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Not for the Sake of Punishment Alone:
Comments on *Viewing the Criminal Sanction
Through Latter-day Saint Thought*

Marguerite A. Driessen*

*. . . God himself atoneth for the sins of the world, to bring about the plan of mercy, to appease the demands of justice, that God might be a perfect, just God, and a merciful God also.*¹

In his article, *Viewing the Criminal Sanction Through Latter-day Saint Thought*, Professor Martin Gardner undertakes to examine whether the doctrines and teachings of the Church of Jesus Christ of Latter-day Saints (hereinafter the “Church”) provide any insights on the use of the criminal sanction in secular society.² Given, as Professor Gardner states, that “the criminal sanction entails the purposeful infliction of suffering upon offenders,”³ a periodic review of our society’s use of that sanction is a necessary and important undertaking. Professor Gardner’s choice to conduct that review through the lens of a particular religious dogma is both interesting and unique. I was asked to comment on Professor Gardner’s article presented at the LDS Perspectives on Law Conference.⁴ This Comment will first provide a brief overview of the structure and content of Professor Gardner’s article. Second, it will examine

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1. *Alma* 42:15 (Book of Mormon).

2. See Martin R. Gardner, *Viewing the Criminal Sanction Through Latter-day Saint Thought*, 2003 B.Y.U. L. REV. 861; see also *infra* notes 30–32 and accompanying text.

3. Gardner, *supra* note 2, at 861.

4. The primary sources for my comments on Professor Gardner’s work are the LDS scriptures and various commentaries on them. Scriptural analysis and doctrinal interpretation are areas in which theologians spend their entire careers developing the necessary expertise to speak authoritatively. I make no claims to having done so. Instead, I have evaluated Professor Gardner’s article in light of my criminal justice training and experience and my own gospel study.

Professor Gardner's analysis of Latter-day Saint (LDS) philosophies and his application thereof as support for his ultimate conclusion, which is that LDS teachings require punishment for violations of secular laws "in order that justice be done."⁵ This section demonstrates that Professor Gardner has provided a thorough and engaging discussion of retributivism and has outlined apparent supports for retributivist justification of criminal punishment in LDS philosophy. However, because of his failure to consider the atonement of Jesus Christ in his analysis, Professor Gardner has misapprehended the LDS scriptures and teachings he used to support his conclusions.

The final section of this Comment posits that the conspicuous absence of any discussion of the atonement of Jesus Christ and the concomitant effects thereof on his scriptural analysis leave Professor Gardner's arguments ultimately unconvincing. Finally, it will use LDS philosophies, with primary reliance on the doctrine of the atonement, to explain why the support for Professor Gardner's pure retributivist theory of punishment just is not there.

I. A BRIEF OVERVIEW OF *VIEWING THE CRIMINAL SANCTION THROUGH LDS THOUGHT*

The substance of Professor Gardner's analysis is presented in two sections: Section II, describing "just deserts" retributivism, and Section III, discussing secular punishment and LDS thought.⁶ Both of these sections will be addressed in turn.

5. Gardner, *supra* note 2, at 861.

6. *Id.* at 862, 871. Professor Gardner's other sections include an introduction as Section I and a conclusion as Section V. *Id.* at 861, 889. Professor Gardner also includes Section IV, a discussion of the death penalty in light of LDS thought and his conclusions that this particular punishment is *not* required under that dogma. *Id.* at 882-89. I found the inclusion of this section unnecessary and somewhat distracting. This lengthy discussion, comprising nearly one-third of his article, adds nothing to Professor Gardner's thesis that LDS philosophy supports a just deserts retributivist justification for punishment. In fact, this discussion weakens Professor Gardner's arguments by asserting several key propositions that contradict his thesis.

Professor Gardner's flawed propositions include admitting that retributivists require punishment for wrongdoing but do not require any particular form of punishment to meet the demands of justice. *Id.* at 883. He also admits that the just application of the death penalty would require a degree of accuracy in measuring culpability that is simply not possible in our secular courts. *Id.* at 884. Finally, Professor Gardner states that the finality and irrevocability of the death penalty make it an inappropriate sanction for people who have been cautioned against making judgments of other people. *Id.* at 887. Despite Professor Gardner's statement

A. The Recipe for “Just Deserts”

In Section II of his article, Professor Gardner provides an explanation of and the underlying rationale behind “just deserts” retributivism. This theory of retributivism, he writes, “considers punishing offenders as intrinsically good, independent of any beneficial consequences.”⁷ Under this view, those who violate the law must be punished for that reason, and for that reason alone. For those who embrace this philosophy, it would be improper to impose punishment for any other reason—particularly utilitarian reasons involving the good of civil society or even some other benefit for the criminal himself.⁸ In fact, Professor Gardner states that “some desert theorists might advocate punishing offenders even if the results of such were socially detrimental.”⁹

In this section of his article, Professor Gardner does a thorough job presenting authority for just deserts retributivism. Beginning with the writings of Immanuel Kant,¹⁰ working through those of Herbert Morris¹¹ and C.S. Lewis,¹² and concluding finally with the

to the contrary, *id.* at 888, as will be discussed *infra*, each of these points is equally applicable to other forms of secular punishment.

