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Reservations About Retribution in Secular Society

*Steven F. Huefner**

INTRODUCTION

Martin Gardner's thoughtful article *Viewing the Criminal Sanction Through Latter-day Saint Thought*¹ is an intriguing exploration of the intersection of western secular law, on the one hand, and concepts of eternal law contained in the theology and practice of the Church of Jesus Christ of Latter-day Saints, on the other. It provides a fruitful opportunity for additional thought about the relationship between the criminal sanction and moral responsibility generally, as well as about the impact of Latter-day Saint (LDS) theology on justificatory theories of punishment. I am delighted to react to Gardner's work and to offer my own observations and reflections, albeit from a jurisprudential perspective outside the immediate field of Criminal Law.

Primarily, my aim is to explain why I remain skeptical of Gardner's suggestion that Latter-day Saint theology justifies imposing secular punishment² on a retributive basis.³ While I am sympathetic with Gardner's sense that LDS theology and its emphasis on personal agency, accountability, and eternal growth strongly support the claim that moral wrongdoing deserves a

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1. Martin R. Gardner, *Viewing the Criminal Sanction Through Latter-day Saint Thought*, 2003 BYU L. REV. 861.

2. By secular punishment I refer to those punishments that an organized social community inflicts on individuals that it adjudges to have committed a punishable offense. My discussion herein is limited to western democratic societies, and focuses, like Gardner's article, on the legal system of the United States.

3. As Gardner indicates, justificatory theories of criminal punishment are typically divided into two types: utilitarian (or consequentialist) and retributive. See Gardner, *supra* note 1, at 861 & n.3.

sanction,⁴ I am unpersuaded that the theology sustains a retributive justification for secular societies to impose this sanction or to punish wrongdoing. Where Gardner suggests that secular or criminal “punishment is required in order that justice be done,”⁵ I would suggest that such punishments instead merely have the potential to *facilitate* the achievement of ultimate justice.

My response will proceed in two parts. Part I will discuss what I see as some general theoretical obstacles to justifying secular retribution upon ideas in LDS theology. In particular, I will explain that largely because of society’s inherent difficulties in determining and meting out “just deserts,” I remain skeptical that secular retribution is required to do justice. While these difficulties provide arguments for rejecting retributivism independent of theology, I believe they resonate with principles of LDS doctrine and resulting ideas of ultimate or eternal justice.

Part II will discuss specific aspects of LDS theology that seem to my mind to count against any requirement for secular retribution. Principal among these is the doctrine of the atonement of Christ, as a result of which each individual need not suffer the full consequences of personal wrongdoing. This Part will also respond to many of Gardner’s particular arguments from LDS scripture and statements of church leaders, arguing that, if anything, these same sources more strongly support a utilitarian justification for secular punishment.

I. GENERAL THEORETICAL DIFFICULTIES WITH RETRIBUTIVE JUSTICE

To explain my lingering skepticism that LDS theology sustains a retributive justification for secular societies to impose criminal punishment, I will first describe what I understand “retribution” to mean. Next, I will briefly argue that retribution is both too broad and too narrow a justification for secular punishment. As a specific example, I then will discuss Gardner’s approach to the death penalty, explaining why his insights there pose broader problems for what I take to be his claim concerning the necessity of secular retribution.

4. See *id.* at 871–74, 877–81; see also *Articles of Faith 2* (Pearl of Great Price) (“We believe that men will be punished for their own sins, and not for Adam’s transgression.”).

5. Gardner, *supra* note 1, at 861.

A. The Idea of Retribution from an LDS Perspective

At the outset, it is important to clarify how I interpret Gardner to use the term “retribution.” In common parlance, we often hear the word retribution used to include revenge or “getting even.”⁶ In contrast, Gardner appropriately has narrowed the idea of retribution to exclude revenge and has defined it instead simply as the idea of “just deserts,” or as a “demand of justice” that must be met.⁷ In other words, one who commits a wrong therefore *deserves* to be punished.

But *why* must this demand be met? Here, retribution seems to connote a cosmic or eternal “squaring of accounts,” or moral balancing.⁸ Gardner identifies two distinctive aspects of this

6. For instance, a TIME magazine essay on September 12, 2001, titled “*The Case for Rage and Retribution*,” argued for “ruthless indignation,” “focused brutality,” and “a wholesome and intelligent enmity” in response to the previous day’s terrorist attacks on American soil. Lance Marrow, *The Case for Rage and Retribution*, TIME, Sept. 12, 2001, at 48, available at <http://www.time.com/time/nation/article/0,8599,174641,00.html>.

7. See Gardner, *supra* note 1, at 862. Gardner’s articulation of a “just deserts” justification of punishment argues that “punishment is justified, indeed required, simply because it is just” and that punishing wrongdoers therefore is “intrinsically good, independent of any beneficial consequences.” *Id.* In limiting his conception of retribution to this extent, Gardner is employing a classic formulation. See, e.g., John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955) (describing the retributive view as justifying punishment because “[i]t is morally fitting that a person who does wrong should suffer The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.”); GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 416–17 (1978) (“Retribution simply means that punishment is justified by virtue of its relationship to the offense that has been committed.”); Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983) (describing the retributivist justification of punishment as the philosophy that “someone who has violated the rights of others should be penalized, and punishment restores the moral order that has been breached by the original wrongful act”); MICHAEL MOORE, *PLACING BLAME* 88 (1997) (“The distinctive aspect of retributivism is that the moral desert of an offender is a *sufficient* reason to punish him or her”). More particularly, Gardner appears to be employing what Jeffrie Murphy has called “character retributivism.” Jeffrie G. Murphy, *Moral Epistemology, the Retributive Emotions, and the “Clumsy Moral Philosophy” of Jesus Christ*, in *THE PASSIONS OF LAW* 149, 153 (Susan A. Bandes ed., 1999).

