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Abstract

Often hailed as the father of modern criminology, the writings of the prominent eighteenth-century Italian thinker Cesare Beccaria were deeply influential on the American Founders' views of criminal law and theory. Courts, lawyers, and legal observers recently have begun to appreciate Beccaria's influence, including on such timely topics as the pardon power, the theory of criminal sentencing, and the moral implications of the death penalty. But another topic Beccaria wrote about with great influence has been largely neglected: the individual right to keep and bear arms. This article seeks to correct this gap in the current scholarship surrounding Beccaria's thought and influence on the right to keep and bear arms.

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I first demonstrate that Beccaria's writings were known by the Founding generation and deeply influenced them. Next, I highlight the areas of criminal law and theory where courts and commentators have begun to appreciate Beccaria's important guidance. Finally, I point out that Beccaria's equally significant writings on the right to keep and bear arms, and the law concerning firearms, have gone largely ignored in the literature and judicial opinions, and argue that the same considerations that have spurred courts and scholars to revisit Beccaria's writings in other areas should lead them to recognize, and be affected by, his contributions in the area of Second Amendment jurisprudence.

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I. INTRODUCTION

Beginning with *District of Columbia v. Heller*, the Supreme Court has placed significant weight on the "historical background" of the Second Amendment.[1] *Heller* itself turned on the Founding generation's understanding that the Amendment guaranteed an individual right to bear arms.[2] Two years later, the Court incorporated this right against the states in *McDonald v. Chicago* after concluding that it "is 'deeply rooted in this Nation's history and tradition'"[3] and was considered "fundamental by those who drafted and ratified the Bill of Rights."[4] The Court's historical emphasis has increased the importance of Founding-era thinking on the right to bear arms, compelling all legal observers interested in Second Amendment jurisprudence to take a closer look at the intellectual influences and early interpreters of that right, such as William Blackstone,[5] William Hawkins,[6] James Madison,[7] and Joseph Story.[8] But one writer has remained noticeably absent from this historical discussion: Cesare Beccaria.

"[T]he father of modern criminology"[9] and a prominent Italian Enlightenment thinker during the late eighteenth century, Beccaria had an outsized impact on the Founders' understanding of the right to keep and bear arms.[10] Beccaria's treatise *On Crimes and Punishments* (1764) blazed through intellectual circles on both sides of the Atlantic in the 1760s and

1. 554 U.S. 570, 592–95 (2008).

2. *Id.* at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

3. 561 U.S. 742, 767–68 (2010) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

4. *Id.*

5. *Id.*

6. Rogers v. Grewal, 140 S. Ct. 1865, 1870 (2020) (Thomas, J., dissenting from the denial of certiorari).

7. *McDonald*, 561 U.S. at 769.

8. *Id.* at 769–70.

9. Steve Russell, *The Legacy of Thurgood Marshall in Strawberry Season*, 23 T. MARSHALL L. REV. 19, 30 (1997).

10. For the purposes of this article, and probably for most purposes in the study of American legal and political history, the term "Founders" also known as "Founding Fathers" generally refers to the influential persons who led the American Revolution and adopted the Constitution and Bill of Rights. *See The Founding Fathers*, NAT'L GEOGRAPHIC, https://www.nationalgeographic.org/article/founding-fathers/ (last visited Nov. 10, 2020). The phrase "the Founding Generation" generally refers to those Americans who supported these events and institutions or were neutral. British Loyalists and Tories should be excluded from these terms since they opposed the Founding.

1770s with its first-of-its-kind articulation of a comprehensive, rational approach to criminal justice. His ideas were particularly well known among the Founders.[11] Indeed, both Thomas Jefferson and John Adams were so taken by *On Crimes and Punishments* that they each copied passages longhand into their own commonplace books or diaries.[12]

Because of his significant influence on the Founders, legal observers have begun to recognize Beccaria's work as it concerns certain areas of American criminal law, such as the criminal pardon,[13] the importance of proportionality in sentencing,[14] and the death penalty.[15] Still, relatively little has been written about Beccaria's important thinking on the individual right to bear arms. Given the impact of his work on that topic during the Founding era, this is an oversight. And given the Supreme Court's pronounced interest in Founding-era thinking in Second Amendment cases, this oversight is grave.

II. BECCARIA'S IDEAS WERE KNOWN, DISCUSSED, AND TAKEN SERIOUSLY BY THE FOUNDERS

Beccaria's work was widely read in America during the Founding period.[16] As James Madison said, Beccaria hit "the zenith of his fame as a philosophical legislator" when the American Founders were contemplating revolution and the new government.[17] Not only were many ordinary American colonists familiar with Beccaria's writing in the 1760s, 70s, and 80s,[18] but the Founders, as members of the educated class, were especially knowledgeable about his work.[19] The first four American presidents all knew

11. *See* John D. Bessler, *The Italian Enlightenment and the American Revolution: Cesare Beccaria's Forgotten Influence on American Law*, 37 HAMLINE J. PUB. L. & POL'Y. 1, 33 (2016) (explaining Beccaria's influence on George Washington, John Adams, and Thomas Jefferson among others) [hereinafter Bessler, *Italian Enlightenment*].

12. *See* John F. Tobin, *The Boston Massacre Trials*, 85 N.Y. ST. B.A. J. 11, 12 (2013).

13. Paul S. Gillies, *The Pardon*, 45 VT. B.J. 12, 12 (2019).

14. Bessler, *Italian Enlightenment*, *supra* note 11, at 18.

15. *Id.*

16. David B. Kopel & Clayton E. Cramer, *Credentials Are No Substitute for Accuracy: Nathan Kozuskanich, Stephen Halbrook, and the Role of the Historian*, 19 WIDENER L.J. 343, 366 (2010).