7. *Id.* at 862.

8. *Id.*

9. *Id.*

10. *See id.* at 863 (citing IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (John Lodd trans., 1965)). Gardner describes Kant as a classic retributivist and quotes Kant as stating that “punishment can *never* be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime.” *Id.* at 863 (emphasis added) (quoting KANT, *supra*, at 100).

11. *See id.* at 864 (citing Herbert Morris, *Persons and Punishment*, in PUNISHMENT 74 (J. Feinberg & H. Gross eds., 1975)). Gardner cites Morris to argue that all people have a “moral right to be punished for their criminal offenses,” which Morris argues stems from each individual’s “right to be treated as a person.” *Id.*

12. *See id.* at 865 (citing C.S. Lewis, *The Humanitarian Theory of Punishment*, in 6 RES JUDICATAE 224 (1953)). Gardner presents Lewis’s critique of therapeutic models of punishment as further support for just deserts retributivism. *Id.* Lewis acknowledges that giving offenders their just deserts may have ancillary utilitarian effects and he sees no problem with that. *Id.* at 866 n.15 (quoting Lewis, *supra*, at 225). However, to impose punishment for any reason other than the “desert” would be wickedness. *Id.* Of import, Gardner cites Lewis to make the point that the therapeutic model of punishment, which Lewis labels the Humanitarian theory, misapprehends the concepts of mercy and justice by substituting mercy for justice and thereafter leads to a system of forced therapy, regardless of desire, that is inherently unmerciful. *Id.* at 867.

thoughts of Herbert L. Packer¹³ and Michael S. Moore,¹⁴ Professor Gardner establishes several salient aspects of the theory of just deserts retributivism that he later seeks to support through LDS philosophy. First, and most important, is the notion that every individual is a person with the right to choose evil over good.¹⁵ As will be discussed, *infra*, this first point is wholly consistent with mainstream LDS philosophy.

Second, Professor Gardner presents the theory that stemming from personhood and the right to choose evil is the right to be punished commensurate with the evil that you do. That is to say, society *must* punish the individual who commits crime, for failure to do so is to deny that individual's autonomy. After all, that person made a deliberate choice to violate societal norms and to bring forth the natural consequences of that choice. Therefore, the criminal has a *right* to those consequences.¹⁶

The final aspect of just deserts stems ultimately from Professor Gardner's second point: since the criminal has the right to be punished, society cannot properly dilute, mitigate, or forgo due punishment consistent with that right and with the demands of justice.¹⁷ Thus, humanitarian goals aimed at rehabilitation, treatment, or any other therapeutic models of crime and punishment are, at best, misguided, and must not exist in a just society.¹⁸

Professor Gardner has painstakingly presented these points and has gleaned from them a clear, concise theory of just deserts retributivism. It is this theory of retributivism that Professor Gardner asserts is not just supported in LDS philosophy, but demanded by

13. *See id.* at 868 (citing HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 53–88 (1968)). Gardner cites Packer's example of a "good behavior pill" (that removes all criminal propensities) that the government chooses to use instead of punishment to illustrate Packer's support for "the right to be bad" that is inherent in human autonomy. *Id.* at 868 (citing PACKER, *supra*, at 57–88).

14. *See id.* at 869 (citing Michael S. Moore, *The Moral Worth of Retribution*, in *FOUNDATIONS OF CRIMINAL LAW* 80, 81 (Leo Katz et al. eds., 1999)). Gardner cites Moore to illustrate a different support for just deserts retributivism: the virtuous feelings of guilt and desire to be punished each of us would have were we to commit the crime in question. *Id.* (citing Moore, *supra*, at 81). Moore argues that we should trust those feelings and translate the punishments we would imagine ourselves deserving in similar circumstances into the actual punishment imposed on the real offender. *Id.* (citing Moore, *supra*, at 82).

15. *Id.* at 865–68.

16. *Id.* at 864–67.