8. Gardner’s formulation of retributive theory contains no explicit reliance on any notion of eternal, cosmic, or universal justice. His approach is consistent with much contemporary retributivist thinking, which either “appeal[s] to little more than intuition,” Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1659 (1992), or else strives to develop an argument that punishment effectuates the wrongdoer’s reconciliation with society (or perhaps with the victim), rather than with the universe or God, see, e.g., *id.* at 1685–98. However, when developed in this latter way, the values of retributivist punishment might also be conceptualized in utilitarian terms, including, for example, punishment’s salutary effects of helping to build order and stability within a

reconciliation, one focused on making whole the larger community, the other focused on making whole the wrongdoer. First, he argues that punishment may serve primarily to exact from an offender “the amount of suffering deemed proper to pay the ‘debt’ owed society.”⁹ But he also describes the importance to the wrongdoer of this reconciliation, aligning himself with others who speak of a wrongdoer having a “right” to be punished.¹⁰ Thus, through punishment, a demand is satisfied and a reconciliation is achieved, for the benefit of both the wrongdoer and the cosmos itself. Something is not right with the universe until a wrongdoer makes recompense,¹¹ and so in some fashion pays a debt back, thereby bringing the wrongdoer, and in turn the universe, closer to God. In other words, retribution amounts to atonement and expiation.

This view of retribution understandably “resonates” with Gardner,¹² as well as with other LDS adherents, both out of faith in principles of atonement¹³ and because of the centrality to LDS theology of the concept of individual eternal progress. This theology certainly lends support to the idea that punishment is a “right” that each of us possesses in connection with our own wrongdoing,

temporal community, improving the human feelings and relationships in that community, and satisfying the community’s need to express its displeasure about bad conduct. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997). I have therefore chosen to link retributivism expressly to notions of metaphysical or eternal justice and reconciliation—a choice that also seems appropriate given Gardner’s, and this conference’s, enterprise of relating theories of law to LDS thought and theology. Otherwise, the retributivist claim that wrongdoers should be punished simply because they “deserve” to be would become, in the words of Richard Wasserstrom, “not an argument but merely an assertion.” Richard Wasserstrom, *Why Punish the Guilty*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 328, 337 (Gertrude Ezorsky ed., 1972).

9. Gardner, *supra* note 1, at 865.

10. *Id.* at 864–68.

11. As Rawls expressed it, “[t]he state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not . . .” Rawls, *supra* note 7, at 5. Or, in one of Kant’s formulations quoted by Gardner, “[i]f legal justice perishes, then it is no longer worthwhile for men to remain alive on this earth.” Gardner, *supra* note 1, at 863 (quoting IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (John Lodd trans., 1965)). I note, however, that this view seems potentially inconsistent with certain elements of LDS theology, in which mortal life can have value even under tyrannical governments or in a “lawless” society.

12. Gardner, *supra* note 1, at 870.

13. Most importantly, at the core of LDS doctrine is faith in the atonement of Jesus Christ. I briefly discuss the relationship between secular punishment and the atonement of Christ in Part II.C, *infra*.

allowing us to experience the consequences of our actions.¹⁴ Personal accountability, free will, and the related notion of eternal growth and progression implicitly include not only an openness to but also a need for true chastening.¹⁵

I concede that from this perspective I too share some (possibly paternalistic¹⁶) temptation towards retribution, and towards structuring secular society so as to enhance wrongdoers' access to their "rights" to punishment. I also note that, from a theological or metaphysical standpoint, this defense of and inclination towards retribution may itself ultimately rely upon a utilitarian or consequentialist idea, albeit not one limited to the consequences flowing to secular society in mortality. In particular, what does Gardner really mean when he says that retribution is "intrinsically good"?¹⁷ Specifically from the standpoint of LDS theology, it seems that secular retribution might seem intrinsically good or attractive to us precisely because of the positive eternal results that it brings about and its therefore beneficial contributions to a divine system of justice predicated on individual agency and accountability. Nevertheless, I am skeptical that even these eternal justifications can be adequately translated to a retributive defense of a secular system of punishment, as I next explain.

B. Secular Retribution's Over- and Under-Inclusiveness

Assuming that retribution embodies the idea that individuals both deserve and have a right to be punished for their wrongdoing, then I believe that Gardner's account of it as a justification for secular, rather than eternal, punishment is both too broad and too narrow. It is too broad, first, because despite setting the burden of proof for criminal sanctions at the very high level of "beyond a

14. See Gardner's overview of these ideas and related references, *supra* note 1, at 877–81 and accompanying notes.

15. Cf. STERLING M. MCMURRIN, *THE THEOLOGICAL FOUNDATIONS OF THE MORMON RELIGION* 12–13 (1965) (describing Mormon conception of eternal progress as predicated on human freedom); *Hebrews* 12:6, 12:11 ("For whom the Lord loveth he chasteneth . . . [Chastening] yieldeth the peaceable fruit of righteousness . . .").

16. Paternalism is typically associated more with utilitarian theories of punishment than with retributive ones, in that a common purpose of utilitarian punishment is to reform or improve the criminal. On the other hand, forcing criminals to "enjoy" their rights to punishment, and thereby to become reconciled, strikes me as potentially just as paternalistic, and it is from this perspective that I admit to feeling an urge to make everyone whole.

17. Gardner, *supra* note 1, at 862.

reasonable doubt,”¹⁸ we as a secular society still do—and inevitably will—make mistakes and impose punishments on those who are wholly undeserving.¹⁹ At the same time, this retributive justification of secular punishment also is too narrow because we simply do not provide *or even try to provide* this “right” to be punished to all who deserve or merit it. On the contrary, in a variety of ways we have deliberately chosen not to attempt to do so, for instance by adopting the exclusionary rule²⁰ and by prohibiting double jeopardy,²¹ in addition to using the “beyond a reasonable doubt” burden of proof.

