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Viewing the Criminal Sanction Through Latter-day Saint Thought

*Martin R. Gardner**

I. INTRODUCTION

In this article, I consider possible perspectives on criminal law linked to thought and doctrine of the Church of Jesus Christ of Latter-day Saints (hereinafter the “Church”). I address this topic by focusing on substantive criminal law, specifically on “the distinguishing feature” of criminal law: the institution of punishment.¹ I examine whether the Church’s restored gospel has anything to say about whether we, as a secular community, are justified in imposing the criminal sanction and, if so, why?

The concern for justification arises because the criminal sanction entails the purposeful infliction of suffering upon offenders² and thus on its face appears at odds with the demands of ordinary morality to do our all to *relieve* suffering. Justificatory theories are generally categorized as utilitarian, retributive, or a mixture of the two.³ I hope to show that Latter-day Saint doctrine relating to agency and the premortal existence supports, and is very much consistent with, some varieties of retributive theories of punishment. In this sense, I suggest that Church doctrine provides a unique foundation for the view that punishment is required in order that justice be done.⁴

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1. GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 25 (1998).

2. H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in *PUNISHMENT AND RESPONSIBILITY* 4–5 (1968).

3. See Michael S. Moore, *A Taxonomy of Purposes of Punishment*, in *FOUNDATIONS OF CRIMINAL LAW* 60, 62–63 (Leo Katz et al. eds., 1999).

4. Members of the Church of Jesus Christ of Latter-day Saints, more commonly known as the Mormons, (hereinafter “Latter-day Saints”) can, of course, join others in also defending, where viable, utilitarian justifications of punishment. Moreover, the argument presented in this article is not directed to any particular actors within the Latter-day Saint legal

I proceed in Part II by sketching a retributive theory of punishment developed by several prominent legal philosophers. Part III considers the few statements regarding criminal punishment espoused by Latter-day Saint scriptures and Latter-day Saint church leaders. Part III.C then examines the principles of agency within the context of the restored gospel, suggesting that these principles supply a doctrinal basis for a Latter-day Saint justification of the criminal sanction. In Part IV, I consider capital punishment in light of the ideas expressed in Parts II and III and argue that my proposed Latter-day Saint perspective on punishment in general does not necessarily commit Church members to advocate the death penalty as a particular form of punishment.

II. "JUST DESERTS" RETRIBUTIVISM

While a number of retributive theories exist,⁵ I would like to focus on the variety that regards the punishment of culpable violators of criminal rules as a demand of justice. Under this view, punishment is justified, indeed required, simply because it is just. In contrast to utilitarian theories that justify punishment as effectuating such beneficial consequences as deterring crime or incapacitating crime-prone offenders, just deserts theory considers punishing offenders as intrinsically good, independent of any beneficial consequences. Indeed, some desert theorists might advocate punishing offenders even if the results of such were socially detrimental.

community, some of whom may be obligated under other Church doctrine to obey positive legal rules that might not be fully consistent with the theory presented here. *See Articles of Faith* 12 (Pearl of Great Price) ("We believe in being subject to kings, presidents, rulers, and magistrates, in obeying, honoring and sustaining the law."); *see also infra* notes 29–30. The theory of punishment presented herein is thus offered as an ideal, to be maintained when found in practice within existing legal systems and to be sought for through lawful means within systems where it is not found.

In arguing that Latter-day Saint doctrine provides a "unique foundation" for retributive theory, I do not mean to suggest that these doctrinal positions must necessarily be embraced by retributivists. The claim here is simply that the strong sense of agency and accountability found in Latter-day Saint thought offers a powerful grounding for retributive theory.

5. For example, sometimes retributive theories claim that doing justice is merely a necessary but not a sufficient condition for punishing. *See, e.g.*, K.G. Armstrong, *The Retributivist Hits Back*, in *THE PHILOSOPHY OF PUNISHMENT* 138 (H.B. Acton ed., 1969). Other theories, such as those described in the text accompanying *infra* notes 6–18, claim that doing justice is both a necessary and a sufficient condition for punishing.

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Contemporary just deserts theory echoes the classic retributive views of Immanuel Kant. The following provides a summary of Kant's views:

Judicial 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; for a human being can never be manipulated merely as a means to the purposes of someone else His innate personality [that is, his right as a person] protects him against such treatment. . . . The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it—in keeping with the Pharisaic motto: “It is better that one man should die than that the whole people should perish.” If legal justice perishes, then it is no longer worthwhile for men to remain alive on this earth.⁶

Kant goes on to posit a principle for assessing the degree of deserved punishment: the principle of equality, the Mosaic *lex talionis*. Kant explains that “any undeserved evil . . . you inflict on [another] you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself.”⁷ In the context of the death penalty, Kant offers the following famous observation:

There is no sameness of kind between death and remaining alive even under the most miserable conditions, and consequently there is also no equality between the crime and the retribution unless the criminal is judicially condemned and put to death. . . . Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to

6. IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (John Lodd trans., 1965). Kant illustrates the primacy of the value of justice:

[W]hat should one think of the proposal to permit a criminal who has been condemned to death to remain alive, if, after consenting to allow dangerous experiments to be made on him, he happily survives such experiments and if doctors thereby obtain new information that benefits the community? Any court of justice would repudiate such a proposal with scorn if it were suggested by a medical college, for [legal] justice ceases to be justice if it can be bought for a price.

Id. at 100–01.

7. *Id.* at 101.

separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.⁸

Some observations are in order. For Kant, one's "innate personality, his right as a person," protects him from being used as a means for the benefit of others. His human dignity entitles him to be dealt with as an end in himself, as a free moral agent. Unless he deserves punishment, he cannot be punished, even if doing so would result in huge social benefits. But if he is deserving of punishment, he must be punished. Justice demands as much.

Indirectly, Kant argues that persons have a right to be punished. Such a position is made explicit in the writings of Herbert Morris. In his paper, *Persons and Punishment*,⁹ Professor Morris argues that guilty persons have a moral right to be punished for their criminal offenses. Under Morris's theory, the moral right to be punished derives from a more fundamental natural right that is inalienable and absolute: the right to be treated as a person. Persons are entitled to have their choices respected. Therefore, when one chooses to engage in morally reprehensible conduct prohibited by a just system of criminal law,¹⁰ one chooses also the consequences of his offense: punishment.¹¹

8. *Id.* at 102.

9. Herbert Morris, *Persons and Punishment*, in PUNISHMENT 74 (Joel Feinberg & Hyman Gross eds., 1975). The description in the text of Morris's theory is drawn from my previous works. See Martin R. Gardner, *The Right to be Punished—A Suggested Constitutional Theory*, 33 RUTGERS L. REV. 838, 839–46 (1981) (reprinted with permission of the RUTGERS LAW REVIEW); Martin R. Gardner, *The Right of Juvenile Offenders to be Punished: Some Implications of Treating Kids as Persons*, 68 NEB. L. REV. 182, 183–87 (1989).

10. Professor Morris's "right to be punished" theory is applicable only within a legal system that conditions punishment on a careful finding that a person is guilty of violating a "primary rule," which is similar to a core rule of our criminal law. To avoid unjust applications of punishment, accused offenders must be afforded a variety of substantive defenses, permitting them to show that their offenses were involuntary or otherwise excusable. Moreover, the system must provide safeguards against double jeopardy and self-incrimination, rights to trial by jury, requirements of proof beyond a reasonable doubt as a prerequisite to conviction, and protections against punishment that is disproportionate to the seriousness of the offense or the culpability of the offender. Morris, *supra* note 9, at 75–78.

11. Professor Morris justifies the institution of punishment as both a necessary means of promoting compliance with the law and as a requirement of justice. *Id.* at 75–80. Justice

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At first blush, one may wonder how being subjected to punishment could ever be meaningfully viewed as a “right” rather than an onus of the severest sort. If “rights” are claims that must be honored upon assertion, why would *anyone* in possession of his or her senses *ever* demand to be punished? The answer becomes clear if we imagine a world without criminal law, where the void created by the criminal sanction is filled by a therapeutic response to anti-social behavior.¹²

Non-punitive sanctions, imposing compulsory therapy or rehabilitation, regard deviant behavior as merely symptomatic of pathological conditions or emotional immaturity rather than as the actions of responsible human agents. Thus, therapy and rehabilitation are directed toward altering the offender’s currently undesirable conditions with no necessary attention paid to past undesirable conduct. In this way, coerced therapeutic responses fail to respect the rational choices, and thus the personhood, of the offender. Moreover, therapy tends toward paternalism and coercion insofar as the therapist is assumed to know, and thus often permitted to use, those treatments that will be beneficial, no matter how objectionable the “patient” may find them. On the other hand, the primary thrust of punishment, rather than seeking to benefit the offender, is to exact from the recipient the amount of suffering deemed proper to pay the “debt” owed society through commission of the offense. Payment of the debt nullifies the offender’s guilt.