17. *Id.*

18. *Id.* at 867–70.

it.¹⁹ However, it is not at all clear that the theory of just deserts retributivism is demanded by LDS doctrine.²⁰ To the contrary, it appears that LDS doctrine weighs in opposition to just deserts retributivism.

B. LDS Thought on Secular Punishment

As illustrated above, in Section II of his article, Professor Gardner described the theory of just deserts retributivism and provided support for the rationale underlying it.²¹ In his next section, “Secular Punishment and LDS Thought,” Professor Gardner discusses elements of LDS doctrine that he argues support the retributivist theory of punishment he previously described.²² In this section, Professor Gardner gleans support from three sources: scriptural references, statements of Church leaders, and an analysis of the LDS beliefs regarding free agency and the premortal life.²³ While the particulars of Professor Gardner’s analysis will be discussed in my Section II, *infra*, there are a few general observations regarding his analysis of scriptural references that are worthy of mention.

First, Professor Gardner admits to the paucity of direct scriptural references to the use of the secular criminal law.²⁴ Indeed, his entire scriptural support is limited primarily to a discussion of only two sections of the *Doctrine & Covenants*.²⁵ Professor Gardner freely admits that even these scriptures can be interpreted to support a

19. *See id.* at 861, 889. Professor Gardner states that “Church doctrine provides a unique foundation for the view that punishment *is required* in order that justice be done,” *id.* at 861 (emphasis added), and then concludes that his presentation of the LDS perspective on the criminal law “*commits* Latter-day Saints to strive for and uphold systems of criminal law that do justice,” *id.* at 889 (emphasis added). As mentioned previously, Professor Gardner does not address other purposes of punishment. That punishment for crime may be justified by rehabilitative, deterrent, or other utilitarian purposes is not refuted in his article. In fact, an early footnote acknowledges his belief that Latter-day Saints can, presumably consistent with LDS doctrine, defend utilitarian purposes of punishment. *See id.* at 861 n.4. It was not Professor Gardner’s intent to refute any other purpose of punishment. Rather, his goal was to demonstrate that LDS philosophies specifically support a retributivist view of punishment.

20. This Comment will not critique retributivism generally, but rather will point out areas in which LDS philosophy is inconsistent with it.

21. Gardner, *supra* note 2, at 862–70.

22. *Id.* at 871–81.

23. *Id.*

24. *Id.* at 871.

25. *Id.* at 871–74.

utilitarian rationale rather than a retributivist one.²⁶ As further evidence of the dearth of direct scriptural references, this section is extremely brief, comprising only three pages in a twenty-eight page article. Finally, Professor Gardner's approach to this analysis is quite diffident because his interpretations of the scriptural passages are stated not as conclusions, but as possibilities—making each step in his analysis a tentative conditional rather than a finding.²⁷

Given the nature of the topic and the realities regarding resource material to address it, these observations would ordinarily not be a concern. In this instance, however, these observations align to point out Professor Gardner's analytical weakness: despite the admitted limitations to his supporting references and the conclusions that may be drawn therefrom, Professor Gardner confidently asserts that “[o]n this view, it is essential that violators of the law be punished in order to receive their just deserts.”²⁸

Professor Gardner's remaining supports discussed in his Section II do not suffer from these express limitations. However, for reasons that will be discussed in my Section II, *infra*, his analysis in these subsections also falls short of providing the support for retributivism that Professor Gardner ultimately asserts.²⁹

II. AN ANALYSIS OF PROFESSOR GARDNER'S LDS SUPPORT FOR RETRIBUTIVISM

A. The Misapprehension of LDS References

Given the foregoing discussion, Professor Gardner's preface to his discussion of LDS thought on secular punishment in which he acknowledges the paucity of direct scriptural references to it is particularly apt. I adopt his disclaimer as I initiate my own analysis. The lack of direct scriptural references obviously makes authoritative analysis difficult. Add to this difficulty the fact that it is scripture that

26. *Id.* at 871, 873.

27. *See id.* at 871–74. Note the number of times Professor Gardner states, in essence, “if the scripture means this, then it supports a retributivist view.”

28. *Id.* at 874.

29. *See supra* notes 47–49 and accompanying text which illustrate that these sections ultimately lead to the conclusion that the doctrine of free agency is central to LDS doctrine and that with choice comes accountability; however, these sections do *not* lead to the conclusion that “accountability” must be meted in a particular secular manner.

must be analyzed, and the difficulty increases exponentially. Fully acknowledging that sufficient holes and ambiguities exist in the texts on these matters and that minds brilliant as well as reasonable could differ, this section nevertheless resolves that, for the reasons that follow, Professor Gardner's interpretation of scripture and the thoughts of Church leaders was simply wrong.

