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Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to Seek Justice in a Comparative Analytical Framework

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ESSAY

THE YALE L. ROSENBERG MEMORIAL LECTURE

TAKING PROSECUTORIAL ETHICS SERIOUSLY: A CONSIDERATION OF THE PROSECUTOR'S ETHICAL OBLIGATION TO "SEEK JUSTICE" IN A COMPARATIVE ANALYTICAL FRAMEWORK

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An earlier version of this Essay was presented as the inaugural Yale L. Rosenberg Memorial Lecture, delivered at the University of Houston Law Center on March 9, 2004. The Yale L. Rosenberg Memorial Fund was established to recognize and foster excellence at the University of Houston Law Center. Professor Yale Rosenberg was the holder of the A.A. White Professorship, and he exemplified such excellence in his scholarship and teaching. The Yale L. Rosenberg Memorial Lecture showcases academic distinction annually. In 2005, the focus will be on student scholarship.

I thank Irene Rosenberg for inviting me to present these remarks in memory of Yale Rosenberg, whose ethical conduct and pioneering work in the comparative study of Jewish legal theory and American law have served as an inspiration to me and many others. *See generally In Memoriam: Yale Rosenberg*, 39 HOUS. L. REV. 869 (2002). I thank Irene, Laura Oren, and the faculty and students at the University of Houston Law Center for their kindness and hospitality.

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I. INTRODUCTION

In many ways, the role of the prosecutor in the American justice system differs significantly from that of other lawyers.¹ The difference may be most evident in the unique ethical duties of the prosecutor, whose professional responsibility extends beyond that of the advocate to include the obligation to “seek justice.”² Notwithstanding the aspirational value and general importance of such an obligation, however, the articulation of the prosecutor’s duties in the form of a broad directive to seek justice has been a source of much criticism among legal scholars.³ Indeed, in recent years, scholars and courts alike have expressed growing dissatisfaction with the inclusion of broad ethics provisions in ethics codes.⁴ Not surprisingly, those calling for increased specificity view the standard governing prosecutors, arguably one of the broadest of all ethics rules, as unworkably vague for purposes of meaningful interpretation and application.

1. See, e.g., *Berger v. United States*, 295 U.S. 78, 88–89 (1935) (discussing the standard that governs prosecutorial misconduct).

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88; see also *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976) (“It is the functional comparability of their judgments to those of the judge that has resulted in . . . prosecutors being referred to as ‘quasi-judicial’ officers . . .”).

2. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1980) [hereinafter MODEL CODE] (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to *seek justice*, not merely to convict.” (emphasis added)); see also MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2003) [hereinafter MODEL RULES] (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

3. See Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 292 (1993) (arguing that the “justice” provisions of Model Rule 3.8 provide minimal guidance for prosecutors). See generally Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991) [hereinafter Zacharias, *Can Prosecutors Do Justice?*] (arguing that the noncompetitive “do justice” approach is inadequate because the professional codes do not exempt prosecutors from the requirements of zealous advocacy).

4. See generally Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527 (2003) [hereinafter Levine, *Taking Ethics Codes Seriously*] (offering a comparative framework for interpreting ethics provisions that have been criticized as vague).

This Essay responds to such concerns through a comparison to parallel issues of interpretation and application that arise in Jewish law. Specifically, the Essay examines the complex nature of the prosecutor's broad obligation to seek justice through a consideration of the similarly broad directive in Jewish law requiring that "in all [of] your ways acknowledge [God]."⁵ The Essay emphasizes that unlike other lawyers, the prosecutor must take into account complex implications of the concept of justice during the process of ethical deliberation and decisionmaking. Likewise, Jewish law recognizes and addresses the complexity of ethical and normative decisionmaking that each adherent must undertake in the service of acknowledging God. Thus, through this comparative analytical framework, the Essay demonstrates that the prosecutor's broad ethical obligation to seek justice serves as a workable and, indeed, appropriate standard for prosecutorial ethics.

II. BASIC PRINCIPLES: ILLUSTRATIONS OF THE UNIQUE NATURE OF THE PROSECUTOR'S ETHICAL OBLIGATION TO SEEK JUSTICE

The unique nature of the prosecutor's ethical obligation to seek justice manifests itself in numerous examples of the conduct required of prosecutors in the course of fulfilling their role in the criminal justice system.⁶ Before proceeding to a normative analysis of the application of this obligation to more ethically

5. *Proverbs* 3:6 (Tanakh); see also 2 *The Holy Scriptures* 1763 (Jewish Publ. Soc. of Am. 1955) (using the term "acknowledge" in translating this verse). A literal translation of the quoted phrase might read "in all of your ways know Him." I have chosen the term "acknowledge," however, because as is often true of translations, this substitution for literalism may in fact provide a more accurate and meaningful depiction of the original in modern English. See generally Aryeh Kaplan, *Translator's Introduction*, in *THE LIVING TORAH: THE FIVE BOOKS OF MOSES*, at v (Aryeh Kaplan trans., 1981).

Nevertheless, there is clear significance in the use of the biblical term for "knowledge" in the original Hebrew verse, connoting a close form of intimate connection, which is applied here to an individual's relationship with God. See, e.g., *Genesis* 4:1 (Tanakh) (demonstrating use of the term "yada"); see also YITZCHAK HUTNER, *PACHAD YITZCHAK, PURIM 77-78* (6th ed. 1998); JOSEPH B. SOLOVEITCHIK, *FAMILY REDEEMED: ESSAYS ON FAMILY RELATIONSHIPS* 94-95, 179 (David Shatz & Joel B. Wolowelsky eds., 2000).

In addition, the final word in the quoted phrase is actually the pronoun "Him," to which the antecedent is clearly "God." In the interest of brevity, the obligation embodied in this verse will hereinafter often be referred to as the obligation to "acknowledge God."

6. See, e.g., MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* §§ 11.01-16 (2d ed. 2002) (discussing the "special ethical rules" that apply to prosecutors); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 13.10 (1986) (noting the prosecutor's dual role of bearing responsibility for convicting the guilty and ensuring that the innocent are not convicted).

complex scenarios, it may be helpful to look at some basic examples that illustrate the prosecutor's ethical duties.

The unique nature of the prosecutor's position is manifest when juxtaposed with that of the private attorney representing a civil client.⁷ Yet the extent to which the prosecutor's conduct differs in conformance with the dictates of seeking justice is perhaps most starkly expressed when contrasted with the role of the opposing lawyer operating in the same arena as the prosecutor—the criminal defense attorney. Although the American adversarial system generally adopts the premise that justice prevails through the exercise of zealous advocacy on the part of opposing sides to a legal dispute, in the context of a criminal case, the prosecutor—and pointedly, not the defense attorney—has the additional and unilateral obligation to help ensure that justice is done.

A. *The Decision to Prosecute*

One of the most basic and important decisions for a prosecutor is whether to file charges against a particular defendant. Although this decision may turn on a number of considerations, there are some circumstances in which, despite a strong likelihood of obtaining a conviction, a prosecutor remains ethically obligated to refrain from prosecution. Under the Model Rules of Professional Conduct, a prosecutor must not prosecute a charge “that the prosecutor knows is not supported by probable cause.”⁸ As George Sharswood put it in his groundbreaking 1854 essay on legal ethics, a lawyer should not prosecute a defendant

7. Notably, a number of scholars have delineated theoretical models of legal ethics that extend the obligation to do justice to attorneys representing private clients. Representative of, and perhaps foremost among, several leading scholars advocating such a position is Professor William Simon, who published a series of articles culminating in a book-length “defen[se of] an approach to ethical decisionmaking” adopting the “basic maxim . . . that the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice.” WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 9 (1998). In fact, Professor Simon expressly compares his model of ethical lawyering for private attorneys to the obligation that ethics codes prescribe for prosecutors. *Id.* at 10.

Although such suggestions raise important theoretical and philosophical issues, they rely on a self-conscious departure from the law governing the conduct of lawyers. See Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 *IND. L. REV.* 21, 38–40 & 38 n.115 (2003) [hereinafter Levine, *Taking Ethical Discretion Seriously*]; Zacharias, *Can Prosecutors Do Justice?*, *supra* note 3, at 52 n.26. As a descriptive matter, the ethical obligations of a prosecutor reflect the fundamental difference between the prosecutor's role and that of other lawyers in the American legal system.

8. MODEL RULES, *supra* note 2, R. 3.8(a).

whom the lawyer “knows or believes to be innocent.”⁹ Although the precise contours of this obligation may be open to interpretation,¹⁰ the obligation clearly sets forth a standard strikingly different from that of the criminal defense attorney.

Like other lawyers representing private clients, criminal defense attorneys have an ethical obligation to zealously represent their clients’ interests.¹¹ Yet criminal defense attorneys stand out in the extent to which ethics regulations permit—and at times require—that they engage in methods of advocacy otherwise considered outside the bounds of ethical lawyering, methods almost diametrically opposed to those comprising the ethical obligations of prosecutors to seek justice.

9. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 93 (F.B. Rothman & Co. 5th ed. 1993) (1884), *quoted in* Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 612–13 (1999) [hereinafter Green, *Prosecutors*]. The essay was first published as *A Compend of Lectures on the Aims and Duties of the Profession of Law, Delivered Before the Law Class of the University of Pennsylvania (1854)*. For a historical discussion of Sharswood’s essay, including the history of its first publication in 1854, see generally Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992).

10. According to many scholars, prosecutors “must satisfy themselves of an individual’s guilt as a precondition” to prosecution. *E.g.*, Green, *Prosecutors*, *supra* note 9, at 641; *see also* John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174, 178 (1965) (stating that “regardless of the strength of the case,” prosecutors should not file charges unless they “actually believe” that the defendant committed the crime and that it is “morally wrong” to continue to prosecute unless “personally convinced” of such), *cited in* FREEDMAN & SMITH, *supra* note 6, at 300. As one scholar has put it, “you never put a defendant to trial unless you [are] personally convinced of [the defendant’s] guilt.” Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 309 (2001) [hereinafter Gershman, *The Prosecutor’s Duty to Truth*]. In fact, in an earlier article, Professor Gershman argued that the proper standard for proceeding with a criminal case should be the prosecutor’s “moral certainty” of the defendant’s perpetration of the crime. Bennett L. Gershman, *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 530 (1993) [hereinafter Gershman, *A Moral Standard*].

In any event, each of these views appears to endorse a standard different from that mandated under the Model Rules. *See* FREEDMAN & SMITH, *supra* note 6, § 11.05, at 304.

