

1956

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Recommended Citation

Hogan, John C., "Blackstone and Joseph Story--Their Influence on the Development of Criminal Law in America" (1956). *Minnesota Law Review*. 1634.

<https://scholarship.law.umn.edu/mlr/1634>

MINNESOTA LAW REVIEW

Volume 40

January, 1956

No. 2

BLACKSTONE AND JOSEPH STORY—THEIR INFLUENCE ON THE DEVELOPMENT OF CRIMINAL LAW IN AMERICA

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Legal historians for decades have commented upon Blackstone's influence on the general development of the law in America, but few have made systematic studies of his influence on specific fields such as criminal law.

Supreme Court Justice Joseph Story, for one, was greatly influenced by Blackstone's theories on criminal law. This influence can be demonstrated by a comparison of Blackstone's statements on public wrongs and Story's unsigned essay on criminal law in the first edition of the *Encyclopedia Americana*.¹ Story's essay is essentially a restatement and interpretation of Blackstone's discussion of the subject in the fourth volume of the *Commentaries*.² Story frequently paraphrases Blackstone, and even makes use of direct quotations from the *Commentaries*, sometimes without indicating by marks or citations that he is quoting.³ The two works are almost identical structurally except that Story adds some observations on American law in his essay. A detailed examination of the two may be worthwhile as an indication of Blackstone's influence generally on American criminal law.

THE GENERAL NATURE OF CRIMES AND PUNISHMENTS

Both works begin their discussion of the general nature of criminal law by distinguishing private wrongs from public wrongs.⁴ Private wrongs, says Story, affect the rights and property of particular individuals while public wrongs affect not only particular individuals, but the community at large by endangering the peace,

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1. 4 *Encyclopedia Americana* 34-40 (1830). Hereinafter cited "Encyclopedia."

2. 4 Blackstone, *Commentaries* 1-40. Hereinafter cited simply "Commentaries." All references are to pages of the original edition.

3. Compare the definition of "Accessory," 4 *Commentaries* 35, with 4 *Encyclopedia* 39; and the remarks concerning "ignorance or mistake," 4 *Commentaries* 27, with 4 *Encyclopedia* 38.

4. 4 *Commentaries* 1; 4 *Encyclopedia* 34.

the good order, and even the existence of society⁵ Blackstone observes that the nature of public wrongs in England is reflected by the name *pleas of the crown*, so titled "because the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights, belonging to that community, and is therefore in all cases the proper prosecutor for every public offense."⁶ Both men point out the fact that the distinction between the two classes is not simple because wrongs to individuals also affect the community in which they live and wrongs to society also affect the individuals of which it is composed.⁷

Both believe the right of the state to inflict punishment in cases involving public wrongs depends on higher law. Blackstone says that criminal law "should be founded upon principles that are permanent, uniform, and universal, and always conformable to the dictates of truth and justice though it sometimes (provided there be no transgression of these external boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern."⁸ Story distinguishes two classes of public offenses—those resting upon legislative enactments and those deemed from their very nature to be injuries to the public, independent of any such enactments.⁹ As examples of the latter he cites treason, murder, setting fire to a house in a large city, and riots. Because all of these are offenses that endanger the good order and safety of the state, it is proper that the state inflict punishment for them. But the offenses belonging to this class are not always capable of perfect enumeration, and whenever there is doubt about whether certain conduct is a public wrong within established principles of criminal law, the court should leave it to the legislature to declare it such.¹⁰

Both works deal next with the objectives of punishment. Blackstone sees a double objective—*first*, redress for the people injured and *second*, benefit to society, "by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish for the government and tranquillity of the whole."¹¹ Story refers only to the second of these objectives. He writes "The common law considers the great object of the

5. 4 Encyclopedia 35.

6. 4 Commentaries 2.

7. 4 Encyclopedia 35, 4 Commentaries 5.

8. 4 Commentaries 2-3.

9. 4 Encyclopedia 35.

10. *Ibid.*

11. 4 Commentaries 7

public punishment of crimes to be the prevention of offences, by deterring both the offender and others from a repetition of the same. Its object is not so much an atonement for, or expiation of, the offences, as a precaution against their recurrence."¹² And he adds that the reformation of the individual who commits the crime arises, not as the primary motive, but as an incident of this object. Story observes that since reformation of the criminal is not always probable, society must rely on capital punishment for security.