As a theory of justice, the right to be punished embraces the traditional retributive requirements that the form and degree of punishment be proportionate to the seriousness of the offense, as determined by the characteristic harmfulness of the conduct and the individual culpability of the offender.¹³ Moreover, forms of punishment that fail to respect the dignity of the person are, of course, impermissible. Persons are subject only to just and humane

demands that an offender be punished in order to restore the equilibrium lost through the offender’s renunciation of the burdens of law-abiding conduct. Without punishment, the offender would gain an unfair advantage over law-abiding citizens since he would receive the benefits of life within the legal order, without assuming the burdens of restraining his conduct in accordance with the rules of the legal system. *Id.*

12. C.S. Lewis notes that therapeutic alternatives to the criminal law would inevitably become coercive: “If a tendency to steal can be cured by psychotherapy, the thief will no doubt be forced to undergo the treatment.” C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 224 (1953).

13. *See infra* note 32 and accompanying text.

punishment and have rights to be free from unjust, cruel, or inhumane punishments.

Similar to Morris, C.S. Lewis also appears to embrace a right to be punished. Lewis has sarcastically labeled the substitution of a therapeutic response for sanctions meting out just deserts the “Humanitarian Theory,”¹⁴ which he criticizes as follows:

We demand of a cure not whether it is just but whether it succeeds. Thus, when we cease to consider what the criminal deserves and consider only what will cure him . . . , we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a “case.”¹⁵

14. *See supra* note 12.

15. Lewis, *supra* note 12, at 225. Lewis also objects to grounding punishment theory on deterrence principles:

If we turn from the curative to the deterrent justification of punishment we shall find the new theory even more alarming. When you punish a man *in terrorem*, make of him an “example” to others, you are admittedly using him as a means to an end; someone else’s end. This, in itself, would be a very wicked thing to do. On the classical theory of Punishment it was of course justified on the ground that the man deserved it. That was assumed to be established before any question of “making him an example” arose. You then, as the saying is, killed two birds with one stone; in the process of giving him what he deserved you set an example to others. But take away desert and the whole morality of the punishment disappears. Why, in Heaven’s name, am I to be sacrificed to the good of society in this way?—unless, of course, I deserve it.

But that is not the worst. If the justification of exemplary punishment is not to be based on desert but solely on its efficacy as a deterrent, it is not absolutely necessary that the man we punish should even have committed the crime. The deterrent effect demands that the public should draw the moral, “If we do such an act we shall suffer like that man.” The punishment of a man actually guilty whom the public think innocent will not have the desired effect; the punishment of a man actually innocent will, provided the public think him guilty. But every modern State has powers which make it easy to fake a trial. When a victim is urgently needed for exemplary purposes and a guilty victim cannot be found, all the purposes of deterrence will be equally served by the punishment (call it “cure” if you prefer) of an innocent victim, provided that the public can be cheated into thinking him guilty. It is no use to ask me why I assume that our rulers will be so wicked. The punishment of an innocent, that is, an undeserving, man is wicked only if we grant the traditional view that righteous punishment means deserved punishment. Once we have abandoned that criterion, all punishments have to be justified, if at all, on other grounds that have nothing to do with desert. Where the punishment of the innocent can be justified on those grounds (and it could in some cases be justified as a deterrent) it will be no less moral than any other punishment. Any distaste for it on the part of a Humanitarian will be merely a hang-over from the Retributive theory.

Id. at 227–28.

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Lewis adds this observation:

Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. . . . To be “cured” against one’s will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we “ought to have known better,” is to be treated as a human person made in God’s image.¹⁶

Responding to possible criticisms that giving offenders their just deserts may be unduly legalistic and void of proper compassion, Lewis points out:

I think it [is] essential to oppose the Humanitarian theory . . . root and branch, wherever we encounter it. It carries on its front a semblance of mercy which is wholly false. That is how it can deceive men of good will. . . . [T]he distinction [between justice and mercy] . . . is essential. The older view was that mercy “tempered” justice, or (on the highest level of all) that mercy and justice had met and kissed. The essential act of mercy was to pardon; and pardon in its very essence involves the recognition of guilt and ill-desert in the recipient. . . . But the Humanitarian theory wants simply to abolish Justice and substitute Mercy for it. This means that you start being “kind” to people before you have considered their rights, and then force upon them supposed kindnesses which they in fact had a right to refuse, and finally kindnesses which no one but you will recognize as kindnesses and which the recipient will feel as abominable cruelties. You have overshot the mark. Mercy, detached from Justice, grows unmerciful. That is the important paradox. As there are plants which will flourish only in mountain soil, so it appears that Mercy will flower only when it grows in the crannies of the rock of Justice: transplanted to the marshlands of mere Humanitarianism, it becomes a man-eating weed, all the more dangerous because it is still called by the same name as the mountain variety.¹⁷

16. *Id.* at 228.

17. *Id.* at 229–30. For a criticism of Lewis’s views, see Norval Morris & Donald Buckle, *The Humanitarian Theory of Punishment: A Reply to C.S. Lewis*, 6 RES JUDICATAE 231 (1953). For Lewis’s reply to the reply, see C. S. Lewis, *On Punishment: A Reply*, 6 RES JUDICATAE 519 (1954).

Like Morris and Lewis, Herbert Packer suggests that abandoning the criminal sanction in favor of therapeutic responses would result in the loss of important rights.¹⁸ Packer asks us to consider a world without punishment by engaging in the following thought experiment:¹⁹ Suppose scientists develop a “good behavior pill” that permanently alters human personality by removing all criminal propensities without generating any unfortunate side effects. Suppose further that the state responds to this development by abandoning the use of punishment in lieu of compelling those who engage in anti-social conduct (or even those who do not) to take a “good-behavior pill.”²⁰ Packer asks whether such a response might be objectionable as a violation of one’s “right to be bad” and thus at odds “with long standing ideals of human autonomy.”²¹

The views of a final retributivist, Michael Moore, are worthy of note. Unlike thinkers in the Kantian tradition who ground their theories in principles of justice, Moore considers what our emotions teach us about punishment. In Moore’s words:

Our concern for retributive justice might be motivated by very deep emotions that are nonetheless of a wholly virtuous nature. These are the feelings of guilt we would have if we did the kinds of acts that fill the criminal appellate reports of any state.

The psychiatrist Willard Gaylin interviewed a number of people closely connected to the brutal hammering death of Bonnie Garland by her jilted boyfriend, Richard Herrin. He asked a number of those in a Christian order that had been particularly forgiving of Richard whether they could imagine themselves performing such an act under any set of circumstances. Their answer was uniformly “Yes.” All of us can at least find it conceivable that there might be circumstances under which we could perform an act like Herrin’s—not exactly the same, perhaps, but something pretty horrible. . . .

18. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 53–57 (1968).

19. *Id.* at 56–57.

20. *Id.* at 57.

21. *Id.* at 57–88. Is this another way of describing the right to be treated as a person that is similar to the views of Kant, Morris, and Lewis? It must be noted, however, that unlike Kant, Morris, and Lewis, Packer adopts a mixed theory of punishment embracing both retributive and utilitarian aspects. For Packer, the culpability of the offender acts only as a *necessary* but not a *sufficient* condition for punishment. Culpability is thus a limiting principle that assures that only those deserving of punishment receive it. *See id.* at 62–70.

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Then ask yourself: What would you feel like if it was you who had intentionally smashed open the skull of a 23 year-old woman with a claw hammer while she was asleep, a woman whose fatal defect was a desire to free herself from your too clinging embrace? My own response, I hope, would be that I would feel guilty unto death. I couldn't imagine any suffering that could be imposed upon me that would be unfair because it exceeded what I deserved.

