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Answer Outline for Criminal Law Exam

I. Question One—Liability Related to Abduction of Accountant Lau in Hong Kong

This question asked students to consider whether Batman could be charged under Article 212 of the Model Penal Code (“MPC”) for his abduction of the mafia accountant Lau, and it then asked what “related charges” could be brought against Batman’s charter pilot. Good answers considered the three plausible charges against Batman under Article 212, discussed credible defenses, and then considered whether the pilot might be liable as a conspirator or an accomplice.

A. Charges against the Batman under Model Penal Code Article 212

1. Potential Charges

The three plausible charges against Batman under Article 212 are kidnapping (§ 212.1), felonious restraint (§ 212.2), and false imprisonment (§ 212.3). Kidnapping is a bit of stretch, and felonious restraint and false imprisonment are pretty solid. There is no basis for a charge of interference with custody or criminal coercion, and exam takers who devoted significant effort to those offenses lost valuable time.¹

a. Kidnapping

To be convicted of kidnapping as defined by MPC § 212.1, one must (1) unlawfully remove another, (2) from his place of residence or business (or a substantial distance from where the victim is found), (3) with one of four enumerated purposes. In Batman’s case, the first two elements are easy to prove. He removed Lau from his office (place of business), and he did so unlawfully (by force).²

The real issue here is whether Batman acted with one of the purposes listed in Section 212.1, and none will be easy for the prosecution to prove.³ There is no evidence (a) that Batman intended to use Lau as a hostage⁴ or seek a ransom, or (b) that the abduction occurred to facilitate a felony or was in flight from a felony, or (d) that Batman sought to interfere with a governmental function

¹ The same is true of students who devoted time to discussing assault, burglary, and other offenses outside Article 212.

² Note that for purposes of this Section, “unlawfully” is defined as being “accomplished by force, threat or deception.” Batman crashed through Lau’s window and “disabled” guards; he clearly used force. For a discussion on whether Batman’s mistake might have prevented him from “knowingly” acting “unlawfully,” see the section on defenses below.

³ Some students suggested that other than for the enumerated purposes, the *mens rea* for Section 212.1 is “recklessness” because none is specified. Actually, the *mens rea* with respect to conduct is also “purpose.” While this error is not very important here (because Batman clearly acted with purpose with respect to the “removal” and “confinement” of Lau), consider that one cannot “recklessly” abduct someone with the purpose of injuring her. If one is acting with the purpose to injure, surely the acts by which one attempts to do so (if not the attendant circumstances) are purposeful.

⁴ Some students suggested that Lau was a hostage because he was held against his will. Not so; such a definition would convert all abduction victims into hostages. *Black’s* defines a hostage as an “innocent person held captive by another who threatens to kill or harm that person if one or more demands are not met.” Merely abducting someone does not make that person a “hostage.”

(indeed, he sought to help Gotham officials). The only credible enumerated purpose is (c) to injure or “to terrorize the victim.”⁵ Although it is possible that Batman chose his dramatic method of abduction with the purpose of terrorizing Lau (perhaps to soften him up for police interrogation), it is more likely that Batman used the only method he could think of. Lau was well guarded, and Batman devised a complicated plan to nab him. Lau might well have been terrorized, but it would be difficult to establish that such terror was Batman’s intent.⁶

If kidnapping is somehow proven, Batman would be liable for a second degree felony because he released Lau “alive and in a safe place prior to trial;” he delivered Lau to the Gotham police. A clever argument for the imposition of first-degree felony liability is that Gotham (and those under the protection of its police) are not actually “safe,” but for purposes of the kidnapping statute, surely police custody will count as safe.

b. Felonious Restraint

If a kidnapping charge cannot be proven, the most serious remaining offense is felonious restraint (§ 212.2), which one commits if he knowingly (1) restrains another unlawfully, (2) in circumstances exposing him to risk of serious bodily injury. As discussed above, Batman abducted Lau unlawfully. In addition, being “grabbed” by someone who crashed through your office window and then “escapes by sending a balloon attached to a cable to a plane he has chartered” would expose the victim to risk of serious bodily injury. Batman may be skilled, and perhaps the risk was low, yet any stunt involving a balloon-cable contraption and an airplane creates a risk of serious injury. Unless Batman can convince the jury that he did not know about the risk, this element of the offense is established.