These and related problems strike me as more than minor details if secular retribution indeed is necessary for justice to be done. For instance, Gardner explains that Herbert Morris would limit his retributive “right” to be punished to a legal system with certain safeguards, including requiring proof beyond a reasonable doubt.²² But why should this particular procedural protection be required?²³ Of course it reduces those instances in which society mistakenly punishes the innocent; yet it also dramatically increases those instances in which society fails to punish the guilty, and thereby denies a huge number of wrongdoers their rights to retributive punishment.

18. This decision reflects society’s choice to favor other secular values—principally the protection of the innocent from the power of the state—over the satisfaction of the demands of retributive justice. *See, e.g.*, Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1406–09 (1991) (describing traditional criminal processes as using “innocence-weighted approach,” rather than either “guilt-weighted” or neutral alternatives); *see also infra* notes 22–25 and accompanying text.

19. *See* David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1632–33 (1992). The innocence projects that have sprung to life in many states in the last several years, following several high-profile capital cases in which DNA testing has subsequently proven the innocence of a wrongly convicted defendant, are but one recent manifestation that, even with our beyond-a-reasonable-doubt standard, we still punish the innocent.

20. To deter law enforcement officers from violating rights protected by the Fourth Amendment, the exclusionary rule prohibits the use in a criminal trial of illegally obtained evidence. For a summary of the exclusionary rule, *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 377–422 (3d ed. 2002).

21. “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb” U.S. CONST. amend. V.

22. Gardner, *supra* note 1, at 864 n.10.

23. It is not enough to say that society has chosen to protect the innocent in this way. *See supra* note 18. Instead, the question is, how has society made this choice, or why has society valued innocence protection above facilitating access to our rights to retributive punishment?

Gardner seems to acknowledge this imperfect correlation between deserved and imposed punishments, but suggests that doing “rough justice” will be sufficient.²⁴ Yet as long as “rough justice” is adequate for a retributive theory of punishment, one could imagine a system that performed equally well or better—in other words, provided “just deserts” with an equal or lesser rate of error—but which convicted, for instance, based on a preponderance standard, rather than on a beyond-a-reasonable-doubt standard. Indeed, if retribution at the hands of the state is morally necessary for all wrongdoers, why not punish anyone who even arguably may have committed a wrong? Might we not thereby be doing them a favor?²⁵

Similarly, what should we think of the exclusionary rule²⁶ (and its typically utilitarian justifications) given its potential effect of denying a wrongdoer’s right to punishment and a victim’s right to vindication through punishment of the guilty? Or, to take another problem, should we favor an inquisitorial, rather than adversarial, legal system, if we aim primarily to provide wrongdoers with their punishment rights?²⁷ Of course, these issues may simply reflect a reality that society today does not attempt to justify secular punishment primarily on a retributive basis, not that it could not or should not do so as a normative matter. But these questions also may suggest a difficulty in claiming that secular punishment is required to accomplish a necessary reconciliation or expiation between wrongdoers and God or the universe, for society certainly is not now, and is not likely ever to be, providing this right uniformly to wrongdoers.

24. See Gardner, *supra* note 1, at 887–89.

25. In other words, why could not a “rough justice” system for meting out retributive punishments be structured equally well as over-inclusive, or “guilt-weighted,” rather than under-inclusive, or “innocence-weighted,” to borrow Tom Stacy’s lexicon? Stacy has argued that our criminal processes would produce the fewest errors, and thus the most accurate distribution of retributive rights, were it neither innocence-weighted nor guilt-weighted, but instead neutral. See Stacy, *supra* note 18, at 1408. This argument seems to presume that the principle of retribution is zero sum, however, when such a characteristic might not necessarily be required. That is, although gratuitous suffering might be objectionable for a variety of reasons, it is not clear that it would necessarily undermine retributivist theory.

26. See *supra* note 20.

27. For an argument that an inquisitorial system better determines “absolute” truth, while the adversary system, in pursuit of additional values, settles for a “pragmatic” truth, which may more easily result in letting wrongdoers avoid criminal responsibility, see Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 INT’L LEGAL PERSP. 185, 187–89 (2002).

Furthermore, even where society does succeed in identifying the truly culpable, it simply cannot determine what would be, for purposes of some metaphysical or eternal account-squaring, the appropriate or “deserved” quality and quantity of secular punishment.²⁸ Rather, in almost every case, the particular punishment that society chooses to impose is sure to be either too harsh or too lenient to reconcile the cosmic balance sheet properly.²⁹ To the extent that we again would respond by accepting secularly imposed punishments as providing only “rough justice,”³⁰ or as the first approximations of some ultimate eternal “just deserts,” it seems that we would need some additional justificatory theory.³¹ Indeed, in contrast to the idea of a “just desert,” what would seem to underlie this much cruder secular version of retribution is what we might call the idea of an “almost-just desert,” an idea with something of an oxymoronic quality.

These concerns about retributivism are not meant to suggest that utilitarian justifications *alone* are sufficient for criminal sanctions, or that society can ignore issues of culpability in meting out punishment. Otherwise, society might deliberately punish individuals who in fact are morally blameless simply to frighten others into

28. That, of course, is a judgment for the eternities, and one that seems intimately connected to the idea of the atonement. See *infra* notes 52–58 and accompanying text. It is not a judgment for which our mortal societies and institutions are well-suited. Accordingly, Hart called this “the most perplexing feature” of a retributive justification of punishment. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 233 (1968); see also Dolinko, *supra* note 19, at 1635–42 (discussing the difficulty of determining truly “deserved” punishment, and dismissing retributivist efforts to impose merely “proportional” punishment, instead, as both inadequate and corroborative of underlying flaw); Murphy, *supra* note 7, at 157–59 (arguing that because we lack true understanding of the extent to which wrongdoers deserve punishment, “we act recklessly in inflicting misery on people as the suffering they deserve for their inner wickedness”).