The ABA standard appears to mean that the prosecutor can ethically go forward . . . regardless of . . . personal[] belie[f] that the accused is [or is not] guilty, and [despite knowing] that there is insufficient evidence against the accused to survive a motion for judgment of acquittal at the close of the government’s case.

Id.; *see also* Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1588 (finding that Model Rule 3.8(a) “deals with only one aspect of prosecutorial discretion—the core decision whether to prosecute a criminal charge—and incorporates a standard that is both too low and incomplete”).

11. *See* MODEL CODE, *supra* note 2, Canon 7 (“A lawyer should represent a client zealously within the bounds of the law.”); MODEL RULES, *supra* note 2, R. 1.3 cmt. 1 (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).

As a threshold matter, unlike a prosecutor, a criminal defense attorney may engage in advocacy even when the facts of the case are contrary to the client's position, including when the attorney knows both that the client committed the crime and that the charge is supported by evidence sufficient for a conviction. Again, in the classic words of Judge Sharswood, when representing a criminal defendant, a lawyer should "exert all his ability, learning, and ingenuity, in such a defense, even if . . . perfectly assured . . . of the actual guilt of the prisoner."¹² Furthermore, alone among attorneys, the criminal defense attorney is exempt from the ethics provision that broadly prohibits "bring[ing] or defend[ing] a proceeding, or assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so."¹³ In express contrast to the general prohibition, the Model Rules permit the criminal defense attorney to "so defend the proceeding as to require that every element of the case be established."¹⁴

B. Disclosure of Exculpatory Evidence and Information

Another "special responsibilit[y] of a prosecutor" delineated by the Model Rules requires "timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."¹⁵ In sharp contrast, consistent with constitutional guarantees and the ethical duty of confidentiality, the criminal defense attorney may—more likely, must—withhold from the prosecution both material and incriminating evidence.¹⁶ As one leading scholar has put it, "[w]hile those protections may not warrant a general prohibition against all prosecution discovery of defense information prior to trial, they do create a mine field of constitutional and other restrictions that must be negotiated before defense disclosure can be required."¹⁷

12. SHARSWOOD, *supra* note 9, at 92, *quoted in* Green, *Prosecutors*, *supra* note 9, at 613.

13. MODEL RULES, *supra* note 2, R. 3.1.

14. *Id.* & cmt. 3 ("The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.")

15. MODEL RULES, *supra* note 2, R. 3.8(d).

16. *See* *People v. Meredith*, 631 P.2d 46, 51–52 (Cal. 1981) (discussing multiple cases involving the applicability of the attorney-client privilege in the criminal context); MODEL RULES, *supra* note 2, R. 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client . . .").

17. WOLFRAM, *supra* note 6, § 13.10.5 n.98, at 767 (citation omitted). The protections referenced above include the protection against self-incrimination, the

C. *Candor Toward the Tribunal: Cross-Examination of Truthful Witnesses and Arguing False Inferences*

Finally, once a trial has commenced, prosecutors, like all attorneys, are bound by a duty of candor toward the tribunal.¹⁸ Again, however, the prosecutor's ethical obligations differ from those of most lawyers—in particular those of the criminal defense attorney¹⁹—as a result of what one scholar has termed the prosecutor's "duty to truth."²⁰

For example, a skilled attorney may attempt to discredit a truthful adversarial witness through effective cross-examination.²¹

presumption of innocence, the confidentiality of attorney-client communication, and the protection of attorney work-product. *Id.*

18. See MODEL RULES, *supra* note 2, R. 3.3.

19. Like most other lawyers, prosecutors may not knowingly offer false evidence, including the false testimony of a witness. See *id.* R. 3.3(a)(3). In contrast, the criminal defense attorney is partially exempt even from such a basic rule of candor. For example, in some jurisdictions a criminal defense attorney is obligated to accede to the wishes of a client who insists on testifying falsely and must present the testimony in the form of a "narrative statement." *Id.* R. 3.3 cmt. 7. In addition, unlike other private attorneys, a criminal defense attorney may not refuse to offer into evidence the client's testimony based on the attorney's reasonable belief that the testimony is false. *Id.* R. 3.3(a)(3).

The precise extent to which a prosecutor must be satisfied of the veracity of a witness before permitting that witness to testify remains a subject of debate among legal scholars. For example, Professor Zacharias asserts that "prosecutors need not act as judges of their witness's testimony unless they are sure the witness is falsifying facts." Zacharias, *Can Prosecutors Do Justice?*, *supra* note 3, at 94. However, Professor Zacharias's position may not represent a categorical view that "it is not the prosecutor's function to make a personal evaluation of the truth." Gershman, *The Prosecutor's Duty to Truth*, *supra* note 10, at 310 & n.4 (presenting various viewpoints in favor of and against this proposition). In fact, Professor Zacharias does require that the prosecutor evaluate the truth of the evidence to the extent that "prosecutors should not rely on information they know to be false." Zacharias, *Can Prosecutors Do Justice?*, *supra* note 3, at 94.

Likewise, in a groundbreaking article on the subject of prosecutorial ethics, Professor Richard Uviller does not appear to permit the prosecutor to forego any and all evaluation of the truth; rather, he prescribes that "when the issue stands in equipoise in [the prosecutor's] own mind, when [the prosecutor] is honestly unable to judge where the truth of the matter lies, [there is] no flaw in the conduct of the prosecutor who fairly lays the matter before the judge or jury." H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1159 (1973). In an article published many years later, Professor Uviller's position seems to have evolved somewhat, maintaining that "the conscientious prosecutor . . . should be assured to a fairly high degree of certainty that he has the right person, the right crime, and a good chance of success with a petit jury." H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1703 (2000); cf. WOLFRAM, *supra* note 6, § 13.10.4, at 767 ("The prosecutor must take reasonable steps to assess the truth or falsity, and not just the plausibility, of evidence that will be offered."). Refer to note 10 *supra* and accompanying text.

20. See Gershman, *The Prosecutor's Duty to Truth*, *supra* note 10, at 314 (identifying sources of the "duty to truth").

21. See FREEDMAN & SMITH, *supra* note 6, §§ 8.01–.09 (examining the morality of using cross-examination to discredit a witness known to be telling the truth); WOLFRAM, *supra* note 6, § 12.4.5, at 650–51 (noting the general agreement among commentators that

Indeed, as Justice White famously observed, this method of cross-examination comprises “part of the duty imposed on the most honorable defense counsel,” despite the fact that such conduct “in many instances has little, if any, relation to the search for truth.”²² Although the propriety of civil attorneys using such a tactic may be open to debate,²³ it is clearly unethical for a prosecutor to engage in a method of cross-examination that would impugn the credibility of a truthful defense witness.²⁴ Similarly, a criminal defense attorney may rely on truthful evidence to persuade the jury to accept an inference that is favorable to the client but that the lawyer knows is false.²⁵ Again, there appears to be some question concerning whether civil attorneys may engage in such conduct,²⁶ but there is general agreement that prosecutors may not present false inferences to support a conviction.²⁷

persuading a jury not to believe a truthful witness is permissible).

22. See *United States v. Wade*, 388 U.S. 218, 258 (1967) (White, J., dissenting in part and concurring in part).

Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what [counsel] thinks or knows to be the truth. . . . [M]ore often than not, defense counsel will cross-examine . . . and impeach [a prosecution witness] . . . even if [counsel] thinks the witness is telling the truth In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

Id. at 257–58 (White, J., dissenting in part and concurring in part).

23. Compare FREEDMAN & SMITH, *supra* note 6, § 8.06, at 222–23 (stating that in representing either a civil client or a criminal defendant “there is general agreement that a lawyer can properly cross-examine a truthful and accurate witness to make [the witness] appear to be mistaken or lying” and that “the prevailing view is that the lawyer is ethically required to do so unless tactics dictate otherwise”), and Green, *Prosecutors*, *supra* note 9, at 631–32 (stating that “in all likelihood” this tactic “is acceptable” for lawyers in civil proceedings), with WOLFRAM, *supra* note 6, § 12.4.5, at 651 (stating that “the justifiability of a system of searching for ‘weaknesses’ in a witness’ testimony with no regard to its accuracy is most supportable, if supportable at all, in the context of the criminal justice system,” and that “it seems extremely doubtful that it should be extended to civil cases”).

24. See FREEDMAN & SMITH, *supra* note 6, § 11.01, at 294–95; WOLFRAM, *supra* note 6, § 12.4.5, at 651; Green, *Prosecutors*, *supra* note 9, at 631–32, 632 n.113.

25. See WILLIAM H. FORTUNE ET AL., *MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK* § 13.5.1, at 426–27 (1996); Green, *Prosecutors*, *supra* note 9, at 631–32. In fact, at least one court has apparently held that a criminal defense attorney “must argue a false inference that is fairly supported by the evidence,” and that court granted a writ of habeas corpus based on counsel’s failure to do so. FORTUNE ET AL., *supra*, § 13.5.1, at 427 (citing *Johns v. Smyth*, 176 F. Supp. 949 (E.D. Va. 1959)).

26. Compare FORTUNE ET AL., *supra* note 25, § 13.5.1, at 428 (stating that “the answer is unclear” but that “leading authorities argue that it is unethical for a civil lawyer to knowingly argue for a false inference”), with Green, *Prosecutors*, *supra* note 9, at 631–32 (stating that “in all likelihood” this tactic “is acceptable” for lawyers in civil proceedings).

27. See FORTUNE ET AL., *supra* note 25, § 13.5.1, at 427–28; Green, *Prosecutors*,

Each of these scenarios exemplifies a different aspect of the prosecutor's ethical obligations and broadly illustrates some of the basic contours of the prosecutor's duty to seek justice. In each case, the prosecutor is required to forego conduct that would increase the likelihood of obtaining a conviction in favor of conduct that will increase the likelihood of obtaining justice. Indeed, beyond the dictates of ethical guidelines, on a normative level the appropriate prosecutorial response in each of these scenarios appears fairly self-evident. It would seem to conflict with fundamental notions of justice for a criminal defendant to face a conviction either when the prosecutor does not believe the evidence supports such an outcome, on the basis of a jury's inability to consider evidence that would tend to exculpate the defendant, or through a prosecutor's distortion of the implications of a witness's testimony or other truthful evidence.