Absent a defense (to be discussed below), Batman is easily convicted of this offense.

c. False Imprisonment

The prosecution could also establish the elements of false imprisonment (§ 212.3), which occurs when one knowingly (1) restrains another unlawfully (2) so as to interfere substantially with his liberty. As discussed above, Batman abducted Lau unlawfully. In addition, being taken by force and flown from one country to another (where he will be locked up) must qualify as “substantial” interference with liberty.

Absent a defense (to be discussed below), Batman is easily convicted of this offense.⁷

2. Potential Defenses

If the prosecution can prove all elements of one or more of the above offenses, Batman might evade liability by establishing one or more defenses. Potential defenses include public

⁵ The “inflict bodily injury” portion of this prong is not applicable. Surely if Batman wanted to hurt Lau, he would have.

⁶ See also MPC § 2.02(2)(a)(i), which provides that one acts “purposely” with respect to a “result” of one’s conduct (such as causing terror) if it is one’s “conscious object ... to cause such a result.” Chances are, Batman was indifferent to Lau’s feelings (although I admit reasonable minds may differ).

⁷ If Batman were guilty of both felonious restraint and false imprisonment, the court would consider whether false imprisonment should be discarded as a lesser included offense. See MPC § 1.07(1) & (4)(a).

duty/public authority/law enforcement, choice of evils/necessity, various forms of mistake, and entrapment. Odds are, however, that none of these defenses will prevent Batman's conviction.

a. Public Duty/Public Authority/Law Enforcement

Batman can argue that because he was acting at the behest of the District Attorney and a Gotham police lieutenant, his actions while otherwise criminal are justified by the defense of public authority (or a public duty, or by the powers granted to law enforcement). Relevant provisions include MPC § 3.03(3)(b), which provides that conduct is justified “when the actor believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority,”⁸ and Section 3.07(4)(a), which states that a “private person who is summoned by a peace officer to assist in effecting an unlawful arrest, is justified in using any force that he would be justified in using if the arrest were lawful, provided that he does not believe the arrest is unlawful.”⁹ Unlike the *Barker* defendants, who burgled an empty office, Batman's abduction was an arrest of sorts, making Section 3.07(4)(a) potentially applicable. Regardless of whether the abduction counts as an “arrest,” Section 3.03(3)(b) appears to be on point because Batman was asked to “assist a public officer” (Dent and Gordon) in the performance of their official duties.¹⁰

The success of Batman's defense ultimately depends on his belief at the time he abducted Lau that the abduction was lawful. Section 3.03(3)(b) covers an “actor [who] believes his conduct to be required or authorized,”¹¹ not a vigilante who knowingly performs illegal acts at the request of police officers constrained by laws. (Also, if one reads “unlawfully” to have its ordinary meaning of “against the law” when it appears in the definitions of offenses in Article 212, then Batman could not “knowingly” abduct Lau “unlawfully” if he thought his behavior was duly authorized by the police, meaning he could not be convicted of kidnapping, felonious restraint, or false imprisonment. As noted in footnote 2, however, “unlawfully” is given a particular meaning in Section 212.1, and the definition includes actions taken “by force.”) My reading of the facts convinces me that Batman knew his actions were unlawful and not properly authorized by Dent and Gordon; accordingly, I conclude that Batman cannot use a public authority defense. Reasonable persons might disagree, and those who explained a contrary conclusion well received full credit.¹²

b. Choice of Evils/Necessity

The relevant MPC provision is Section 3.02.¹³ The argument here is, in short, that Batman may have broken the law in abducting Lau, but the harm is outweighed by the benefits, which include the opportunity to convict several mobsters. The main problem for Batman here is Section

⁸ This is the provision that, despite its apparent relevance to the *Barker* case (casebook p. 471), is cited in neither the majority opinion nor the dissent.