29. Sentencing guidelines, death penalty qualification factors, and the like are all efforts to tailor punishments to fit the crime. Likewise, diminished capacity and other defenses operate in theory to spare penalizing the truly “undeserving.” But ultimately these and other measures are only crude and imperfect tools of matching punishments with culpability. See *supra* note 28.

30. Gardner, *supra* note 1, at 888–89.

31. This problem seems inherent in retributivism even if we adopt a version, such as that which Gardner attributes to Stephen Morse, see *id.* at 884, that purports only to require a proportionally “deserved” punishment, rather than a punishment absolutely and invariably fixed as the amount deserved for a specific wrongdoing. Even here, our inability to determine true moral culpability, given our inability to judge the hearts and minds of wrongdoers, renders us unable adequately to determine desert.

compliance with authority.³² An adequate justification of secular punishment still requires a meaningful if imperfect effort to establish “blameworthiness.”³³ But even from an LDS perspective of the eternal importance of personal accountability, the principle of blameworthiness also does not alone justify secular punishment, absent the practical benefits flowing to society from the criminal justice system and its sanctioning of wrongdoing.³⁴

*C. The Death Penalty: Only One Example of
the Problem of “Rough Justice”*

The preceding skepticism about the claim that LDS theology supports a retributive justification for secular punishment derives partly from the same reasons that Gardner identifies in the section of his article articulating opposition to the death penalty. As he explains it, “[m]oral culpability is . . . a subjective state” that for its determination requires “the ability to ‘search people’s minds,’” a

32. This is a classic critique of pure utilitarian justifications of punishment. *See, e.g., id.* at 866 n.15 (quoting a passage from C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 227–28 (1953)). Such a system of course would be fraught with the danger of being exposed as a sham, in which individual conduct had no correlation with punishment or consequence, and hence would lose all its utilitarian value. It is also objectionable on broader grounds as well. *See infra* note 33.

33. Punishment without culpability would strike us all as a gross injustice, whether out of its inconsistency with ideas of retributive justice, out of its inconsistency with the aims of utilitarian justice, or, even more generally, out of a sense that any enlightened society must protect individual rights and freedoms from arbitrary exercises of state power. *See, e.g.,* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 65–69 (1968); HART, *supra* note 28, at 10–13; KANT, *supra* note 11, at 100 (as quoted in Gardner, *supra* note 1, at 863 & n.6). The idea that society should punish only the deserving does not necessarily imply that the sole or even primary justification for secular punishment should be to mete out “just deserts.” Rather, many theorists now follow Hart in distinguishing between retribution in the *distribution* of punishment and retribution in the *justification* for punishment. *See, e.g.,* HART, *supra* note 28, at 9; 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 160 (1988); *see also* Gardner, *supra* note 1, at 862 n.5, 868 n.21 (noting that some retributive theories other than the ones on which his article focuses may claim only that retribution is a necessary, but not a sufficient, condition for punishment). In this regard, I am employing what some have variously called a “mixed theory” or a theory of “negative” retribution, while Gardner employs a version of “pure” or “positive retribution,” in which blameworthiness alone justifies punishment. *See* Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1451–53 (1990).

34. Furthermore, these benefits in theory could include satisfying the need for retribution, or even for vengeance, felt by some members of society. *See, e.g.,* Robinson & Darley, *supra* note 8, at 454 (“[C]riminal law based on the community’s perceptions of just desert is, from a utilitarian perspective, the more effective strategy for reducing crime.”).

process “unattainable in earthly tribunals.”³⁵ When we implement a system of capital punishment, he continues, we “risk the injustice of executing those . . . not sufficiently culpable,” as well as those who are “totally innocent.”³⁶ Because retributivism, when properly conceived, “allows life to be taken only when death is deserved,”³⁷ society lacks the ability to ensure that the death penalty is imposed with an adequate retributive justification.

Why don’t these same concerns apply to *any* secular punishment? That death is a punishment different *in kind* does not seem to be an adequate response to these core issues about the underlying justification of any punishment *at all*. Doesn’t retributivism require that, for its proper imposition, any punishment be deserved? Gardner acknowledges that this question merits extensive discussion, but suggests that being content with “rough justice” will ultimately provide a sufficient basis for a distinction.³⁸

Although I am content to tolerate (or even embrace) the idea of “rough justice” in our secular social order, I do so for utilitarian reasons.³⁹ But I find it difficult to rely on this practical accommodation as a basis for a retributive theory of secular punishment. Doesn’t a properly conceived theory of retributivism require us to eschew undeserved punishments generally? If so, then on what basis do we allow our uncertainty regarding one’s ultimate desert to dissuade us only from imposing one particular kind of punishment, but not another? Certainly as a kind of punishment death may be different, but not in a way that eliminates the fundamental problem of imposing *undeserved* punishment in the name of achieving “just deserts.” Rough justice may be—in fact certainly is—“the best our [secular] legal system can ever achieve,”⁴⁰

35. Gardner, *supra* note 1, at 884 (quoting Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1183 (1981)).

36. *Id.* at 885.

37. *Id.* at 886 (quoting Lempert, *supra* note 35, at 1183).

38. *See id.* at 887–89.

39. Namely, with culpability still a predicate, *see supra* notes 32–34 and accompanying text, but with processes heavily weighted towards innocence protection, *see supra* note 18, we do our best to determine who has committed a crime and then impose punishment because of the resulting benefits. And while we yet should want our punishments to be proportional to the crime, *see infra* note 62, we need not attempt the impossible task of discerning precisely what kind or amount of punishment will fully reconcile the wrongdoing.

40. Gardner, *supra* note 1, at 888.

but to me this suggests that we need a justificatory theory for rough justice other than retribution, with its eternal, cosmic, universal weight and implications.⁴¹ Otherwise, the idea of “rough retributive justice” will inherently give rise to precisely the types of problems of both over- and under-inclusiveness described in Part I.B above.