Capital punishment is a topic outside the scope of Justice Story's best known writings. He deals with it at length in a separate article entitled "Punishment of Death," which also appears in the fourth volume of the *Encyclopedia Americana*.¹³ In that article, Story notes that the right of capital punishment has been "doubted by some distinguished persons; and the doubt is often the accompaniment of a highly cultivated mind, inclined to the indulgence of a romantic sensibility, and believing in human perfectibility. The right of society to punish offences against its safety and good order will scarcely be doubted by any considerate person." He adds that "the Scriptures most clearly recognize and justify the infliction of capital punishment in certain cases."¹⁴ And in the article on criminal law Story declares that "the divine law has certainly sanctioned it."¹⁵

Blackstone quotes Sir Matthew Hale's statement¹⁶ that when offences grow enormous, frequent, and dangerous to a state or to civil societies, severe punishment and even death is a necessary addition to the laws;¹⁷ and Blackstone adds: "I would not be understood to *deny* the right of the legislature in any country to enforce its own laws by the death of the transgressor, though persons of some abilities have *doubted* it."¹⁸

Story thought capital punishment ought never be resorted to except in cases of "atrocious guilt" and where lesser punishments are "manifestly inadequate to produce security."¹⁹ The foundation for this idea can be found in the *Commentaries*. Blackstone says that "as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different

12. 4 *Encyclopedia* 35; cf. Vattel, *The Law of Nations* 138 (1829).

13. 4 *Encyclopedia* 140-145.

14. 4 *Encyclopedia* 140-141.

15. 4 *Encyclopedia* 35.

16. Hale, 1 *Pleas of the Crown* 13 (1st American ed. 1847).

17. 4 *Commentaries* 9.

18. 4 *Commentaries* 11.

19. 4 *Encyclopedia* 35; Kent argues that "it ought to be confined to the few cases of the most atrocious character, for it is only in such cases that public opinion will warrant the measure, or the peace and safety of society require it." Kent, 2 *Commentaries* 13 (1889).

natures those should be most severely punished, which are the most destructive of the public safety and happiness."²⁰ And he adds that "punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity"²¹

Blackstone refers to Beccaria's²² idea that crimes are more effectually prevented by the certainty, than by the severity, of punishment.²³ And he cites Montesquieu as authority for the proposition that excessive severity of laws hinders their execution.²⁴ In this connection, Story declares that "it is certain that the *frequency* of capital punishment has some tendency to abate its terrors, but it is by no means as certain that capital punishments have a tendency to prevent the occurrence of the crime, or to secure a conviction."²⁵ And he points out that there is a natural repugnance among judges and juries, as well as the public, to punish slight offences with such severity, and hence they lean against prosecutions and in favor of acquittals in such cases. Story declares that the probability of conviction is sometimes in proportion to the moderation of punishments.²⁶

At the time Blackstone wrote there were no less than one hundred and sixty offences which had been declared by act of parliament to be felonies for which the penalty was capital punishment. "So dreadful a list," Blackstone says, "instead of diminishing, increases the number of offenders,"²⁷ because the injured party, through compassion, sometimes forbears to prosecute, or juries for the same reason acquit the accused or mitigate the nature of the offence, or judges likewise recommend royal mercy. In this

20. 4 Commentaries 16.

21. 4 Commentaries 16-17

22. Marchese di Beccaria (1735-1794), an Italian economist and jurist, who anticipated in his lectures the economic theories of Adam Smith, and the theories of Malthus on population and subsistence, a member of the commission for reform of civil and criminal jurisprudence in Lombardy (1790). This work condemns capital punishment and torture, and advocates the prevention of crime by education. See, Voltaire, *An Essay on Crimes and Punishments*, by the Marquis Beccaria of Milan (1872)

23. 4 Commentaries 16-17

24. Cf. Montesquieu, *L'Esprit des Lois*, Bk. 6, Ch. 13 (1748)

25. 4 Encyclopedia 35, Vattel explains that "experience informs us, that the imagination becomes familiarized to objects that are frequently represented to it: if therefore, horrible punishments are multiplied, the people will become daily less affected by them, and at length contact an ungovernable cruelty these bloody spectacles then no longer produce the effect designed, for they cease to terrify the wicked." *The Law of Nations* 140 (1829).

26. 4 Encyclopedia 35.