⁹ This provision is discussed in *Barker*. The dissent argued the provision lacked relevance because the defendants in that case were not involved in an “arrest.”

¹⁰ Use of this section, however, may be precluded by Section 3.03(2)(a), which appears to require that use of force against persons be justified by a section of Article 3 *other than* Section 3.03. If so, Section 3.07(4)(a) becomes vital.

¹¹ Similarly, Section 3.07(4)(a) covers an actor only if he “does not believe the arrest [he assists] is unlawful.”

¹² Many students gave insufficient attention to the issue of Batman's *belief* about the mission's legality, as opposed to the simple fact that Batman was asked to perform the mission.

¹³ Section 3.02(1) provides: “Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that ... (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged”

3.02(c), which states that the choice of evils defense is available only when “a legislative purpose to exclude the justification claimed does not otherwise plainly appear.” When a legislature or constitution restricts the activities of law enforcement officials, it inevitably balances the desire to catch and convict criminals with concerns about abuse of power and potential “false positives”—*i.e.*, the subjection of innocent persons to treatment intended only for criminals. Accordingly, even though a police officer (or prosecutor, judge, etc.) might occasionally believe that the “evil” of violating someone’s rights would be outweighed by the benefits of achieving justice and decreasing crime, a “legislative purpose to exclude the justification” should always be found to appear in the statute proscribing the conduct at issue. Indeed, absent such a rule, a police officer might sensibly argue that when a dangerous criminal cannot be convicted (perhaps because no admissible evidence against him can be found), the officer may justifiably murder the criminal (or, if choice of evils may not justify homicide, then justifiably imprison the criminal indefinitely in the officer’s basement¹⁴) because the benefits to society outweigh the evil. If an officer’s illegal actions are truly beneficial, the sentencing judge may mitigate punishment in certain cases, or a jury could refuse to convict. The law, however, demands that officers (and their vigilante comrades) obey the law even when it is inconvenient.

c. Mistakes of Law or Fact

Batman may also assert defenses based on mistakes of fact and law. Normally, a mistake of law does not excuse illegal conduct. The MPC, however, provides certain exceptions to this general principle, and relevant ones are discussed above in the section on public authority. In the end, a successful defense based on mistake of law depends on Batman’s honest belief that he was authorized to act as he did (or at least his lack of a belief that the abduction was illegal).¹⁵ Similarly, certain honest mistakes of law might be said to negate the *mens rea* needed for convictions under Article 212.¹⁶ My opinions on these issues are discussed above.

As for mistakes of fact, there is not much for Batman to work with. He cannot credibly state that he thought Lau’s office was not his “place of business,” or that he was not exposing Lau to a “risk of serious bodily injury.” No mistake of fact, as opposed to a mistake of law concerning Batman’s authorization to assist Dent and Gordon, seems relevant.

d. Entrapment

As a last resort, Batman might argue that he was entrapped as defined at MPC § 2.13. As usual, this defense is a loser.¹⁷ To bring such a defense, a defendant must have been encouraged to commit an offense by a law enforcement officer “for the purpose of obtaining evidence” against the defendant. Here, Gordon and Dent asked Batman to abduct Lau so they could question Lau, not so they could convict Batman of an offense related to the abduction. Also, it is by no means clear that

¹⁴ Of course, some officials have argued that the United States may indefinitely imprison suspected terrorists against whom no compelling evidence could be admitted in an American criminal court. *See, e.g.*, Peter Baker, “Obama to Use Current Law to Support Detentions,” *N.Y. Times*, Sept. 23, 2009, at A23. Even if this novel principle is accepted into American law, it has not yet been extended to justify the kidnapping or imprisonment without trial of garden-variety mobsters, much less their accountants.