17. Bessler, *Italian Enlightenment*, *supra* note 11, at 31 (citation omitted).

18. Alan Gura, *Briefing the Second Amendment Before the Supreme Court*, 47 DUQ. L. REV. 225, 276 (2009).

19. Bessler, *Italian Enlightenment*, *supra* note 11, at 33.

of and engaged with his ideas,[20] with John Adams using a quote from *On Crimes and Punishments* in his closing argument at the Boston Massacre trials[21] and Thomas Jefferson recording no fewer than twenty-six of the book's passages for his own reference.[22] Outside the presidential circle, Benjamin Franklin, Charles Lee, Pennsylvania publisher William Bradford, Benjamin Rush, John Hancock, and Josiah Quincy, Jr. among others, also reported being influenced by Beccaria's treatise.[23]

It would have been unlikely for an educated late eighteenth-century man with an interest in law and political philosophy to have been unaware of Beccaria, so firm was his foothold in the world of Enlightenment scholarship.[24] Across the ocean in Europe, William Blackstone was instantly captivated by Beccaria's treatise.[25] Blackstone cited Beccaria more than any other source in his 1769 volume of *Commentaries on the Laws of England*,[26] thereby introducing Beccaria's writing to a wide, new Anglo-American audience.[27] Through Blackstone, Beccaria's work spread rapidly. Jeremy Bentham was similarly taken by Beccaria,[28] and perhaps his greatest champion was Voltaire, to whom "no single Enlightenment figure" was more inspiring.[29] Voltaire even wrote a commentary on *On Crimes and Punishments* featured in foreign-language editions of the treatise.[30] In short,

20. *Id.*

21. Tobin, *supra* note 12, at 12.

22. Bessler, *Italian Enlightenment*, *supra* note 11, at 149.

23. *See id.* at 24; Jordan M. Steiker, *The American Death Penalty: Constitutional Regulations as the Distinctive Feature of American Exceptionalism*, 67 U. MIAMI L. REV. 329, 331 (2013) ("Many of our founders—including James Madison, Thomas Jefferson, Benjamin Franklin, and Benjamin Rush—were familiar with Cesare Beccaria's path-breaking critique of the death penalty and accordingly advocated restriction or abolition of capital punishment.").

24. Bessler, *Italian Enlightenment*, *supra* note 11, at 126 (stating that Beccaria's work "influenced the founding generation long before the 1790s").

25. Bernard E. Harcourt, *Beccaria's "On Crimes and Punishments": A Mirror on the History of the Foundations of Modern Criminal Law*, CHICAGO UNBOUND 4 (2013), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1633&context=law_and_economics.

26. *Id.* at 4–5.

27. *See* State v. Wheeler, 175 P.3d 438, 443 (Or. 2007) (discussing Beccaria's influence on Blackstone in regard to criminal punishment).

28. Harcourt, *supra* note 25, at 4–5; Robert J. McWhirter, *Baby, Don't Be Cruel: What's So "Cruel & Unusual" About the Eighth Amendment? Part 2*, 46 ARIZ. ATT'Y 38, 50 n.4 (Jan. 2010).

29. Joshua E. Kastenberg, *An Enlightened Addition to the Original Meaning: Voltaire and the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment*, 5 TEMP. POL. & CIV. RTS. L. REV. 49, 55 (1995).

30. *See* Harcourt, *supra* note 25, at 4.

Beccaria was a key part, if not the centerpiece, of the conversation on law and criminology in Enlightenment circles, including American revolutionary circles, when the United States was founded.

Beccaria's ideas had a direct impact on the revolution and early American law. As mentioned, Thomas Jefferson especially appreciated Beccaria's work, to the point that some have argued Beccaria's work was the "true origin[]" of some of the ideals Jefferson enshrined in the Declaration of Independence.[31] Beccaria envisioned laws that would produce "the greatest happiness distributed among the greatest number," which is echoed later in the Declaration's celebrated commitment to "the pursuit of happiness."[32] Likewise, John Dickinson, a Founding Father sometimes called the "Penman of the American Revolution,"[33] encouraged support for American independence by arguing in Beccarian terms against British law's perpetuation of inequality.[34] At the most fundamental level, Beccaria provided the Founders with a framework for understanding the purpose of law and government that also revealed England's shortcomings in the pre-Revolutionary era.[35]

Perhaps unsurprisingly, post-Revolutionary War Americans turned to Beccaria's ideas once they had the chance to write their own laws.[36] Records show that Thomas Jefferson and James Madison drafted and advocated for a Virginia state bill on criminal sentencing proportionality that referenced *On Crimes and Punishments* multiple times.[37] In Pennsylvania, state legislators quoted Beccaria and Voltaire in a sweeping piece of criminal legislation.[38] In Vermont, Senator Nathaniel Chipman wrote in his own legal treatise that "the world is more indebted to the Marquis Beccaria, for his little treatise on

31. Patrick J. Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457, 474–75 (2011) (internal quotation marks omitted) (quoting GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 154–55 (1978)).

32. *Id.* at 475.

33. Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 PENN ST. L. REV. 415, 417 (2003).

34. *Id.* at 443–45.

35. *See* Bessler, *Italian Enlightenment*, *supra* note 11, at 162.

36. *Id.*

37. *Id.* at 148.

38. *See* Kastenberg, *supra* note 29, at 64.

Crimes and Punishments, than to all other writers on the subject."[39] Across the young country, state legislatures trying to build new criminal legal systems drew on Beccaria and his ideas to show them the way forward.[40]

It is difficult to understand the Framers' mindset on criminal law while drafting our founding documents unless one appreciates what they learned from Beccaria. Beccaria's ideas were being discussed and debated when the Continental Congress met; James Madison included *On Crimes and Punishments* in a list of recommended reading for the Congress's members.[41] Later, the *Pennsylvania Gazette*, one of Philadelphia's most-read newspapers, published long excerpts of the treatise in the 1780s that many delegates to the Constitutional Convention would have read.[42] One study found that approximately one out of every thirty citations to major Enlightenment thinkers during the 1780s, when the Constitution was drafted, was to Beccaria.[43] Therefore, it is little wonder that Madison is considered to have been "a student of Beccaria" when he drafted the Bill of Rights[44] and that, more generally, the Framers are considered to have been "profoundly influenced" by Beccaria's work while crafting the Constitution.[45] At every step during the Founding period, Beccaria's treatise appeared, offering guiding principles and substantive ideas that would become codified into American law.