27. 4 Commentaries 18-19.

connection, Blackstone deploras the abuses of the criminal law arising from the want of revision and amendment. These, he charges, "have arisen from too scrupulous an adherence to some rules of the ancient common law, when the reasons have ceased upon which those rules were founded; from not repealing such of the old penal laws as are either obsolete or absurd; and from too little care and attention in framing and passing new ones."²⁸ Blackstone says that if a committee were appointed even once every hundred years to revise criminal law, the law would be freed of many of its absurdities.²⁹

Dean Pound points out that well into the nineteenth century, felonies in England were punished with death, but he adds that "punishments extending to loss of some member of the body are to be found specified in Blackstone and in Coke's Third Institute from which knowledge of the subject was chiefly derived in the colonies."³⁰ Thus in colonial legislation a distinction was frequently made between offenses in the jurisdiction of magistrates from those in which the punishment extended to life, limb, or member and this same distinction was sometimes carried over into the earlier state statutes. In North Carolina for example it continued as late as the fourth decade of the nineteenth century.³¹

George B. Adams found that by 1824 indications were clear that the changes in the criminal law which had long been urged were about to take place.³² He points out that many slight offences such as forgery and petty larceny were punishable with death, but that in actual practice so severe penalties were not exacted. The needed reconstruction of the code took place between 1822 and 1830, and the death penalty was left on the statute books only for serious crimes. The procedure of criminal trials was at the same time simplified.³³ And in 1836 a change was made in criminal procedure whereby the accused was given the right of counsel and to a more complete knowledge of the evidence against him, and in 1837, a further advance was made in limiting the number of crimes for which the punishment was death.³⁴

According to Justice Story, the tendency of modern legislation was almost uniformly in favor of relaxing the severity of the penal code. He observed that "in the United States, there has been a

28. 4 Commentaries 4.

29. 4 Commentaries 4.

30. Pound, *Organization of Courts* 141 (1940).

31. Cf. N. C. Rev. Stat. ch. 42, § 6 (1837). Const. of Ga., Amendment of 1835, cited in Pound, *id.*, note 3.

32. Adams, *Constitutional History of England* 431 (1938).

33. *Ibid.*

34. *Id.* at 454.

constant effort to diminish the number of capital offences. Treason, murder, rape, arson or burning of a dwelling house are generally punishable with death, and sometimes robbery, burglary or breaking into a dwelling house in the night time with intent to steal. The code of the United States also includes piracy, the slave-trade, fraudulently casting away ships on the sea, robbery of the mail, burning public ships of war, and the rescue of convicts capitally convicted when the sentence is about to be executed."³⁵ But he adds that in the United States no capital punishments are inflicted unless by the injunctions of some positive statute. Story says, however, that certain offences such as murder, rape, robbery, burglary, and several other felonies are punished with death by the common law even in the absence of any statute to direct it.³⁶ The right of capital punishment in such cases, he says, is "founded either upon the notion of conformity to the divine law, or upon some positive law whose existence cannot now be traced."³⁷

THE PERSONS CAPABLE OF COMMITTING CRIMES

The second topic in Blackstone's outline of his book on "Public Wrongs" deals with the persons capable of committing crimes.³⁸ For purposes of his discussion, however, Blackstone approaches this topic from the point of view of the persons incapable of committing crimes, and who, therefore, are exempt from the censures of the criminal law. He divides these into seven classes: (1) infancy or nonage, (2) idiot or lunatic, (3) drunkenness or intoxication, (4) misfortune or chance, (5) ignorance or mistake, (6) compulsion or necessity, and (7) the royal prerogative. Justice Story, in the second part of his article on "Criminal Law," also announces that he will discuss those persons capable of committing crimes, but he too approaches the subject from the point of view of persons *incapable* of committing crimes.³⁹ Story's list is almost identical with Blackstone's, except that he has changed the order of their discussion in some instances, and for the royal prerogative, has substituted the right of self-preservation.

Blackstone finds the general rule is that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.⁴⁰ He then proceeds to discuss three general cases, or

35. 4 Encyclopedia 35-36.

36. 4 Encyclopedia 36.

37. *Ibid.*

38. 4 Commentaries 20.

39. 4 Encyclopedia 36.

40. 4 Commentaries 20.

classes of cases, "in which the will does not join with the act."⁴¹ These are: (1) where there is a defect of understanding; (2) where there is understanding and will, but these are not called forth and exerted at the time the act is committed; and (3) where the action is constrained by some outward force and violence.

Story finds the same general rule that all persons are punishable for disobedience to, and infractions of the law.⁴² The exceptions, he says, are few and clearly defined, and are "such as presuppose a defect of reason and understanding, or intention. A defect of understanding exists in the case of injuries committed by persons in a state of infancy, lunacy, idiocy, or intoxication. A defect of intention exists in the case of offences committed by chance, mistake and ignorance, wholly without or against the intention of the party. In respect to want of capacity, idiots, madmen, and other persons not at the time in possession of reason, such as somnambulists, are generally excused, whatever injuries they may commit."⁴³