II. LDS THEOLOGY AND JUSTIFICATIONS FOR SECULAR PUNISHMENT

The preceding more general reflections now bring me to a few observations about the justification of secular punishment drawn from specific details of LDS theology. First, I will raise a question about the retributive efficacy, from an eternal standpoint, of secularly coerced punishments. Second, I will express a thought about proxy punishments. In turn, this will lead into a brief but essential discussion of the atonement of Christ as a basis for skepticism about the necessity of secular retribution. Finally, I will respond to the particular scriptural and historical references in Gardner’s article.

A. Secular Retribution from an Eternal Perspective

The LDS doctrine of eternal progression gives rise to a demand that we both learn from and make amends for our mistakes. This demand of justice undeniably has a retributivist flavor. But the doctrine of eternal progression does not suggest to me that we should depend upon, or even expect, secular society to be the moving cause for the imposition of retributive justice. On the contrary, it seems to me that individual wrongdoers are expected to seek to vindicate their “rights” to punishment voluntarily.

In the eternal scheme, one need not be found guilty by a secular court in order to be either obligated or able to pay retribution. In part, this is because of a lack of congruence between spiritual sin and crime. Obviously it also is because of the imperfect ability of courts to convict actual wrongdoers.⁴² And it is also because, in some

41. For extensive arguments that retributive justifications fail on their own terms, see Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843 (2002), and Dolinko, *supra* note 19.

42. *See supra* text accompanying notes 18–27.

circumstances, a contrite wrongdoer may pay retribution without the involvement of secular authority.⁴³

Of course, a wrongdoer can confess and thereby eliminate the possibility that our secular courts will fail to convict. Indeed, *ecclesiastical* confession seems clearly the preferred predicate for retribution in LDS theology: wrongdoing leads first to remorse, followed by confession to God, to wronged individuals, and, where appropriate, to church authorities.⁴⁴ In addition, the wrongdoer then is expected both to forsake the misconduct and to make restitution where possible,⁴⁵ including accepting whatever secular punishment society imposes. This is all part of the process by which individuals “pay the price” for their errors, and take responsibility on an ongoing basis for “participat[ing] in their own salvation.”⁴⁶

But where confession, and, in turn, true remorse or contrition, are lacking, how “intrinsically good”⁴⁷ can coerced retribution be? Does true expiation for individual wrongdoing need to be self-initiated, or at least voluntary, rather than forced? Perhaps forced expiation can occasionally cause the self-reflection that leads to remorse and, ultimately, to strengthened character and eternal growth, but this is by no means its natural or inevitable result.⁴⁸

From the standpoint of LDS theology, and the preeminent role therein of individual agency and accountability, why should secular society force punishments on those who place no value on their own rights to receive punishment? Here, utilitarian justifications certainly

43. It is not clear that LDS theology in all instances requires a person who commits a minor but chargeable crime—for instance, shoplifting or criminal trespass—to submit to secular authority, provided the wrongdoer has made full restitution and genuinely repented.

44. For a contemporary introduction to church doctrine concerning repentance, see THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, GOSPEL PRINCIPLES 122–27 (1992) [hereinafter GOSPEL PRINCIPLES]. Of course, ecclesiastical confession is distinct from secular confession; and while in many instances the first may lead to the second, this seems by no means always necessary, as suggested above. See *supra* note 43.

45. See *id.* at 124–25.

46. See Gardner, *supra* note 1, at 880.

47. Here, I am referring to my previously expressed sense that from an LDS perspective principles of retributive punishment may seem inherently good because of their beneficial impact on a wrongdoer’s eternal development. See *supra* note 17 and accompanying text.

48. Nor does forced expiation have a happy history. Indeed, in furtherance of just such expiation, and in seeking the “intrinsic goodness” of doing justice, many societies and cultures have engaged, for instance, in burnings at the stake or have compelled certain conduct or even have compelled belief. Within the Christian tradition, some of the most obvious of these events would include the Spanish Inquisition and the prosecution of Galileo Galilei for the heresy of subscribing to the Copernican view of the solar system.

spring to mind, including some related to the theology of eternal progression and individual agency. For instance, deterrent effects of secular punishment may keep individuals from wrongdoing until their own character has developed to the point of independently causing them to avoid it. Or, secular punishment may serve to incapacitate one whose actions otherwise would seriously impinge on the freedom of others.⁴⁹ But when wrongdoers are not ready to be reconciled, it is much less clear that a *retributive* theory of secular punishment will achieve any eternal aspirations we may have for it.

B. Proxy Punishment

From an LDS perspective, a “rights” theory of punishment seems especially apt when a wrongdoer voluntarily seeks to vindicate these rights as part of an ongoing self-improvement process. What, then, of one whose remorse for wrongdoing and whose voluntary desire to be reconciled come too late for retribution through secular punishment? This might happen because of a statute of limitations problem,⁵⁰ but consider the more interesting case of one whose remorse occurs after death. Is there still eternal progress for the secularly unpunished, and therefore unretributed?

LDS theology certainly holds out the hope that, through the performance of vicarious ordinances of salvation, some who repent after this life may still experience many of the blessings of having lived a penitent life in mortality.⁵¹ Accordingly, if we believe that

49. In addition, some have argued that punishments may have instructive moral value even for the unrepentant wrongdoer. See, e.g., Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984) (arguing that the primary purpose of punishment is to teach wrongdoers moral bases for choosing not to commit offenses).

50. This is but another example of the way in which secular retribution may be too narrow. See *supra* notes 20–27 and accompanying text.