Is that virtuous? Such deep feelings of guilt seem to me to be the only tolerable response of a moral being. "Virtue" is perhaps an odd word in the context of extreme culpability, but such guilt seems, at the least, very appropriate. One ought to feel so guilty one wants to die. Such sickness unto death is to my mind more virtuous than the nonguilty state to which Richard Herrin brought himself, with some help from Christian counseling about the need for self-forgiveness. After three years in prison on an eight- to twenty-five-year sentence for "heat of passion" manslaughter, Richard thought he had suffered quite enough for the killing of Bonnie.²²

Although Herrin admitted that he had dealt with his victim unfairly, he criticized his sentencing judge for not allowing him a chance to live a "productive life" in society and complained that he was being required to unfairly waste his life in prison.²³

In response to Herrin's self-serving attitude, Moore observes: "Compared to such shallow, easily obtained self-absolution for a horrible violation of another, a deep sense of guilt looks very virtuous indeed. . . . The alternative, of not crying over spilt milk (or blood), is truly indecent. A moral being *feels* guilty when he or she *is* guilty of past wrongs."²⁴

Moore goes on:

We should trust what our imagined guilt feelings tell us; for acts like those of Richard Herrin, that if we did them we would be so guilty that some extraordinarily severe punishment would be deserved. We should trust the judgments such imagined guilt feelings spawn [S]uch guilt feelings typically engender the

22. Michael S. Moore, *The Moral Worth of Retribution*, in FOUNDATIONS OF CRIMINAL LAW, *supra* note 3, at 80-81.

23. *Id.* at 81-82.

24. *Id.* at 82.

judgment that we deserve punishment. . . . that we *ought* to be punished. . . .

. . . .

. . . [W]e should ask whether there is any reason not to make the same judgment about Richard Herrin's actual deserts as we are willing to make about our own hypothetical deserts. If we experience any reluctance to transfer the guilt and desert *we* would possess, had we done what Richard Herrin did, to Herrin himself, we should examine that reluctance carefully. Doesn't it come from feeling more of a person than Richard? . . . [W]e certainly have never been subject to the exact same stresses and motivations as Richard Herrin. Therefore, it may be tempting to withhold from Richard the benefit each of us gives himself or herself: the benefit of being the subjective seat of a will that, although caused, is nonetheless capable of both choice and responsibility.

Such discrimination is a temptation to be resisted, because it is no virtue. It is elitist and condescending toward others not to grant them the same responsibility and desert you grant yourself. Admittedly, there are excuses the benefit of which others as well as yourself may avail themselves. . . . Herrin had no excuse the rest of us could not come up with in terms of various causes for our choices. To refuse to grant him the same responsibility and desert as you would grant yourself is thus an instance of . . . treating a free, subjective will as an object. It is a refusal to admit that the rest of humanity shares with us that which makes us most distinctively human, our capacity to will and reason—and thus to be and do evil. Far from evincing fellow feeling and the allowing of others to participate in our moral life, it excludes them as less than persons.²⁵

Most of the views of these retributive thinkers are attractive to me as an academic criminal lawyer. They also resonate with me as a Latter-day Saint. The remainder of this paper will attempt to explain why such views might be particularly well-fitting in the Latter-day Saint tradition.

25. *Id.* at 82–83.

III. SECULAR PUNISHMENT AND LATTER-DAY SAINT THOUGHT

A. Scriptural References

Latter-day Saint scripture, with its attention to the Savior's Atonement, has much to say about the subject of punishment, justice, and mercy in the eternal context. On the other hand, modern revelation, not surprisingly, provides few explicit references in the standard works to the criminal sanction in secular legal systems. That the scriptures say anything about the subject, particularly in admonishing use of the criminal sanction, is perhaps significant given biblical cautions about going "to law with another"²⁶ in the context of civil, and perhaps even criminal, matters.²⁷

Yet *Doctrine & Covenants* section 134 clearly discusses the criminal justice system:

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 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 committed; and for the public peace and tranquility all men should step forward and use their ability in bringing offenders against good laws to punishment.²⁸

While the last clause of this text suggests utilitarian purposes of punishment (offenders should be punished "for the public peace and tranquility"), the first clause (perhaps describing the *primary* purpose of punishment) expresses just deserts principles.²⁹ Criminals are to be punished "according to the nature of their offense . . . and according to their criminality." Thus, punishment should correspond to the

26. 1 *Corinthians* 6:1–7.

27. See DALLIN H. OAKS, *THE LORD'S WAY* 162 (1991).

28. *Doctrine & Covenants* 134:8.

29. In an earlier verse, section 134 addresses a commitment to uphold the legal order "for the good and safety of society": "We believe that governments were instituted of God for the benefit of man; and that he holds men accountable for their acts in relation to them, both in making laws and administering them, for the good and safety of society." *Doctrine & Covenants* 134:1. Such utilitarian views of the virtues of law in general do not necessarily contradict a reading of verse 8 as espousing a just deserts theory. Indeed, unless the criminal law principles reflected in verse 8 are understood to embrace justice principles not articulated in the utilitarianism of verse 1, verse 8 appears to add little and is thus, perhaps, redundant.

nature of the offense. An offender's "criminality" and "tendency to evil" must also be taken into account. While the text speaks of "criminality" in the context of offenses, perhaps this term might be better understood to speak to the blameworthiness of the offender, since the concern for proportioning punishment to the seriousness of the offense is already made clear by the language specifying "nature of the offense" and its "tendency to evil." If the scripture teaches that offenders are to be punished commensurate to their personal culpability³⁰ and the harm caused by their actions, the verse expresses the exact factors articulated by Andrew von Hirsch in fashioning his neo-Kantian theory of commensurate deserts.³¹

While *Doctrine & Covenants* section 134 admonishes "all men" to bring offenders to punishment, section 42 of the *Doctrine & Covenants* specifically directs members of the Church to participate in the workings of the criminal justice system, even to the point of "delivering up" fellow members who commit crime:

And it shall come to pass, that if any persons among you shall kill they shall be delivered up and dealt with according to the laws of the land; . . . and it shall be proved according to the laws of the land. . . . And if a man or woman shall rob, he or she shall be delivered up unto the law of the land. And if he or she shall steal, he or she shall be delivered up unto the law of the land. And if he

30. That personal culpability is an imperative is further suggested by other language in section 134: "We believe that every man should be honored in his station, rulers and magistrates as such, being placed for the protection of the innocent and the punishment of the guilty . . ." *Doctrine & Covenants* 134:6. The reference to "punishment," the distinguishing feature of the criminal law, see FLETCHER, *supra* note 1, at 25, in the quoted language thus appears to address criminal law matters. "Rulers and magistrates" (perhaps judges?) are to protect the "innocent." The most obvious way in which judges protect the innocent in the criminal law context is by assuring that punishment not be imposed on non-culpable defendants. Verse 1 thus appears to express the mandate that punishment should be imposed but only on culpable offenders.

While the first clause of verse 1 thus appears to express principles of just deserts, subsequent language, as in verse 1, see *supra* note 29, addresses the virtues of the legal order in general in utilitarian terms. "[T]o the laws all men owe respect and deference, as without them peace and harmony would be supplanted by anarchy and terror; human laws being instituted for the express purpose of regulating our interests as individuals and nations, between man and man . . ." *Doctrine & Covenants* 134:6. Therefore, on this interpretation, *Doctrine & Covenants* section 134 verses 1, 6, and 8 commit Latter-day Saints to embrace the legal order in general because of the benefits derived from life under law. On the other hand, when it comes to the criminal law in particular, its primary function appears to be the dispensation of justice: punishing the guilty and assuring that the non-guilty not be punished.

31. ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 66, 79–80 (1976).