¹⁵ *See* footnote 11 and accompanying text for the provisions creating this subtle distinction.

¹⁶ *See* MPC §§ 2.04(1) & 2.04(3).

¹⁷ Duress, insanity, and self-defense/defense of others are even less likely to help Batman. Several students devoted substantial time to these defenses, which were tenuous at best.

Gordon or Dent knowingly misled Batman as to the legality of his conduct.¹⁸ The fact pattern suggests to me that everyone involved in their conversation, including Batman, understood that his actions in Hong Kong would be unlawful. Indeed, Gordon and Dent summoned Batman precisely because “Batman is under no one’s jurisdiction,” meaning that he can get away with illegal conduct that the police could not perform.¹⁹

B. Related Charges against the Charter Pilot under Model Penal Code

Assuming Batman has performed conduct constituting an offense, his pilot is potentially liable as an accomplice (*see* MPC § 2.06) or as a conspirator (*see* MPC § 5.03). For both potential sources of liability, the charter pilot’s intent is an essential element, and the fact pattern does not provide nearly enough information to know beyond a reasonable doubt what the pilot knew or intended while flying his plane above Hong Kong and back to Gotham. Good answers acknowledged this absence of information and discussed the primary possibilities.

1. Complicity

Pursuant to MPC § 2.06(3)(a)(ii), someone “is an accomplice of another person in the commission of an offense if ... with the purpose of promoting or facilitating the commission of the offense, he ... aids ... such other person in planning or committing it.” The pilot clearly aided Batman in the abduction of Lau; he flew the plane to which Batman fled with the captured victim. The question is whether the pilot acted “with the purpose of promoting or facilitating the commission of the offense.” If Batman told the pilot that Gordon and Dent authorized the mission, and the pilot believed it was lawful, then the pilot did not act with the purpose of facilitating an offense.²⁰ Also, it could be that the pilot had no idea what Batman was doing in Hong Kong; he could have been told to fly over a specific building and given no reason, or simply lied to. Then again, the complex method by which Batman and Lau returned to the plane supports a theory that the pilot must have had at least some knowledge of what was afoot.

2. Conspiracy

Pursuant to MPC § 5.03(1)(b), someone “is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he ... agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.” The pilot certainly did “aid” Batman in the abduction, but he may not have “agreed” to do so. Like the complicity charge, it depends on what the pilot knew, believed, and intended.

¹⁸ *See* MPC § 2.13(1)(a). Unless Batman was misled, his defense could succeed only if police used methods likely to ensnare “persons other than those who are ready to commit” the offenses which with Batman is charged, *id.* § 2.13(1)(b), and Batman is precisely the kind of person “ready to commit” such acts.

¹⁹ By “get away with,” I mean “do with impunity because no one will arrest him,” not “do lawfully because of some technical legal provision.” For more evidence (outside our fact pattern) that Gotham police know that Batman acts unlawfully, see “Daydreams and Believers,” in Ed Brubaker *et al.*, *Gotham Central Book Two: Jokers and Madmen* (2009), in which the police hire a civilian employee, Stacy, to turn on the Bat-Signal, lest police become tainted by Batman’s illegal acts. [Criminal Procedure/Constitutional Law note: Chances are, this subterfuge would not immunize the police from liability outside of a comic book.]

²⁰ *See* MPC § 2.04(1)(a), which provides that ignorance of facts or law is a defense if it “negatives the purpose, knowledge, [or] belief ... required to establish a material element” of an offense.

3. Other Substantive Crimes

This portion of Question One was not explicitly limited to crimes related to Article 212, and some students took the chance to discuss whether the pilot might be complicit in Batman's performance of other crimes, such as assault and burglary. While I did not intend for these issues to be presented, the question was vague enough to permit it. The analysis is quite similar to that for Article 212 crimes; it depends on what the pilot knew and agreed to.

