Journal of Criminal Law and Criminology

Volume 35 | Issue 4 Article 8

1945

Questions and Answers

QUESTIONS & ANSWERS[1]

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Question 1: What is the difference between an accessory and an accomplice?

Answer:

Each word has reference to one of the guilty parties to a crime involving two or more offenders. But whereas each of such parties is an accomplice, many of them are not accessories. As already pointed out the term accessory is applied only in cases of felony, and does not apply even in a felony case to one who was actually or constructively present at the moment of its perpetration. The word accomplice, on the other hand is used whether the crime involved is treason, felony, or misdemeanor, and without reference to presence or absence at the moment of perpetration.

An "accomplice" is an associate or companion in crime. Some authorities have used the word in a sense so broad as to include all guilty parties to the same offense. The more sound usage limits it to those whose guilt has been connected with the *commission* of the crime. This includes principals in the first degree, principals in the second degree, and accessories before the fact. It does not include accessories after the fact (but these are included in the broader meaning employed by some courts).

It is not out of place to mention also, that while the importance of the word "accessory" is distinctly on the wane, that of "accomplice" appears to be on the upgrade. For example, a rather common statutory provision makes the uncorroborated evidence of an accomplice insufficient for conviction of crime.

Question 2: What is meant by "legalized murder"?

Answer:

There is no such thing. It is a phrase employed by persons not familiar with the law. Murder is *unlawful* homicide committed with malice aforethought. Hence, if the homicide is "legalized" it cannot be murder. The term is usually used to express a very strong opposition to the law which authorizes homicide in certain situations. Thus, one very much opposed to capital punishment may refer to the execution of a sentence of death as "legalized murder"; and another who has very strong feelings against war may use this expression to designate killings on the field of battle. It would be beyond the scope of this answer to present an argument for or against capital punishment, or for or against war. It must suffice for the moment to say that the phrase "legalized murder" is self-contradictory and hence is to be avoided by those interested in accuracy of expression.

Question 3: What is meant by the phrase "without benefit of clergy"?

Answer:

This phrase is used on the street with a great variety of meanings, such for example, as to represent the sad plight of the unmarried mother. Its original use was in connection with the administration of criminal justice. At a time when the church was very powerful it succeeded in establishing

[1]Questions one to seven, inclusive, are from Mr. Perkins and the remainder from Mr. Meyer.

the position that no member of the clergy should be tried for felony in the ordinary criminal law courts of the land. Under the ancient procedure, if one of this favored group was indicted for such an offense he had only to assert his "benefit of clergy" and prove his right thereto. Thereupon his case was transferred to the ecclesiastical court for trial and disposition there.

In the course of time the procedure changed and the common law courts no longer permitted this privilege to be asserted at the initial stage of the prosecution, but limited it to one who had entered a plea of guilty, or whose guilt had been established by the verdict of a jury. After this change was complete the only effect of benefit of clergy was with reference to the punishment to be inflicted upon one who had been convicted of felony. This, however, was a matter of the utmost significance. It was a basic principle that the church would not impose the punishment of death, and hence he who was entitled to "benefit of clergy" was not capitally punished. All felonies, at common law, were punishable by death and forfeiture of goods. Benefit of clergy, after the change of procedure mentioned, did not protect against forfeiture of goods, but did save the life of the convicted felon. In order that persons convicted of certain felonies should not escape the death penalty by this means, it was expressly provided by statute that those convicted of these felonies should be "without benefit of clergy." Hence this phrase, as commonly used, did not refer to *persons* who did not come within this protection, but to *offenses* which had been placed beyond its reach by legislation.

This is all a matter of history; modern criminal procedure has no such rules.

Question 4: Is motive ever an essential element in the commission of crime?

Answer:

Yes. The books are full of comments to the contrary, but the general statement to the effect that motive is never an essential element in the commission of crime is too broad. Like most generalizations it is subject to certain exceptions. In most situations the question of motive is important only as a clue,—to establish who the guilty person may be. A good motive is never sufficient, for exculpation if all of the elements of crime are otherwise established. One, for example, who kills his wife because he loves her and cannot bear to watch her suffer from an incurable disease, is guilty of criminal homicide.

But some offenses, for example, have a special mental requirement represented by the word "corruptly." And no inquiry into whether or not a certain thing has been done corruptly can ignore the motive of the doer. Furthermore, the issue of motive may arise in other ways. A rogue may be committing a grave felony under such circumstances that the killing of the felon to prevent this crime would be privileged. One who kills him for that purpose is not guilty of crime. But if at that very moment a gangster should see the rogue, and without even knowing of the rogue's intent to commit a felony, should kill him because he had been wanting to get rid of him, the gangster would be guilty of murder. The intent is the same,—to kill that person. But a killing under those circumstances with that intent is no crime if the motive is to promote justice by preventing the grave felony which is impending, but is murder if the motive is to satisfy an old grudge.

Question 5: Can a woman be guilty of rape?

Answer:

Yes. If a man who intends to commit murder is unwilling to make the

effort alone and calls in another to hold the victim while he plunges a knife into his heart, the second is just as guilty of murder as the first, provided he was fully aware of the purpose. For the same reason both men would be guilty of rape if one helped to subdue a woman while another had felonious intercourse with her. This would be equally true even if the "assistant" was a woman. A woman cannot herself commit the act of rape, but she can be guilty of this crime by aiding a man in its perpetration.