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or she shall lie, he or she shall be delivered up unto the law of the land.³²

The modern scriptures do not explain why it is a matter of religious obligation to see that offenders be punished by secular law. Of course, one explanation might simply be that doing so will result in less crime and thus a better society. Such a utilitarian view does not uniquely belong to the Latter-day Saints. However, if the scriptural language, “persons among you,” refers to Church members, section 42 spells out an obligation to see that civil

32. *Doctrine & Covenants* 42:79, 42:84–86. The *Doctrine & Covenants* is not the sole Latter-day Saint scripture that discusses secular punishment. The *Book of Mormon* notes in several places that a system of criminal law and punishment was in place in ancient America. As I have argued elsewhere, some *Book of Mormon* scriptures that appear to speak of secular punishment are better understood as discussing eternal punishment, while other scriptures that do address secular punishment do so merely to point out facts about *Book of Mormon* society rather than to impose obligations to punish:

Turning finally to the Book of Mormon, one finds a variety of passages that may seem to suggest that murderers should suffer the death penalty. Second Nephi 9:35 provides, “Wo unto the murderer who deliberately killeth, for he shall die.” But when this verse is read in the context of the rest of the chapter, it becomes clear that . . . *spiritual*, and not physical death is being discussed. [Two examples are] 2 Nephi 9:28, 38–39 [and] . . . 2 Nephi 26:32 Man “perishes,” suffers *spiritual* death, when he murders or commits other sins.

Other verses in the Book of Mormon seem to recognize capital [and other] punishment as a reality of ancient society. Alma 1:18 provides: “And they durst not steal for fear of the law, for such were punished; neither durst they rob, nor murder, for he that murdered was punished unto death.” [The verses clearly express an appeal to general deterrence as the basis for punishments. As such, there appears no reason to see the penalties as necessary, as ends in themselves, to do God’s will. Rather, the punishments seem to have been employed contingently as means to deter.] . . .

Other scriptures in the Book of Mormon indicate that personal atonement through capital punishment of murderers may be inconsistent with Christ’s atonement. [See] Alma 34:10–12. . . . The scripture recognizes the reality of capital punishment for murder in ancient society but says nothing about capital punishment being required by either God or by principles of justice. The reference to “just law” seems to refer to the well-recognized principle of justice forbidding criminal punishment of those who obey the law. Justice demands that only the culpable be punished. The scripture thus does not say that justice requires capital punishment, but that any punishment be a consequence of personal blameworthiness.

Martin R. Gardner, *Mormonism and Capital Punishment: A Doctrinal Perspective Past and Present*, DIALOGUE: A JOURNAL OF MORMON THOUGHT, Spring 1979, at 21–22.

For a similar argument that *Doctrine & Covenants* 42:19, “he that killeth shall die,” refers to *spiritual* rather than physical death, see *id.* at 42:20–21. This interpretation is also embraced by Dallin H. Oaks, *supra* note 27, at 213. Note, however, that Bruce R. McConkie disagrees and sees capital punishment as divinely required by section 42 verse 19. See Gardner, *supra*, at 18.

punishment is imposed on persons who are also subject to ecclesiastical sanction which, for such persons, might be as effective as civil punishment in deterring the described acts. Perhaps, therefore, the obligation to see that violators of criminal law are punished is not grounded in utilitarian theory but reflects the retributive interest in seeing that justice is done through application of punitive sanctions not available to Church tribunals. On this view, it is essential that violators of the law be punished in order to receive their just deserts.

B. Views of Church Leaders

Interpretations of sections 134 and 42 as grounded in retributive theory appear consistent with the few expressions of Church leaders regarding the function of the criminal sanction. In words reminiscent of Kant's urgings that the last offender on an island be punished, even if the island society were to disband by mutual consent,³³ Brigham Young is said to have made the following statement in urging the 1846 Municipal High Council³⁴ to bring to justice members of the Church who had "trampled on the rights of the Priesthood . . . [I am] not so much afraid of going into the wilderness alone but [that] offenders go unpunished for such or like offenses."³⁵

Assuming that Young's words were not the product of a spirit of vengeance, a motive inconsistent with Latter-day Saint teachings,³⁶ his views might be expressions of a desire that offenders be given their just deserts. As with Kant's example of punishing the last offender on the soon-to-be abandoned island society, Young's desire that offending Church members receive civil punishment (corporal punishment, fines, restitution, and community service were apparently the penalties of the day)³⁷ as well as ecclesiastical sanction

33. See *supra* note 8 and accompanying text.

34. The Municipal High Council was a court exercising both civil and ecclesiastical jurisdiction in fraud and theft cases during the Nauvoo exodus. See EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS* 288, 355, 360-61 (1988).

35. *Quoted in id.* at 361.

36. Spencer W. Kimball taught that "[t]he spirit of revenge, of retaliation, of bearing a grudge, is entirely foreign to the gospel of . . . Jesus Christ." SPENCER W. KIMBALL, *THE MIRACLE OF FORGIVENESS* 265 (1969). Dallin H. Oaks adds: "Revenge is never a proper motive for a Christian." OAKS, *supra* note 27, at 181.

37. See FIRMAGE & MANGRUM, *supra* note 34, at 361.

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appears grounded in retributive rather than utilitarian principles. Arguably, subjecting offending Church members to ecclesiastical sanction, excommunication in particular, would have provided a significant general deterrent effect regarding other members tempted to commit similar crimes. Moreover, specific deterrence concerns would seemingly not require criminal punishment. If a given offender did not learn his lesson by being excommunicated, he could simply be left behind by the Latter-day Saint community as it moved west.

Utilitarian concerns for incapacitating dangerous offenders appear equally inapposite given the forms of civil punishment employed.³⁸ Young's demand for civil punishment thus appears best explicable as a Kantian categorical imperative. Offenders, even in situations where society may disband and leave them behind, must be punished in order for justice to be done.

Neal A. Maxwell, seemingly joining C.S. Lewis's opposition to the "Humanitarian Theory," recently observed that society often overlooks the importance of justice. Maxwell observes:

Now, you are going to live out your lives in contemporary society. It is a society in which, instead of a rush to judgment, there is almost a rush to mercy, because people are so anxious to be nonjudgmental. Many have quite a confused understanding of mercy and justice. People tend to shy away from correction even when it might be helpful.³⁹

Maxwell then quotes Lewis's view that "[m]ercy detached from Justice grows unmerciful."⁴⁰ Assuming that Maxwell is including the criminal justice system in his remarks, the caution against a "rush to mercy" appears to place a very high value on holding offenders accountable for their actions. While it is surely true that in other contexts the "merciful are blest,"⁴¹ apparently so far as the criminal

38. See *supra* note 37 and accompanying text.

39. Neal A. Maxwell, *Jesus, the Perfect Mentor*, ENSIGN, Feb. 2001, at 8, 12.

40. *Id.*; see *supra* note 17 and accompanying text. For information on the Church's belief on justice and mercy, see the following: Bruce C. Hafen, *Justice and Mercy*, in 2 ENCYCLOPEDIA OF MORMONISM 775-76 (Daniel H. Ludlow ed., 1995); Bruce C. Hafen, *Justice, Mercy, and Rehabilitation*, in THE BROKEN HEART 143-54 (1989); JOHN TAYLOR, MEDIATION AND ATONEMENT OF OUR LORD AND SAVIOR JESUS CHRIST (1882); 2 *Nephi* 9:25, 25:23 (Book of Mormon); *Mosiah* 3:11 (Book of Mormon); *Alma* 41:2-6 (Book of Mormon); *Alma* 42 (Book of Mormon); 3 *Nephi* 27:14-16 (Book of Mormon); *Doctrine & Covenants* 82:10; and *Articles of Faith* 2 (Pearl of Great Price).

41. *Matthew* 5:7 (King James).

justice system is concerned, doing justice is the higher virtue. If I am interpreting Maxwell's views correctly, it would appear that he would also subscribe to Lewis's view that "to be punished, however severely, because we have deserved it, because we 'ought to have known better,' is to be treated as a human person made in God's image."⁴² Likewise, it would appear that abandoning the criminal sanction for Herbert Packer's "good behavior pill"⁴³ would be an undesirable manifestation of the "rush to mercy" because it would render justice irrelevant by removing the possibilities of agency and, hence, accountability.