Drunkenness or Intoxication

Blackstone defines drunkenness or intoxication as an artificial, voluntarily contracted madness which deprives men of their reason and puts them in a temporary frenzy.⁴⁴ And he says it is an aggravation of the offence, rather than an excuse for criminal misbehavior. He cites with approval Lord Coke's statement that a drunkard has no privilege thereby, "but what hurt or ill soever he doth, his drunkenness doth aggravate it."⁴⁵ Story follows Blackstone and declares that the common law considers voluntary intoxication as an aggravation of the offence, he adds that if the party at the time of the offence be drunk by the use of strong liquors, he is to be punished even though he may be thereby at the time reduced to a state of insanity.⁴⁶ Story points out that this policy applies to intoxication only when it is the direct cause of a crime, not when it is the remote cause. For example, if an insane man commits a crime while he is sober, the fact that his insanity was caused originally by drunkenness does not aggravate the offense. The strictness of the law regarding voluntary drunkenness stems from a policy of preventing the dangerous effects that may arise from indulgence in strong liquors.⁴⁷

41. 4 Commentaries 21.

42. 4 Encyclopedia 36.

43. *Ibid.*

44. 4 Commentaries 25.

45. 4 Commentaries 26.

46. 4 Encyclopedia 36.

47. *Ibid.*

Actually, the early common law seems to have made no concession whatever because of intoxication, and the suggestion of Coke and Blackstone that the fact of intoxication be considered as a circumstance of aggravation was not adopted.⁴⁸ In the earliest reported English case on this subject, *Reniger v. Fogossa*,⁴⁹ decided in 1551, the court approved of the imposition of the death penalty where a homicide had been committed by the prisoner while in extreme intoxication. Prior to the nineteenth century therefore, drunkenness in any extent was not allowed as a defense in a criminal case. Professor Perkins observes that since then there have been some modifications of this rule, and three are usually mentioned: (1) involuntary intoxication may be so extreme as to be exculpatory; (2) voluntary intoxication may entitle the defendant to an acquittal if the crime charged requires a specific intent and he was too drunk to have such intent; (3) delirium tremens is treated the same as other types of insanity although it results from overindulgence in liquor.⁵⁰

Blackstone observes that different drinking habits have been practiced in Greece, Rome, Norway, Italy and Spain and that the law has sometimes made great allowances for this vice⁵¹ but he adds that "the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another."⁵² Hall says that the argument that drunkenness can be readily feigned may be disposed of at once, and that no satisfactory reason has been advanced why the determination of this fact is any more difficult than those raised by insanity, mistake and legal provocation. He adds "indeed, the contrary seems more probable when it is considered that the history of the defendant and the events preceding his wrongful act are examined in greater detail in the drunkenness cases than is usual. Moreover the burden of proving intoxication was, and usually is, placed on the defendant."⁵³

48. Cf. Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1046 (1944).

49. *Reniger v. Fogossa*, 1 Pl. Com. 1, 75 Eng. Rep. 1 (K.B. 1551).

50. Perkins, *Cases and Materials on Criminal Law and Procedure* 434 (1952).

51. "It hath been observed, that the real use of strong liquors, and the abuse of them by drinking to excess, depends much upon the temperature of the climate in which we live. The same indulgence, which may be necessary to make the blood move in Norway, would make an Italian mad." 4 Commentaries 26.

52. 4 Commentaries 26.

53. Hall, *op. cit. supra* note 48, at 1047-8.

Crimes Committed by Infants

Blackstone says that crimes committed because of infancy or nonage arise from a defect of the understanding, for "where there is no choice, there can be no act of the will, which is nothing else but a determination of one's choice to do or to abstain from a particular action; he, therefore, that has no understanding, can have no will to guide his conduct."⁵⁴ He cites Hawkins's *Pleas of the Crown*⁵⁵ as authority for the statement that infants, under the age of discretion, ought never to be punished by any criminal prosecution whatever, and observes that the age of discretion has not always been the same in all nations.⁵⁶ In this connection, Story observes that there are various ages of infancy, in the common law, for various purposes. "The general age of majority for all purposes is, in our law, 21 years, in the civil law, 25 years. Children under 7 years of age are deemed without discretion, and are universally exempted by our law from punishment. Between 7 and 14 years, they are said to be in a dubious stage, in point of discretion. If they in fact possess it, if they appear to have judgment, and understanding, and a sense of crime, they are liable to punishment; otherwise not. Generally, the rule of presumption is in favor of mercy—that an infant under 14 is *doli incapax*. After 14, the general presumption is in favor of an infant being *doli capax*, and therefore he generally stands upon grounds similar to those of adults, until his actual incapacity is proved."⁵⁷ Story says of the test applied to children between seven and fourteen: "it deserves consideration, whether this is a sufficient test of rational discernment of the nature of crime and duty; and judges may well lean against conviction in such cases, upon principles not merely of humanity, but of philosophical responsibility."⁵⁸ Story observes that extreme old age sometimes reduces persons to a state in which they would be held no more liable to punishment than infants.⁵⁹

In every civilized society, the law recognizes criminal incapacity based upon extreme immaturity, and no matter what the harm caused by a person of very tender years, his offence is dealt with by some machinery other than that normally applied in the administration of adult criminal justice. Thus at common law, because of the wide differences in individuals, the two ages referred

54. 4 Commentaries 21.

