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THE BIRTH OF AMERICAN LAW
An Italian Philosopher and the American Revolution
John D. Bessler

The Birth of American Law

*An Italian Philosopher and the
American Revolution*

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In memory of

U.S. Magistrate Judge
John M. “Jack” Mason
(1938–2002)

my former law partner
George O. Ludcke
(1952–2004)

a good friend
and a lawyer’s lawyer
John P. Sheehy
(1955–2012)

and my late colleague
Prof. Barry E. Carter
(1942–2014)



CESARE BECCARIA

The name of Beccaria has become familiar in Pennsylvania, his authority has become great, and his principles have spread among all classes of persons and impressed themselves deeply in the hearts of our citizens. You yourself must have noticed the influence of these precepts in other American states. The tyranny of prejudice and injustice has fallen, the voice of a philosopher has stilled the outcries of the masses, and although a bloody system may still survive in the laws of many of our states, nevertheless the beneficent spirit sown by Beccaria works secretly in behalf of the accused, moderating the rigor of the laws and tempering justice with compassion.

—William Bradford, Jr., James Madison's Princeton classmate and Pennsylvania's Attorney General, from a 1786 letter to Luigi Castiglioni, an Italian botanist who toured the United States of America from 1785 to 1787

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Acknowledgments

This book builds upon my prior scholarship on the Italian philosopher Cesare Beccaria. I have long advocated the abolition of capital punishment, and Cesare Beccaria (1738–1794)—of a noble family from Milan, but now a little-known figure except among criminologists—was the first Enlightenment thinker to make a comprehensive case for abolishing executions. In 1764, Beccaria’s slender Italian treatise, *Dei delitti e delle pene*, a product of the Italian Enlightenment and the rationalistic sentiment it inspired in Milan’s coffeehouses and salons, first appeared in print. In it, Beccaria—using his native language—opposed capital punishment and torture. Beccaria’s book specifically emphasized the tyrannical nature of unnecessary punishments, and argued for proportion between crimes and punishments. Written at a time of rampant state brutality and when intellectuals on both sides of the Atlantic were hungry for new ideas, the Italian treatise was translated into English three years later as *On Crimes and Punishments*. Though Beccaria lived in southern Europe in a locale once governed by Roman law and customs and then by Lombard laws, *Dei delitti e delle pene* would transform English and American law and the world writ large, with Beccaria essentially founding the field of criminology. A number of countries abolished torture in the decades after the appearance of Beccaria’s book, and Anglo-American lawyers and jurists, including America’s Founding Fathers, especially admired Beccaria’s treatise, which was quickly translated into an array of other languages.

Many of America’s founders, including Benjamin Franklin and Thomas Jefferson, took an abiding interest in the Italian Enlightenment and the products of it. Although America’s senior statesman, as scholar Antonio Pace notes in *Benjamin Franklin and Italy*, “never set foot on Italian soil,” Dr. Franklin—the famed American inventor—favored law reform and corresponded with Italian scientists with strong connections to Beccaria’s social circle. Franklin also exchanged letters with Gaetano Filangieri (1752–1788), an Italian penal reformer whose own great work, *La Scienza della legislazione*, appeared in the 1780s. Thomas Jefferson likewise carefully studied Beccaria’s writings before drafting a bill to curtail executions and better proportion crimes and punishments in Virginia, his home state. Fulfilling a long-held desire, Jefferson—the Virginia plantation owner turned diplomat—actually did travel to the Duchy of Milan and the surrounding Italian countryside in April 1787 shortly before the U.S. Constitution was framed in Philadelphia. As described in George Green Shackelford’s richly detailed book, *Thomas Jefferson’s Travels in Europe, 1784–1789*, Jefferson—a lover of art, music and architecture—endured rough, mountainous roads as he made his way into the region by mule and two-horse carriage, spending two days and three nights in Milan, the capital of what was then known as Lombardy. Both Franklin and Jefferson, as well as other prominent American revolutionaries such as John Adams and James Madison, carefully considered Beccaria’s ideas—ideas that ultimately shaped American laws and penal codes.