4. Defenses

The pilot could raise defenses similar to those of Batman. For example, under Section 3.07(4)(b), "A private person who assists another private person in effecting an unlawful arrest ... is justified in using any force that he would be justified in using if the arrest were lawful, provided that (i) he believes the arrest is lawful, and (ii) the arrest would be lawful if the facts were as he believes them to be." Depending on what Batman told the pilot and what the pilot believed, this provision might be satisfied. Section 3.03(3)(b) could also apply, depending on the pilot's mental state. Note, however, that the same mental state that would establish the "purpose" necessary for a complicity or conspiracy conviction would prevent the successful pleading of these defenses. In other words, if the defenses above could work, the pilot would not need them, for he already would be innocent of the offenses themselves. Another potential defense is duress. Unlike Batman, who surely was not acting out of fear of Gordon or Dent, the pilot might well have feared Batman's wrath, and Batman might have obtained the pilot's help by threatening him. The fact pattern does not provide nearly enough information to establish this defense, but it is plausible.

II. Question 2—Liability of Ferry Passenger under the Common Law of Crimes

This question asks whether the passenger on the "innocent ferry" who tried to destroy the "convict" ferry may be charged with attempted murder. A good answer required a brief discussion of the law concerning attempt, a more detailed discussion of various common law homicide crimes, and a consideration of potential defenses to these crimes.

The law of attempt at common law merited only brief discussion. Under any reasonable test (including the proximity tests, the *res ipsa* test, etc.), the passenger's actions exceeded "mere preparation" and constituted an attempt to detonate the explosives aboard the convict ferry. The facts report that the man "stands up, takes the detonator, and tries to use it, but it is wrestled away from him before he can do so." The *actus reus* is his trying "to use" the detonator, and his purpose—to blow up the other ship, which one could expect to kill everyone on it—is clear from his actions. This is not a close call.

A. What Attempted Homicide Crime Fits?

With an attempt established, the issue becomes, “attempt to do what?” One might consider various charges, such as:

1. First-Degree Murder

Because first-degree murder is a species of murder, a threshold question is whether the passenger attempted murder of any kind. If so, one can consider whether the prosecution could establish the extra elements of first-degree murder.

To commit murder at common law, one must kill another person with “malice aforethought.” The relevant form of “malice aforethought” here is the old standby: intent to kill. Because the passenger attempted to blow up a ferry full of people, the prosecution need not resort to “depraved indifference to human life,” intent to cause grievous bodily harm, or felony murder. The passenger’s intent to kill is clear from the facts.

The additional elements of first-degree murder, however, are not so easy to prove. Absent poisoning or lying in wait, the common law traditionally requires “deliberation” before the fatal act.²¹ In other words, the killer must act with a “cool purpose.” The best evidence for deliberation here is that the passengers on the innocent ferry voted to destroy the convict ferry, and perhaps this process itself shows that the passenger had sufficient time and coolness. That said, the man is described as “frantic,” and he was spurred to action by the failure of others to do the deed. He appears to have acted on impulse and not with the delay required by most courts construing first-degree murder statutes.

2. Second-Degree Murder

The elements of second-degree murder (intentional killing) are discussed above. Absent a defense, the passenger appears at first blush to be guilty of this offense.²²

3. Voluntary Manslaughter

Perhaps, however, the passenger lacked “malice aforethought” because he attempted an intentional killing “in the heat of passion,” meaning that the passenger could be convicted of attempted voluntary manslaughter, not attempted murder of any degree. The issue is whether the provocation endured by the passenger is legally adequate to arouse the heat of passion in a reasonable person, such that he would be liable to act rashly, without reflection (or, in other words, from passion rather than judgment). In addition to this general question, one might consider the specific species of provocation deemed legally adequate and legally inadequate at common law.²³ Here, the passenger was threatened with death by the Joker, as were his fellow passengers. In

²¹ Many students conflated “deliberation” with “premeditation.” Recall that premeditation can occur “in an instant,” while deliberation requires some additional time (although how much more is uncertain).