III. BEYOND BASIC PRINCIPLES: FURTHER ANALYSIS OF THE NORMATIVE IMPLICATIONS OF THE PROSECUTOR'S ETHICAL OBLIGATION TO SEEK JUSTICE

Beyond the basic—and somewhat intuitive—responsibilities implicit in the duty to seek justice, the prosecutor often faces more complex ethical challenges, extending to situations in which the ethically proper course of action seems considerably less obvious. Indeed, on a normative level, the conduct expected or permitted of the prosecutor in such situations may prove somewhat difficult to reconcile with the apparent demands of the prosecutor's obligation to seek justice. Thus, an analysis of these scenarios may suggest that, consistent with the complex nature of the prosecutor's mode of ethical decisionmaking, it may be not only helpful but perhaps necessary to consider the prosecutor's ethical duties through guidelines articulated in broad principles such as the provision requiring that the prosecutor seek justice.

A. *Nondisclosure of Nonexculpatory Evidence and Information*

A well-known New York case presents an intriguing variation on the prosecutor's duty to disclose evidence tending to negate or mitigate the defendant's culpability.²⁸ Following several

supra note 9, at 632 & n.113 (quoting *United States v. Universita*, 298 F.2d 365, 367 (2d Cir. 1962); *United States v. Lusterino*, 450 F.2d 572, 574–75 (2d Cir. 1971)). Moreover, at least one federal court of appeals has held that a prosecutor cannot present an argument based on facts outside the record to rebut defense counsel's argument in support of false inferences. See *FORTUNE ET AL.*, *supra* note 25, at 427–28, 427 n.5 (quoting *United States v. Latimer*, 511 F.2d 498 (10th Cir. 1975)).

28. See *People v. Jones*, 375 N.E.2d 41 (N.Y. 1978). The facts of this case have also

months of plea negotiations, unbeknownst to the defendant, the complaining witness died; four days later, the defendant accepted the prosecutor's plea offer.²⁹ Upon later learning of the witness's death, the defense attorney moved to withdraw the plea, arguing that the prosecutor had been obligated to disclose the fact that the witness had died, a fact that might have affected the defendant's decision regarding the plea offer.³⁰

The New York Court of Appeals rejected the defense attorney's argument, emphasizing that the information concerning the death of the witness "would not have constituted exculpatory evidence—i.e., evidence favorable to an accused where the evidence is material either to guilt or to punishment."³¹ Rather, the court found that the information the prosecutor failed to disclose constituted "nonevidentiary information pertinent to the tactical aspects of a defendant's determination not to proceed to trial."³² As the court further explained, "notwithstanding that the responsibilities of a prosecutor for fairness and open-dealing are of a higher magnitude than those of a private litigant, no prosecutor is obliged to share [an] appraisal of the weaknesses of [the] case (as opposed to specific exculpatory evidence) with defense counsel."³³

Insofar as it describes the legal obligation of the prosecutor to disclose exculpatory information to the defendant, the court's conclusion stands on firm analytical ground: Because the information at issue did not tend to negate or mitigate the defendant's culpability, it was not subject to disclosure requirements.³⁴ Nevertheless, as a normative matter, it may not appear quite as clear that the prosecutor's conduct in this case complied, in a broader sense, with the unique ethical duty to seek justice. If the prosecutor's professional responsibility is in fact seen to extend beyond the goal of conviction to include the goal of fair and just criminal proceedings, then the ethical obligation to seek justice might be understood as requiring disclosure to the

provided the basis of a hypothetical question posed in countless interviews to candidates for positions in prosecutors' offices.

29. *Id.* at 42.

30. *Id.*

31. *Id.* at 43.

32. *Id.*

33. *Id.* at 43–44.

34. *See id.* at 44–45. For an apparently contrary approach, see *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 512 (E.D. Mich. 1983) (finding that the plaintiff's attorney had an obligation to inform opposing counsel that the plaintiff had died during the course of settlement negotiations).

defendant of information that, albeit not technically exculpatory, may be crucial to the defendant's decisionmaking process.³⁵

B. Decision Not to Prosecute: Perjury Charges Against the Elderly Mother of a Criminal Defendant

In the course of a criminal trial, following the government's presentation of evidence, the defendant may offer evidence to rebut the government's case. For example, the defense attorney may offer the testimony of an alibi witness who will testify that when the crime transpired, the defendant was with the witness rather than at the scene of the crime. The alibi witness may be a close friend or relative of the defendant—at times, poignantly, the defendant's elderly mother. Despite the sympathy that a mother's testimony may evoke in the trier of fact, to the extent that her statement proves to be, in a particular case, flatly contradicted by extensive and highly reliable testimony or physical evidence, it will appear patently fabricated and will have minimal, if any, bearing on the outcome of the case.

Under these facts, the prosecutor is faced with a clear case of perjury by the defendant's mother, creating grounds for criminal charges and a strong possibility of conviction. Yet the prosecutor in such a scenario will likely choose not to investigate or prosecute the perjury charge. As a descriptive matter, the decision not to prosecute undoubtedly falls within the broad range of prosecutorial discretion.³⁶ In addition, there may exist practical considerations supporting the prosecutor's decision.³⁷

35. Using Professor Bruce Green's framework for substantive components of the prosecutor's obligation to seek justice, on some level the prosecutor's conduct in this scenario would arguably seem to violate the objective of "affording the accused . . . a lawful, fair process." Green, *Prosecutors*, *supra* note 9, at 634 (emphasis added).

36. See generally, e.g., Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980) (examining prosecution rates and prosecutors' reasons for declining to prosecute defendants in the federal system); Gershman, *A Moral Standard*, *supra* note 10 (exploring challenges to the prosecutor's charging power in different hypothetical situations); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669 (describing the central role of the prosecutor and of prosecutorial discretion in the adversary system); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996) (identifying trends that have strengthened prosecutorial power and proposing an outline for tying the exercise of prosecutorial discretion to the availability of prison resources); Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511 (2000) (analyzing four prosecutorial decisions and focusing on education as a means to help "prosecutors navigate the discretionary decision-making process"); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (examining the nature, scope, and effect of prosecutorial discretion and suggesting that it may be overly broad and in need of reform).

37. Refer to note 96 *infra* and accompanying text (describing one practical reason

Nevertheless, on a normative level, the decision not to prosecute an individual who has perjured herself in open court arguably constitutes an abdication of the prosecutor's duty to seek justice, which seemingly requires undertaking an attempt to convict those who have clearly committed crimes.³⁸

C. *Leniency for Cooperators*

As numerous scholars have observed, the prevalence of cooperators—criminal offenders who provide the prosecutor with either information or testimony, or both, in exchange for possible leniency in criminal charges or sentencing³⁹—presents prosecutors with various practical and ethical challenges.⁴⁰ Nevertheless, the problems manifest in the use of cooperators

not to prosecute as inadequate resources).

38. In Professor Green's framework, such prosecutorial conduct might violate the objectives of "enforcing the criminal law by convicting and punishing . . . those who commit crimes" and "treat[ing] lawbreakers with rough equality." Green, *Prosecutors*, *supra* note 9, at 634. However, Professor Green qualifies that the first of the objectives includes punishing only "some (but not all) of those who commit crimes." *Id.* Therefore, Professor Green may provide a particularly helpful framework for considering whether the defendant's mother's perjury should be prosecuted.

39. This definition borrows from Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 2 (2003).

40. See, e.g., FREEDMAN & SMITH, *supra* note 6, § 11.13, at 318–19 (suggesting that the lack of guidance and the incentives for "snitches" to cooperate with prosecutors may not always produce accurate information); Ellen Yaroshefsky, *Introduction* to Symposium, *The Cooperating Witness Conundrum: Is Justice Obtainable?*, 23 CARDOZO L. REV. 747, 749 (2002) [hereinafter Yaroshefsky, *Introduction*] (noting that although the dangers of using cooperating witnesses have been widely accepted, the concern about the use of such witnesses is on the rise). See generally, e.g., John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797 (2001) (questioning the reliability of testimony from one type of cooperator—an accomplice—in the context of the Confrontation Clause of the U.S. Constitution); George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1 (2000) (addressing the legal and ethical challenges posed by cooperative testimony and describing the offer of leniency or immunity provided in exchange for such testimony as an exception to the rule against paying for witness testimony); Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1 (1992) (discussing several potential problems with the use of cooperating witnesses, including the possible validation of criminal activity and the potential for unreliable information); Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning In the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199 (1997) (critiquing the extent of the federal prosecutor's power over substantial assistance departures from mandatory sentencing guidelines when negotiating with cooperating witnesses); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105 (1994) (recognizing the paradox created by the relationship between knowledge and culpability: the more a cooperating witness knows about a particular crime, the more culpable that witness is likely to be); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999) (using interviews with prosecutors to explore the dilemma posed by prosecutors' frequent reliance on inaccurate cooperator testimony).

have not deterred prosecutors from increasingly relying on cooperation as an indispensable tool in the investigation and prosecution of crime.⁴¹

Compared to the extensive concerns scholars have raised regarding procedural ethical issues that may arise in the course of working with a cooperator, the more fundamental issue of the substantive ethical propriety of granting leniency in exchange for assistance has received considerably less attention. Arguably, entering into a cooperation agreement may represent yet another instance in which a widely accepted practice among prosecutors seems to contradict the normative nature of the prosecutor's paramount and fundamental obligation to seek justice. After all, in light of the crime the cooperator has committed and the corresponding punishment that should therefore constitute the cooperator's just deserts, it seems to defy justice for the prosecutor to grant leniency on the basis of the practical utility of the information and assistance the cooperator has provided.⁴²

Thus, in each of these scenarios, the laws and provisions regulating prosecutorial ethics give prosecutors the discretion to engage in conduct that appears to undermine the prosecutor's underlying ethical obligation to seek justice. Whether the decision proves detrimental to the defendant—such as a refusal to disclose information that would assist the defense but that falls short of being exculpatory—or ultimately benefits the defendant—such as a decision to offer leniency if the defendant acts as a cooperator or not to prosecute a defendant's mother for perjury—the prosecutor's choice in each case resists simple normative explanation.