III. COURTS AND LEGAL OBSERVERS ARE STARTING TO APPRECIATE BECCARIA'S INFLUENCE—BUT QUITE SELECTIVELY

In recognition of Beccaria's Founding-era prevalence, the legal establishment has begun to credit Beccaria for his role in the development of American law. Four opinions in Supreme Court cases in the latter half of the

39. Gillies, *supra* note 13, at 12 (quoting NATHANIEL CHIPMAN, PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS (1833)).

40. *See generally* Bessler, *Italian Enlightenment*, *supra* note 11.

41. Carmona v. Ward, 576 F.2d 405, 427 (2d Cir. 1978).

42. *See* Bessler, *Italian Enlightenment*, *supra* note 11, at 41.

43. *See* Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIST. REV. 161, 163 n.7 (2004).

44. *Carmona*, 576 F.2d at 427.

45. Anthony J. Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57, 77 (1995).

twentieth century cite Beccaria directly.[46] These opinions note Beccaria's historical relevance to criminal law, for example, how his "attitude toward infamy was a part of the background of the Fifth Amendment,"[47] and adopt broad Beccarian principles, such as his view that "the punishment should fit the crime."[48] In this way, Beccaria's general philosophy has enjoyed some modern recognition.

But that recognition remains selective. The legal community, led by public interest lawyers, have magnified certain strands of Beccaria's work while neglecting other aspects entirely. Consider, for example, capital punishment. Academics, including Professor John Bessler, have done yeoman's work in recent years, highlighting Beccaria's contributions to Founding-era thinking on abolishing the death penalty.[49] In Bessler's view, Beccaria was a "pioneering advocate of the death penalty's abolition"[50] whose ideas "materially shaped American thought on capital punishment, torture and cruelty."[51]

Bessler contends that a line can be drawn from *On Crimes and Punishments*—in which Beccaria called the death penalty an "example of cruelty" too extreme for state usage[52]—to the debate among the Founders that led to the adoption of the Eighth Amendment's prohibition against "cruel and unusual punishments."[53] Since Beccaria's work affected the adoption of this provision, argues Bessler, the Eighth Amendment must be interpreted in the context of Beccaria's work.[54] In this way, Bessler has breathed new life into

46. *See* Bessler, *Italian Enlightenment*, *supra* note 11, at 18; *see* Payne v. Tennessee, 501 U.S. 808, 820 (1991); Solem v. Helm, 463 U.S. 277, 312 n.5 (1983) (Burger, C.J., dissenting); Furman v. Georgia, 408 U.S. 238, 343 n.85 (1972) (Marshall, J., concurring); Ullmann v. United States, 350 U.S. 422, 450–52 (1956) (Douglas, J., dissenting).

47. *Ullmann*, 350 U.S. at 452 (Douglas, J., dissenting).

48. *Payne*, 501 U.S. at 820.

49. *See generally* John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989 (2019) [hereinafter Bessler, *A Century*]; John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J. L. & SOC. POL'Y 195 (2009) [hereinafter Bessler, *Revisiting*].

50. Bessler, *A Century*, *supra* note 49, at 1069.

51. Bessler, *Italian Enlightenment*, *supra* note 11, at 1.

52. *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 55 (Aaron Thomas, ed., Aaron Thomas & Jeremy Parzen, trans., 2008) (1764).

53. *See generally* Bessler, *Revisiting*, *supra* note 49.

54. *Id.*

the modern death penalty abolitionist movement by lending it originalist support in the form of *On Crimes and Punishments*.[55] Professor Erin Braatz's genealogy of the Eighth Amendment's prohibition on "cruel and unusual punishments" also begins with a reference to Beccaria.[56] In an article linking the Amendment to late eighteenth-century penal reform, Braatz observes that Beccaria's scholarship was a "ubiquitous presence in the libraries and writings of the Founders."[57] Braatz notes that Beccaria served as a lodestar for late eighteenth-century penal reforms because he "was one of a handful of Enlightenment thinkers that everyone, loyalist and patriots, could agree on."[58] Likewise, Professor Alice Ristroph identifies Beccaria as one of the first thinkers to emphasize that punishment must be proportional to the severity of the crime.[59] That principle has since emerged as a cornerstone argument for the anti-death penalty movement.[60]

This growing body of scholarship has resonated in the American judicial system as courts are increasingly channeling Beccaria's anti-death penalty views.[61] In Massachusetts, the Supreme Judicial Court determined that the state constitution prohibited the mandatory death penalty in rape cases as cruel and unusual punishment after citing Beccaria's proclamation that "[l]ife is 'the greatest of all goods.'"[62] Connecticut's Supreme Court went a step

55. *Id.*

56. Erin E. Braatz, *The Eighth Amendment's Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. CRIM. L. & CRIMINOLOGY 405, 406 n.1 (2016).

57. *Id.* at 430.

58. *Id.*

59. Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 272 (2005). The "eye for an eye" principle was contained in the Code of Hammurabi, and in two of the earliest books of the Old Testament. *See generally* W.W. DAVIES, CODES OF HAMMUABI AND MOSES WITH COPIOUS COMMENTS INDEX, AND BIBLICAL REFERENCES (1905). It was considered a limitation on punishment. *See generally* Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L. J. 1059 (1992). So, the concept of proportionality between the crime and the punishment traces back much earlier than Beccaria's work during the Italian Enlightenment. However, during Beccaria's lifetime, criminal punishments were getting out of hand; for example, in England, many small crimes were punishable by severe penalties such as death, transportation overseas, and imprisonment for long periods on derelict hulks. *See generally* FRANK MCLYNN, CRIME AND PUNISHMENT IN EIGHTEENTH CENTURY ENGLAND (1989).