²² Some students suggested that all “intentional” killing (or at least all killing with “malice aforethought”) is murder in the first degree (with some stating that only “depraved heart” killing is murder in the second degree). Not so. Much intentional killing is second-degree murder. If this is confusing, review *Brown* (casebook p. 775) and the notes that follow it.

²³ The notes following *Freddo* (p. 800) are instructive here.

addition, each minute brought the passengers closer to their scheduled deaths at midnight. One could easily imagine tensions increasing, with the passengers' control growing weaker, until one passenger finally snapped. Then again, everyone else managed to stay under control, even those on the "convict ferry;" perhaps that demonstrates that a reasonable passenger would not have tried to use the detonator. The passenger might reply that his fellow passengers voted to use the detonator, making it hard to argue that its use was totally unreasonable.

The analysis of whether the passenger was in fact provoked into the heat of passion (and, if provoked, whether "cooling time" passed before he acted) is similar to that above with respect to his potential for "deliberation." The vote suggests an absence of passion, while the passenger's "frantic" lunge for the detonator when the fellow passengers failed to act creates an appearance of passion. Overall, I think attempted voluntary manslaughter fits the facts here better than does attempted murder, but the answer is far from obvious.

B. Potential Defenses

Assuming that the prosecution can establish the elements of at least one attempted homicide crime, which it almost certainly can, the issue is whether there exists a defense to justify or excuse the passenger's attempt.

1. Necessity/Choice of Evils

This defense depends on the claim that destroying the convict ferry would have been a lesser evil than allowing the Joker to destroy both ferries. In essence, the argument is that the deaths of some seafarers is better than the deaths of those same persons and more besides. The obvious problem is the rule of *Dudley & Stephens* (p. 415), which provides that necessity (*a.k.a.* choice of evils, or the "general defense of justification") is not a defense to murder at common law.

2. Duress

A similar problem arises if the passenger seeks to justify his actions on a theory of duress. True, the Joker threatened him and his fellow passengers with death, telling them credibly that unless they blew up the "convict ferry," the Joker would destroy both ferries. The general rule at common law, however, precludes the use of duress as a defense to murder.²⁴

3. Self-Defense/Defense of Others

The passenger's best potential defense is based on self-defense or defense of others (his fellow passengers). The common law allows a person to kill another person if the killer honestly and reasonably believes that deadly force is necessary to prevent the imminent use of unlawful deadly force (against himself or a third person) by the person killed. Here, the initial aggressor was the Joker, and anyone on either ferry would have had a solid self-defense claim had he killed the Joker to prevent the destruction of the ferries. The passenger, however, attempted to blow up the convict ferry, not the Joker. Accordingly, he has a defense only if he reasonably believed that the persons he attempted to kill were about to use deadly force against himself or others. Such a belief by the passenger might well have been reasonable. Surely many passengers on the innocent ferry expected

²⁴ See the casebook note at p. 493 ("Duress as a Defense to Murder").

the convicts to kill them, and the facts suggest that the warden aboard the convict ferry handed his detonator to a convict in the expectation that the convict would destroy the innocent ferry.²⁵ Even though the passenger's belief would have been mistaken—the convict disabled his ship's detonator—it could nonetheless have been honest and reasonable.²⁶

4. Insanity

Several students suggested that the passenger might have an insanity defense. Although he was “frantic,” the fact pattern provides no evidence whatsoever about a “mental disease” to which his actions can be attributed. Stressful situations like his are more relevant to a discussion of “heat of passion” than to insanity, which is a substantial reach here.