41. See, e.g., Simons, *supra* note 39, at 3, 14 (stating that “cooperation has never been more prevalent than it is today” and citing statistics demonstrating increasing cooperation); see also FREEDMAN & SMITH, *supra* note 6, § 11.13, at 318 (describing use of cooperators as “an increasingly troublesome area for prosecutors, who regularly obtain information and testimony from people who can incriminate others in exchange for promises of leniency,” but noting that “in some cases, because of [a] lack of adequate evidence, it would be difficult, if not impossible, to prosecute without such ‘cooperation’”); Steven M. Cohen, *What Is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 817, 817 (2002) (observing that “at the core of almost every complex criminal case sits an accomplice (or cooperating) witness”); *id.* at 819–20 (asserting that “in the federal [criminal justice] system, the notion of salvation through cooperation is pervasive” and that “the almost mystical qualities of cooperation—the prospect of receiving a substantially reduced sentence . . . —is known to every criminal defendant”); Yaroshefsky, *Introduction*, *supra* note 40, at 749 (describing “an accepted proposition that an effective criminal justice system is dependant upon informants and other cooperators”); *id.* at 750 (noting that “there exists a theoretical recognition of the dangers associated with cooperating witnesses and, over time, scholars, judges, and lawyers have made numerous proposals to reduce those dangers” but that “most of those have gone unheeded”).

42. The prosecutor's conduct may thus violate the objective “to treat lawbreakers with rough equality, that is, similarly situated individuals should generally be treated in roughly the same way.” Green, *Prosecutors*, *supra* note 9, at 634.

Instead, a normative justification for these decisions seems to require a more complex and nuanced consideration of the prosecutor's ethical obligation to seek justice. In an effort to undertake such an analysis, it may be helpful to look to another system of legal and ethical decisionmaking, specifically Jewish law's approach to issues of ethical complexity. Perhaps the Jewish legal system offers an analogue that may be used to help create a more complete appreciation of the nature of the prosecutor's ethical duties and decisions.⁴³

IV. LEGAL AND ETHICAL DECISIONMAKING IN A COMPARATIVE NORMATIVE FRAMEWORK

A. *Underlying and Overarching Normative Directives*

The underlying and overarching normative directive governing the ethical conduct of the American prosecutor is the broad obligation to seek justice. In Jewish law and philosophy, although a number of broad provisions serve as basic sources of legal and ethical obligation,⁴⁴ the underlying and overarching normative directive may be found in the biblical imperative: "In all of your ways acknowledge [God]."⁴⁵ In both legal systems,

43. Indeed, in the past I have suggested that hermeneutic and analytical elements of Jewish law may provide a particularly apt and valuable source for further exploration and understanding of various areas of the American legal system, including: constitutional law, *see, e.g.*, Samuel J. Levine, *An Introduction to Legislation in Jewish Law, with References to the American Legal System*, 29 SETON HALL L. REV. 916 (1999) [hereinafter Levine, *Introduction to Legislation*]; Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 UTAH L. REV. 465; Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997) [hereinafter Levine, *Jewish Legal Theory*]; Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 CONST. COMMENT. 511 (1998); criminal law, *see, e.g.*, Samuel J. Levine, *Capital Punishment in Jewish Law and Its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY'S L.J. 1037 (1998); Samuel J. Levine, *Playing God: An Essay on Law, Philosophy, and American Capital Punishment*, 31 N.M. L. REV. 277 (2001); Samuel J. Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 FORDHAM URB. L.J. 1677 (2000); and legal ethics, *see, e.g.*, Samuel J. Levine, *Professionalism Without Parochialism: Julius Henry Cohen, Rabbi Nachman of Breslov, and the Stories of Two Sons*, 71 FORDHAM L. REV. 1339 (2003); Levine, *Taking Ethical Discretion Seriously*, *supra* note 7; Levine, *Taking Ethics Codes Seriously*, *supra* note 4; Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 TEX. TECH L. REV. 1199 (1996) [hereinafter Levine, *Broad Life*].

44. *See* Levine, *Taking Ethics Codes Seriously*, *supra* note 4, at 542–43, 542 n.56.

45. *Proverbs* 3:6 (Tanakh); *see also* MAIMONIDES, *MISHNE TORAH, Laws of De'oth* 3:2–3:3; MAIMONIDES, *COMMENTARY ON THE MISHNA, Introduction to PIRKE AVOTH*, ch. 5; MOSES HAYYIM LUZZATTO, *MESILLAT YESHARIM* 336–39 (Shraga Silverstein trans., 1966);

however, the contours of the broad directive are delineated in part by various specific obligations. In Jewish law, enumerated obligations provide a means for acknowledging God in every area of human activity.⁴⁶ Although not as comprehensive, specific rules similarly govern a considerable range of the prosecutor's conduct, all of which are designed to be consistent with the fundamental obligation to seek justice.⁴⁷ Nevertheless, as is typical of any legal framework, the finite set of delineated rules comprising both Jewish law and the regulation of prosecutorial ethics can address only a limited number of scenarios. Therefore, legal and ethical decisionmakers are required to engage in various methods of reasoning and interpretation in order to apply the rules to the overwhelming number of cases not expressly addressed.

More significant for the purposes of the present discussion, beyond the cases in which enumerated rules are susceptible to interpretive analysis, there exist scenarios that may be categorized as presenting ethical or legal dilemmas that require appeal to metaprinciples of decisionmaking and application.

YITZCHAK HUTNER, PACHAD YITZCHAK, PESACH 123–26 (6th ed. 1999); Levine, *Broad Life*, *supra* note 43, at 1204–06.

46. See, e.g., ARYEH KAPLAN, *THE HANDBOOK OF JEWISH THOUGHT* 78 (1st ed. 1979) (stating that the commandments “penetrate every nook and cranny of a person's existence, hallowing even the lowliest acts and elevating them to a service to God” and that “the multitude of laws governing even such mundane acts as eating, drinking, dressing and business, sanctify every facet of life, and constantly remind one of [one's] responsibilities toward God”); see also Levine, *Taking Ethics Codes Seriously*, *supra* note 4, at 542 n.56 (citing MAIMONIDES, *SEFER HA-MITZVOTH* (Soncino 1940); MAIMONIDES, *SEFER HAHINNUCH: THE BOOK OF MITZVAH EDUCATION* (Charles Wengrov trans., 1985); JOSEPH B. SOLOVEITCHIK, *HALAKHIC MAN* 33 (Lawrence Kaplan trans., 1983) (originally published in Hebrew as *Ish ha-halakhah*, in 1 TALPIOT 3–4 (1944)); Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 309, 322 (1961)). See generally Levine, *Broad Life*, *supra* note 43; Levine, *Introduction to Legislation*, *supra* note 43; Samuel J. Levine, *Reflections on the Practice of Law as a Religious Calling, from a Perspective of Jewish Law and Ethics*, 32 PEPP. L. REV. (forthcoming 2005).

47. See Green, *Prosecutors*, *supra* note 9, at 634 (“Doing justice comprises various objectives which are, for the most part, implicit in our constitutional and statutory schemes.”).

Most obviously, these include enforcing the criminal law by convicting and punishing some (but not all) of those who commit crimes; avoiding punishment of those who are innocent of criminal wrongdoing (a goal which, as reflected in the “presumption of innocence,” is paramount in importance); and affording the accused, and others, a lawful, fair process. Additionally, most would agree, the sovereign has at least two other aims. One is to treat individuals with proportionality; that is, to ensure that individuals are not be [sic] punished more harshly than deserved. The other is to treat lawbreakers with rough equality; that is, similarly situated individuals should generally be treated in roughly the same way.

Id.; see also Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 815 (2000) (characterizing Professor Green as “contend[ing] that the ‘do justice’ standard in fact comprises a series of more specific objectives”).

These scenarios include relatively basic cases in which ambiguity is derived from uncertainty regarding the applicability of a given rule and more complex cases requiring a choice among competing and, at times, conflicting values. In such cases, broad provisions and principles, including the directives to seek justice and to acknowledge God, provide methodological guidelines for determining the mode of legal analysis appropriate for resolution of the difficult ethical issues.

B. *Basic Cases*

1. *Clear Obligation.* Perhaps the most basic case of ethical decisionmaking involves a situation in which the ethically proper conduct is delineated through a clearly defined and applicable obligation. In the context of the Jewish legal system, which consists of legal and ethical obligations relating to all areas of life, Jewish law mandates that a particular mode of action be followed in numerous situations specified in the Torah and in later legal texts.⁴⁸ For example, the Torah prohibits engaging in “*melacha*,” sometimes loosely translated as “work,” on the Sabbath.⁴⁹ In turn, the Talmud identifies thirty-nine general categories of activity that are included within the biblical prohibition.⁵⁰ Although determining the definition and application of each of these categories requires interpretive analysis, the interpretive process will ordinarily yield a clear determination of the range of activities included within each general category.⁵¹ Thus, refraining from one of these activities on the Sabbath presents a basic case in which an individual acknowledges God through observance of a clear obligation.

The case of a clear obligation in Jewish law may provide an analogue for basic cases in which the prosecutor’s obligation to seek justice dictates a clearly identifiable mode of ethically proper conduct, such as the requirements to prosecute only on the basis of probable cause, to disclose exculpatory information, and to engage in candor toward the tribunal.⁵² Again, although determination of the precise contours of these requirements may involve an interpretive process, the normative application of the

48. Refer to note 46 *supra* and accompanying text.

49. See, e.g., *Exodus* 20:10 (Tanakh).

50. See TALMUD BAVLI, *Shabbath* 63a.

51. See Levine, *Jewish Legal Theory*, *supra* note 43, at 445–46, 456–57.

52. Refer to Part II *supra* (discussing prosecutors’ duties under the “seek justice” obligation).

duty to seek justice in these cases is largely unambiguous and therefore not dependent on a complex form of ethical analysis.

2. *Indeterminate Applicability of a Clear Obligation.* A somewhat more difficult case involves a situation in which, under a specific set of facts, the decisionmaker is unable to determine the applicability of an otherwise clearly defined obligation.⁵³ In such a scenario, the decisionmaker has unsuccessfully exhausted the possibility of resolution through the ordinary interpretive process. Instead, it is necessary to resort to an alternative method of resolution, a metaprinciple of decisionmaking regarding the applicability of the rule under consideration.