First, it appears that Professor Gardner identified the few existing scriptural references to secular law and punishment and used them to support a theory of punishment that he had already formed.³⁰ It would not be fair to say that he quoted the supporting passages out of context and thereby misrepresented their meaning; however, it would be fair to say that Professor Gardner missed the global or overarching context in which all of these scriptures have been presented and therefore misapprehended their meanings. For example, Professor Gardner cites to verse 8 of section 134 of the *Doctrine & Covenants* as authority for the position that LDS doctrine supports retributivist principles.³¹ My reading of this passage leads me to conclude that not only does it fail to support a retributivist theory of punishment, but it also provides direct support for utilitarian justifications. Verse 8 reads in part:

We believe that the commission of crime should be punished according to the nature of the offense; that murder, treason, robbery, theft, and the breach of the of the general peace, in all respects, should be punished *according to their criminality and their tendency to evil among men*, by the laws of that government in which the offense is committed³²

As clarified by the second clause, rather than arguing in favor of retributivism, the first clause is a profession of a general belief that punishments should be proportionate to the crimes for which they are imposed. As I read it, the second clause is an attempt to clarify that general belief with a specific example. This is illustrated by the inclusion of the phrase “according to their criminality and their

30. It is clear—not just from *Viewing the Criminal Sanction Through Latter-day Saint Thought*, but also from his other works—that Professor Gardner himself leans toward pure just deserts retributivism. See Martin R. Gardner, *The Right of Juvenile Offenders to be Punished: Some Implications of Treating Kids as Persons*, 68 NEB. L. REV. 182 (1989); Martin R. Gardner, *The Right to be Punished: A Suggested Constitutional Theory*, 33 RUTGERS L.J. 838 (1981).

31. Gardner, *supra* note 2, at 871.

32. *Doctrine & Covenants* 134:8 (emphasis added).

tendency to evil among men.” This phrase includes a limitation on the degree of punishment and expresses a belief that unpunished offenses lead others to lawlessness. Inherent in this language is a desire to deter men from that tendency to evil—a utilitarian rationale for punishment. The interpretation that *Doctrine & Covenants* 134:8 supports utilitarian purposes of punishment rather than retributivist purposes is further supported by the third and final clause in this verse which states, “and for the public peace and tranquility all men should step forward and use their ability in bringing offenders against *good* laws to punishment.”³³ Professor Gardner acknowledges that this clause is problematic for just deserts retributivism because it “suggests utilitarian purposes of punishment” in providing a reason for punishing offenders (furthering the causes of public peace and tranquility) that is not punishment for its own sake.³⁴ However, he misses the true import of the adjective “good” modifying the “laws” for which punishment is to be sought. We may certainly infer from this clause that there is no obligation to bring offenders against *bad* laws to punishment. Retributivists would argue that the violation of the law requires punishment simply because the law was broken. As long as the law exists, violations thereof will require punishment—even if some consider the law to be unwise or unjust.

The conclusion that verse 8 does not support a retributivist theory of punishment becomes more clear when it is read in connection with verses 9 and 10, which Professor Gardner failed to quote. Verse 8 does not describe how the Lord wants the members of his Church to view all laws, it simply describes those laws the Lord views as just. Verse 9 describes a category of laws the Church viewed as unjust: laws mingling church and state that furthered the cause of any particular religion over the interests of another.³⁵ Verse 10 describes religious freedoms that the Church held paramount (the freedom to deal with their own members without legal intrusion regarding issues of fellowship and membership in good standing) and described more laws that it would view as unjust (laws permitting religious societies to place a member’s life, liberty, or

33. *Id.* (emphasis added).

34. Gardner, *supra* note 2, at 871.

35. *Doctrine & Covenants* 134:9 (“We do not believe it just to mingle religious influence with civil government, whereby one religious society is fostered and another proscribed in its spiritual privileges, and the individual rights of its members, as citizens, denied.”).

property in jeopardy, or permitting them to inflict physical punishments, or any punishments at all beyond excommunication).³⁶ Professor Gardner missed the significance of this larger context because he limited his analysis to exclusively verse 8.

Professor Gardner also missed the broader context in his only other scriptural reference, *Doctrine & Covenants* 42:84–86. These verses describe certain offenses for which Latter-day Saints must “deliver up” fellow members who commit crime to the secular law to be punished.³⁷ If you read nothing else, these passages appear to support his conclusion that LDS philosophy supports just deserts retributivism. However, when read with the whole of section 42, the import of those three specific verses shifts.