Sadly, Beccaria's substantial influence on early American law and social thought has long been neglected, and today, most Americans—even most lawyers—know little if anything about Beccaria and his ideas. I was particularly struck by one conversation I had in 2012 with a successful Minneapolis lawyer I know who said he'd never even *heard* of Beccaria before. And that instance is hardly an aberration. In polling roughly a hundred of my Georgetown and University of Baltimore law students, I got much the same reaction, mostly blank stares. In fact, only one student showed any recognition at all when I brought up Beccaria's name. Even that first-year law student, I noticed, only tentatively raised his hand, perhaps worried I'd use the Socratic method and call on him to recount details of Beccaria's life he likely didn't remember anymore. While Sir William Blackstone and Jeremy Bentham are penal reformers that law students and even some undergraduates are likely to encounter in their studies, the name of Beccaria—very familiar to American revolutionaries in 1776, the year of America's birth—is now largely forgotten, relegated to the discard pile of history. That circumstance, I decided, badly needed to be remedied, hence the book you are now holding in your hands—or at least reading on your iPad, Nook, or Kindle as an e-book.

I began my research on Cesare Beccaria as a visiting professor at The George Washington University Law School in Washington, D.C. I initially published some of my findings in a 2009 article in the *Northwestern Journal of Law and Social Policy* titled “Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement.” I later compiled additional research on Beccaria in my recent book, *Cruel and Unusual: The American Death Penalty and the Founders' Eighth Amendment*, then did further investigation of Beccaria's impact on the American Revolution in preparing for lectures I gave in Norway and Spain in 2012 and 2013. This book, *The Birth of American Law*, contains a wealth of new material on Beccaria's life and his enormous influence on early American society and its legal culture, but I am forever grateful to prior editors and fellow scholars who, in years past, provided helpful comments on my earlier work. The writings of Yale Law School professor Akhil Amar, who I've gotten to know through our mutual interests in the U.S. Constitution's Eighth Amendment and my daughter's education at Yale University, have—in my thinking about the Constitution—been enormously helpful, as has the scholarship of law professor Sandy Levinson at the University of Texas-Austin.

I am particularly thankful to my colleagues at the University of Baltimore School of Law and the Georgetown University Law Center for supporting my scholarly agenda, as well as faculty members at the University of Maryland School of Law who reviewed portions of my book manuscript. One of my colleagues, Tim Sellers, is an expert on the Enlightenment, and I have benefitted enormously from his scholarship, as well as from the comments or writings of José Anderson, James Maxeiner, and constitutional law scholars Garrett Epps, Mike Meyerson, C.J. Peters, Elizabeth Samuels and Max Stearns. Summer grants from The George Washington University Law School and the University of Baltimore School of Law made my research—and thus this book—possible, so I also want to thank the deans and faculty members, among them Ron Weich, Phil Closius, Michael Higginbotham and Fred Lawrence, who approved the grant applications. I am grateful, too, for the exemplary work of my University of Baltimore research assistants, Jordan Halle and Yosef Kuperman, as well as that of my executive assistant, Rose McMunn. The encouragement of friends like Terry Anker, Sandra Babcock, Tom Banchoff, Bruce Beddow, Michael Handberg, Rob Hendrickson, Owen Herrstadt, Dave Jensen, Robin Maher, John Symington and Mark Taticchi also made the writing easier.