To return to the example of the prohibition of *melacha* on the Sabbath, in Jewish law, with respect to most issues of legal and religious significance, each day of the week, including the Sabbath, begins at night.⁵⁴ However, it is not clear—indeed, it is indeterminate—under Jewish law whether night commences at sundown or at a later stage of more substantial darkness.⁵⁵ Thus, it is consequently not clear whether *melacha* is permitted during the “twilight” period between these two points in time, both at the beginning of the Sabbath and at the end of the Sabbath. As a result of the absence of a method of interpretation that may be employed to resolve this uncertainty, the proper mode of conduct during the period is instead determined through a more general principle: With respect to the applicability of a biblical obligation in a given scenario, uncertainties are resolved in favor of

53. This discussion accepts the premise that legal arguments are generally susceptible to determinacy and that there may be one course of action that arguably represents the proper resolution of the scenarios under consideration in the text. Thus, the reference to an “indeterminate application” of a clear rule involves the relatively unusual situation in which the decisionmaker lacks some element of basic information necessary for an informed and reasonable interpretive resolution of the basic question of the applicability of the rule.

54. See Levine, *Broad Life*, *supra* note 43, at 1203 n.13.

55. See, e.g., MAIMONIDES, MISHNE TORAH, *Laws of the Sabbath* 5:4; HERSHEL SCHACHTER, ERETZ HATZEVI: BE'UREI SUGYOT 61–69 (1992). Conceptually, this indeterminacy may be understood not as a consequence of an actual uncertainty regarding whether the twilight period is considered day or night, but rather as a reflection of the dual nature of this time period, which retains properties of both day and night. As a result of this duality, the legal characteristics of this time period mirror those applied to the category of actual legal uncertainty. See 1 AHARON LICHTENSTEIN, LEAVES OF FAITH: THE WORLD OF JEWISH LEARNING 214 (2003) (referring to the teachings of Rabbi Joseph B. Soloveitchik and describing “a category of doubt regarding two conflicting matters that issues from the balanced conflict between two certainties, and not from uncertainty itself”); 7 MESORAH 44 (Hershel Schachter & Menachem Genack eds., 1992) (citing the teachings of Rabbi Joseph B. Soloveitchik); HERSHEL SCHACHTER, MIPNINEI HARAV 164 (2001); JOSEPH B. SOLOVEITCHIK, 1 SHI'URIM LE-ZEKHER ABBA MARI 107–29 (2002); Joseph B. Soloveitchik, *The Lonely Man of Faith*, TRADITION: J. ORTHODOX JEWISH THOUGHT, Vol. 7, No. 2, 1965, at 5.

requiring adherence to the obligation.⁵⁶ Therefore, those activities that are prohibited on the Sabbath as forms of the biblical definition of *melacha* are likewise prohibited during the “twilight” period of time.⁵⁷

In the context of legal ethics, similar situations arise in which neither ethics provisions nor their interpretation yields a resolution to an ethical dilemma. As a result of the indeterminate nature of the applicability of the ethics rules in such circumstances, it seems necessary to look beyond specific interpretive methodologies and instead to resort to broad principles of ethical decisionmaking. Somewhat parallel to the principle in Jewish law that uncertainties are resolved in favor of adherence to biblical obligation, for the attorney representing a private client, cases of ethical uncertainty are often resolved in favor of the best interests of the client.⁵⁸ Indeed, ethics codes arguably support such a result through repeated express and implied emphasis on the attorney’s duty of zealous representation of the client’s interests.⁵⁹ Thus, the attorney’s general ethical obligation to pursue the interests of the client provides a metaprinciple for ethical decisionmaking in the face of

56. See, e.g., MAIMONIDES, *MISHNE TORAH, Laws of the Sabbath* 5:4. See generally ARYEH LEB HA-COHEN HELLER, SHEV SHEMAT^{TA}.

57. See MAIMONIDES, *MISHNE TORAH, Laws of the Sabbath* 5:4.

58. See, e.g., David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 473 (1990) (“[T]he traditional model strongly implies that doubts about the exact contours of the law should be resolved in the client’s favor.”). It should be noted that this discussion is limited to an analysis of the currently prevailing model of client-oriented legal ethics. One of the central areas of contention among contemporary ethics scholars relates to the numerous proposals containing alternative models that have been offered to supplement or replace the current model. See generally Levine, *Taking Ethical Discretion Seriously*, *supra* note 7 (describing and providing a critical analysis of alternative models).

59. See MODEL CODE, *supra* note 2, Canon 7; MODEL RULES, *supra* note 2, R. 1.3 cmt. 1; see also Wilkins, *supra* note 58, at 473 n.17 (stating that “the rules of professional conduct generally support the view that all doubts should be resolved in favor of furthering the best interest of the client” (citing MODEL CODE, *supra* note 2, DR 7-101 (A)(1), EC 7-4, EC 7-5; MODEL RULES, *supra* note 2, R. 3.1 cmt. 1)).

Professor Zacharias has offered a similar observation:

When the codes authorize lawyers to choose between emphasizing partisanship and important third party or societal interests, lawyers’ natural [personal and economic] incentives encourage them to select partisanship. Lawyers who make that choice can readily justify their conduct as mandated by the code by claiming adherence to the code provisions that call for zeal.

Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1340 (1995); cf. Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 898 (1996) (“The more frequently a black letter ethics code is inconclusive, the more opportunities there are for . . . interpreting the rules simply to permit pursuit of the client’s ends, without regard to independent ethical concerns.”).

For a discussion of the ramifications of the prevalence of this approach, see Levine, *Taking Ethical Discretion Seriously*, *supra* note 7, at 56–58 & nn.151–52.

apparently insoluble uncertainty. The availability in both Jewish law and legal ethics of such relatively mechanical means for resolving cases of indeterminacy suggests that such scenarios may be categorized as more closely associated with basic cases of ethical decisionmaking than with instances of genuine ethical complexity.

Moreover, the U.S. Supreme Court has appeared to endorse the application of a similarly mechanical approach in the context of prosecutorial ethics as well. Addressing the scope of the prosecutor's duty to disclose exculpatory evidence of a material nature, the Court determined,

Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.⁶⁰

According to the Court's reasoning, in the face of a matter of ethical indeterminacy, the prosecutor's mode of ethical decisionmaking should comply with the broad principle of resolving uncertainties in favor of protecting the constitutional rights of the criminal defendant. Thus, the Court's prescription for the prosecutor parallels the apparent obligation of the private attorney, substituting the rights of the criminal defendant for the best interests of the private client as the overarching principle of ethical guidance.

Nevertheless, notwithstanding the utility—and perhaps the normative appeal—of such an approach in resolving ethical dilemmas that arise in the representation of private clients, a close look at the prosecutor's ethical obligations suggests that the approach is inadequate, if not utterly inapposite, in addressing the ethical challenges that scenarios of indeterminacy pose to the prosecutor. The Court's decision was ostensibly premised on the application of a fundamental rule of prosecutorial ethics, portraying the prosecutor as the “servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.”⁶¹ In short, as the Court explained, “though the attorney for the sovereign must prosecute the accused with earnestness and vigor, [the prosecutor] must always be faithful to the client's overriding interest that ‘justice shall be done.’”⁶²

60. *United States v. Agurs*, 427 U.S. 97, 108 (1976).

61. *Id.* at 111 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

62. *Id.* at 110–11.

Upon further review, however, the Court's solution instructing the prosecutor to resolve doubts in favor of the criminal defendant seems consistent with only one aspect of the prosecutor's duty to seek justice: the obligation to guarantee the fair and just protection of the defendant's rights.⁶³ Thus, the Court's approach fails to account for the prosecutor's coextensive duty to ensure that criminals are properly prosecuted and, when appropriate, justly convicted. The dual nature of the prosecutor's ethical obligation resists simple prescriptions in the face of uncertainty.⁶⁴ To the extent that a uniform solution, such as the one offered by the Court, satisfies only one element of the prosecutor's duty, it entails a corresponding risk of ignoring or even violating the full range of obligations included in the ethical obligation to seek justice.

Perhaps a normative analysis of the ethical decisionmaking of prosecutors should more fully appreciate the distinction between the duties of private attorneys and those of prosecutors, a distinction that is reflected in the differences in the natures of their respective ethical dilemmas. A suitable analytical

63. See MODEL RULES, *supra* note 2, R. 3.8.

64. Professor Zacharias has offered the following description of the attitude expected of private attorneys:

Private lawyers confronting ethical dilemmas usually find themselves torn between promoting a single client's goals and safeguarding their own professional or moral self-interest. The disciplinary rules resolve these conflicts largely by casting trial lawyers as agents who must champion client interests, subject only to narrow limits on extreme behavior.

Zacharias, *Can Prosecutors Do Justice?*, *supra* note 3, at 57. In contrast, Professor Zacharias notes that the prosecutor

has no single client. The prosecutor is simultaneously responsible for the community's protection, victims' desire for vengeance, defendants' entitlement to a fair opportunity for vindication, and the state's need for a criminal justice system that is efficient and appears fair. Described accurately, the prosecutor represents "constituencies"—and several of them at one time.

This multirepresentation is significant for the structure of prosecutorial ethics. . . .

Prosecutors . . . face conflicts among their constituents' interests as well as between constituent and personal interests.

Id. at 57–58 (footnotes omitted).

Similarly, describing the unique challenges inherent in the prosecutor's obligation to seek justice, Professor Green has explained,

A prosecutor is a representative of, as well as a lawyer for, a government entity that has several different, sometimes seemingly inconsistent, objectives in the criminal context. Of these, convicting and punishing lawbreakers is only one, and it is no more important than others, such as avoiding the punishment of innocent people and ensuring that people are treated fairly. As the government's surrogate, the prosecutor's job is to carry out all these objectives and resolve the tension among them.

Green, *Prosecutors*, *supra* note 9, at 642.

framework for prosecutorial ethics must incorporate an acknowledgment of the unique tensions and conflicts that require the prosecutor to balance competing interests carefully rather than allow simple reliance on a uniform principle to choose among them. Thus, turning again to the Jewish legal system for a comparative analytical model, it may be helpful to explore the approaches in Jewish law for addressing scenarios that involve not mere instances of indeterminacy or uncertainty, but outright conflicts that require more complex forms of consideration and resolution.

C. Cases of Ethical Conflict and Complexity

1. *Prioritization Among Conflicting Normative Obligations and Values.* Partly as a result of the large number and wide range of legal and ethical obligations that comprise the Jewish legal system, an important segment of Jewish law relates to the inevitable and often irreconcilable conflicts that arise when an adherent tries to fulfill different obligations. The conflicts may materialize in a variety of ways, but they all share the need for mechanisms of prioritization among obligations; in addition, each conflict poses its own unique challenges, thereby necessitating a correspondingly particularized method of resolution.