Section 42 contains instructions to members of the Church for dealing with each other, dealing with transgressors, and as a part of that, dealing with lawbreakers.³⁸ Specific transgressions are to be dealt with in specified manners, with a couple of general statements—those quoted by Professor Gardner—that those who violate the secular laws should be left to those laws for punishment. In isolation, those verses could be read as a demand that secular justice be meted out. However, in context, those verses instead appear to be counsel to the leaders of the Church to let the secular law deal with secular criminals. When read with the rest of the section, it seems that verse 8 is more of a jurisdictional limitation than a moral imperative.³⁹

36. Verse 10 states,

We believe that all religious societies have a right to deal with their members for disorderly conduct, according to the rules and regulations of such societies; provided that such dealings be for fellowship and good standing; but we do not believe that any religious society has authority to try men on the right of property or life, to take from them this world's goods, or to put them in jeopardy of either life or limb, or to inflict any physical punishment upon them. They can only excommunicate them from their society, and withdraw from them their fellowship.

Id. at 134:10.

37. *Id.* at 42:84–86.

38. *See generally id.* at 42:69–93 (the section heading states that the Prophet Joseph Smith described this section as “embracing the law of the church”).

39. Although the language appears to state a command to “deliver” lawbreakers to the secular authorities, the notion that this is a jurisdictional limitation is supported by Church practice. Those who confess transgressions to ecclesiastical leaders do not report them. Consider the case of Paul Turner who confessed to trying to kill his wife in 2001. News accounts reported that his bishop encouraged him to turn himself in. LDS bishops to whom the confessions are made honor the sanctity of the confessional and do not turn those who confess over to the authorities. *See* Geoffrey Fattah, *Guilty Plea in Poisoning*, DESERET NEWS,

Professor Gardner's discussion of comments made by leaders of the Church is more robust, but ultimately suffers from the same problem affecting his scriptural analysis: misinterpretation due to missed context. When Professor Gardner quotes Dallin H. Oaks, he accurately recounts the words, but misses the context in which they were presented and again misapprehends their meaning. He quotes Elder Oaks and attributes to him an apparent retributivist position⁴⁰ based upon several passages of text in which Elder Oaks is actually illustrating the distinction between man's criminal law and the Lord's law of discipline for the members of the Church.⁴¹ However, Elder Oaks is simply stating his opinion on the nature of the secular law. He does not in those passages—nor in any other identifiable source—adopt that view as his own, voice approval for it, or in any way assert that LDS doctrine dictates that is the way it is supposed to be.

Professor Gardner quotes Elder Oaks regarding people “feeling” that justice has been done when the punishment fits the crime.⁴² Given Elder Oaks' subsequent discussion of the parable of the mediator, it is clear that Professor Gardner makes too much of this statement. People may not “feel” that justice has been done unless the offender “receives what he deserves.” However, when the demands of justice have been met, these people must be satisfied. The creditor, having been paid by the intermediary, cannot demand that the debtor suffer for his failure to be responsible, to pay on time, or to pay from the debtor's own pocket.⁴³ The creditor's or

Mar. 28, 2003, at A1. While a party's willingness to confess to appropriate people outside of the Church is relevant to whether that party's repentance is sincere, its relevance is minimal in terms of what ecclesiastical discipline the Church subsequently metes out.

40. See Gardner, *supra* note 2, at 876 (quoting DALLIN H. OAKS, *THE LORD'S WAY* 217 (1991), for the proposition that the admonition that “crime should be punished” is grounded in the interest of doing justice).

41. See OAKS, *supra* note 40, at 216–17. Elder Oaks states that the laws of men have no theory of mercy and take no account of the atonement. It is “justice” that requires punishment. It is this “justice” that Elder Oaks urges us to look beyond in seeking to follow the Lord's way instead of man's way. *Id.*

42. Gardner, *supra* note 2, at 876–77. Note that in the passage provided by Professor Gardner he has run together statements from two different paragraphs. The new paragraph begins: “People generally feel . . .” See OAKS, *supra* note 40, at 216–17.

43. See OAKS, *supra* note 40, at 219; *THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, GOSPEL PRINCIPLES MANUAL* 75–77 (1997) [hereinafter *GOSPEL PRINCIPLES*] (containing Boyd K. Packer's parable of the Mediator).

anyone else's feelings that the delinquent debtor may have gotten significantly less than he deserved are simply irrelevant.