55. Cf. Hawkins, 1 Pleas of the Crown 2 (1762).

56. 4 Commentaries 22.

57. 4 Encyclopedia 36-37

58. 4 Encyclopedia 37

59. *Ibid.*

to above were emphasized. Today, we have combined this technique with modern juvenile courts and youth correction authority acts which were unknown in Blackstone's time. Professor Perkins points out also that the age, below which there is complete criminal incapacity, has been raised by statute in some jurisdictions, but that any provision of this nature should be read in the light of the common law⁶⁰

Crimes Committed by Lunatics and Idiots

Blackstone observes that lunacy and idiocy involve a deficiency in will, arising from a defective or vitiated understanding, which will excuse a party from the guilt of crimes.⁶¹ Idiots and lunatics, therefore, are not chargeable for their own criminal acts, if committed under these incapacities, not even for treason itself. But Blackstone adds that if a lunatic has lucid intervals of understanding, he shall be held responsible for what he does in those intervals as if he had no deficiency.⁶² Story also observes that this exception applies to crimes committed by lunatics and idiots only where the disability exists at the time of the offence, and that "it is no excuse, if a person who has been insane commits an offence in a lucid interval, or at a time when his reason is clearly restored. Everything depends upon soundness of mind and real discretion at the time of committing the offence."⁶³ Both Blackstone and Story believe that where a person becomes insane after the commission of a crime, but before the trial, he ought not be brought to trial until he is restored to his reason.⁶⁴ At whatever stage of the prosecution the insanity occurs, it operates, by the common law, as a suspension of all further proceedings. Thus, Story says if "it occurs before arraignment, the party ought not to be arraigned for the offence, if after arraignment, he ought not to be required to plead, if after plea, he ought not to be put to trial, if after trial, he ought not to have judgment or sentence pronounced against him, if after judgment, execution of the sentence ought to be stayed."⁶⁵ The reason generally offered for the existence of this rule is that if the prisoner had been of sound mind he might have alleged something that would have entitled him to mercy or to an exemption from punishment.⁶⁶ Story adds, however, that "a reason quite as satisfactory is, that

60. Perkins, *op. cit. supra* note 50, at 450.

61. 4 Commentaries 24.

62. 4 Commentaries 25.

63. 4 Encyclopedia 37

64. 4 Commentaries 24, 4 Encyclopedia 37

65. 4 Encyclopedia 37

66. *Cf. Hale, 1 Pleas of the Crown 34* (1st American ed. 1847)

the punishment of an insane person can produce no good result, either to reform the offender or as a public example."⁶⁷

Injuries Committed Through Misfortune or Chance

When a man commits an unlawful act through misfortune or chance, Blackstone says that he ought to be exempt from the censures of the law because "here the will observes a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime."⁶⁸ But there is a distinction between an accidental mischief which follows the performance of a lawful act and one which follows an unlawful act. In this connection, Story observes that where "an accidental mischief happens in the performance of a lawful act, in the doing of which the party uses reasonable care and diligence, he is wholly free from guilt, and it is deemed his misfortune; but if he does not use reasonable care and diligence, he is liable to punishment according to the nature and extent of his negligence. . . . If the mischief happens in the performance of an unlawful act, and a consequence ensues which was not intended or foreseen, the party is not free from guilt. But the degree of punishment ought to depend upon the nature of the unlawful act itself."⁶⁹ Thus, if *A* be working with a hammer, using due care, and the head flies off and strikes *B*, a bystander, killing him, this is not a criminal offence, for *A* was performing a lawful act without any intention of inflicting harm.⁷⁰ Story says that a parent may moderately correct a child, and if in so doing death happens, against his intention, it is mere misadventure. But if he correct the child immoderately, or uses an instrument which is dangerous to life, or is wanting in reasonable caution, he is guilty of manslaughter or murder, according to the circumstances and the degree of the punishment.⁷¹ And he adds that "if a man, riding a horse with reasonable care, accidentally runs over a child and kills him, he is not guilty of any offence. If he rides him furiously in a street where there may be danger, and the like mischief happens, he is guilty of manslaughter at least. If he rides him furiously into a crowd, either from wantonness or thoughtlessness, and the like accident happens, it will be murder."⁷²

67. 4 Encyclopedia 37.