Although Maxwell does not specifically refer to the criminal justice system when counseling against a rush to mercy, Dallin H. Oaks clearly recognizes the significance of retributive theory in secular law by observing that "[t]he paramount concern of human [criminal] law is justice."⁴⁴ He adds:

[T]he laws of man focus on justice, [and] have no theory of mercy. . . . When the criminal law has been violated, justice usually requires that a punishment be imposed. . . . People generally feel that justice has been done when an offender receives what he deserves—when the punishment fits the crime. Thus our church's declaration of belief states that "the commission of crime should be punished."⁴⁵

42. See *supra* text accompanying note 16. Viewing Maxwell's teachings as embracing the just deserts theory may appear at odds with his observation that "[p]eople tend to shy away from correction *even when it might be helpful*." Maxwell, *supra* note 39, at 12 (emphasis added). While such language might appear to embrace a utilitarian theory of punishment, it can perhaps better be read to mean that correction (punishment?) might sometimes be "helpful" *in addition to* its other virtues. Thus, the thrust of Maxwell's comments appear to me to suggest that punishment (doing justice) is desirable whether or not it results in beneficial consequences.

43. See *supra* text accompanying notes 19–20.

44. OAKS, *supra* note 27, at 217. Oaks also notes, "preserv[ing] peace and harmony by encouraging injured parties to forego private retribution or revenge and look to the laws and civil authorities to punish their adversary . . . or to deter or prevent future wrongs" as purposes for criminal punishment, both of which are utilitarian interests. *Id.* at 211. If, for Oaks, the paramount concern of the criminal law is to do justice, these utilitarian interests would appear subsidiary.

45. *Id.* at 216–17. Oaks contrasts earthly criminal law, with its emphasis on justice with "church discipline" the primary goal of which is to "save souls" accomplished through justice but more particularly through "mercy and the atonement." *Id.* While the "laws of man focus on justice" with little attention to the divine virtue of mercy, Oaks is clear in his view that however inferior to divine law, "our church's declaration of belief states that 'the commission of crime should be punished [through the secular criminal law].'" *Id.*

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Oaks thus describes the scriptural admonition that “crime should be punished” as fundamentally grounded in the interest of doing justice. Moreover, Oaks’s reference to the “feelings” of people as an indicium of justice may be a nod in the direction of recognizing virtuous emotions as the philosophical ground for generating a just deserts theory along the lines of the one by Michael Moore outlined above.⁴⁶

C. Agency and the Premortal Life

If some Church leaders are in favor of a just deserts theory of criminal punishment, the underlying rationale for such a view is not made explicit. However, Joseph Smith’s teachings about the concept of agency, in the context of premortal life, appear to be a fertile source of support for some Church leaders’ affinity to a just deserts model.

In a widely embraced interpretation⁴⁷ of certain scriptural references as amplified by Joseph Smith’s King Follett Discourse,

Moreover, Oaks also contrasts this secular criminal punishment with eternal punishment, noting that the primary purpose of both is the satisfaction of justice:

The laws of God are likewise concerned with *justice*, but they are also concerned with the mercy made possible because of the atonement. Church doctrine explains this.

The idea of justice as what one deserves is the fundamental premise of all scriptures that speak of men’s being judged according to their works. The Savior told the Nephites that all men would stand before him to be “judged of their works, whether they be good or whether they be evil.” (3 Ne. 27:14; also see Mosiah 15:26–27; Alma 41:3–4.) In his letter to the Romans, Paul described “the righteous judgment of God” in terms of “render[ing] to every man according to his deeds.” (Rom. 2:5–6.) Our second Article of Faith affirms that “men will be punished for their own sins, and not for Adam’s transgression.”

According to eternal law, when a commandment is broken, a commensurate penalty may be imposed. “There is a law given, and a punishment affixed,” the prophet Alma taught, and “justice claimeth the creature and executeth the law, and the law inflicteth the punishment.” “For behold,” he continued, “justice exerciseth all his demands.” (Alma 42:22, 24.) The justice of God “divide[s] the wicked from the righteous.” (1 Ne. 15:30.) By itself, justice is uncompromising. This is how mortals became subject to temporal and spiritual death.

Id. at 217–18.

46. See *supra* notes 22–25 and accompanying text.

47. The interpretation sketched herein, positing the individuality of primal intelligences, was supported by Joseph Smith, Brigham Young, Wilford Woodruff, Lorenzo Snow, Orson Pratt, George Q. Cannon, John A. Widtsoe, and Joseph Fielding Smith. See Truman G. Madsen, *Philosophy*, in B.H. ROBERTS, THE TRUTH, THE WAY, THE LIFE 605 (John W. Welch ed., BYU Studies 2d ed. 1996). An early article espousing the individuality of primal intelligences was published in 1907 by B.H. Roberts with the approval of the First Presidency

Joseph Smith revealed that all individual persons (“intelligences”) exist eternally—are uncreated, indestructible, and beginningless.⁴⁸ While few details are known regarding the nature of existence as intelligences and differing views have been expressed, B.H. Roberts taught:

[Intelligences] are uncreated; self-existent entities, necessarily self-conscious, and otherwise consciousness—they are conscious of the “me” and the “not me.” They possess powers of comparison and discrimination without which the term “intelligence” would be a solecism. They discern between evil and good; between good and better; they possess will or freedom—within certain limits at least. The power, among other powers, to determine upon a given course of conduct as against any other course of conduct. The individual intelligence can think his own thoughts, act wisely or foolishly; do right or wrong.⁴⁹

On this view, each of us as intelligences were at some point provided spirit bodies, became begotten spirit children of our Heavenly Father, and were eventually provided the earthly bodies we presently possess. Our present existence is thus comprised of our earthly bodies, our spirit bodies, and our primal self, our intelligence.⁵⁰

Because we are, in this sense, essentially uncreated, we are ultimately the first cause of all our actions⁵¹ and are free to choose our course in life. As Truman Madsen has expressed it, “man is, and

(Joseph F. Smith, President) and seven members of the Council of the Twelve. TRUMAN G. MADSEN, *ETERNAL MAN* 24–25 & n.5 (1966). However, some Church leaders, including Bruce R. McConkie, reject the view that individual intelligences existed prior to birth as spirit children. See Madsen, *Philosophy, supra*, at 614 n.32. For a discussion of various theories of the pre-existence, see Blake Ostler, *The Idea of Pre-Existence in the Development of Mormon Thought*, *DIALOGUE: A JOURNAL OF MORMON THOUGHT*, at 59 (1982).

48. See STERLING M. McMURRIN, *THE THEOLOGICAL FOUNDATIONS OF THE MORMON RELIGION* 49–57 (1965); MADSEN, *ETERNAL MAN, supra* note 47, at 13, 24; ROBERTS, *supra* note 47, at 246–57.

49. ROBERTS, *supra* note 47, at 255. Truman Madsen has added: “At a minimum, Roberts ascribes to primal intelligences these traits: consciousness, self-consciousness, subject-object discrimination, generalization, and a prior ratiocination. By these labels Roberts means powers of deduction, induction, imagination, memory, deliberation, judgment, and volition.” Madsen, *Philosophy, supra* note 47, at 605.

50. Roberts described this process as follows: “[T]hrough generation the father imparts of his own nature to his offspring; so that intelligences when begotten spirits have added to their own native, underived, inherent qualities somewhat the father’s nature also, and are veritably sons of God.” B.H. Roberts, *Immortality of Man*, *IMPROVEMENT ERA*, Apr. 1907, at 408.

51. MADSEN, *ETERNAL MAN, supra* note 47, at 66.

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always has been, one of the unmoved movers, one of the originating causes in the network.”⁵² By choosing to follow eternal law we may, through the Atonement of Jesus Christ, be perfected and sanctified.⁵³

Apart from their eternal consequences, these concepts have obvious relevance for mortal life. Because we are genuinely our own agents, we are responsible for our actions.⁵⁴ Our good actions are genuinely ours and merit praise; our bad actions are also genuinely ours and merit blame. Culpable violations of earthly law therefore merit punishment. Thus if “persons” have a right to be punished under Herbert Morris’s view, it would appear *a fortiori* that eternal moral agents would enjoy a similar right.⁵⁵

The doctrinal importance of agency and accountability for one’s choices is vividly illustrated by Latter-day Saint teachings concerning

52. *Id.* at 66 n.9.

53. *Id.* at 67 n.11.

