity, however, should be front and center throughout the reform debate. In fact, the consideration of Cesare Beccaria's corollary to the necessity-for-punishment principle—that is, the imposition of the minimum sanction warranted by the given circumstances—has implications for existing systems of bail throughout the country and for efforts to reduce criminal justice costs while keeping the American public equally safe or even safer. Efforts to reform America's bail system and to recalibrate sentencing policies are now underway from coast to coast in the United States, and the necessity-for-punishment principle should not be lost in those important public debates.