A small cadre of lawyers and scholars continue to take an abiding interest in Cesare Beccaria's work, and to them I am likewise indebted. I would especially like to thank Brian Saccenti, Michel Porret, Elisabeth Salvi and Pascal Bastien. Brian Saccenti, a Maryland public defender, brought to my attention one of Maryland's founders, Charles Carroll of Carrollton, who—like so many American founders—displayed considerable admiration for Beccaria's treatise. Brian, who teaches an Appellate Advocacy Clinic at the University of Maryland and who works in Baltimore in the Appellate Division of the Office of the Public Defender, also provided me with details surrounding the adoption and history of the “sanguinary Laws” clause of Maryland's Declaration of Rights of 1776. Pascal Bastien, a history professor at the Université du Québec, Montréal, invited me to speak at a major, world-class conference in Geneva, Switzerland, on Beccaria and his legacy. That invitation prompted me to redouble my efforts to trace Beccaria's influence on American law, which led to the drafting of a new book manuscript as I prepared for that conference. After the symposium, Pascal also graciously agreed to translate my findings into French. Professors Michel Porret and Elisabeth Salvi, of the Université de Genève, are the much-respected Beccaria scholars who organized that 2013 conference, which focused on Beccaria's global reception and heritage. Michel and Elisabeth have long studied Beccaria's influence in Europe and have become experts in what one source describes as “Beccaria studies.” It is my hope that this book will be a welcome addition to that scholarship.

I have others to thank as well. At the international conference in Geneva, Donald Fyson—an historian at the Université Laval Québec who has studied Beccaria's reception north of the U.S.-Canadian border, in Québec—ably served as a translator for me, allowing me to gather much-needed additional information on Beccaria from the Francophone presenters. Emmanuelle de Champs—an expert on Beccaria and Jeremy Bentham at the Université Paris—was also tremendously helpful and good-natured about my lack of French, as were the many other multi-lingual conference participants and attendees, among them Vincent Sizaire, a French magistrate affiliated with the Université Paris-Ouest; Lilith Malagoli, an Italian law student; Dario Ippolito of the Università Roma; Serena Luzzi of the Università degli studi di Trento; Elio Tavilla, a professor of the history of medieval and modern law at the Università di Modena e Reggio Emilia; and Laure Zhang, another Université de Genève academic who has studied Beccaria's influence in China. I was especially grateful to find an entire display at the Université de Genève's library devoted to Beccaria's legacy, replete with well-labeled reproductions of various editions and translations of *On Crimes and Punishments*. The oral explanations of the exhibit provided by our two principal hosts, Michel Porret and Elisabeth Salvi, gave me a much better understanding of aspects of Beccaria's life and legacy and also opened up new avenues of inquiry for me. For the hospitality I received in February 2013 at the Université de Genève, including from its professors, students, and dedicated library staff, I am extremely grateful. *Merci beaucoup!*

In addition, I would like to extend my gratitude to Dr. Lill Scherдин and Per Ystehede at the University of Oslo, as well as a host of U.S. librarians and other individuals and scholars who assisted me in tracking down relevant information. On one of my first forays into a rare book room, Elizabeth Fregel, a research librarian at Yale's world-renowned Beinecke Rare Book & Manuscript Library, skillfully assisted me as I retrieved a 1770 copy of *On Crimes and Punishments*—a copy likely owned at one time by John Trumbull, the American painter who palled around in Paris with Thomas Jefferson, or his cousin, another John Trumbull, who studied law with John Adams. Michael Lotstein—an archivist at Yale University Library—also graciously answered one of my many follow-up queries regarding Beccaria's writings. The library staff at the Georgetown University Law Center

was equally helpful in directing me to important rare books. Erin Kidwell, the Curator of Legal History for Georgetown's extensive collection of rare books, as well as her colleague Hannah Miller, were particularly gracious. My sincere appreciation also goes to Scott Pagel, the Associate Dean for Information Services at The George Washington University Law School, who provided capable assistance at that school's rare book room.