One form of conflict involves contemporaneously applicable and competing positive obligations. In some cases, the issue of priority involves merely the appropriate order for undertaking different obligations. In other scenarios, as a result of time restrictions, the conflict precludes fulfillment of all of the obligations, thus presenting the more difficult question of which obligations are to be observed and which to be foregone. In both of these situations, the appropriate resolution of the conflict depends on the application of a number of principles of prioritization that relate to both the general and specific qualities of the respective natures of the conflicting obligations.⁶⁵ A more direct form of conflict involves a scenario in which a positive obligation may be fulfilled only through the simultaneous violation of a negative commandment. Though subject to numerous limitations and qualifications, the general principle for resolving such a conflict prescribes fulfilling the positive

65. See 2 ARYEH KAPLAN, *THE HANDBOOK OF JEWISH THOUGHT* 107–10 (Abraham Sutton ed., 1992) [hereinafter KAPLAN, 1992 HANDBOOK] (discussing the principles of prioritization that appear in Jewish law); see also SHLOMO YOSEF ZEVIN, *HAMOADIM B'HALACHA* 194–95 (1955) (same).

commandment in spite of the incidental violation of the prohibition.⁶⁶

Finally, in addition to complex principles of prioritization that govern situations of unavoidable conflict among obligations, at least one scenario follows a rule of clear substantive priority: An overarching and generally applicable principle of prioritization prescribes that, in the absence of exceptional circumstances, obligations in the Jewish legal system are suspended when necessary to fulfill the superceding obligation to save a life.⁶⁷ Thus, for example, in the face of life-threatening danger, notwithstanding the legal and philosophical significance and centrality of the Sabbath to Jewish thought,⁶⁸ any and all activities otherwise prohibited on the Sabbath should be performed on the Sabbath without hesitation or delay.⁶⁹ Indeed, virtually any plausible possibility of danger to life, however remote, overrides nearly every competing obligation in Jewish law, not only permitting but mandating violation of the dictates of the competing obligation.⁷⁰

Conceptually, methods of resolving cases of competing obligations in Jewish law may present an analytical framework for consideration of cases of ethical complexity relating to the prosecutor's obligation to seek justice. For example, principles of prioritization in Jewish law may offer insight into the U.S. Supreme Court's instruction that a prosecutor faced with an uncertainty regarding the obligation to disclose exculpatory

66. See KAPLAN, 1992 HANDBOOK, *supra* note 65, at 109–10; HERSHEL SCHACHTER, B'IKVEI HATZOAN 14–18 (1997) [hereinafter SCHACHTER, B'IKVEI HATZOAN]. For a normative and philosophical analysis of the priority in such circumstances of the positive commandment vis-à-vis the negative commandment, see RAMBAN (NACHMANIDES), COMMENTARY ON THE TORAH 309–10 (Charles B. Chavel trans., 1973) [hereinafter RAMBAN] (explicating *Exodus* 20:8); MEIR SIMCHA OF DVINSK, MESHECH CHOCHMA 522 (explicating *Deuteronomy* 34:12).

67. See TALMUD BAVLI, *Yoma* 85a–85b; MAIMONIDES, MISHNE TORAH, *Laws of Sabbath*, ch. 2. For discussions of the contours of this principle, see KAPLAN, 1992 HANDBOOK, *supra* note 65, at 38–49; SCHACHTER, B'IKVEI HATZOAN, *supra* note 66, at 14–18; SOLOVEITCHIK, *supra* note 46, at 34–35. See also Levine, *Taking Ethical Discretion Seriously*, *supra* note 7, at 57 n.151.

68. See, e.g., TALMUD BAVLI, *Chulin* 5a, *Commentary of Rashi* (highlighting the importance of the Sabbath); MAIMONIDES, MISHNE TORAH, *Laws of Sabbath* 30:15 (same); RAMBAN, *supra* note 66, at 312–13 (same).

69. See MAIMONIDES, MISHNE TORAH, *Laws of Sabbath* 2:2–2:3; SOLOVEITCHIK, *supra* note 46, at 34.

70. See SOLOVEITCHIK, *supra* note 46, at 34–35; see also SCHACHTER, B'IKVEI HATZOAN, *supra* note 66, at 228–32; Hershel Schachter, *B'kashruth Dag Ha-tuna Sheb'kufsoath*, 1 MESORAH 66, 71–72 & n.5 (Hershel Schachter & Menachem Genack eds., 1989) (noting the prevailing view that this principle does not extend to an extremely remote possibility of danger to life, such as when there exists a “one-in-a-thousand” chance of danger).

information should resolve doubts in favor of protecting the constitutional rights of the criminal defendant.⁷¹

Through an analogy to parallel cases in Jewish law, the scenario addressed by the Court may be seen as involving contemporaneous positive obligations. Thus, perhaps the Court's decision prescribing disclosure as the ethically proper conduct reflects a mode of analysis that takes into account the dual nature of the prosecutor's ethical duty to seek justice but concludes, on the basis of principles of prioritization, that the obligation to the defendant takes precedence. More likely, however, the case may be understood as one of directly conflicting obligations. After all, the decision to favor the prosecutor's duty to the defendant involves, to a corresponding degree, rejection of the applicability of the prosecutor's duty to convict a deserving defendant. In such a case, the operative principle of prioritization might favor disclosure despite the resulting harm to the possibility of conviction. As a final alternative, the Court may view the protection of the defendant's constitutional rights as an overarching principle that takes priority regardless of the nature of the consequences or of the competing interests. Indeed, such an approach may be consistent with the general function of a criminal defendant's constitutional protections, which when violated, supercede the undeniable utility of improperly obtained evidence in securing a conviction.⁷²

This framework may similarly help explain the somewhat contrary and contrarian approach of the New York Court of Appeals, which held that the prosecutor in question was not obligated to disclose to the defendant the fact that the complaining witness had died.⁷³ The court expressly and extensively acknowledged the dual nature of and competing values implicit in the prosecutor's ethical obligation to seek justice.⁷⁴ Ultimately, the court concluded that, because the death of the witness was not exculpatory, the prosecutor was not required to inform the defendant of its occurrence.⁷⁵ The court

71. *United States v. Agurs*, 427 U.S. 97, 108 (1976). Refer to notes 60–62 *supra* and accompanying text (discussing *Agurs*).

72. *See, e.g., Agurs*, 427 U.S. at 103 (noting that “a conviction obtained by the knowing use of perjured testimony” must be set aside if the “testimony could have affected the judgment of the jury”).

73. *See People v. Jones*, 375 N.E.2d 41, 42 (N.Y. 1978). Refer to Part III.A *supra* (discussing *Jones*).

74. *See Jones*, 375 N.E.2d at 43–44 (citing *Berger v. United States*, 295 U.S. 78 (1935); *Brady v. United States*, 397 U.S. 742 (1970); *People v. O'Neill*, 164 N.E.2d 869 (N.Y. 1959)) (describing competing elements of a prosecutor's obligation to seek justice).

75. *Id.* at 44–45.

emphasized that to obligate disclosure in such a scenario would, in effect, improperly place upon the prosecutor the obligation to reveal nonexculpatory weaknesses in the prosecution's case.⁷⁶ Arguably less than fully compelling in its logic, and certainly not without its critics,⁷⁷ the court's approach might be better understood through the lens of the comparative conceptual framework of cases in Jewish law involving complex ethical decisionmaking.

The court's depiction of the dual nature of the prosecutor's ethical duties articulates not only competing but also conflicting obligations, suggesting that resolution of the issue requires a metaprinciple of ethical decisionmaking. Thus, to the extent that the court's conclusion contradicts the Supreme Court's analysis, it may rely on contrary principles of prioritization. Specifically, the New York court's decision may be premised on an approach that recognizes the importance of protecting the rights of the defendant but that nevertheless—either as a result of balancing the prosecutor's conflicting obligations or as a matter of overarching principle—prioritizes the exercise of the prosecutor's duty to convict the deserving.⁷⁸ Such prioritization should not—and clearly, in the view of the court, does not—relieve the prosecutor of the unique obligation to seek justice for the defendant in the midst of pursuing a conviction.⁷⁹ At the same

76. *Id.* at 43.

77. The court's decision has been subjected to criticism on a number of grounds, including the apparent license it grants for continuous prosecution in the absence of evidence necessary to obtain a conviction. *See, e.g.,* MICHEL PROULX & DAVID LAYTON, *ETHICS AND CANADIAN CRIMINAL LAW* 661–62 (2001) (finding the holding in *Jones* “not consistent with the Canadian tradition of prosecutorial ethics” and stating that “if the Crown knows that an essential witness is dead, and the case can no longer be proved, the Crown has a duty not only to make disclosure but to go further and to stay the case”).

Tellingly, in arriving at its decision, the New York Court of Appeals formulated a variation on the fundamental principle that “innocence [shall not] suffer,” *e.g., Agurs*, 427 U.S. at 111 (quoting *Berger*, 295 U.S. at 88), proclaiming axiomatically and without supporting reference that “a fundamental concern of the criminal justice system, of course, is that an innocent defendant shall not be convicted; not that a possibly guilty actor shall escape conviction because the People are not able to establish his guilt.” *Jones*, 375 N.E.2d at 44. Clearly, the Canadian view of prosecutorial ethics would reject such a distinction.

78. Alternatively, the court may have conceptualized the issue of disclosure of nonexculpatory information as simply presenting a basic case of clear obligation rather than a case of ethical conflict and complexity. Refer to Part III.A *supra* (explaining the complexity of the decision not to disclose). Under such an approach, once it is determined that the information at issue is not exculpatory, there is no obligation of disclosure to the defendant and, therefore, there remains no significant component of the duty to seek justice that conflicts or even competes with the clear obligation to seek the conviction of a deserving defendant.

79. Indeed, the court was careful to reserve a decision regarding a hypothetical variation of the facts of the case before it:

time, however, absent compelling and overriding circumstances, the court's approach recognizes—indeed, it mandates—that the prosecutor fulfill the obligation to seek justice through effective prosecution.⁸⁰

Thus understood, on one level, the process of resolving scenarios of competing and conflicting normative and ethical obligations, in both Jewish law and American prosecutorial ethics, differs considerably from the decisionmaking process relating to situations involving indeterminacy of obligation. Unlike cases of indeterminacy, which may be settled through fairly mechanical application of general principles of resolution, cases of conflict require more complex resolution through the application of principles providing for prioritization among competing values and obligations. More broadly, however, both

[I]n the course of plea negotiation a particular defendant staunchly and plausibly maintains . . . innocence but states explicitly and creditably that as a matter of balanced judgment in the light of the apparent strength of the People's proof [the defendant] wishes to interpose a negotiated plea to reduced charges to avoid the risk of a more severe sentence likely to attend conviction after trial; failure of the prosecutor to reveal the death of a critical complaining witness might then call for a vacatur of the plea. Silence in such circumstances might arguably be held to be so subversive of the criminal justice process as to offend due process.