III. Question 3—Proposed New Crime Concerning Vigilante Justice

The question presented is whether Gotham should adopt “a new law making it a crime to pursue vigilante justice while hiding one's identity” and, if such a law is to be adopted, how “to construct such an offense in a way that would be most likely to maximize its benefits while minimizing its flaws.” There were many good ways to address this question. Some students proposed specific statutory language, and others provided more general descriptions of how a sound statute would read. All good answers gave at least some strong arguments for and against the idea. Some answers made explicit references to the purposes of punishment studied at the beginning of the semester. This was potentially useful but was not strictly necessary.

A. The Merits: Should Such a Crime Be Created

1. Arguments in Favor

The primary arguments in favor concern the direct harms caused by those who pursue vigilante justice while hiding their identity. For example, vigilantes likely lack the training given to police officers, and they almost surely lack methods by which they can be held accountable. There is no Civilian Complaint Review Board to which complaints about Batman can be addressed. In addition, even skilled vigilantes likely violate the laws protecting criminals (not to mention mere suspects), as Batman does in our fact pattern. Unskilled vigilantes not only risk harm to the public but also put themselves in danger.

Most students also noted some indirect harms caused by those who pursue vigilante justice while hiding their identity. Even if vigilantes perform well—reducing crime with no more bad

²⁵ One argument against a self-defense claim is that while perhaps the passenger reasonably believed that *someone* on the convict ferry was about to use that ship's detonator, the passenger nonetheless attempted to use excessive force because he would have killed *everyone* on the convict ferry, regardless of that person's actions.

²⁶ A few students noted an interesting issue: If the passenger's belief was reasonable, wouldn't the convicts have been just as reasonable in expecting the passengers on the “innocent ferry” to kill them (the convicts)? If so, then an attempt by the convicts to blow up the “innocent ferry” would have been justified by self-defense, meaning that the act the defendant passenger meant to thwart was not “unlawful.” It seems odd to conclude that each ferry might reasonably have expected the other to destroy it, yet neither has a good self-defense claim. The logic of *Dudley & Stephens* might support such a result; perhaps each ferry's passengers should choose mutual death rather than act to kill innocents (in this context, the convicts are also innocent). But, then again, if any one ship's attempt *is* unlawful, then the other ship might be justified in using deadly force to prevent it. At some point this discussion resembles the cliché about angels dancing on the heads of pins, or the scene involving the consumption of iocane powder in *The Princess Bride*.

behavior than seen from police—the inability to accurately evaluate vigilante action might nonetheless inspire fear among the public (*e.g.*, of being the victim of an inaccurate, unaccountable vigilante), erode respect for the rule of law (by creating the impression that law enforcement is at the whim of random citizens), and could thwart genuine law enforcement efforts (as vigilantes fail to coordinate with police while maintaining their secret identities).²⁷

2. Arguments Against

The simplest effective argument against the enactment of such a statute is that most outrageous vigilante behavior is already illegal, particularly if the police cease inviting citizens to aid law enforcement and thereby cloaking their actions with a potential defense of public authority. Abduction is prohibited, as are assault and murder. In addition, the fact pattern identifies only one vigilante crime fighter (or two if you count the charter pilot). One might wonder if a new statute is the best response to a single person's odd behavior. If Gotham wants Batman to stay out of town, perhaps Gordon should just destroy the Bat-Signal and say so.

In addition, it appears that Batman at least occasionally provides tremendous benefits to Gotham, as he did when he prevented the Joker from destroying the two ferries packed with Gothamites. True, citizens think Batman is a murderer, but we know better. And the city needs all the help it can get fighting mobsters and occasional supervillains. If Bruce Wayne cannot fight crime in secret, he might abandon his efforts to Gotham's detriment. Or he might reveal his identity, thereby exposing himself to attacks by criminals.

Finally, the statute might prove difficult to enforce. If Batman is willing to risk death to fight crime, he might also risk a criminal conviction (as he does already when he abducts and assaults persons). Again, the easiest way to stop Batman from fighting crime, if Gotham truly wants him to stop, probably is to ask him—or at least to cease asking for his assistance.