51. See GOSPEL PRINCIPLES, *supra* note 44, at 255–57; 1 *Peter* 4:6; 1 *Corinthians* 15:29. The LDS doctrine of baptism for the dead provides for the performance by proxy of the ordinance of baptism on behalf of those who would have embraced the gospel during their mortal life had they had the opportunity to do so. Although it also has elements of a “second chance” for those who rejected the gospel in mortality or who willfully refused the opportunity to repent, such individuals may not fully benefit from vicarious baptism. Nonetheless, consistent with the broadest application of the doctrine, there may be many individuals who did not repent in this life only because of their lack of knowledge concerning gospel teachings. See *Doctrine & Covenants* 138:31–35. Moreover, the gospel teaches that those who embrace its teachings in this life thereby become obligated to continually evaluate their conduct and repent as necessary. Presumably, some beneficiaries of the practice of baptism for the dead could also have benefited from this ongoing post-baptism repentance process, had they embraced the gospel in mortality. It is in this light that I reflect here on the hypothetical

secular punishment is required in order that justice be done, then just as LDS theology has room for vicarious baptisms for the dead, it seems that it might also have room for the idea of vicarious *punishments* “for the dead.” That the doctrine of baptism for the dead in fact does not include any corollary principle of proxy *punishment* provides a simple demonstration that in LDS theology whatever punishment is required need not come at the hands of secular authorities in mortality. Rather, LDS theology has no principle of “punishments for the dead” *per se* because at the very heart of LDS theology is the doctrine of the atonement.

C. *The Atonement*

Central to my thinking about the implications of LDS theology on the justification of secular punishment is the doctrine of Christ’s atonement. The atonement amounts to a vicarious punishment on behalf of every one of us, if we avail ourselves, for all of our wrongdoing.⁵² Through the atonement, the retribution that is required of each of us for our individual wrongdoing is essentially spiritual,⁵³ leading to a reconciliation with God that then will permit the atonement to operate in our lives to accomplish whatever further cosmic balancing eternal justice requires for our individual wrongdoing.

Admittedly, LDS theology suggests that “[e]very man must answer for his own sins” and that “salvation can come only through

possibility of vicarious punishments as well, on behalf of those whose repentance for mortal wrongdoing does not occur until after their stay in mortality has concluded.

52. See GOSPEL PRINCIPLES, *supra* note 44, at 73–78. As a result of the atonement, the idea of “punishment for the dead” becomes wholly superfluous, because a baptism for the dead then cleanses the beneficiary’s slate of all mortal wrongdoing.

53. See, e.g., 2 *Corinthians* 7:9–11 (describing the notion of “godly sorrow,” which “worketh repentance to salvation”). Suggestive of this spiritual retribution or suffering is Michael Moore’s description, recounted by Gardner, of the “extreme culpability” and “sickness unto death” one ought to feel at committing a horrible crime. See Gardner, *supra* note 1, at 868–69 (quoting Michael S. Moore, *The Moral Worth of Retribution*, in FOUNDATIONS OF CRIMINAL LAW 80–81 (Leo Katz et al. eds., 1999)). However, this passage also suggests to me the possibility that this spiritual suffering may itself be not only necessary but also sufficient for the demands of eternal justice, regardless of whether society ever satisfies the guilty person’s felt need that society impose an “extraordinarily severe punishment.” *Id.* at 869 (quoting Moore, *supra*, at 82). For a critique of Moore’s argument from hypothesized guilt, see Murphy, *supra* note 7.

obedience to law”⁵⁴ (in contrast to theologies in which salvation comes through faith alone). Yet the personal accountability inherent in this formulation does not necessarily provide a basis for concluding that secular punishments should be justified retributively. Rather, consistent with this formulation, individuals can be *forgiven* for their wrongdoing through the process of repentance, thereby achieving that union of justice and mercy described by C.S. Lewis and others.⁵⁵ While the repentance process may include elements of both spiritual *and* temporal or physical suffering for the wrongdoing, it is not clear that some temporal or secular punishment is always a necessary component of the repentance process by which a person “answers” for sin and partakes of the atonement.⁵⁶

Therefore, it seems to me a mistake to expect that our system of secular justice should impose, even as a matter of “rough justice,” a punishment that is in essence *commensurate* with our wrongdoing. From the standpoint of LDS theology, such an effort seems inherently flawed. The atonement teaches us that we cannot and need not literally repay in full the debts that we incur for our mistakes, and that we instead may answer for our misdeeds in other ways. We therefore may hope for secular punishments that are in fact *proportionate* to our wrongdoing, but only as a facilitative component of our eternal growth, rather than as a necessary component of eternal retribution.⁵⁷ In particular, bearing even a token measure of blame for our misconduct may have an instructive value to us, helping us to internalize the consequences of our choices.⁵⁸ But one who feels remorse and seeks expiation may not *necessarily* need a secular punishment in order that justice be done.

54. MCMURRIN, *supra* note 15, at 90; *see also* *Articles of Faith 2* (Pearl of Great Price) (“We believe that men will be punished for their own sins, and not for Adam’s transgression.”).

55. *See* Gardner, *supra* note 1, at 867 (quoting C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 229–30 (1953); *id.* at 875–76 (quoting Neal A. Maxwell, *Jesus, the Perfect Mentor*, ENSIGN, Feb. 2001, at 8, 12).

56. For additional discussions of the doctrine of the atonement in LDS theology, *see* MCMURRIN, *supra* note 15, at 82–90; GOSPEL PRINCIPLES, *supra* note 44, at 71–78.

57. Consistent with this view that secular punishments are not required to fulfill the demands of eternal justice is the church’s repudiation of the doctrine of “blood atonement,” which Gardner has previously described. *See* Martin R. Gardner, *Mormonism and Capital Punishment: A Doctrinal Perspective, Past and Present*, DIALOGUE: J. MORMON THOUGHT, Spring 1979, at 9, 16–22.

58. *Cf.* Hampton, *supra* note 49 (arguing that the primary purpose of punishment is to teach the wrongdoers moral bases for choosing not to commit offenses).