54. The *Doctrine & Covenants* supports the idea of individual agency and responsibility: Man was also in the beginning with God. Intelligence, or the light of truth, was not created or made, neither indeed can be. All truth is independent in that sphere in which God has placed it, to act for itself, as all intelligence also; otherwise there is no existence. Behold, here is the agency of man, and here is the condemnation of man; because that which was from the beginning is plainly manifest unto them, and they receive not the light. And every man whose spirit receiveth not the light is under condemnation. For man is spirit. The elements are eternal, and spirit and element, inseparably connected, receive a fulness of joy; [a]nd when separated, man cannot receive a fulness of joy. The elements are the tabernacle of God; yea, man is the tabernacle of God, even temples; and whatsoever temple is defiled, God shall destroy that temple. The glory of God is intelligence, or, in other words, light and truth. Light and truth forsake that evil one. Every spirit of man was innocent in the beginning; and God having redeemed man from the fall, men became again, in their infant state, innocent before God. And that wicked one cometh and taketh away light and truth, through disobedience, from the children of men, and because of the tradition of their fathers.

Doctrine & Covenants 93:29–39.

Other scriptures also support this view. See, e.g., 2 *Nephi* 2:16, 2:27 (Book of Mormon) (“Wherefore, the Lord God gave unto man that he should act for himself. . . . Wherefore, men are free according to the flesh, and all things are given them which are expedient unto man. And they are free to choose liberty and eternal life, through the great Mediator of all men, or to choose captivity and death.”); *Helaman* 14:30 (Book of Mormon) (“[W]hosoever perisheth, perisheth unto himself; and whosoever doeth iniquity, doeth it unto himself; for behold, ye are free; ye are permitted to act for yourselves; for behold, God hath given unto you a knowledge and he had made you free.”); *Moses* 5:56 (Pearl of Great Price) (“And it is given unto [man] to know good from evil; wherefore they are agents unto themselves.”).

55. Some philosophers might contend that free will and, hence, moral responsibility are meaningful *only if* persons exist as uncreated and uncaused agents. Truman Madsen notes that John Wisdom holds that “freedom is only explicable if we assume man’s pre-mortal existence.” MADSEN, ETERNAL MAN, *supra* note 47, at 66 n.7.

the “war in heaven”⁵⁶ that took place prior to mortal existence. The controversy involved God the Father’s unembodied spirit children who elected to follow either Lucifer, whose plan was to compel all mortality to righteousness and thus eternal life, or God’s Only Begotten Son, Jesus Christ, who embraced the Father’s plan. This latter plan, which of course prevailed, was that mortal persons would be free to choose righteousness, or its opposite, and thus participate in their own salvation.⁵⁷ The Father looked upon Lucifer’s plan with abhorrence. Because Lucifer embraced it, he became Satan, and he and his followers were cast out of heaven. In the words of Latter-day Saint scripture:

Wherefore, because that Satan rebelled against me, and sought to destroy the agency of man, which I, the Lord God, had given him . . . , I caused that he should be cast down; And he became Satan, yea, even the devil, the father of all lies, to deceive and to blind men, and to lead them captive at his will.⁵⁸

Thus, these teachings make clear that denying persons their agency is a grave evil. Translated to the context of earthly criminal law, it would appear that programs that deny human freedom and coerce observance of the law would be highly objectionable. For Latter-day Saints, Herbert Packer’s “good behavior pill”⁵⁹ could be seen as another manifestation of Satan’s attempt “to destroy the agency of man,” in blatant denial of a person’s divine “right to be bad” if he or she so chooses.⁶⁰ Furthermore, Latter-day Saint insights into the nature of the war in heaven, and the importance of personal

56. *Revelation* 12:7–9 (King James). For further information on the Church’s belief on agency and the premortal life see TEACHINGS OF THE PROPHET JOSEPH SMITH 354–65 (Joseph Fielding Smith, ed., 1961); JAMES E. TALMAGE, *JESUS THE CHRIST*, 6–16 (42d ed., 1976); BRUCE R. MCCONKIE, *MORMON DOCTRINE*, 589–90 (2d ed. 1966); Gayle Obald Brown, *Premortal Life*, in 3 *ENCYCLOPEDIA OF MORMONISM*, *supra* note 40, at 1123–25; *Alma* 13:3–5 (Book of Mormon); *Doctrine & Covenants* 138:56; *Abraham* 3:21–23, 3:27 (Pearl of Great Price); *Jeremiah* 1:5 (King James); and *Jude* 1:6 (King James).

57. See TALMAGE, *supra* note 56, at 6–10.

58. *Moses* 4:3–4 (Pearl of Great Price); see also Dallin H. Oaks, *The Desires of Our Hearts*, *TAMBULI*, June 1987, at 22 (“[A]gency and accountability are eternal principles.”).

59. See *supra* notes 19–20 and accompanying text.

60. Fascinating questions arise in considering the question whether the good behavior pill would be objectionable if an individual person chooses to take the pill, removing all prior propensities to evil. Can virtue be obtained without personal struggle? Would taking the good behavior pill, with its forfeiture of free agency, be analogous to selling oneself into slavery? Would it be selling one’s soul to the devil? For some possible answers to these questions, see OAKS, *supra* note 27, at viii.

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accountability in the eternal scheme of things, give support to secular theories positing that rights of personhood entail rights to make choices, rights to have those choices respected, and thus rights to be punished when one culpably violates the criminal law.⁶¹

Finally, Latter-day Saint doctrine provides interesting insights into why, as Michael Moore observes, we feel a “sickness unto death” when we engage in serious misdeeds.⁶² Our immortal intelligence is fortified through our filial association with our Father in Heaven,⁶³ and through the influence of the Light of Christ⁶⁴ and the whisperings of the Holy Ghost⁶⁵ which guide us in our mortal lives. If Moore can “trust what [his] . . . guilt feelings tell [him],”⁶⁶ Latter-day Saints should be even more confident in relying on certain messages from spiritual sources, given their understanding of the virtuous sources of such messages. Thus, Latter-day Saints may feel a special affinity to Moore’s theory and conclude with him that guilty offenders must be punished.

61. See *supra* notes 9–17 and accompanying text.

62. See *supra* note 22 and accompanying text.

63. See MADSEN, ETERNAL MAN, *supra* note 47, at 66. Truman Madsen writes, “Long before mortality, in a process of actual transmission, there were forged into man’s spirit the embryonic traits, attributes, and powers of God Himself!” *Id.* at 35. We thus possess a “divine nature” to supplement our own innate possibilities of prime intelligence. *Id.* at 37, 66.

64. *Doctrine & Covenants* 88:6–7, 88:13 explains:

[Jesus Christ] ascended up on high, as also he descended below all things, in that he comprehended all things, that he might be in all and through all things, the light of truth; Which truth shineth. This is the light of Christ. As also he is in the sun, and the light of the sun, and the power thereof by which it was made. . . . The light which is in all things, which giveth life to all things, which is the law by which all things are governed, even the power of God who sitteth upon his throne, who is in the bosom of eternity, who is in the midst of all things.

B.H. Roberts describes the Light of Christ as, among other things, an “intelligence-inspiring power” that is “God immanent in the universe.” ROBERTS, *supra* note 47, at 225–26.

65. Bruce R. McConkie has noted that “[the] companionship [of the Holy Ghost] is the greatest gift that mortal man can enjoy. His mission is to perform all of the functions appertaining to the various name-titles which he bears [Comforter, Testator, Revelator, Sanctifier]. . . . [H]e has power . . . to perform essential and unique functions for men.” MCCONKIE, *supra* note 56, at 359. B.H. Roberts adds: “[F]rom whose immediate personal presence [the Holy Ghost] there goes forth a special, spiritual, witnessing power—pure spirit of intelligence—which brings to those brought into contact with it a witness of the truth, of all truth.” ROBERTS, *supra* note 47, at 226.

66. See *supra* text accompanying notes 22–25.

IV. THE DEATH PENALTY

It remains to consider what place, if any, the death penalty occupies in Latter-day Saint thought and doctrine. This is a subject worth attention because confusion exists within the Latter-day Saint community regarding the place of capital punishment in the context of the restored gospel.