I would also like to single out and thank the following academics, archivists, librarians, curators and others for providing helpful responses to my questions: Jim Acker, Barbara Austen, Betsy Boyle, Jodi Boyle, Doug Brown, Jane Calvert, Steve Charnovitz, Margaret Chisholm, Joanne Colvin, Constance Cooper, Bill Copeley, Bill Creech, Jane Cupit, Dick Dieter, Jim Gerencser, Roy Goodman, Sarah Hartwell, James Heller, Rachel Jirka, Tracey Kry, Valerie-Ann Lutz, Patty Lynn, Linda Oppenheim, Alison Paul, Mary Person, John Pollack, Frances Pollard, Bob Pool, Kimberly Reynolds, Ed Richi, Susan Riggs, Bijal Shah, Nancy Shawcross, Lee Shepard, Jonathan Siegel, Julie Silverbrook, Steve Smith, Sabrina Sondhi, Gabriel Swift, Linda Tesar, Will Tress and Mike Widener. Lilith Malagoli—the Italian law student I met in Geneva who has studied, in her native Europe, the Napoleonic Code promulgated in the wake of the French Revolution—was especially kind in providing content and translations from afar. Andrea Bartoli and his son Pietro—both Italian speakers—also aided me in my quest to better understand early American connections to the Italian Enlightenment, in addition to giving me the correct pronunciation of Cesare Beccaria's name. Andrea—now the Dean of the School of Diplomacy and International Relations at Seton Hall University—received his Ph.D. from the University of Milan and has long been involved with the Community of Sant'Egidio, an organization that opposes capital punishment. Pietro's translations of some of Beccaria's letters and the Italian portions of Thomas Jefferson's commonplace book were especially helpful. *Grazie mille!*

I would also like to thank the following institutions and organizations for their invaluable assistance: the American Antiquarian Society, the American Philosophical Society, the Boston Public Library, Brown University Library, the Charleston Library Society, the College of Charleston, the Connecticut Historical Society, the Constitutional Sources Project, the Dartmouth College Library, the Delaware Historical Society, the Georgia Historical Society, the Harvard Law School Library, the Harvard College Library, the Harvard University Archives, the Historical Society of Pennsylvania, the Kentucky Historical Society, the Library of Congress, the Maryland Historical Society, the Massachusetts Historical Society, the National Archives, the National Death Penalty Archive at the University of Albany, the New Hampshire Historical Society, the New Jersey Historical Society, the New York Public Library, the New York Society Library, the North Carolina State Archives, Princeton University Library, the Ohio Historical Society, the Rhode Island Historical Society, Rutgers University Libraries, the Society of the Cincinnati, the South Carolina Historical Society, University of Pennsylvania Libraries, the Vermont Historical Society, the Virginia Historical Society, the Waidner-Spahr Library and the Archives and Special Collections at Dickinson College, the William & Mary Law Library, Yale University Library, the Arthur W. Diamond Law Library at Columbia Law School, and the Lillian Goldman Law Library at Yale Law School. The Washington, D.C.-based Death Penalty Information Center, a non-profit funded by individual donors and organizations such as the Roderick MacArthur Foundation, the Open Society Foundation and the William and Mary Greve Foundation, also regularly produces high-quality reports that were helpful to me.

Beccaria's influence on American law—the subject of this book—is not minor or inconsequential. On the contrary, Beccaria's writings shaped the very fabric of the Ameri-

can Revolution, as well as the Founding Fathers' views on happiness and tyranny, and crime and punishment in particular, in fundamental ways. Although America's founders naturally looked to English laws and traditions as they crafted early state constitutions, bills of rights, and the U.S. Constitution itself, their abiding admiration for Italian thought and Beccaria's treatise shaped those legal documents and the founders' understanding of them. On January 24, 1783, in the *Journals of the Continental Congress*, "Beccaria's works" were specifically referenced in "a list of books" on "Politics" that were deemed "proper for the use of Congress" — a list prepared by a committee made up of American founders James Madison, Hugh Williamson and Thomas Mifflin. Madison took the lead in drafting the U.S. Bill of Rights; Williamson, a Pennsylvania native who studied at the College of Philadelphia and in Europe, was a physician now best known for representing North Carolina at the Constitutional Convention; and Mifflin — a Philadelphia merchant and politician — became the first governor of Pennsylvania. Beccaria's writings influenced America's founders almost a decade before the signing of the Declaration of Independence, and that impact would be felt for many decades thereafter. While a wide array of offenses, including witchcraft, adultery and sodomy, resulted in executions in colonial times, the death penalty's use — including for the crime of murder itself — was openly questioned and debated after the 1760s publication and translation of Beccaria's book.