Question 6: Under what circumstances may crime be justified or excused?

Answer:

Under no circumstances. As a matter of juridical science there can never be any justification or excuse for crime. Under many circumstances a deed which would otherwise be criminal may be justified or excused; but what is justified or excused is not a crime. For example, one man intentionally kills another. This at once suggests a crime on his part, but he insists that the other made a murderous assault upon him and that he was forced to kill in the defense of his own life. If it is found that he was free from fault and was placed in peril of his life by the felonious attack of the other and would have suffered death or great bodily injury had he not used deadly force in his own defense, justification has been established. But it is not a *crime* which is justified. Since there was justification for the *homicide* no crime was committed.

A crime may be committed under circumstances of mitigation. In such a case the deed constitutes a crime although the authorities may be warranted in foregoing prosecution or in inflicting a penalty much milder than would otherwise be used. But it is contradiction to speak of justification or excuse for crime.

Question 7: I have a friend who divorced her former husband last winter and plans to marry another man this summer. The statute of her state forbids either party to marry again "within six months from the date of the filing of said decree," and punishes a violation of this law by a penalty which may be as severe as six months in jail. She does not wish to run any risk of being found guilty of such a crime, but has plans she is eager to carry out if no such risk is involved. Her divorce decree was filed on February 29, 1944, and she planned her second marriage for August 30, 1944. Could she safely have carried out that plan?

No. She should have delayed the wedding at least two days. In the early English common law the word "month" was held to mean a lunar month of twenty-eight days (although the true lunar month is longer than this). But in most of the states in this country at the present time the word "month" means *calendar month* when it is used alone. It is also to be borne in mind that in computing periods of time the law excludes the first day and includes the last. Thus a ten day period from November 6 ends at the close of November 16. For the same reason a year from July 1 ends at the close of July 1 on the following year, although if the first July 1 was counted the period would end at midnight on June 30. The ancient jingle of a "year and a day" encountered in homicide cases dates back to the time when the judges were not certain whether a year from July 1 would include the following July 1 or not. But the settled rule now is that it is included without calling it a "year and a day."

Since this is the rule in computing periods of time and since "month" means calendar month, it follows that the end of a period of one month from

January 1 to February 1, the end of a period of two months from March 10 is May 10, and that of six months from April 15 is October 15. This is too well settled for controversy, but a different element enters into the computation if we are dealing with a period of a month from January 31 or from February 29.

There still seems to be some support for the notion that one month from January 31 should end two days later than one month from January 29. If this were true the former period would end March 2 in Leap-year and on March 3 in any other year (since on the same theory a period of one month from January 29 would carry over to March 1 except in Leap-year). For the most part, however, the authorities now seem fairly well agreed on the view that a month from either January 28, 29, 30, or 31, will end at the close of February 28 (unless it is Leap-year). This has suggested the statement that a period of one month (or several months) from any day ends at the close of the corresponding day of the following (or later) month, if that month has so many days, and if not it ends at the close of the last day of that month.

If this statement could be accepted without qualification a six month period from February 29 would end at the close of August 29 and the answer to the question would be that sufficient time would have lapsed since the divorce, and no crime would have been committed by marriage on August 30. Some courts, however, insist that a different answer is required when the period is figured from the last day of a month. The reasoning is this: since the first day is not counted, a period of one month from the last day of any month does not include any part of that month and hence must include all of the following month. By this method of computation, a month from February 29 would end with the close of the following month, or at midnight on March 31; and six months from February 29 would include all of each of the six following months, and hence would not end until the close of August 31.

Although this method of computation has not been uniformly accepted it is quite sound and the present trend of the cases seems to be in this direction. Hence, it would not have been safe for your friend to marry until the first of September.

Question 8: Assuming that two defendants have honorable backgrounds, does placing one on probation entitle the other to the same treatment?

Answer:

The answer to this question is no, because, as indicated above, probation is not a right, it is a favor. In *United States vs. Gargano* the Supreme Court held that placing one defendant on probation does not entitle the co-defendant to probation, even when both have similar backgrounds.

Question 9: How much proof is necessary to revoke probation?

Answer:

The law requires that before probation is revoked, the defendant be given a hearing before the court to determine that there has been no abuse of discretion in revoking probation. This does not mean that the defendant is entitled to a trial however. The degree of proof need not convince the court beyond a reasonable doubt as is necessary at the trial of the case. It is enough if the court is reasonably satisfied that revocation is to the best interest of the majority concerned. (*Esco vs. Zerbst 295 U. S. 490.*)

Question 10: Does a person who has been placed on probation lose his civil rights?

Answer:

That depends upon the law of the state in which he resides. Most of the civil rights are derived from state law, not from Federal laws, and therefore the civil rights of federal probationers are determined by the states in which they live. There is some question however, as to whether or not probation always constitutes a conviction. A man can be placed on probation before any sentence has been imposed, or he can be placed on probation after a sentence has been pronounced but its execution stayed or suspended. Now the question is: Is there a conviction when no sentence is given? In *Berman vs. United States, 302 U. S. 211, 212,* the Supreme Court determined that "final judgment in a criminal case means sentence. The sentence is the judgment." Accordingly it might be argued that there is no judgment of conviction in the first type of probation since no sentence has been imposed. It would seem then that the state laws governing civil rights would apply only to the latter kind of probation where a conviction or judgment of sentence was entered.

There is need for further clarification on this point.