The doctrine of “blood atonement” often comes up in this context. Blood atonement is the doctrine that an offender’s shedding his own blood is necessary for his possible salvation. In an earlier paper, I noted that while nineteenth-century leaders often discussed the death penalty in terms of the doctrine of blood atonement, the Church presently rejects any defense of capital punishment by appeal to this doctrine.⁶⁷

With regard to the death penalty generally, neither scriptural authority nor authoritative declarations from Church leaders give theological support to a commitment to capital punishment.⁶⁸ Indeed, representatives have recently clarified that the Church adopts a neutral position on the death penalty, neither promoting nor opposing its imposition.⁶⁹ Notwithstanding such declarations, occasional references to blood atonement continue to surface as a Mormon folk doctrine.⁷⁰ Moreover, a well-known treatise

67. See generally Gardner, *supra* note 32.

68. See *id.* Note, however, that official Church doctrine does mandate following the laws of the land whether or not such laws embrace the death penalty. See *supra* notes 4, 29, 30.

69. See, e.g., Hannah Wolfson, *LDS Church Remains Neutral on Death Penalty*, STANDARD EXAMINER, May 5, 2001, at 3C; Don Lattin, *Musings of the Main Mormon*, SAN FRANCISCO CHRONICLE, April 13, 1997, at 3/Z1. However, several sources indicate that the Church has had varying viewpoints over time. See, e.g., Roy W. Doxey, *The Law of Moral Conduct*, RELIEF SOCIETY MAGAZINE, Aug. 1960; Stuart W. Hinckley, *Capital Punishment*, in 1 ENCYCLOPEDIA OF MORMONISM, *supra* note 40, at 255; *Doctrine & Covenants* 42:19, 42:79; *Genesis* 9:12 (Joseph Smith Translation); *Leviticus* 24:17 (King James).

The Church’s current position on capital punishment has been stated as follows: “The Church of Jesus Christ of Latter-day Saints regards the question of whether and in what circumstances the state should impose capital punishment as a matter to be decided solely by the prescribed processes of civil law. *We neither promote nor oppose capital punishment.*” Posting of the Church of Jesus Christ of Latter-day Saints to Newsroom.lds.org, at <http://www.lds.org/newsroom/mistakes/0,15331,3885-1-16708,00.html> (last visited Sept. 30, 2003).

70. See, e.g., Peggy Fletcher Stack, *Concept of Blood Atonement Survives in Utah Despite Repudiation*, THE SALT LAKE TRIBUNE, Nov. 5, 1994, at D1. For further information on the concept of blood atonement see JOSEPH FIELDING SMITH, *The Doctrine of Blood Atonement*, in 1 ANSWERS TO GOSPEL QUESTIONS 180 (1957); MCCONKIE, *supra* note 56, at 92–93; Charles W. Penrose, *Blood Atonement as Taught by Leading Elders of the Church of Jesus Christ of Latter-day Saints*, in 1 ENCYCLOPEDIA OF MORMONISM, *supra* note 40, at 131; Lowell M.

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expounding Mormon doctrine, published in 1966, continues to be circulated which defends blood-spilling modes of capital punishment as necessary for atonement of sins.⁷¹ In addition, Doctrine and Covenants section 42 verse 19 currently contains a cross reference to “Capital Punishment” in the Topical Guide to the standard works of the Church,⁷² despite the fact that Dallin H. Oaks maintains that the scripture has nothing to do with the death penalty.⁷³

Leaving such confusing matters aside, I would like to reconsider briefly the status of the death penalty in Latter-day Saint thought in light of the argument presented in this paper. I have argued that Church doctrine provides a foundation for a commitment to a just deserts theory of criminal punishment in general but does not provide a basis for a commitment to the death penalty in particular. Therefore, Latter-day Saint retributivists must necessarily form their opinions about employment of capital punishment in light of secular retributive arguments, some of which, as I will show in the remainder of the article, do not entail a commitment to the death penalty but in fact provide a basis for opposing it. While many retributivists—certainly Kant—see capital punishment of murderers and perhaps other serious offenders as a requirement of justice,⁷⁴ others see no necessary connection between just deserts theory and the death penalty.⁷⁵ Thus, Latter-day Saints can logically subscribe to a just deserts theory but need not favor the death penalty. For example, so far as I know, Herbert Morris has never advocated use of the death penalty. Indeed, the subject is not even mentioned in his *Persons and Punishment* paper. In any event, what he and all retributivists require is that offenders suffer in proportion to their culpability and the seriousness of their offense, whatever form that suffering may take. For many modern retributivists, the actual punishment imposed for a given crime is not fixed by any defining

Snow, *Blood Atonement*, in 1 ENCYCLOPEDIA OF MORMONISM, *supra* note 40, at 131; 3 MESSAGES OF THE FIRST PRESIDENCY 183–87 (James R. Clark ed., 1966).

71. McConkie, *supra* note 56, at 92. McConkie later repudiated this view: “There seems to me to be no present significance as to whether an execution is by firing squad or in some other way.” *Quoted in* Gardner, *supra* note 32, at 18.

72. *Doctrine & Covenants* 42:19 n.b.

73. See Oaks, *supra* note 27, at 162.

74. See, e.g., Walter Berns, FOR CAPITAL PUNISHMENT (1979).

75. See, e.g., David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 6 (1998).

principle, such as Kant's *lex talionis*, but is relative to time and place. As Stephen Morse has explained:

Few sophisticated persons would claim that there is an invariant, objective deserved punishment for each offensive act. But desert theorists only need to make a more modest claim: It is possible in any society to rank the seriousness of criminal offenses and to assign to each a punishment that the society at that time considers proportional to the seriousness of the offense. This is then the deserved punishment at that time and in that place.⁷⁶

Moreover, even if we conclude as a theoretical matter that justice demands that some offenders deserve to die for their crimes, practical implementation of the death penalty raises problems for retributivists. Considering just the crime of homicide, retributivists agree that not all killers, not even all murderers, deserve death.⁷⁷ Capital punishment is reserved for only the most morally culpable, described by Richard Lempert as "those who fully intended, and perhaps rejoiced in, the suffering and death they inflicted and who, in some meaningful sense, could have done otherwise."⁷⁸ Moral culpability is thus a subjective state requiring for its assessment the ability to "search people's minds."⁷⁹ However, perfect assessments of culpability are unattainable in earthly tribunals. As a consequence, Lempert observes:

[The inability of the legal system to truly determine the most evil offenders and thus those most deserving of death] means that in deciding whether to inflict the death penalty we often attend more to the circumstances of the crime than to the circumstances of the criminal. The person who slays in a peculiar or brutal way is more likely to receive the death penalty than one who dispatches his victim with a single bullet, yet the former may have been insane under all but the narrowest legal test while the latter was cool and calculating.⁸⁰

76. Stephen J. Morse, *Justice, Mercy, and Crazyiness*, 36 STAN. L. REV. 1485, 1493-94 (1984) (book review).

77. Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1182 (1981); see also, Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992).

78. Lempert, *supra* note 77, at 1183.

79. *Id.*

80. *Id.*

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Not only does the legal system risk the injustice of executing those who, though guilty of a criminal act, are not sufficiently culpable to deserve the death penalty, but also perhaps the greater injustice of executing totally innocent persons who have committed no criminal act.⁸¹

81. While such situations are no doubt rare, the recent use of DNA and other evidence has revealed that totally innocent people are sometimes convicted and sentenced to death. Justice Breyer of the United States Supreme Court has recently cited a study documenting at least 100 known cases of death row inmates who were exonerated through DNA tests in the latter decades of the twentieth century. *Ring v. Arizona*, 122 S. Ct. 2428, 2447 (2002) (Breyer J., concurring) (citing Henry Weinstein, *The Nation's Death Penalty Foes Mark a Milestone Crime: Arizona Convict Freed on DNA Tests Is Said to Be the 100th Known Condemned U.S. Prisoner to Be Exonerated Since Executions Resumed*, LOS ANGELES TIMES, Apr. 10, 2002, at A16).

Such statistics led Judge Jed Rakoff to hold that the Federal Death Penalty Act violates due process. Judge Rakoff found:

The best available evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed and that, on the other hand, convincing proof of their innocence often does not emerge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence. It follows that implementation of the Federal Death Penalty Act not only deprives innocent people of a significant opportunity to prove their innocence, and thereby violates procedural due process, but also creates an undue risk of executing innocent people, and thereby violates substantive due process.

United States v. Quinones, 205 F. Supp. 2d 256, 257 (S.D.N.Y. 2002). Although *Quinones* was subsequently reversed, *United States v. Quinones*, 313 F.3d 49 (2d Cir. 2002), Judge Rakoff's views remain relevant to policymakers.