*D. Utilitarian Aspects of Specific LDS Statements
Concerning Punishment*

Partly from the preceding thoughts, I read pertinent LDS scriptural references concerning punishment, as well as particular statements of church authorities on the subject, to support a utilitarian theory of punishment at least as much as, if not more than, they support retributive theory. These statements include the same scriptural passages that Gardner analyzes, and the same statements he cites from contemporary church authorities and early church President Brigham Young. In addition, the prophet Joseph Smith expressed a remarkably clear utilitarian view of secular punishment.

For instance, the expression in section 134 of the *Doctrine & Covenants*⁵⁹ that wrongdoers “should be punished according to their criminality and their tendency to evil among men,”⁶⁰ which Gardner interprets as expressing the idea of “just deserts,”⁶¹ also seems entirely consistent with utilitarian theories of deterrence, rehabilitation, and perhaps incapacitation as well. Furthermore, to the extent that this passage implies the idea that punishments should be proportional, this characteristic is not unique to retributive justifications.⁶²

59. The *Doctrine & Covenants* is a canon of LDS scripture consisting primarily of revelations received by Joseph Smith between 1823 and 1843, along with several other central statements of doctrine. Section 134 is “[a] declaration of belief regarding governments and laws in general, adopted by unanimous vote at a general assembly of the church held at Kirtland, Ohio, August 17, 1835.” *Doctrine & Covenants* 134.

60. *Id.* at 134:8.

61. See Gardner, *supra* note 1, at 871.

62. Proportionality is widely desired on many theories of punishment. For instance, Bentham made clear that proportionality was important to his utilitarian theory of punishment. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165–74 (Oxford 1996). Furthermore, although Justice Scalia is known for having opined in *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991), that “[p]roportionality is inherently a retributive concept,” other aspects of his opinion in that case confirm that retribution has no monopoly on the ideal of proportionality. In particular, Justice Scalia also invoked what he called “[t]he New Hampshire proportionality provision, by far the most detailed” of numerous proportionality provisions found in early state constitutions, yet a provision that expressly justified punishment on utilitarian rather than retributivist grounds:

“All penalties ought to be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offences; the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude

In particular, I adverted earlier to the idea that although society could employ utilitarian systems of punishment without the predicate of any true blameworthiness, such a system would be a house of cards.⁶³ Once ordinary citizens learned that the victims of society's punishment were not necessarily culpable, the utilitarian values derived from the punishment would rapidly evaporate. Utilitarian justifications of deterrence, incapacitation, and rehabilitation also should all depend on punishing the actual wrongdoer, within the limits of "rough justice."⁶⁴ Thus, section 134's inclusion of an idea of blameworthiness in no way precludes it from serving primarily as a premise for utilitarian justifications of secular punishment.⁶⁵

Likewise, section 42 of the *Doctrine & Covenants*, which appears to require church members, as a matter of religious obligation, to subject their colleagues to civil punishment, seems to me at least as amenable to a utilitarian interpretation as to the retributivist interpretation that Gardner ascribes to it. In particular, members of the community of Saints may have an obligation to see offenders among them punished according to secular law not to ensure that wrongdoers receive their "just deserts,"⁶⁶ but rather purely as a secular ordering principle. In fact, at the time of section 42, church members may have felt this obligation particularly acutely, given that the church's relationship to greater American society was quite

of sanguinary laws is both impolitic and unjust. *The true design of all punishments being to reform, not to exterminate, mankind.*"
Id. at 978 n.8 (emphasis added) (quoting N.H. CONST. art. XVIII, pt. 1).

63. See *supra* notes 32–33 and accompanying text.

64. As previously discussed, see *supra* note 33, this approach is sometimes identified as a "mixed" approach, as "distributive retribution," or as "negative retribution."

65. Furthermore, as Gardner acknowledges, see Gardner, *supra* note 1, at 871 n.29, 872 n.30, section 134 is replete with other language, not only elsewhere in verse 8 but also in verses 1 and 6, that clearly "addresses the virtues of the legal order in general utilitarian terms." *Id.* at 872 n.30. Nor would verse 8 become "redundant," *id.* at 871 n.29, if we also interpreted this verse primarily in utilitarian terms as well, for it then would be extending to the specific category of the criminal law verse 1's much more general statement about the utilitarian purpose of all secular law to advance "the good and safety of society," *Doctrine & Covenants* 134:1, while also adding the injunction that "all men" should involve themselves in criminal law enforcement, *id.* at 134:8. Finally, the possibility that a passage of scripture (as distinguished, for instance, from a legislative statute) might contain redundancies, even deliberate ones, should not be surprising. Rather, such scriptural redundancies are frequent and help lead to an interpretation in which all components are mutually reinforcing.

66. See Gardner, *supra* note 1, at 872–74.

tenuous.⁶⁷ In any event, the passage's support for a retributive theory is by no means obvious, as Gardner's discussion itself acknowledges.⁶⁸

Church President Brigham Young's injunction to the church's Municipal High Council to bring church members in fraud and theft cases to justice prior to the Nauvoo exodus⁶⁹ out of a fear that they would otherwise go unpunished⁷⁰ is also by no means clearly retributivist. Though the language of his statement is reminiscent of Kant's claim that a society could not properly disband without first dispensing justice to all who deserved it,⁷¹ Brigham Young's fear instead could have arisen from a much more pragmatic worry about "going into the wilderness alone"⁷² with groups of church members who remained ill-disposed towards one another because of unresolved legal disputes.⁷³

Similarly, Elder Dallin Oaks' recent statement that "the paramount concern of human law is justice"⁷⁴ also does not

67. See generally LEONARD J. ARRINGTON & DAVIS BITTON, *THE MORMON EXPERIENCE* 44–82 (1979) (describing the persecutions of early church members between 1832 and 1846 across Ohio, Missouri, and Illinois).

68. See Gardner, *supra* note 1, at 873–74. Furthermore, it seems unlikely that ecclesiastical sanctions "might be as effective as civil punishment" for deterrent (or other utilitarian) purposes, *id.* at 874, even at the time of section 42, when the insular church community often relied heavily on ecclesiastical courts.