60. *See* Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (holding that it is unconstitutional under the Eighth Amendment to impose the death penalty for the crime of raping a child, when the victim does not die and death was not intended).

61. *Id.*

62. Comm. v. O'Neal, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, J., concurring) (quoting BECCARIA, *supra* note 52, at 45).

further after striking down the death penalty as entirely unconstitutional under the state constitution's due process provisions. In its written opinion, the court cited with favor the publication of Beccaria's treatise in the *New Haven Gazette* in the 1780s and its resultant impact on Connecticut's constitutional architects.[63] Maryland's highest court has similarly cited Beccaria's anti-death penalty views.[64] Across the country, courts are responding to the academic assertion that Beccaria's anti-death penalty views shaped American law and accordingly are making Beccaria's vision a reality. It is no wonder, then, that when the U.S. Supreme Court handed down *Furman v. Georgia* in 1972, which significantly circumscribed the application of the death penalty in federal criminal cases, Bessler declared the case "[t]he final vindication by the Supreme Court of [Beccaria's] view of the social inutility of this punishment."[65] The movement to limit or abolish the death penalty in the courts has thus relied heavily on Beccaria and his pervasive influence on the Founders.

Recent recognition of Beccaria's influence is also evident in other areas of the law. Courts have assigned weight to Beccaria's ideas concerning the development of the Fifth Amendment;[66] the drafting of various state constitutions;[67] the role of proportionality in criminal sentencing;[68] the number of witnesses required for credible testimony;[69] the deterrence value of criminalization;[70] and a host of other issues. But these important examples do not just represent a Beccarian revival. They also inadvertently highlight academia's and the courts' glaring omission of Beccaria's views on the right to bear arms under the Second Amendment and various state bills of rights.[71]

63. *See* State v. Santiago, 122 A.3d 1, 38 (Conn. 2015).
64. *See, e.g.*, Miles v. State, 80 A.3d 242, 247–248 (Md. 2013).
65. Bessler, *Revisiting*, *supra* note 49, at 240.
66. *See, e.g.*, Ullmann v. United States, 350 U.S. 422, 452 (1956).
67. *See, e.g.*, Daye v. State, 769 A.2d 630, 637 (Vt. 2000).
68. *See, e.g.*, State v. Wheeler, 175 P.3d 438, 443 (Or. 2007).
69. *See, e.g.*, *Ex parte* Deidesheimer, 14 Nev. 311, 320 (1879).
70. *See, e.g.*, Comm. v. Martin, 313 A.2d 264, 270 (Pa. 1973).
71. *See, e.g.*, JOHN BESSLER, THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION 390–93 (2014). John Bessler's book documenting Beccaria's influence on American law is a minor exception that proves the rule. In an otherwise-comprehensive study of Beccaria's ideas, Bessler dedicates a scant two pages to acknowledging Beccaria's unstinting support for the right to bear arms, though he does cite Stephen Halbrook's important and highly influential research and scholarship on the Second Amendment. *Id.* (citing STEPHEN HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (2013)).

IV. COURTS AND LEGAL OBSERVERS SHOULD RECOGNIZE BECCARIA'S INFLUENCE ON THE SECOND AMENDMENT'S RIGHT TO KEEP AND BEAR ARMS

The renaissance of Beccarian thinking should not, and cannot, omit Beccaria's steadfast support for the right of ordinary citizens to possess and carry firearms and other arms. In the last decade or so, the Supreme Court has continued to emphasize the importance of the historical context of the Second Amendment.[72] Thus, it is more imperative than ever that constitutional interpretation should acknowledge the full breadth of Beccaria's work because Beccaria advanced a fundamental thesis about the right to bear arms that shaped the views of the Founders who wrote and ratified the Second Amendment.[73]

Professor Bessler, after studying Beccaria's treatise, distilled Beccaria's philosophy into "[a] few plain axioms easy of apprehension."[74] First, Beccaria saw "[t]hat the prevention of crimes is the sole end of government."[75] Second, "every punishment, which is not absolutely necessary for that purpose, is a cruel and tyrannical act."[76] Third, "every penalty should be apportioned to the offence."[77] The overarching theoretical basis for these "axioms" was Beccaria's conceptualization of the law as a societal compact, which effectuates happiness for the greatest number of people by stemming the tides of violence, disorder, and anarchy.[78] A law's legitimacy was tied to this goal.[79] These principles led Beccaria to oppose what we would today call "overcriminalization," and they specifically led him to reject many firearm

72. *See, e.g.*, Caetano v. Mass., 136 S. Ct. 1027 (2016); *see also* Rogers v. Grewal, 140 S. Ct. 1865, 1866, 1871 (2020) (Thomas, J., dissenting from the denial of cert.) (explaining the scope of the Second Amendment is based on "the original meaning of the Second Amendment's text as well as the historical understanding of the right," and "it is th[e] founding era understanding that is most pertinent"); Duncan v. Becerra, 970 F.3d 1133, 1151 (9th Cir. 2020) (determining whether there is "persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment") (quoting Jackson v. City & Cty. of S.F., 746 F.3d 953, 961 (9th Cir. 2014)), *pet. for reh. en banc filed* Aug. 28, 2020.