The influential nature of *On Crimes and Punishments* in early America is evident in the many changes in American law that took place in the wake of its printing. As American states moved from traditional common-law crimes to statutory penal codes, the number of capital crimes appreciably declined in number. And during the late colonial and post-1776 period, America's Founding Fathers — both famous and, in some cases, now little remembered — regularly consulted Beccaria's treatise as those changes in the law were taking place. The only Roman Catholic signer of the Declaration of Independence, Charles Carroll of Carrollton, was, for example, an admirer of Beccaria's treatise. A Maryland planter and an early advocate of independence, Carroll was — as fate would have it — also the last surviving signatory of America's founding document, dying at the age of 95 in 1832. By the time he died, America's penal system — thanks in part to Beccaria's treatise — had been transformed from torturous dungeons and horrid, disease-ridden local jails to a series of state prisons designed by leading thinkers and architects. By the 1830s, when the Frenchmen Alexis de Tocqueville and Gustave de Beaumont came to America to visit its prisons and to study its new-fangled laws and penal practices, penitentiaries dotted the American landscape and Americans had a much different conception of justice than the one they inherited from England. This American story deserves to be told, and Beccaria's crucial role in it should, once again, become part of the broader American consciousness.

Writing a book takes years, and bringing it into the world requires the assistance of many people. I want to express my gratitude at the outset to Duke law professor H. Jefferson Powell, the Carolina Academic Press Legal History Series editor, for recommending this book for publication; publisher Keith Sipe and Senior Law Acquisitions Editor Jefferson Moors for taking on this project; and production designer Grace Pledger and the rest of the Carolina Academic Press staff for their efforts. Last, but certainly not least, I want to thank my wife Amy and my daughter Abigail for their understanding and devotion. Beccaria wrote a lot about torture and capital punishment, but he also knew how to enjoy life and wrote about everything from republics and imagination to style, scents and happiness. My wife, Amy Klobuchar, the senior U.S. Senator from Minnesota, has done a tremendous job serving our country and the people of Minnesota, and every day — through her work — she makes Minnesotans, like me, proud. She and Abigail, the loves

and lights of my life, have given me the generous gifts of joy and laughter, and for that, I am eternally grateful. With Amy doing her work in the Senate and Abigail now off studying at Yale, I could not be prouder of all their accomplishments. Through their wit, humor, and stories, they daily energize me and provide me with much-needed respite from the solitary labors of my writing life. Abigail's first column for the *Yale Daily News*—a beautifully written piece titled “The Obstacles Are the Path”—made me laugh aloud and reminded me just how lucky I am; her first magazine profile, about an 84-year-old Italian-American who still volunteers at a senior center every day, literally moved me to tears. Amy and I celebrated our twentieth wedding anniversary in 2013, the same year Abigail turned eighteen, and I look forward to all the many fun-filled years that are still to come.

The American Declaration of Independence—a document inspired in part by Beccaria's writings—famously speaks of “the pursuit of Happiness.” In *Seven Pleasures: Essays on Ordinary Happiness*, the essayist Willard Spiegelman writes of reading, walking, looking, dancing, listening, swimming and writing. Over the past two decades, I have immensely enjoyed doing all of those things with Amy and Abigail. And those simple pleasures of life, to which I would add bicycling and traveling, as well as cooking and (at least occasionally, when time permits) eating home-cooked meals together, have meant the world to me. Though Abigail is now off at college, leaving Amy and I as “empty nesters,” I eagerly await our next weekend adventure together to Lanesboro, Minnesota, for another hilarious play at the Commonweal Theatre, or to Tofte or Grand Marais, Minnesota, for yet another beautiful hike along the rocky, rugged terrain of Lake Superior's North Shore.