68. 4 Commentaries 26.

69. 4 Encyclopedia 37.

70. Blackstone says: "if any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused from all guilt. . ." 4 Commentaries 26-27.

71. 4 Encyclopedia 37

72. 4 Encyclopedia 37-38.

Both Blackstone⁷³ and Story⁷⁴ make a distinction between cases where the original act is *malum per se* and where it is *malum prohibitum*—that is, where the original act is wrong and unlawful in itself or where it is merely prohibited by statute. In the one case, the party is responsible for all incidental consequences of his unlawful act, and in the other he is not. Thus in the case of a hunter who accidentally kills another, Story says that if the person who commits the act be prohibited by statute from hunting game, and does so anyway, and an accident occurs as a result of his shooting, he has committed an original act *malum prohibitum*, but he is not answerable in any other manner than a person duly qualified by law to hunt.⁷⁵ On the other hand, if *A*, intending to steal poultry from *B*, fires at the poultry, and by accident kills *C*, he will be charged with murder by reason of the felonious intent of the original act which is *malum per se*.⁷⁶

Injuries Committed Through Ignorance or Mistake

When a man, intending to do a lawful act, but by ignorance or mistake does something unlawful, Blackstone says that there is a defect of will sufficient to excuse that man from criminal responsibility. Here there is not that combination of deed and will necessary for a criminal act.⁷⁷ However, this must be ignorance or mistake of *fact*, and not of *law*, for it is one of the maxims of the law that ignorance of a law that everyone is bound to know excuses no one.⁷⁸ A common illustration of the operation of this maxim, in cases involving injuries committed through ignorance or mistake, is that of a man intending to kill a thief or housebreaker, in his own house, who, by mistake, kills one of his own family.⁷⁹ Story observes that "if he acted under circumstances of reasonable belief that the party killed was the thief or housebreaker, there is no ground to impute criminality to him. His conduct was founded in a mistake of fact, that is, of the person, for it is sometimes lawful, by the common law, to kill a housebreaker found in your house.

73. 4 Commentaries 8-9.

74. 4 Encyclopedia 37.

75. 4 Encyclopedia 38.

76. 4 Encyclopedia 38. "If the object of the rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal, while if its object is to prevent stealing, it would do better to hang the thief in every thousand by lot." Holmes, *The Common Law* 58 (1881).

77. 4 Commentaries 27.

78. See discussion of this maxim, note 9 to Book IV, in 2 Chitty's *Blackstone* 19 (1832).

79. Cf. 4 Commentaries 27.

But a mistake, or ignorance of law will not justify an act of the like nature. If a person supposes he has a right to kill a trespasser or outlaw, or excommunicated person, and he does so, he is guilty of murder."⁸⁰

While the maxim "ignorance of the law is no excuse" is one of the most familiar expressions in criminal jurisprudence, it is not without exceptions. Professor Perkins states this maxim in these words "Every person is presumed to know the law."⁸¹ And he adds that to understand either the maxim or its exceptions, it is necessary to know what is meant, in law, by the word *presumed*. He says that this maxim means that a particular case will be disposed of exactly as if the defendant actually did know the law whether such is the fact or not. "And this is exactly the sense in which this word is used ordinarily in this phrase. This is the sense in which it is used in all of those cases in which ignorance of the law is no excuse. In those rare and exceptional cases in which ignorance of the law is recognized as an excuse in a criminal case the presumption is rebuttable. In other words, while there are exceptions to the rule that ignorance of the law is no excuse, there are none to the statement that everyone is presumed to know the law—except to the extent that the presumption may be overcome by evidence where this is permissible. Stated differently, knowledge of the law is presumed; in most cases this presumption is conclusive but under exceptional circumstances it is disputable."⁸²

Crimes Committed by Compulsion, Force, or Necessity

Blackstone says that another species of defect of will is that which arises from compulsion or inevitable necessity, which are "a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject."⁸³ And he adds that those acts which are done as the results of unavoidable force and compulsion ought to be exempted from the censures of the law. Blackstone discusses four topics under this heading: (1) *civil subjection*,⁸⁴ whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest—as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality; (2) *duress per minas*,⁸⁵

80. 4 Encyclopedia 38.

81. Perkins, *op. cit. supra* note 50, at 462.

82. *Id.* at 462-3.

83. 4 Commentaries 27

84. 4 Commentaries 28.