69. In response to growing persecution, early members of the church, in 1846, hastily abandoned their thriving community on the banks of the Mississippi River at Nauvoo, Illinois, then the second largest city in Illinois, to begin the final stage of their westward migration to what would become the State of Deseret, precursor to the Utah Territory. See ARRINGTON & BITTON, *supra* note 67, at 69, 94–101, 162–63.

70. See Gardner, *supra* note 1, at 874.

71. See *id.* at 863–64 & n.8 (quoting KANT, *supra* note 11, at 102).

72. *Id.* at 874 (relating Brigham Young's injunction as quoted in EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS* 361 (1988)). Here, "alone" did not mean unaccompanied, as Brigham Young was planning the exodus of an entire people, and instead may have been a euphemism for "without secular law or authority," as the church members anticipated leaving U.S. law behind.

73. As a possible response to this concern, Gardner suggests that the LDS community could simply have left wrongdoers behind, after *ecclesiastical* court proceedings, without needing to impose civil punishments upon them. See *id.* at 874–75. Yet given that during this period church courts already routinely exercised ecclesiastical and civil authority, there is nothing unusual—nor necessarily retributive—in Young's injunction that the courts continue to bring offenders to justice during the exodus.

74. See Gardner, *supra* note 1, at 876 (quoting DALLIN H. OAKS, *THE LORD'S WAY* 217 (1991)). Dallin H. Oaks, formerly on the faculty of the University of Chicago Law School and president of Brigham Young University, now serves as a member of the church's Quorum of the Twelve Apostles.

necessarily reflect a view that retribution should be the primary justification for secular punishment. Rather, it may simply mean that secular (“human”) law, to be valid in the eyes of the citizenry, must be regular, impartial, fair, and predicate its punishments upon principles of culpability and proportionality.⁷⁵ In addition, Elder Neal Maxwell’s very recent remark about the tendency of many people today to confuse mercy and justice and “to shy away from correction even when it might be helpful”⁷⁶ immediately suggests something quite different to me than approval of retributive theory, as Gardner reads it.⁷⁷ Rather, this statement seems explicitly to recognize the *rehabilitative* value of punishment, and to encourage us to be much more welcoming of secular sanctions precisely because they can help us to learn our lessons.⁷⁸

Indeed, the idea of rehabilitation infuses remarks made by the prophet Joseph Smith during his candidacy for President of the United States in 1844.⁷⁹ He suggested that legislatures should “pardon every convict in their several penitentiaries, blessing them as they go, and saying to them . . . , ‘Go thy way and sin no more.’”⁸⁰ He urged that criminals, for their punishment, should be put to work on public projects

75. As noted above, that society places a high value on ensuring that the punishment fits the crime—in other words, that the *distribution* of punishment be based upon some “retributive” principle—does not necessarily mean that society’s primary *justification* for the imposition of punishment is retributive. See *supra* notes 32–34 and accompanying text. Nor is a concern that punishments be proportional in order to be “just” necessarily retributive. See *supra* note 62.

76. See Gardner, *supra* note 1, at 875 (quoting Maxwell, *supra* note 55, at 12). Like Elder Oaks, Neal A. Maxwell, formerly on the faculty of the Political Science Department of the University of Utah, also serves as a member of the church’s Quorum of the Twelve Apostles.

77. See *id.* at 875–76 & n.42.

78. Gardner acknowledges this possible interpretation, but argues that punishment is “helpful” only “in addition to its other virtues.” *Id.* at 876 n.42 (emphasis omitted).

79. As president of the church, Smith canvassed likely candidates for President of the United States in the election of 1844 concerning their disposition towards the church. Not fully satisfied by any of their answers, Smith undertook his own candidacy from January 1844 until his assassination in June 1844. In addition to calling for prison reform, his platform advocated revoking imprisonment for debt, abolishing slavery by 1850, establishing a national bank, and annexing Texas and Oregon. See CHURCH EDUC. SYS., CHURCH HISTORY IN THE FULNESS OF TIMES 269–70 (1989).

80. 6 JOSEPH SMITH, JR., HISTORY OF THE CHURCH 205 (B.H. Roberts ed., 1950). These remarks are obviously reminiscent of Christ’s response to the woman taken in adultery, for whom the prescribed punishment under the Mosaic Law would have been stoning. See *John* 8:1–11.

or any place where the culprit can be taught more wisdom and more virtue, and become more enlightened. Rigor and seclusion will never do as much to reform the propensities of men as reason and friendship Let the penitentiaries be turned into seminaries of learning, where intelligence . . . would banish such fragments of barbarism.”⁸¹

These remarks, with their explicit emphasis on forgiveness and reform, rather than “desert,” seem fundamentally inconsistent with the idea that secular retribution is necessary in order for justice to be done.

CONCLUSION

I have confessed some sympathy for the idea that wrongdoing merits a sanction without regard to the resulting benefits to society. But I trace this feeling to an underlying belief that punishment may ultimately benefit the wrongdoer, and I fear that secular institutions are ill-equipped to dispense punishments on this basis alone. Furthermore, I see no necessity for them to do so. Instead, implications of the atonement, along with other aspects of LDS theology, reinforce in me a sense that from a theological standpoint, secular punishments are justified primarily by the way in which they help individuals to avoid or learn from error, and secondarily by the way that they help provide a stable society in which we all may more meaningfully exercise our agency. Regardless of whatever cosmic or eternal balancing ultimately may be required for our wrongdoing, the atonement will cover all but the smallest token contribution that we as individuals can make. Although we, in turn, may be expected to make these token contributions wherever we have the opportunity (including wherever our secular society requires them of us), we do so not in order to effectuate the retributive balancing of accounts. Rather, we do so both to help us “learn our lesson” and as an expression of the faith and gratitude necessary to effectuate the full gift of the atonement.

81. SMITH, *supra* note 80, at 205.