73. Cornell, *supra* note 43, at 162.

74. Bessler, *Italian Enlightenment*, *supra* note 11, at 125–26 n.295 and preceding text.

75. *Id.*

76. *Id.*

77. *Id.*

78. Bessler, *A Century*, *supra* note 49.

79. *Id.*

regulations as useless and therefore illegitimate—based on his conclusion, still widely persuasive today, that "when [guns] are outlawed, only outlaws will have [guns]."[80] More generally, Beccaria opposed needless criminalization, as with *malum prohibitum* crimes, and disliked disproportionate punishments that do not meaningfully advance the causes of order and stability.[81]

Indeed, Beccaria found arms prohibitions to be not just useless—in that they criminalize the perfectly orderly act of carrying a gun for self-protection—but actively harmful.[82] In Beccarian thinking, gun control laws foment lawlessness and endanger the societal compact. They also threaten personal liberty and individual rights.[83]

As he put the point in "False Ideas of Utility," a chapter in *On Crimes and Punishments*:

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary [laws], which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty—so dear to men, so dear to the enlightened legislator—and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man.[84]

Beccaria's articulation of the right to bear arms was widely influential

80. Cornell, *supra* note 43, at 162.

81. Bessler, *Italian Enlightenment*, *supra* note 11, at 125–26 n.295 and preceding text.

82. CEASARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 87–88 (Henry Paolucci, tr., Bobbs-Merrill, 1963) (1764).

83. *Id.*

84. *Id.*

across the Western world in the late eighteenth century, finding its way to the attention of nearly all our Founding Fathers.[85] Indeed, Thomas Jefferson took the time to transcribe the above quotation *in full*, in the original Italian, into his commonplace book.[86] Nor did he stop there; Jefferson later recommended *On Crimes and Punishments* as "essential to an understanding of the organization of society into a civil government" for containing ideas like this one.[87] Because of passages like the one above, the Founders were "familiar with the nanny-state 'safety' logic of today's gun prohibitionists, criticized in . . . Marquis Beccaria's landmark 1764 treatise."[88] In Beccaria, the country's Founders read and discussed a direct rebuttal to the arguments that gun control advocates now propound—and then they wrote the Second Amendment's right to keep and bear arms.

Today, the American judiciary is slowly beginning to recognize the substantial influence of Beccaria's views on the individual right to own and use firearms. In *State v. Hirsch*, the Oregon Supreme Court examined whether felons had a right to possess firearms (holding that they did not).[89] The Court determined that historical accounts of Beccaria's fierce opposition to gun control illuminated the original meaning of the right to bear arms, under the Second Amendment and Oregon's Bill of Rights, and the typical citizen's right to self-protection.[90] The opinion observed that "Beccaria was fiercely opposed to the notion of disarming the general populace" out of a concern that "when guns are outlawed, only outlaws will have guns."[91] As Beccaria's philosophy had greatly influenced the Founding Fathers, the court saw his writings as helping "provide[] us with a clearer picture of the scope of the framers' view of the notion of a 'virtuous citizen.'"[92] In this way, the Oregon Supreme Court anticipated *Heller's* instruction that courts must examine

85. *See* Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 90 (1992).

86. *See* Cody A. Long, *The Supreme Court of Wisconsin Declares Concealed Weapon Statute May Not Be Constitutionally Applied When Carrying A Concealed Weapon Is the Only Means of Exercising the Right to Bear Arms*, 35 RUTGERS L.J. 1531, 1534 (2004).

87. Kastenberg, *supra* note 29, at 67.

88. Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127, 1163 (2009).

89. 114 P.3d 1104, 1106 (Or. 2005).

90. *Id.* at 1132.

91. *Id.*

92. *Id.*

Founding-era evidence when discerning the Second Amendment's contours.[93] Any such inquiry must recognize Beccaria as a central piece of the puzzle.

Similarly, in *Gowder v. City of Chicago*, a U.S. District Court found as a matter of first impression that an ordinance prohibiting nonviolent misdemeanants from exercising their Second Amendment rights is unconstitutional.[94] The court noted that important Founders such as Thomas Jefferson had been convinced by Beccaria that gun regulations which "disarm only those who are neither inclined nor determined to commit crimes" invariably "make things worse for the assaulted and better for the assailants."[95]

Beccaria's philosophy can also be found in a recent spirited dissent by then-Judge, now Supreme Court Justice, Amy Coney Barrett.[96] In *Kanter v. Barr*, Judge Barrett surveyed historical evidence strongly suggesting that firearm regulations were only permissible at the Founding to the extent they were aimed at individuals who "threatened violence and the risk of public injury."[97] Judge Barrett does not cite Beccaria, but her conclusion dovetails with Beccarian logic.[98] She concluded that firearm regulations can only be permissible if they snuff out impending threats to public safety,[99] and anything that goes further risks punishing the innocent and exacerbating crime.[100]

Judge Barrett's dissent was followed by an equally-fervent dissent a year later by Third Circuit Judge Stephanos Bibas, who argued that while violent felons may be disarmed, legislatures must not have "unreviewable power to manipulate the Second Amendment by choosing a label,"[101] as they do not have "unfettered power over a fundamental right."[102] Today, there is often "little rhyme or reason in which crimes are labeled felonies," and thus the right to bear arms must not be prohibited to persons with such labels who are not

93. *See* District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008).

94. 923 F. Supp. 2d 1110, 1117 (N.D. Ill. 2012).

95. *Id.* at 1118 n.3 (citing THOMAS JEFFERSON, LEGAL COMMONPLACE BOOK which "quot[es] 18th century criminologist Cesare Beccaria").

96. *See* Kanter v. Barr, 919 F.3d 437, 451–69 (7th Cir. 2019) (Barrett, J., dissenting).

97. *Id.* at 456.

98. *Id.* at 457.

99. *Id.* at 456.

100. *Id.* at 461.

101. *Folajtar v. AG of the United States*, No. 19-1687, 2020 WL 6879007, at *12 (3d Cir. 2020) (Bibas, J., dissenting).

102. *Id*. at *19.

dangerous.[103] Judge Bibas thus blended two primary elements of Beccarian thought, namely the rejection of overcriminalization of conduct and its application to the fundamental human right to bear arms.

