**Making an argument**

1. What are the relevant considerations that one might think should be factored in when deciding what to do about [your topic]?
   1. Rather than listing all the possible small details, try to think about big-picture considerations/issues (autonomy/consent, protecting the public, giving people what they deserve, special obligations to children, fairness, etc.) This will make the paper more manageable to write.
   2. List all of the considerations that someone might *think* are relevant, even if don’t agree that they are all relevant.
2. Which considerations are most important? Which generate the weightiest reasons/obligations?
   1. Give evidence to show their importance:
      1. To show that x is more important than y, find contexts in which we have to choose between x and y, and in which it is uncontroversial that we should choose x over y.
   2. If you think some of the seemingly relevant considerations really are not important at all, argue for this.
   3. You don’t need to compare every consideration to every other consideration: figure out which considerations your view deals with best, and argue that those are more important than the others.
      1. If your view deals better with considerations a and b than other views do, then you just need to show that a and b are more important than other considerations; you don’t need to say which of a and b are more important.
      2. If your view deals worse with c, d, and e than other views do, you just need to show that c, d, and e are less important than other considerations; you don’t need to say how they compare to each other.
3. How does this support your view?
   1. How does your view respect the most important considerations?
   2. Why do other possible views not do as good a job as your view?

**An example of steps 1 and 2**

Thesis: Any capable defense of a guilty client, even a defense that uses no questionable tactics, will be impermissible in certain kinds of ordinary cases. These are cases where the defense attorney expects that, were they not to defend, someone else would defend the client just as capably. When a lawyer expects to be replaced in this way, and the defendant’s punishment would be morally permissible, the reasons to defend are categorically outweighed by the reasons against defending. By “capably” I mean, “In a way that increase the client’s chance of avoiding morally justified punishment from what it would be had the client defended himself.”

There are a number of moral considerations typically cited in favor of criminal defense. These fall into two categories. First, some have to do with the protection of the specific defendant’s rights or interests. For example, it is often thought that people in general have a right to be defended or to have their side of an issue heard.[[1]](#footnote-1) Defendants also seem to have a right to be protected from potential improper prosecutorial tactics or excessive punishment.[[2]](#footnote-2) And some writing on criminal defense have pointed out that defendants benefit emotionally or mentally from being defended.[[3]](#footnote-3) The second category of reasons to defend has to do with larger social issues, which go beyond the effects on the particular defendant. Criminal defense is necessary to the continued functioning of an adversarial justice system.[[4]](#footnote-4) Defending clients from wrongfully gathered evidence might help to discourage police misconduct. And failure to defend guilty clients might harm the lawyer/client relationship, since if lawyers regularly abandoned guilty clients, then innocent clients would have reasons to hide inculpating evidence from their attorneys.[[5]](#footnote-5) It does not matter for my argument what the specific reasons that count in favor of defending are, as long as they arise either from the rights/interests of the specific defendant or from these sorts of larger social concerns.

There are a number of potential reasons that could count against capably defending. If we put aside those arising from questionable defensive tactics, the remaining reasons have to do with the possibility that the client will avoid some amount of justified punishment.[[6]](#footnote-6) Exactly what these reasons are depends on what it is that justifies punishment. The standard views are that punishment is justified by retribution (considerations of justice or desert), by the need for specific deterrence or incapacitation (to prevent the defendant from commission of future crimes), by the need for general deterrence (deterrence of other possible criminals), by the need for restitution, or by the need for rehabilitation.[[7]](#footnote-7) Because capable defenses increase the chance that the guilty will escape a significant amount of justified punishment, they increase the risk that the guilty will not pay full restitution or get what they deserve, or that punishment will have a weakened or non-existent rehabilitative, deterrent, or incapacitative effect.

1. Freedman, *Lawyers’ Ethics in an Adversary System*, Smith, ‘Defending defending,’ Simon ‘The ethics of criminal defense,’ Luban, ‘Are criminal defenders different?’ [↑](#footnote-ref-1)
2. Babcock, ‘Defending the guilty’, Wasserstrom, ‘Lawyers as professionals’, Simon ‘The ethics of criminal defense’, David Luban, ‘Lawyers as upholders of human dignity (when they aren't busy assaulting it)’, *University of Illinois Law Review* (2005) pp. 815-845, Smith, ‘Defending defending.’ [↑](#footnote-ref-2)
3. Babcock, ‘Defending the guilty’, Smith, ‘The difference in criminal defense and the difference it makes.’ [↑](#footnote-ref-3)
4. Wasserstrom, ‘Lawyers as professionals.’ [↑](#footnote-ref-4)
5. Smith, ‘The difference in criminal defense and the difference it makes’, Freedman, *Lawyers’ Ethics in an Adversarial System*. [↑](#footnote-ref-5)
6. See, e.g. Luban, ‘Are criminal defenders different’ or Simon, ‘The ethics of criminal defense.’ [↑](#footnote-ref-6)
7. For example, the Model Penal Code seems to endorse incapacitation, retribution, and deterrence as justifications for punishment, see American Law Institute, *Model Penal Code* (1962); retribution is advocated by Igor Primoratz, *Justifying Legal Punishment* (London: Humanities Press International, 1990); general deterrence is advocated by Norval Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974); rehabilitation is endorsed by Egardo Rotman, *Beyond Punishment* (Westport: Greenwood Press, 1990); and restitution is advocated by David Boonin, *The Problem of Punishment* (Cambridge University Press, 2008).

   Another potential view of the justification of punishment is the “rights forfeiture” view: criminals lose their right to not be punished when they commit crimes. It is not terribly plausible that rights forfeiture by itself justifies punishment; some other justification is needed as well. Otherwise the view allows that any punishment, no matter how harsh, can be justified as long as the possibility of it occurring is publicized. See, however, Christopher Wellman, ‘The rights forfeiture theory of punishment,’ *Ethics* 122 (2012), pp. 371-393 for a defense of rights forfeiture as, by itself, justifying punishment. [↑](#footnote-ref-7)