85. 4 Commentaries 30.

or threats and menaces, which induce a fear of death or other bodily harm, and which, for that reason, take away the guilt of many crimes and misdemeanors, at least before the human tribunal, (3) *the choice of two evils*,⁸⁶ as where a man has to make a selection, and being under a necessity of choosing one, he chooses the least pernicious of the two, this species of necessity, says Blackstone, is the "result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, which without such obligation would be criminal;"⁸⁷ and (4) *extreme want of food or clothing*,⁸⁸ as where a man steals to relieve his present necessities. Blackstone says that in England especially, where the laws make sufficient provision for the poor, this defense is dubious, for "it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature."⁸⁹

In his discussion of crimes committed by compulsion, force, or necessity, Justice Story follows the same general outline adopted by Blackstone. First, as to crimes committed under the authority or command of a superior, Story says that there are but a few cases in which such an excuse will be recognized.⁹⁰ Second, as to crimes committed under *duress per minas*, he believes that the fear which compels a man to do an illegal act "must be just and well grounded, such as may intimidate a firm and resolute man, and not merely of such a nature as may operate upon the timid and irresolute, otherwise it will constitute no excuse."⁹¹ As an example, Story refers to the case of a man who commits treasonable acts, in time of war or rebellion, at the compulsion of the enemy or rebels. To be justified as an excuse, the compulsion must be more than a mere threat to do injury to property, or even slight injury to person, it must consist of a just fear either of death or of great bodily harm, and even then, it is the duty of the person to stop doing these acts as soon as he safely may, by escape or otherwise or else he will be considered a volunteer.⁹² And Story observes that this excuse is not allowed in all cases, and seems confined to crimes positively created by society, "for no man can justify or excuse himself for murdering an innocent person, under the pretence of fear or necessity, though he certainly may kill another in necessary self-defence."⁹³

86. 4 Commentaries 30-31.

87. 4 Commentaries 30.

88. 4 Commentaries 31.

89. 4 Commentaries 32.

90. 4 Encyclopedia 38.

91. 4 Encyclopedia 38.

92. 4 Encyclopedia 38.

93. 4 Encyclopedia 38.

Third, as to crimes committed by a person in the extreme want of food, as where such person steals to satisfy his hunger, Story says that whatever may be the doctrine of foreign jurists,⁹⁴ no such excuse is recognized or admitted in the common law.⁹⁵ And he adds that if the offence should be committed under circumstances of extraordinary suffering the case would seldom be brought before a court of justice, and if it were, the humanity of the court itself or the governmental power of pardon would be exercised either to annul or to mitigate the punishment.⁹⁶

Story puts a fourth case, as where an offence is committed by a person in self-defence. Thus, "where two persons at sea are shipwrecked, and get on a single plank, and it cannot support both, but both must be drowned unless one is displaced: what is then to be done? In such a case, the law of self-preservation has been supposed to justify either party in a forcible dispossession of the other. The common law seems to recognize this principle and in such a deplorable calamity imputes no blame to the survivor."⁹⁷

The Royal Prerogative

The king is believed incapable of committing a folly, and much less a crime. Hence, Blackstone adds a seventh case, not discussed by Story in his article on criminal law, in which the law "supposes an incapacity of doing wrong, from the excellence and perfection of the person; which extends as well to the will as to the other qualities of his mind."⁹⁸ By his royal prerogative, the king is not under the coercive power of the law, and the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do any thing inconsistent with his station and dignity; and therefore has made no provision to remedy such a grievance.⁹⁹

THE SEVERAL DEGREES OF GUILT, AS PRINCIPALS OR ACCESSORIES

The third topic in Blackstone's work deals with the distinction between principals and accessories to a crime.¹⁰⁰ He explains that

94. The views of Grotius, Puffendorf, Britton and Hale on this subject are summarized by Blackstone. See, 4 Commentaries 31-32.

95. 4 Encyclopedia 38.

96. 4 Encyclopedia 38.

97. 4 Encyclopedia 38. Holmes observed that "if a man is on a plank in the deep sea which will float one, and a stranger lays hold of it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing." The Common Law 44 (1881).

98. 4 Commentaries 32-33.

99. 4 Commentaries 33; cf. Hale, 1 Pleas of the Crown 44 (1st American ed. 1847).