V. BECCARIA'S PHILOSOPHY AS APPLIED TO MODERN AMERICA

Unfortunately, the number of courts recognizing Beccaria's influence on Second Amendment jurisprudence remain limited. While Beccaria's other ideas on crime and punishment have enjoyed a widespread resurgence in the legal academy and the courts, his thoughts on gun control have, for the most part, been left on the sidelines, in the same manner that certain liberal jurists and scholars selectively choose to recognize and defend only those parts of the Bill of Rights that they support.[104] Only a handful of scholars have referenced Beccaria's thinking on gun control.[105] Perhaps the deepest irony of this disparity in attention to the different strands in Beccaria's thinking is that even as judges and scholars have employed Beccaria's insights into punishment and proportionality to argue for reduced levels of imprisonment for most *other* crimes, many states and cities continue to impose draconian penalties for victimless, paperwork violations of voluminous and Byzantine gun-control laws—the very result Beccaria criticized as counterproductive

103. *Id*. at *20.

104. *See* Friedman v. City of Highland Park, 577 U.S.1039, 1043 (2015) (Thomas J., dissenting). ("The Court's refusal to review a decision [upholding a so-called assault-rifle ban] that flouts two of our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions. *E.g.*, Maryland v. Kulbicki, [577 U.S. 1, 1 (2015)] (per curiam) (summarily reversing because the court below applied *Strickland v. Washington*, 466 U. S. 668 (1984), 'in name only'); Grady v. North Carolina, 575 U. S. 306, [310] (2015) (per curiam) (summarily reversing a judgment inconsistent with this Court's recent Fourth Amendment precedents); Martinez v. Illinois, 572 U. S. 833, 843 (2014) (per curiam) (summarily reversing judgment that rested on an 'understandable' double jeopardy holding that nonetheless 'r[an] directly counter to our precedents') (citations omitted). There is no basis for a different result when our Second Amendment precedents are at stake. I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right.").

105. *See e.g.*, Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1215 (1996) (noting Beccaria's influence on Thomas Jefferson regarding the dangers of firearms regulation); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms*", 49 LAW AND CONTEMP. PROBS 151, 153 (1986); Kopel & Cramer, *supra* note 16, at 366; Renée Lettow Lerner, *The Second Amendment and the Spirit of the People*, 43 HARV. J.L. & PUB. POL'Y 319, 322 (2020) (quoting Beccaria as observing that a "ban on carrying arms 'would put an end to personal liberty'").

and dangerous to the innocent.[106]

One recent example of Beccaria's logic being turned upside down is how government officials across the nation have responded to the acts of violence that broke out after George Floyd's death in May 2020.[107] Many prosecutors and city officials turned a blind eye as rioters terrorized the streets.[108] City officials across America abandoned their obligation to maintain civil order—their most essential role under the "social contract."[109] Police departments have reduced their response rates to certain types of crimes or even announced in advance that entire provisions of the criminal code will not be enforced.[110] Many states, including California, New Jersey, New York, Ohio, and Texas, all took the extraordinary and unprecedented step of releasing thousands of inmates onto the streets in response to COVID-19.[111] This was in addition to the release of thousands of criminals in states such as New York, which have

106. *See* Halbrook, *supra* note 105, at 153 (discussing gun laws and disproportionate punishments for various laws at the founding).

107. *See* Paresh Dave, *What Changes are Governments Making in response to George Floyd Protests?*, REUTERS (June 12, 2020), https://www.msn.com/en-us/news/us/factbox-what-changes-are-governments-making-in-response-to-george-floyd-protests/ar-BB15poBM (surveying responses from government officials in Minneapolis, Los Angeles, Buffalo, Boston, Camden, and other major U.S. cities).

108. *See, e.g.*, Frances Mulraney, *Portland Police Stand Down While Alt-Right Groups and Anti-Police Protesters Brawl with Weapons as Cops "Did Not Have the Manpower to Deal with Large Crowds Willingly Engaging in Violence,"* DAILY MAIL, (Aug. 22, 2020), https://www.dailymail.co.uk/news/article-8655043/Portland-protests-turns-violent-hundreds-alt-right-anti-police-groups-clash.html.

109. *See* Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 OHIO ST. J. CRIM. L. 449, 455 (2008). During the late nineteenth and early twentieth centuries, as professional police forces became more commonplace, Americans transferred some of our monopoly on domestic violence to the government. *See* Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017), https://time.com/4779112/police-history-origins/. But there was a *quid pro quo*. *See* Ferzan, *supra* at 471. Americans surrendered some of their rights to engage in defensive violence in exchange for an agreement with the government (*i.e.*, the police) to show up and protect its citizens when called upon. *Id.* This constituted a form of social contract. *Id.* at 455. Today, this long-standing social contract is arguably being abrogated by state and local governments in many parts of the country. *See* Waxman, *supra*.

110. *See, e.g.*, Alexander Mallin & Luke Barr, *Police Implement Sweeping Policy Changes to Prepare for Coronavirus Spread*, ABC NEWS (Mar. 18, 2020), https://abcnews.go.com/US/police-implement-sweeping-policy-prepare-coronavirus-spread/story?id=69672368.