In fact, despite the few various references to LDS scriptures, it does not appear that Church practice recognizes an obligation to turn over to secular authority those who transgress the secular law. Repentance, for example, requires confession to the Lord and, if the sins are serious, confession to appropriate priesthood authority.⁴⁴ It also requires confession and the making of restitution to any person the transgressor may have harmed.⁴⁵ It does not require confession to the sovereign whose laws the transgressors may have also violated.

It is true that someone under a criminal justice sentence is not generally baptized until the sentence has been satisfied. It is also true that the commission of crime may result in a member of the Church being disfellowshipped or excommunicated. However, it is not required that a transgressor suffer a criminal penalty. Rather, he or she need only be willing to be subject to the secular authority. Otherwise, repentance would require not simply that you confess, for example, to stealing from a neighbor, but that the neighbor report you to the police. It would require not only that you turn yourself over to the police, but that they arrest you, and it would require that the prosecutor charge you. In the face of these charges you must not only plead guilty, but the judge must impose a penalty, and that penalty must be commensurate with what you did in order for your "restitution" to be complete. Yet it is not the case that a person's repentance is dependant upon whether his victim seeks redress at the law and whether the secular authorities exact "retribution" under that law.

However, that is exactly what would be required under a just deserts recidivist theory of punishment. If secular punishment *had* to be meted out for violations of secular law as a condition of repentance, church action would be contingent upon whether all the parties with discretion to affect the secular decision chose to follow through with the infliction of a criminal penalty. I will state here emphatically that such is not the case. The Church believes in being

44. See GOSPEL PRINCIPLES, *supra* note 43, at 124–25. This confession would be made to one's bishop or branch president.

45. *Id.*

subject to the civil law,⁴⁶ but espouses no particular requirements regarding what the content of that law must be.

The final prong of Professor Gardner's argument that LDS philosophy supports just deserts retributivism is contained in his discussion of the LDS doctrines of free agency and the war in heaven that resulted from Lucifer's attempt to destroy that agency.⁴⁷ The basic conclusion is that each of us, our spirits, or more particularly, our intelligences, are eternal, separate entities. Consequently, we are free to choose our own paths.⁴⁸ Because of that freedom, we are each accountable for our actions and to each individual belongs the praise or blame that should attach to those actions.⁴⁹

These points are clearly made and firmly supported through the LDS scriptural references and commentaries thereto that Professor Gardner presents. Where his argument loses cohesion is in his subsequent conclusion that these doctrines parallel Michael Moore's retributivist notion that offenders should be punished by the secular law because our divine spirits feel guilty for our misdeeds. Professor Gardner inexplicably jumps from the existence of agency to the necessity of punishment.

Ironically, this is the opposite of LDS views on eternal life and exaltation. The LDS view of the plan of salvation centers around natural consequences for our actions here on earth and around the notion that our misdeeds, rather than bring upon us particular punishments in the hereafter, cut us off from specified blessings.⁵⁰ Ultimately, even these consequences can be eliminated through the atoning sacrifice of Jesus Christ.

III. RETRIBUTIVISM AND THE ATONEMENT IN LDS THOUGHT

Professor Gardner's failure to address the LDS doctrine of the atonement in his analysis is his argument's greatest weakness. If not for the atonement and its centrality to LDS doctrine, there are several points of textual interpretation presented in Professor

46. *See Articles of Faith* 12 (Pearl of Great Price).

47. Gardner, *supra* note 2, at 877–81.

48. *Id.* at 879.

49. *Id.* The purpose of Professor Gardner's discussion of the premortal existence and of the war in heaven is to illustrate the importance of our free agency. *Id.* at 879–80.

50. *Doctrine & Covenants* 130:20–21. (“There is a law, irrevocably decreed in heaven before the foundations of this world, upon which all blessings are predicated—And when we obtain any blessing from God, it is by obedience to that law upon which it is predicated.”).

Gardner's analysis, and subsequently challenged in this Comment, upon which reasonable minds could arrive at different conclusions. However, an understanding of the doctrine of the atonement militates in favor of interpreting texts and resolving any ambiguities more consistently with this Comment than with Professor Gardner's thesis.