100. 4 Commentaries 1.

a person may be a principal in an offence in two degrees.¹⁰¹ Story, following Blackstone, says that persons are principals in the first degree, if they are the actors or perpetrators of the offence. Persons who are present, aiding and abetting the perpetrator, are principals in the second degree.¹⁰² A person may be present at a crime, in fact, if the parties are standing close-by, or are within sight and hearing.¹⁰³ Constructive presence may exist when the person, while not within sight or hearing of the crime, is standing watch at a convenient distance, prepared to assist, and near enough to do so if necessary.¹⁰⁴ Also a person may be the principal in construction of law, although he is absent. For example, a man who prepares poison with an intention that it should be taken or employs an innocent person to administer it, may be the principal felon, although he is not personally present when it is taken.¹⁰⁵

In the early common law, the word principal was applied, in felony cases, only to the perpetrator of a crime. Any other guilty party was described by the word accessory. Thus in *The Mirror of Justices* (a book of doubtful reputation, but which is sometimes referred to by Blackstone) it is said

“Nine kinds of accessories there be those who command, those who counsel, those who hire or are consenting thereto, those who send, those who aid, those who are partners in the gain, those who acquiesce and do not disturb the offenders by word or deed, and those who knowingly receive them, and those who go out armed.”¹⁰⁶

Blackstone says that an accessory is one who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed.¹⁰⁷ He discusses first the offences, at common law, which admit of no accessories, for instance in high treason there are no accessories—the same acts that make a man an accessory in a felony, make him a principal in high treason, because of the heinousness of the crime.¹⁰⁸ Story points out that in treason, all the parties concerned are deemed principals *propter odium delicti*, but in offences which are under the degree of felony, and in trespasses, all persons concerned are principals because the law will not condescend, in petty crimes, to ascertain the different degrees of guilt. Thus, in all other offences

101. 4 Commentaries 34.

102. 4 Encyclopedia 39.

103. Hale, 1 Pleas of the Crown 615 (1st Amer. ed. 1847).

104. 4 Encyclopedia 39.

105. 4 Encyclopedia 39.

106. 7 The Mirror of Justices 31 (The Selden Society London, 1895).

107. 4 Commentaries 35.

108. 4 Commentaries 35.

except the highest and the lowest, there may be, technically speaking, accessories. It follows as a maxim that in such cases the accessory cannot be guilty of a higher offence than his principal.¹⁰⁹

Blackstone observes that as a general rule the ancient law held that accessories shall suffer the same punishment as their principals. Why then, he asks, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment?¹¹⁰ Blackstone enumerates four reasons in answer to this question: (1) so that the accused may know how to defend himself when indicted; (2) because the distinction is made in the statutes relating to the benefit of clergy; (3) because formerly a man could not be tried as accessory until after the principal was convicted, (4) because one may be indicted as principal after acquittal as accessory. It is not clear, he continues, whether acquittal as principal allows subsequent indictment as accessory *before* the fact, but it is clear that one acquitted as principal may be indicted as an accessory *after* the fact. It is for these reasons that the distinction between principal and accessory is made even though the punishment is much the same with both principals and accessories *before* the fact.¹¹¹ Story also recites several reasons for the distinction between principals and accessories. He notes three reasons. (1) In many instances, a man cannot be tried as accessory until after the trial and conviction of the principal; (2) if a man is indicted as an accessory and acquitted, he may still be indicted as principal; (3) as a natural inference from other considerations, the defence of the accused may and often must turn upon very different principles where he is accused as accessory from what might or could arise if he were accused as principal.¹¹²

Lord Eldon, one of the great Equity judges in England during the nineteenth century, declared that "Blackstone's opinions on the criminal law, as contained in his *Commentaries*, are to be regarded as the offspring of an eager rather than a well informed mind."¹¹³ This view however was not shared by Supreme Court Justice Joseph Story in America. Justice Story's article on criminal law in the *Encyclopedia Americana* is evidence of the respect Blackstone commanded with just one important figure in American jurisprudence. When Story wrote this article in 1830, Blackstone was

109. 4 Encyclopedia 39.

110. 4 Commentaries 39.

111. 4 Commentaries 39-40.

112. 4 Encyclopedia 39.

113. Cf. 1 Jurist 459, quoted in Marvin, Legal Bibliography 126 (1847).

still enjoying a considerable reputation in America. In the "Preface" to Chitty's edition of the *Commentaries*, published in New York in 1832, it was said that the *Commentaries* of Blackstone continue to be the textbook of the student and of the man of general reading, notwithstanding the alterations in the law since the time of their author.¹¹⁴ And it was pointed out that the revisers of the New York statutes had followed in a great degree the arrangement which Blackstone had used in treating the different subjects.

Blackstone's influence on American law, since the time of Justice Story, has been a waning influence, but nevertheless it still plays no small part in our legal thinking.¹¹⁵ Blackstone is only occasionally cited by the courts today, yet the influence of this great jurist on American law is still seen—in the codes, through the arrangement used in treating the different topics, in the casebooks, through the use of his definitions and descriptions of the various crimes, and in cases, where the American courts undertake to trace the history of principles of the law

114. Blackstone, 1 *Commentaries* iii (Chitty ed., 1832)

115. Cf. Harlan Fiske Stone, "The Common Law In the United States," in *The Future of the Common Law* 128 (1937).