111. *See, e.g.*, Lucas Manfredi, *Jails Release Thousands of Inmates to Curb Coronavirus Spread*, FOX BUSINESS (Mar. 22, 2020), https://www.foxbusiness.com/lifestyle/jails-release-inmates-coronavirus; Tracey Tully, *1,000 Inmates Will Be Released From N.J. Jails to Curb Coronavirus Risk*, N.Y. TIMES (Mar. 23, 2020), https://www.nytimes.com/2020/03/23/nyregion/coronavirus-nj-inmates-release.html.

substantially reduced or eliminated cash bail requirements.[112] These measures all occurred against a backdrop of rioting, looting, burning, and wanton destruction that engulfed major urban areas.[113]

But this culture of liberality was not extended to attorneys Mark and Patricia McCloskey, a St. Louis couple who became the subject of a media-driven firestorm of scorn and scrutiny.[114] In June 2020, the McCloskeys stood outside their home with firearms for the purpose of deterring protestors whom the couple feared would cause them physical harm.[115] Despite not firing a shot, the McCloskeys have been charged with the felony of "unlawful use of a weapon" and may face time in prison.[116] Meanwhile, some of the alleged rioters and looters in Missouri during that same summer who were initially arrested under suspicion of committing violent crimes, were released pending further investigation.[117]

The McCloskeys' treatment flies in the face of Beccaria's exhortation that every punishment which is not absolutely essential for preventing crimes "is a cruel and tyrannical act."[118] After all, the McCloskeys intended to deter

112. Tina Moore, *Bail Reform a "Significant Reason" for Crime Spike, NYPD Says*, N.Y. POST (March 5, 2020), https://nypost.com/2020/03/05/bail-reform-a-significant-reason-for-crime-spike-nypd-says/.

113. Marlo Safi, *Here's a List of Cities Hit by Riots in the Last Three Months*, DAILY CALLER (Aug. 25, 2020), https://dailycaller.com/2020/08/25/list-of-cities-riots-three-months-george-floyd-death-looting-fires-police-seattle-portland-dc-atlanta/.

114. Jim Salter, *Mark and Patricia McCloskey, the St. Louis Couple Who Waved Guns at Protesters, Indicted on Weapons, Tampering Charges*, USA TODAY (Oct. 6, 2020), https://www.usatoday.com/story/news/nation/2020/10/06/st-louis-couple-indicted-mark-patricia-mccloskey-gun-tampering/5904095002/.

115. N'dea Yancy-Bragg, *Prosecutor Launches Investigation after White Couple Seen Pointing Guns at St. Louis Protestors*, USA TODAY (June 30, 2020), https://www.usatoday.com/story/news/nation/2020/06/30/mccloskeys-investigated-over-pointing-guns-st-louis-protest/3284186001/.

116. *See* Salter, *supra* note 114.

117. *See* Robert Patrick, *Those Arrested Over Two Nights of Protests and Unrest in St. Louis Released From Jail, Police Say*, ST. LOUIS DISPATCH (June 4, 2020), https://www.stltoday.com/news/local/crime-and-courts/those-arrested-over-two-nights-of-protests-and-unrest-in-st-louis-released-from-jail/article_6c06a78f-b9f3-59f2-842f-0d6c466e84e5.html; Christine Byers, *Looters, rioters not being prosecuted by circuit attorney, says attorney general; Kim Gardner responds*, WFAA (June 3, 2020), https://www.wfaa.com/article/news/local/st-louis-riots-missouri-attorney-general-says-circuit-attorney-not-prosecuting-criminals/63-3cf5934f-623d-4f71-ac9f-05c2c2882b78; Christine Byers, *7 People charged in connection with riots, St. Louis Circuit Attorney Kim Gardner says*, KSDK (June 6, 2020), https://www.ksdk.com/article/news/crime/st-louis-riot-arrests-latest-gardner-suspects-charged/63-76bf21c3-bb27-4ad8-871f-94e0bc2edf1a.

118. Bessler, *Italian Enlightenment*, *supra* 11, at 125.

crime and violence, and it is undeniable that they achieved this goal.[119] Neither their property nor any person was harmed when they stood armed outside their home in defiance of the potentially violent mob.[120] Beccaria thought that the type of laws that target peaceful citizens such as the McCloskeys only "make things worse for the assaulted and better for the assailants"[121] That is because, as the McCloskeys understood, "an unarmed man may be attacked with greater confidence than an armed man."[122]

As noted by Stephen Halbrook, the foremost scholar on the history of the Second Amendment, Beccaria thought "laws against carrying arms belong in the dark ages of penology, along with the rack and the screw, while personal liberty and an enlightened approach to crime and punishment necessitate recognition of the right to keep and carry arms."[123]

The McCloskeys' story has captured the public attention, but across this country, and under the radar, zealous prosecutors enforce laws that penalize law-abiding individuals for peaceably carrying firearms.[124] Beccaria would have condemned these laws at first glance. And he would have further decried the disproportionate punishment attached to this victimless (and often victim-*preventing*) conduct.

In numerous states, from deep blue Connecticut to reliably Republican Nebraska, law-abiding citizens risk prison time for the mere act of possessing a firearm without obtaining a permit (which often requires applicants to jump through one costly hoop after another).[125] In many cases, the permit process

119. *See* Yancy-Bragg, *supra* note 115.

120. *Id.*

121. BECCARIA, *supra* note 84, at 87–88.

122. *Id.*

123. STEPHEN HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 34 (2013).

124. *See Gun Laws by State: The Complete Guide*, GUNS TO CARRY, https://www.gunstocarry.com/gun-laws-state/ (last visited Nov. 11, 2020).