Jones, 375 N.E.2d at 44.

Likewise, several years later the New York Court of Appeals considered a case in which the prosecutor “deliberately dissembl[ed] and [told] half-truths for the purpose of misleading defense counsel into believing that [the crime victim] was still alive and subject to call as a witness when, as [the prosecutor] well knew, [the victim] was dead.” *People v. Rice*, 505 N.E.2d 618, 618–19 (N.Y. 1987). The court found that “the acts of the prosecutor constituted a serious violation of his duties as an attorney and as a prosecutor” and that “such conduct is reprehensible and cannot be condoned,” but it held that the conduct did not amount to reversible error. *Id.* at 619 (citations omitted).

80. Thus, without detracting from the rights of the criminal defendant or the prosecutor's unique ethical duty to protect those rights, the court's analysis recognizes and in part relies upon the importance of the prosecutor's ethical obligation to pursue a proper conviction through zealous advocacy. As Professor Zacharias has observed,

[A] noncompetitive approach to prosecutorial ethics is inconsistent with the professional codes' underlying theory. The codes . . . do not exempt prosecutors from the requirements of zealous advocacy. . . . [T]he codes signal that prosecutors can achieve justice while operating within the adversary system's rules. . . . [A]dvocates are meant to do their best. To the extent prosecutors temper advocacy . . . , they call into question the essential assumptions of the very system the rules codify.

Zacharias, *Can Prosecutors Do Justice?*, *supra* note 3, at 52 (footnote omitted); *see also* Green, *Prosecutors*, *supra* note 9, at 642 (offering a “conception of the duty to seek justice” that “does not imply that [prosecutors] should ‘pull their punches’ or otherwise act to level the playing field between themselves and the defense”); Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126, 129–30 (1988) (“A prosecutor is not supposed to be neutral and detached. It is not the prosecutor's duty to present both sides of a criminal case. Nor is it the prosecutor's duty to urge the jury to draw inferences in favor of the defendant.”).

modes of decisionmaking share the common characteristic of producing a singular and definitive solution on the basis of clearly articulated justification and reasoning. As a result, despite the potential uncertainty and difficulty posed by these situations, in the course of arriving at a solution to the issue, consideration of the remaining significance of contrary but superceded values or concerns becomes virtually obviated.⁸¹

Therefore, a more thorough analysis of the prosecutor's ethical obligations should include scenarios of even greater ethical complexity, involving a choice among conflicting harms, thereby defying simplistic—or even satisfactory—resolution. Rather than presenting indeterminacies or conflicts, which may be resolved through general principles of decisionmaking or prioritization, the most complex cases demand ethical deliberation of a different order. It seems that a method of resolution for such cases would have to look beyond standard modes of ethical consideration, requiring instead direct application of the most general and overarching of all principles of prosecutorial ethics: the obligation to seek justice. Once again, the conceptual framework necessary for the application of this principle may find an analogue in the overarching principle in Jewish law requiring that “in all of your ways acknowledge [God].”⁸²

2. *Choosing Among Conflicting Harms.* Beyond principles of interpretation and prioritization, the Jewish legal system recognizes that situations exist that fall outside the general conventions of legal and ethical decisionmaking. Because they present a choice between conflicting harms, these situations require considerations beyond the range of ordinary normative ethical analysis. Instead, under such exceptional circumstances, the analysis may include a careful balancing of the relative degree of benefit and harm resulting from each of the alternatives. The resolution of such analysis may prescribe action that, although generally prohibited, may qualify in rare cases as ethically proper conduct.

For example, returning again to the example of the Sabbath, the act of placing dough in the oven and baking bread on the Sabbath constitutes one of the categories of activities biblically prohibited as *melacha*.⁸³ In addition, rabbinic legislation⁸⁴

81. See SCHACHTER, B'IKVEI HATZOAN, *supra* note 66, at 17–18.

82. *Proverbs* 3:6 (Tanakh).

83. See TALMUD BAVLI, *Shabbath* 73a.

84. For a discussion of the premises and parameters of rabbinic legislation, see

prohibits removing bread from the walls of the oven on the Sabbath at a certain stage of the baking process.⁸⁵ The Talmud observes, however, that if, on the Sabbath, an individual placed dough in the oven to bake, it is proper for that individual to remove the dough from the walls of the oven before it bakes—in violation of rabbinic legislation—in order to prevent the completion of the baking process, which would constitute a violation of the more stringent biblical prohibition against baking bread.⁸⁶ In such a case, the benefit of preventing violation of the biblical prohibition outweighs the harm of violating the rabbinic prohibition.⁸⁷

Moreover, the Talmud relates a broader principle that, in rare circumstances, permits violation of even a stringent obligation in the case of overwhelming necessity.⁸⁸ In describing such conduct, the Talmud employs the seemingly paradoxical terminology of *aveira lishma*, meaning “a violation for [sincere] purposes.”⁸⁹ Not surprisingly, the application of such a principle is greatly limited through extensive qualifications.⁹⁰ In addition to limitations on the circumstances that comprise the requisite overwhelming necessity,⁹¹ the intentions of the individual committing the transgression must consist of purely idealistic motivation, free from any element of personal interest.⁹² Subject

generally Levine, *Introduction to Legislation*, *supra* note 43.

85. See TALMUD BAVLI, *Shabbath* 117b.

86. See TALMUD BAVLI, *Shabbath* 3b.

87. See SCHACHTER, B'IKVEI HATZOAN, *supra* note 66, at 16.

88. See *id.* at 16–18; see also Levine, *Introduction to Legislation*, *supra* note 43, at 931 (analogizing the principle of rabbinic authority to temporarily suspend a negative biblical commandment to the work of a doctor who may amputate a limb to save a subject's life).

89. See TALMUD BAVLI, *Nazir* 23b.

90. Indeed, one leading contemporary scholar of Jewish law and philosophy has written that

this apparent priority of telos and motivation over formal law has no prescriptive or prospective implications. At most, it means that, after the fact, we can sometimes see that a nominal violation was superior to a licit or even required act; but it gives no license for making the jump.

Aharon Lichtenstein, *Does Jewish Tradition Recognize an Ethic Independent of Halakha?*, in CONTEMPORARY JEWISH ETHICS 102, 121 n.25 (Menachem Mark Kellner ed., 1978).

As Rabbi Lichtenstein acknowledges, however, this severe conceptual limitation on what he terms “idealistic transgression,” *id.* at 107, does not represent a universal understanding of this concept. See *id.* at 121 n.25 (citing MAIMONIDES, COMMENTARY ON THE MISHNA, *Introduction to PIRKE AVOTH*, ch. 5); see also 2 LICHTENSTEIN, *supra* note 55, at 330 n.22; SCHACHTER, B'IKVEI HATZOAN, *supra* note 66, at 16–18 (citing various sources).

91. See SCHACHTER, B'IKVEI HATZOAN, *supra* note 66, at 16.

92. See *id.* at 16–18; 3 ELIYAHU DESSLER, MICHAV M'ELIYAHU 149–50 (Aryeh Carmell & Chaim Friedlander eds., 1964); HUTNER, *supra* note 45, at 141–44 (citing AVRAHAM GRODZINSKI, TORATH AVRAHAM 159 (1978)); CHAIM SHMULEVITZ, SICHOS

to these conditions, even the violation of a stringent biblical prohibition may qualify as conduct the Talmud categorizes as fulfilling the overarching principle of acknowledging God “in all [of] your ways.”⁹³ In such an unusual case, the Talmud explains, “all of your ways” includes even actions that constitute justified transgression from the law.⁹⁴

The conceptual framework for choosing among conflicting harms in Jewish law may offer a normative analogue for consideration of similar issues representing some of the most difficult ethical challenges facing the American prosecutor in his effort to fulfill the obligation to seek justice. As in Jewish law, situations arise in the work of the American prosecutor that exceed the bounds of decisionmaking through ordinary principles of interpretation or prioritization. In such cases, rather than seeking a clearly just result, the prosecutor may have to accept a certain element of injustice and instead seek to consider, evaluate, and balance the relative degree of injustice that may result from alternative ethical decisions.

Such an analytical framework may help justify the decision not to prosecute the mother of the criminal defendant who has undeniably—and unsuccessfully—committed perjury in an attempt to serve as an alibi witness on behalf of her son.⁹⁵ The prosecutor’s decision not to file perjury charges against the defendant’s mother may be based on practical considerations, such as the need to prioritize the allocation of limited prosecutorial resources.⁹⁶ Conceptually, however, recognition of practical impediments to pursuing a particular criminal charge fails to provide a normative explanation for the decision not to prosecute.

MUSSAR 92–96 (Eliyahu Meir Klugman & A. Scheinman trans., Samson R. Weiss & Bezalel Rappaport eds., 1989).

93. *Proverbs* 3:6 (Tanakh).

94. See TALMUD BAVLI, *Brachos* 63a; see also MAIMONIDES, COMMENTARY ON THE MISHNA, *Introduction* to PIRKE AVOTH, ch. 5; Rabbenu Bachya ben Asher, *Kad Hakemach*, in KISVEI RABBENU BACHYA 74 (Chaim Dov Chavel ed., 1995).

95. Refer to Part III.B *supra*.

96. See Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 264 (2001).

[B]ecause of “limitations in available enforcement resources,” [p]rosecutors do not have the ability to punish all crimes. Their budgets constrain their capacity to try cases and force administrators to develop policies that allow prosecution of some crimes but not others. Police resources, court schedules, and prison capacity may impose similar constraints.

Id. (footnote omitted) (quoting Wayne R. LaFave, *The Prosecutor’s Discretion in the United States*, 18 AM. J. COMP. LAW 532, 533–35 (1970)).

Therefore, on a normative level, it may instead be helpful to evaluate the ethical alternatives available to the prosecutor as well as the potential results attending alternative decisions. The decision to pursue perjury charges against the defendant's mother may satisfy the letter of the criminal statute, thus satisfying the prosecutor's ethical obligation to seek a conviction of those who have committed violations of the law. Nevertheless, such a result may not account for the arguably limited culpability of the offender in this scenario, thus failing to apply principles of individualized justice.⁹⁷ Conversely, a decision not to file charges may seem appropriate in light of the apparent lack of substantial moral culpability on the part of the defendant's mother. At the same time, however, such a decision carries with it a failure to attempt to bring to justice the perpetrator of a crime in open court.