This section discusses how these same references can be read and interpreted in a broader context. I do not just mean that the additional words, paragraphs, or pages in which the specific scriptural texts were embedded can and should be read more broadly. Rather, I mean that these sources should be read in light of the overarching context in which all of those words were written: the Lord's plan of salvation.⁵¹

LDS scriptures tell us the Lord's purpose for mortality: "For behold, this is my work and my glory—to bring to pass the immortality and eternal life of man."⁵² We have been put on this earth to be tested, and if we are up to the test we will be exalted and thereby achieve that immortality and eternal life:

25 And we will prove them herewith, to see if they will do all things whatsoever the Lord their God shall command them;

26 And they who keep their first estate shall be added upon; and they who keep not their first estate shall not have glory in the same kingdom with those who keep their first estate; and they who keep their second estate shall have glory added upon their heads for ever and ever.⁵³

These passages help explain what task we are here to do, but they do not tell us how we can accomplish it. The answer to that is the cornerstone of the plan of salvation; and the absence of any adequate discussion of it in Professor Gardner's essay is its primary flaw. This cornerstone is the atonement of Jesus Christ.

51. The phrase "plan of salvation" refers to all those doctrines in the LDS philosophy that collectively purport to describe where we come from, why we are here, where we go after death, and, when possible, how it is all brought about. See *GOSPEL PRINCIPLES*, *supra* note 43, at 301–05 (providing a brief summary of the plan of salvation as an introduction to the topic of exaltation—the goal of that plan).

52. *Moses* 1:39 (Pearl of Great Price).

53. *Abraham* 3:25–26 (Pearl of Great Price).

Because we all fall short of perfection, “by the law no flesh is justified”⁵⁴ However, notwithstanding our errors and shortcomings, Christian faiths espouse the general belief that we may all find redemption through the atonement of Jesus Christ. At the risk of gross oversimplification, the doctrine of the atonement provides that Jesus Christ paid the price for our sins such that we may be spared having to do so.⁵⁵ Christ suffered the penalty for our sins to satisfy the demands of divine justice. And, of paramount importance to our discussion here, those who partake of the atonement by repenting of their sins will not have to personally suffer the consequences for those sins because the Savior will have already done so.⁵⁶ This basic doctrine is central to the beliefs of the Church of Jesus Christ of Latter-day Saints.⁵⁷

Professor Gardner provides great detail of the LDS belief of the premortal existence and the war in heaven that was fought over the free agency of humankind.⁵⁸ He relies upon the doctrine of free agency and the resulting individual accountability to support a right to be punished under the law, and thus, as support for an LDS belief that justice requires that each individual offender *must* be punished under the law.⁵⁹ Given his detailed discussion of agency, it is surprising that Professor Gardner fails to mention that free agency is not an end unto itself, but merely a means to an end in LDS philosophy. We are not here simply to make choices (and suffer the attendant consequences). We are here to see if, given the freedom to choose, we will make the *right* choices.⁶⁰

It is this freedom to choose coupled with the inevitability of our making wrong choices that make it necessary for us to have a Savior and an atonement. And this atonement, the cornerstone of the LDS

54. 2 *Nephi* 2:5 (Book of Mormon).

55. See GOSPEL PRINCIPLES, *supra* note 43, at 71–74; see also OAKS, *supra* note 40, at 217–19. Of course, I make no pretense of providing a thorough explication of the LDS doctrine of the atonement. It is my hope only to describe it clearly and accurately enough for discussion in this context.

56. See GOSPEL PRINCIPLES, *supra* note 43, at 71–74.

57. The atonement is the means by which we have come to resolve the justice-mercy paradox. The apparent paradox derives from the fact that both justice and mercy are eternal principles, and neither can be satisfied at the expense of the other. See *Alma* 42:13–26 (Book of Mormon).

58. See Gardner, *supra* note 2, at 877–81.

59. *Id.*

60. See *Abraham* 3:25 (Pearl of Great Price).

view of the plan of salvation, is the antithesis of Professor Gardner's just deserts retributivism: because of the atonement, no matter what wrongs we commit (with limited exceptions), we will not personally have to suffer the penalty or pay the price for our sins if we properly repent.⁶¹

It is another facet of LDS doctrine that in addition to being tested we are here to learn.⁶² And we believe that what we learn here will accompany us in the world to come and will determine our place in that world.⁶³ Consequently, LDS doctrine teaches that there is no division of nor difference between spiritual teachings and laws and those that are temporal.⁶⁴ Anything that may appear to be temporal must have a spiritual basis.⁶⁵ Thus, what the Lord provides for us here must inevitably lead us to the truth of his gospel, and ultimately back to him. At the very least, the Lord's teachings will not interfere with our ability to achieve exaltation. Because of its tendency to deny the possibility of an atonement, just deserts retributivism, as described by Professor Gardner, cannot claim the support from LDS doctrine that he purports to have found. There are several steps to reaching this conclusion, but they are not complicated and are set forth below.

61. LDS scripture asserts that denying "the Holy Ghost when it once has had place in you" is an unpardonable sin, and that murdering "against the light and knowledge of God" is placed in the same context, though not explicitly labeled "unpardonable." See *Alma* 39:5–6 (Book of Mormon).