125. It is worth noting that Nebraska requires a permit to purchase a handgun but not any other type of firearm, while Connecticut requires a permit to purchase any firearm. *Compare* CONN. GEN. STAT. § 29-33 (2013), *with* NEB. REV. STAT. § 69-2403 (2020). *See also* Mark W. Smith, *Assault Weapon Bans: Unconstitutional Laws for Made-up Category of Firearms*, 43 HARV. J. L. & PUB. POL'Y 357, 360 (2020) (explaining that in the context of certain firearm bans, "[a]n individual caught possessing an AR-15 in [some] jurisdictions will become a felon and go to prison for a nonviolent, victimless, *malum prohibitum* crime . . . . Mere possession of an object that is commonplace and perfectly legal under federal law and in forty-four states will land you in prison, result in the loss of your rights including likely the right to vote, and probably cause you irreparable monetary and reputational damages, as well as your personal liberty. All of this despite the absence of even a single victim.").

is sufficiently arduous or expensive that few citizens can exercise their Second Amendment rights. In New York City, for instance, as Justice Samuel Alito pointed out in *New York State Rifle & Pistol Association v. City of New York*, residents must spend hundreds of dollars over a multi-month labyrinthine process for the chance of obtaining a firearm permit.[126] And even then, the license can be revoked at any point and must be renewed every three years.[127] With only a few exceptions, most New York City residents (or non-residents visiting the City) found in possession of a gun without a license can face felony convictions, hefty fines, and even imprisonment.[128] Other jurisdictions have similarly illogical or punitive schemes.[129]

These restrictive policies do not just target innocent Americans who want to protect themselves. They come at a time when the state is proving increasingly incapable of preserving order. Many of the staunchest advocates of gun control are also leading the campaign to defund or dismantle the police. Shannon Watts, the well-known gun control advocate and leader of the Bloomberg-funded Moms Demand Action for Gun Safety, flatly stated that "[p]olice violence is gun violence."[130] Beccaria would have recoiled at the notion of the state disarming its law-abiding citizens while simultaneously abandoning its principal responsibility of protecting them from unlawful activity.[131] Indeed, according to one scholar, Beccaria would have seen "disarming a potential victim of murder" as tantamount to state-enabled "capital punishment of the victim."[132] In this way, Beccaria's logic would suggest that unnecessary and counterproductive gun control constitutes "a form of cruel and unusual punishment far worse than that inflicted upon the offender."[133]

126. 140 S. Ct. 1525, 1529 (2020) (Alito, J., dissenting).

127. *Id.*

128. *Id.* at 1528.

129. *See Penalties for Violating State Law*, USLEGAL, https://firearms.uslegal.com/penalties-for-violating-state-law/ (last visited Nov. 4, 2020).

130. Emma Hinchliffe, *Moms Demand Action Founder Shannon Watts: "Police Violence is Gun Violence",* FORTUNE (July 12, 2020), https://fortune.com/2020/07/12/moms-demand-action-shannon-watts-guns-police-violence/; *see also* Amber Jamieson, *Bloomberg Funds Moms Demand Action Against Gun Violence. But Several Top Volunteers are Already Supporting Other Candidates*, BUZZFEED (Nov. 24, 2019), https://www.buzzfeednews.com/article/amberjamieson/bloomberg-gun-violence-moms-demand-action-volunteers.

131. *See* BECCARIA, *supra* note 84, at 87–88.

132. HALBROOK, *supra* note 123, at 34.

133. *Id.*

VI. CONCLUSION

Beccaria was a key Enlightenment figure. As Bessler shows, Beccaria's treatise shaped American views on everything from free speech to republicanism, life, liberty, and the pursuit of happiness, and the Founders' understanding of "cruel and unusual punishments."[134] But Beccaria also made a seminal impression on Founding-era debates about the right to keep and bear arms. Yet, even as jurists and scholars revisit many of his ideas in the modern era, his views on armed self-defense and the futility of gun control laws have received short shrift. This is despite their verifiable impact on our Founding Fathers, including Thomas Jefferson and James Madison, who played pivotal roles in the development of Founding-era political philosophy and the Bill of Rights. To correct this oversight, courts must consider Beccaria when interpreting the Second Amendment. There, they will discover strong additional evidence for an originalist interpretation of the Second Amendment that supports the right to bear arms based on personal liberty and utilitarian logic.

Moreover, to be consistent, legal academics and commentators ought to acknowledge that the same principles that substantiate their support for abolition of the death penalty or sentencing reform cannot be divorced from Beccaria's support for the right of the law-abiding to possess and carry firearms. Beccaria disdained prohibitions on that right, believing it an ineffective use of the law that gives criminals the upper hand against victims and fills prisons with those who should not be there.[135] These same principles undergirded Beccaria's anti-death penalty and anti-cruelty standards.[136] Just as the courts and the academy have begun to embrace Beccaria's influence on issues like capital punishment and criminal justice reform, so too must Beccaria's writings on the dangers of gun control be at the forefront of the ongoing conversation about the Second Amendment's fundamental, individual right to keep and bear arms.

The failure to grapple with Beccaria's thinking on the right to bear arms, and its implications for modern Second Amendment jurisprudence, must come to an end. Beginning with *Heller*, the Supreme Court has been clear that the scope of the right to keep and bear arms must be determined only after

134. *See generally* BESSLER, *supra* note 71.
135. *See generally* BECCARIA, *supra* note 84.
136. *Id.*

examining the Founding-era evidence regarding the Second Amendment.[137] As then-Judge Brett Kavanaugh explained while sitting on the D.C. Circuit, lower courts do not "need to squint to divine some hidden meaning from *Heller* about what tests to apply. *Heller* was up-front about the role of text, history, and tradition in Second Amendment analysis."[138] Any such inquiry is incomplete absent consideration of Beccaria's writing and profound impact on America's Founders.

A thorough examination of Beccaria's influence on gun control debates in America at the Founding would help us understand both the contours of the Second Amendment and its rationale. Courts should recognize that the Second Amendment arose, in part, from the viewpoint that self-defense is a natural right, made real by the average citizen's right to own a gun, and that the lawful possession of firearms has always been seen as a rational way to prevent and deter lawlessness while protecting innocent life and civilization itself.

137. *See, e.g.*, New York State Rifle & Pistol Assn., Inc. v. City of New York, 140 S. Ct. 1525, 1527 (2020) (Alito, J., dissenting); Caetano v. Massachusetts, 136 S. Ct. 1027 (2016) (per curium); McDonald v. Chicago, 561 U.S. 742, 767–68 (2010); District of Columbia v. Heller, 554 U.S. 570, 593 (2008).

138. Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1285 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).