Thus, the prosecutor faces an ethical dilemma, the resolution of which may prove unavoidably unsatisfactory, if not inevitably unjust. At best, the prosecutor can choose to balance competing harms, opting for a method of ethical decisionmaking that achieves a relative sense of justice under the circumstances. As in the case of the individual who, on the Sabbath, has already placed dough in the oven to bake,⁹⁸ the prosecutor cannot prevent the wrongful act of perjury. Instead, the preferable and just course of action for the prosecutor may be to mitigate the damage that will result from the perjury. Given such circumstances, similar to the circumstances in which an adherent should choose to violate a rabbinic prohibition rather than violating a more stringent biblical prohibition,⁹⁹ the prosecutor may choose to forego available perjury charges against the defendant's mother in order to avoid the further injustice that may result from prosecuting an individual of arguably minimal culpability.

97. *Id.*

[T]here is an additional "need [for prosecutors] to individualize justice." . . . There are times when a rigid application of the rules may not do justice and when "flexibility" and "sensitivity" are necessary to a just outcome. This tension between rigorous enforcement of the general criminal laws and flexible adjustment to individual circumstances is a constant in discussions about the merits of prosecutorial discretion. Legislators and prosecutors are always striving to strike the proper balance.

Id. at 264–65 (second alteration in original) (footnotes omitted) (quoting LaFave, *supra* note 96, at 534).

98. Refer to notes 83–87 *supra* and accompanying text.

99. Refer to notes 83–87 *supra* and accompanying text (explaining how an individual who, on the Sabbath, places dough in an oven to bake may remove the dough before the completion of the baking process, in violation of rabbinic legislation, to prevent violation of a biblical prohibition).

Finally, an extension of these principles may help provide a methodology for consideration of the ethical challenges and difficulties underlying the prosecutor's reliance on the assistance of a cooperator in exchange for the possibility of lenient treatment.¹⁰⁰ On a practical level, working with an informant or witness who has committed a crime undoubtedly calls for a substantial measure of ethical caution on the part of the prosecutor, including, but not limited to, caution with respect to the reliability of the information or testimony provided.¹⁰¹ Yet without discounting their seriousness, such concerns may perhaps be categorized as procedural or incidental challenges that arise in the course of most criminal prosecution. Thus, to the extent that these difficulties may be amplified in dealing with a cooperator, they may be viewed as representing a difference in degree rather than in kind.

On a normative level, however, cooperation agreements present a direct and central challenge to the prosecutor's ethical obligation to seek justice. Fundamentally, the prosecutor's willingness to grant leniency in exchange for assistance seems to embody a willingness on the part of the prosecutor to place—or at least to permit—limitations on the proper administration of justice.¹⁰² To the extent that a cooperation agreement may serve as an effective means for prosecuting other criminals, it appears, to a corresponding degree, to undermine just prosecution of the cooperator. Indeed, prevailing justifications for reliance on cooperators embody an expressly utilitarian model of criminal justice,¹⁰³ premised in part on foregoing pursuit of just retribution

100. Refer to Part III.C *supra* (discussing the role of cooperators).

101. Refer to note 40 *supra* (providing a list of sources that present the practical and ethical challenges cooperators create).

102. Although decisions regarding plea agreements and sentencing reductions, among others, may ultimately be subject to judicial approval, the prosecutor retains considerable discretion, if not ultimate practical authority, with respect to many of these decisions. See generally Griffin, *supra* note 96 (commenting on the unreviewable quality of prosecutorial discretion and suggesting the use of internal control mechanisms to limit that discretion); Podgor, *supra* note 36 (analyzing “four key prosecutorial decisions” that permit “a wide breadth of discretion” and calling for improved education to avoid “varying results”).

103. See, e.g., Hughes, *supra* note 40, at 14–15.

The *Principles of Federal Prosecution* set out by the United States Department of Justice recognize in very general terms the propriety of permitting the prosecutor to make a utilitarian calculation. Under these principles a prosecutor has a duty to neutralize the largest number of units possible of culpability and dangerousness expressed in behavior that the criminal code prohibits. As to each potential defendant, the prosecutor must make a difficult calculation to measure the moral weight of the culpability, including the harm done, and the future danger to the public. When she can gather no more evidence without inducements, the prosecutor then decides

for the cooperator.¹⁰⁴ It may be helpful to consider an alternative model—or at least an alternative understanding of the utilitarian model—that focuses on the ethical dimensions of the prosecutor’s role in the cooperation agreement. Perhaps the concept of *avera lishma* in Jewish law¹⁰⁵ can provide some insight that will be helpful when articulating such a model.

Not unlike the situations that give rise to the possibility of *avera lishma*, the circumstances surrounding a potential cooperation agreement preclude an entirely satisfactory outcome. On a most basic level, the prosecutor who is considering entering into a cooperation agreement is faced with at least two crimes, only one of which can be successfully prosecuted. Thus, in place of the ordinary pursuit of justice, which entails often difficult but broadly normative ethical decisions, the nature of a cooperation agreement incorporates a recognition that the prosecutor is seeking a different kind of justice—a balancing of relative harms.

whether to proceed and prosecute those suspects against whom the already produced evidence makes a case or whether to extend leniency or full immunity to some suspects in order to procure testimony against other, more dangerous suspects against whom existing evidence is flimsy or nonexistent.

Id. Professor Simons has also recognized this utilitarianism in prosecutorial decisions:

The cost-benefit analysis that underlies the utilitarian model of cooperation is as simple as it is compelling. The “cost” is the leniency given the cooperator; the “benefit” is the additional crime fighting produced by the cooperation. Prosecutors should use cooperators when the benefit outweighs the cost, and judges should reward cooperators with sufficient leniency to ensure that prosecutors can continue to engage in these socially beneficial transactions.

This utilitarian understanding of cooperation is pervasive. . . .

The utilitarian approach also permeates the ways that prosecutors talk about cooperation. . . .

The prosecutor’s utilitarian approach to cooperation has been recognized and implicitly approved by the Supreme Court. . . .

Perhaps the most fully developed utilitarian model of cooperation [is based on an] explicitly economic analysis [of the] “market” for cooperation.

Simons, *supra* note 39, at 22–23.

104. At least one commentator has argued that cooperation agreements may be justified on retributive grounds as well. *See generally* Simons, *supra* note 39 (discussing the hidden retributive components of cooperation). *But see* Hughes, *supra* note 40, at 13 (asserting that “most cooperation agreements would be difficult to fit into any concept of repentance or rehabilitation”).

[P]rosecutors who likely would assert that the cooperator, by his conduct, will strike a blow at crime and, in some cases, will effectively terminate the activities of a criminal organization to which [the cooperator] once belonged. This potential is undeniable, and this form of “restitution” may make the bargain a good one for society, but the cooperator’s actions are not the same as an unsolicited demonstration of a change of heart by a criminal.

Id. at 13 n.47.

105. Refer to notes 88–94 *supra* and accompanying text (exploring the Talmud principle of *avera lishma*, which allows violation of a stringent obligation in cases of overwhelming necessity).

Therefore, the decisionmaking process and the accompanying ethical considerations differ not only in degree, but also in kind from even the most complex ethical challenges that otherwise confront the prosecutor.

Under such circumstances, acknowledging the impossibility of attaining an ideal form of justice may, paradoxically, help delineate the ethical contours that guide the prosecutor's consideration of whether to enter into a cooperation agreement. Through such an acknowledgement, the prosecutor may view a measured resolution to offer leniency in exchange for assistance as an exercise in ethical decisionmaking contributing to the pursuit of justice, rather than merely a concession to utilitarian concerns.

Concomitantly, however, it might be instructive to view the extensive limitations on the applicability of the concept of *avera lishma* as an indication of the need for increased ethical boundaries for regulation of prosecutorial reliance on cooperators. In Jewish law, the unique license to acknowledge God through violation of the law for idealistic purposes is contemplated only under conditions of dire necessity and even then only when the individual committing such a transgression does so with the purest of intentions.¹⁰⁶ It may not be desirable to impose such severe restrictions on the circumstances that will permit a prosecutor to use a cooperation agreement; likewise, it may be unrealistic to limit the utilization of cooperators to cases in which the prosecutor can demonstrate a complete purity of motives. Nevertheless, in taking seriously the ethical obligation to seek justice, it may be advisable for prosecutors to exhibit a more conscious awareness of the ethical and normative challenges presented by increasingly common reliance on cooperators. A greater recognition among prosecutors of the inherent—yet at times necessary—injustice latent in the decision to grant leniency to a criminal offender who cooperates may allow for a more complex understanding of the overarching ethical obligation to seek justice.

V. CONCLUSION

Rabbi Yitzchak Hutner, a leading twentieth century scholar of Jewish law and philosophy, has offered an insightful analysis of the role in the Jewish legal system of the biblical directive requiring “in all of your ways acknowledge [God].”¹⁰⁷ As Rabbi

106. Refer to notes 90–94 *supra* and accompanying text.

107. *Proverbs* 3:6 (Tanakh).

Hutner notes, a common perception of the notion of obligation in Jewish law views clear and enumerated obligations as the primary basis for normative and ethical conduct, leaving the broad concept of acknowledging God to play a secondary role.¹⁰⁸ However, Rabbi Hutner explains that a deeper understanding of Jewish law reveals that the directive to acknowledge God is a necessarily broad expression of the significance and complexity of ethical decisionmaking and action relating to all areas in life, of which clear and enumerated obligations comprise but one category.¹⁰⁹

Likewise, an analysis of the prosecutor's ethical duty to seek justice should extend beyond cases involving clearly delineated obligations to include issues of ethical and normative complexity. Indeed, the challenges confronting the prosecutor require careful consideration and application of the implications of justice in a variety of situations. Thus, parallel to the comparative analytical framework provided by Jewish law, an accurate conceptualization of prosecutorial ethics should similarly view the directive obligating the prosecutor to seek justice as an appropriately broad articulation of a rule reflecting the ethically complex nature of the prosecutor's decisionmaking process.

108. See HUTNER, *supra* note 45, at 123.

109. See *id.* at 123–26.