62. See, e.g., 2 *Nephi* 2:14 (Book of Mormon) ("And now my sons, I speak unto you these things for your profit and learning . . ."), 4:15 ("For my soul delighteth in the scriptures, and my heart pondereth them, and writeth them for the learning and the profit of my children.").

63. See *Doctrine & Covenants* 130:18 ("Whatever principal of intelligence we attain unto in this life, it will rise with us in the resurrection.").

64. The Lord teaches this when he says:

Wherefore, verily I say unto you that all things unto me are spiritual, and not at any time have I given unto you a law which was temporal; neither any man, nor the children of men; neither Adam your father, whom I created. Behold, I gave unto him that he should be an agent unto himself; and I gave unto him commandment, but no temporal commandment gave I unto him, for my commandments are spiritual; they are not natural nor temporal, neither carnal nor sensual.

Doctrine & Covenants 29:34–35.

65. Consider, for example, the LDS word of wisdom, which gives temporal rules regarding substances that should and should not be consumed. See *Doctrine & Covenants* 89. Yet, the Church teaches that even these apparently temporal commandments with clear temporal benefits "are for our spiritual good." See GOSPEL PRINCIPLES, *supra* note 43, at 194–95.

The first step is to remember that just deserts retributivism requires a just system of law to punish an offender for that individual's crimes—the specific offender must pay for his or her offense.⁶⁶ It is not simply that the broken law must be satisfied, but that a just system will only permit satisfaction by the one who broke the law. The offender has a fundamental and personal right to be punished because of the exercise of free will that resulted in the offense.⁶⁷ To deny that punishment, no matter the benevolent or merciful reasons that may seem to exist to do so, is to deny the offender's personhood. The next step is to remember that all earthly aspects are a type of those spiritual.⁶⁸ What lessons can be gleaned from retributivist theories of punishment? The primary lesson is that each offender must satisfy the demands of justice for his or her own offenses. The spiritual corollary would be that if all of us personally must suffer the punishment for our crimes then we must do so for our sins as well. It is not difficult to see what follows. If we must each pay the price of our own sins, then the Savior could not have done it for us; it would not have been possible for him to do so. Any atonement will have been of null effect, so why look to it and to the Lord for our salvation? The inevitable lesson would be that salvation is impossible.

Because we are not perfect and our hands are not clean, it is not possible for any of us to pay the price for our own sins. If we do not repent and avail ourselves of the Savior's atonement, we cannot become exalted because a metaphorical price for those transgressions must be paid, but our own unclean hands cannot pay it. That is what the doctrines of the Church of Jesus Christ of Latter-day Saints teach regarding the need for a Savior and for his infinite atonement.⁶⁹

Just deserts retributivism demands that people must be punished for their crimes to satisfy justice. In the end, because just deserts retributivism is fundamentally inconsistent with the doctrine of the atonement and its primacy in the plan of salvation, the notion that

66. See Gardner, *supra* note 2, at 862–70.

67. *Id.*

68. See *Doctrine & Covenants* 29:34–35, in which the Lord reveals that he has never given us temporal laws and that all things are spiritual unto him. In explaining the performance of the ordinances of the gospel for the dead, the Lord explains in an aside that “that which is earthly conform[s] to that which is heavenly.” *Doctrine & Covenants* 128:13–14.

69. See *GOSPEL PRINCIPLES*, *supra* note 43, at 73.

punishment is required for the sake of punishment alone cannot be demanded, and may not even be permitted, by LDS philosophy.⁷⁰

IV. CONCLUSION

In his essay purporting to examine the criminal sanction through LDS thought, Professor Gardner does not give more than a passing mention to the doctrine of the atonement, let alone explain how the just deserts retributivism model for punishment could be reconciled with it. This omission is quite glaring in an essay that has as its goal the analysis of the criminal sanction from a LDS perspective. Given the obvious parallels between laws and commandments, crime and sin, punishment and consequences, and rehabilitation and redemption, Professor Gardner's failure to address the atonement, to explain or explain away its effect on LDS thought regarding secular justice given its preeminence in divine justice, leaves his proof of LDS support for just deserts retributivism incomplete, and ultimately unconvincing.

70. The commandments, teachings, and counsel provided by LDS doctrine must teach spiritual principles consistent with the plan of salvation. To the extent that retributivist ideals are inconsistent with those principles and would tend to teach the futility of repentance, and even of the atonement of itself, just deserts retributivism would be antithetical to LDS doctrine.