B. Best Construction of the Statute, Assuming Enactment is Inevitable

If the statute is to be enacted, its drafters should consider a variety of issues so that it can provide the greatest benefit and cause the least harm. Good answers discussed what conduct the statute should prohibit and also addressed what mental state should be necessary for conviction.²⁸

Many students cautioned that the statute should be worded carefully so it does not apply to innocent citizens who act as occasional “Good Samaritans” and intervene to stop crimes in progress, nor should the statute cover legitimate neighborhood watch groups, undercover police officers, or anonymous police informants. The concern was that an overbroad (or even an imprecise) statute might discourage beneficial activity largely unrelated to the masked vigilantism truly contemplated by the Governor.

²⁷ Some far weaker arguments against the statute included the claim that it would violate the rights of superheroes (or vigilantes generally) under the Equal Protection Clause of the Fourteenth Amendment (not true), would violate the *Ex Post Facto* Clause (only true if applied to conduct performed before the statute's enactment), or would otherwise violate the Constitution (not likely). In short, these arguments went beyond the scope of our course and the exam question and generally misconstrued the law. I will leave the details to your Constitutional Law professors.

²⁸ Many answers noted that the statute should obey the principle of legality and similar such rules of law. This is true enough but applies to all criminal laws. The best answers focused on issues specific to the Governor's proposal.

Again, the proposed law would cover persons who “pursue vigilante justice while hiding one’s identity.” Accordingly, there are two obvious conduct elements: (1) the concealment of one’s identity and (2) the pursuit of vigilante justice. Each of these could use some explanation to avoid overbreadth and confusion.

With respect to mental state, the appropriate *mens rea* is probably purpose, or at least knowledge. It makes little sense to criminalize one who recklessly or negligently conceals her identity while fighting crime, such as someone returning from a Halloween party who happens upon an assault in progress and intervenes. At a minimum the conduct element of concealing one’s identity should have a high level of *mens rea*, even if other elements are treated differently.²⁹

To avoid including conduct such as legitimate police work and citizen defense of others, some students cleverly proposed using existing criminal offenses. For example, one could create a new offense as follows: “A person is guilty of ‘unidentified vigilante justice’ if she, (1) with the purpose of concealing her identity, (2) with the purpose of fighting, avenging, thwarting, stopping, preventing, or otherwise hindering crime, (3) commits a criminal offense.”³⁰ Such a proposal could then consider the appropriate sentence (perhaps something added onto the sentence for the underlying offense, or a mandatory imposition of the maximum sentence allowed for the underlying offense), and one might specify which offenses can satisfy the third element (perhaps only felonies, or crimes of violence).

Regardless of the construction of the offense, some attention should have been devoted to sentencing. One good idea was that a first offense should be punished lightly, thereby limiting the deterrence of legitimate activity and focusing the statute on citizens who make a habit of masked vigilantism, with subsequent offenses meriting harsh sentences. Another idea advanced by students generally opposed to the proposal was to define the crime as a misdemeanor, thereby limiting its harm.

²⁹ Then again, it is difficult to imagine how one could perform the second element (pursuit of vigilante justice) with a mental state lower than knowledge. One could, in theory, hinder crime by accident, but such behavior is not that of a “vigilante.”

³⁰ By applying only to existing criminal offenses, the new statute by definition excludes legitimate police activities, which are not criminal offenses but instead are justified as actions taken under public authority. The third element also incorporates the other defenses available at law, meaning that a masked person could defend himself from aggression but could not go out looking for trouble. Note that the second element (purpose to fight crime), while focusing on the Governor’s primary concern, also prevents the new statute from applying to any masked criminal (such as a run-of-the-mill bank robber or burglar). In addition, the first element (purposeful identity concealment) should exclude most neighborhood watch groups and Good Samaritans.