A recent commentary notes:

A citizen of Illinois who had been measured for his coffin and was within two days of execution is proven innocent of the murders for which he had been convicted and sentenced to death. Twelve other men, also convicted and sentenced to death in Illinois, are similarly exonerated, declared innocent, and set free. The belief of the complacent in the efficacy of the criminal justice system is shattered by revelations of police torture, prosecutorial misconduct, and ineffectiveness of defense counsel. This is Illinois in the year 2001, and the whole world is watching.

.....
In some cases, wrongful convictions of defendants under sentence of death were established by circumstances other than ineffectiveness of defense counsel or prosecutorial misconduct. In fact, au contraire, it was the persistence of defense counsel and the cooperation of the state which assisted in the exoneration of the defendant.

In *People v. Jones*, the defense counsel never gave up in his efforts to prove Ronald Jones' innocence. The defendant was convicted of murder and aggravated sexual assault of a south side woman in 1985. He was sentenced to death. The Illinois Supreme Court, despite defendant's claim of innocence, affirmed the convictions and sentence.

Lempert observes:

Retributivism is also haunted by those executions of the innocent which inevitably occur if the death penalty is allowed. It is true that documented cases in which the wrong person is executed are quite rare, and likely to remain so. But, as a purely philosophical matter, this is of little help to the retributivist. Retributivism, on its own terms, allows life to be taken only when death is deserved; it does not tolerate killing as a means to some greater social good. Retributivists are proud of their Kantian heritage, which demands that life be treated only as an end. Thus, however good a just punishment system and however much such a system demands the death penalty, the philosophy of retributivism apparently forbids the sacrifice of innocent lives as a condition for the maintenance of such a system. . . .

. . . While the mistaken conviction of those who have not killed is certainly rare, the mistaken allocation of responsibility to those who have killed may be uncomfortably common. To the retributivist one mistake is almost as bad as another, for in most retributivist schemes the unpremeditated murderer or the insane

The defendant then filed a post-conviction petition, charging that the police beat him into a confession, and he requested DNA testing to establish his innocence. The trial Judge stated on the record: "What issue could possibly be resolved by DNA testing?" Jones was exonerated after DNA testing was done, and the Cook County State's Attorney's office agreed to vacate his conviction and drop all charges against him in the light of that definitive evidence.

Marshall J. Hartman & Stephen L. Richards, *The Illinois Death Penalty: What Went Wrong?*, 34 J. MARSHALL L. REV. 409, 409, 428–29 (2001) (citations omitted).

One wonders how many innocent defendants, who did not have lawyers like those who represented Ronald Jones, have gone to their death at the hands of the state. A recent casebook notes:

Death penalty opponents argue that, even if the death penalty were thought to be moral and socially useful, it still should be abolished because it has not been, and cannot be, fairly imposed. This argument is supported by the most comprehensive study yet done on post-*Furman* death sentences: J. Liebman, J. Fagen & V. West, *A Broken System: Error Rates in Capital Cases, 1973–1995*, (2000). The study of all death sentences during the period 1973–95, documented *inter alia*, that 68% of all death sentences were reversed for prejudicial error and that 82% of those whose sentences were reversed were not again sentenced to death. Thus, at least 56% of the death sentences imposed were "wrong."

NINA RIVKIND & STEVEN F. SHATZ, CASES AND MATERIALS ON THE DEATH PENALTY 14–15 (2001). While the authors argue that the figure of fifty-six percent "wrong" death penalty sentences may in fact be too low, *id.* at 15 n.27, it should be noted that these figures do not necessarily establish that the "wrongly" imposed death sentences involved cases where defendants did not commit the criminal acts charged.

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killer no more deserves to die than the innocent victim of misidentification. In arguing from a retributivist philosophy to an actual system of state executions, retributivists are again advocating a system that will work substantial injustice as measured by the standards of the philosophical system they espouse.

. . . .

In short, there is a fundamental irony to the usual retributivist position. Basic principles of moral justice that are believed to justify or even demand the death of those who maliciously kill others are necessarily offended by the attempt to impose a system of state executions in an imperfect world. The emphasis that retributivists place on human beings as ends and not as means, the high value they place on innocent human life, and their insistence that retributivism (unlike revenge) respects the bounds of law combine to form a philosophy from which one cannot derive a policy that trades the wrongful execution of a few for the proper execution of many.⁸²

Such considerations pose problems for retributive defenses of capital punishment and suggest that, perhaps ironically for some, a Latter-day Saint perspective on punishment, with its adherence to principles of just deserts, would not embrace nor merely be indifferent to the death penalty, but would actually oppose it. Dallin H. Oaks has cautioned us, as individuals, to “refrain from making final judgments on people because we lack the knowledge and the wisdom to do so.”⁸³ Perhaps such counsel would apply equally to the “final judgment” entailed when the legal system employs its ultimate and irrevocable sanction.

Finally, because the death penalty is uniquely ultimate and irrevocable,⁸⁴ it is perhaps appropriate to consider the wisdom of its employment in a broader perspective than applied to non-capital punishment, arguments for which I have made solely in terms of

82. Lempert, *supra* note 77, at 1182–84.

83. Dallin H. Oaks, “*Judge Not*” and *Judging*, *ENSIGN*, Aug. 1999 at 7–8.

84. On numerous occasions, the United States Supreme Court has noted that because of its finality the death penalty is *sui generis*. *See, e.g.*, *Griffin v. Illinois*, 351 U.S. 12, 21 (1956) (Frankfurter, J., concurring); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (finality of death penalty requires “greater degree of reliability when imposed”); *Beck v. Alabama*, 447 U.S. 625 (1980) (because of the irrevocability of the death penalty, the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death; the trial judge must give jury the option to convict of a lesser offense).

considerations of justice. Brett Scharffs has argued that in administering criminal law God requires us, as he did Micah, “to do justly, and to love mercy and to walk humbly.”⁸⁵ If so, I suggest that it is perhaps in the *sui generis* context of the death penalty that the virtues of humility and mercy, in addition to justice, have relevance. Given the imperfections of human legal systems, humility should attend our contemplations of the death penalty and perhaps caution us that we really are unable to make the ultimate assessments of personal responsibility required by justice in order to take an offender’s life. In so doing, rather than risk the injustice of executing the innocent, we might choose to execute no one, thus mercifully permitting offenders truly deserving death to live.⁸⁶

But if these considerations counsel against imposing the death penalty, would they not be equally applicable in the context of other punishments such as incarceration? While this question deserves extensive discussion, I will give only a brief response here. It appears true that “rough justice” is the best our legal system can ever achieve. But because of its finality and irrevocability, imposition of the death penalty may demand a more perfect system of justice than we can offer. While doing rough justice may be insufficient in the context of the death penalty, it suffices, indeed is mandated,

85. *Micah* 6:8 (King James). See generally, Brett Scharffs, *Centering on Humility*, CLARK MEMORANDUM, Winter 1998, at 2.

86. Regarding the problem of not giving the truly culpable their just deserts by abolishing the death penalty, Lempert notes:

Absent the death penalty there would still be substantial retributivism and thus justice in the form of sentences to life imprisonment. A number of innocent people will necessarily receive such sentences since mistakes are an inevitable part of any punishment system. The marginal loss of retributively defined justice in the case of the guilty will be the difference between the retributivism inherent in the life sentence and that inherent in an execution, but the marginal gain in justice accorded the innocent will be greater. A number of the innocent will prove their blamelessness after conviction, be released early from prison, and in all probability be compensated to some extent for the time they have served. Note that the presence of the death penalty may also contribute to the unjustified infliction of less than death sentences on the innocent. A guilty plea by an innocent accused may be more likely in a death penalty jurisdiction than in a jurisdiction where one does not risk death by asserting his innocence, and a jury qualified to impose the death penalty may be more likely mistakenly to convict of a less than capital offense than one which has not been so qualified.

Lempert, *supra* note 77, at 1183 n.16 (citing Craig Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 26 CRIME & DELINQUENCY 512 (1980); George L. Jurow, *New Data on the Effect of a “Death Qualified” Jurie on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971)).

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elsewhere. Where discovery of erroneous convictions occur, they may be reversed, and those improperly incarcerated or otherwise punished may be released and perhaps monetarily compensated for their time served.⁸⁷ Some such injustice can be tolerated in the attempt to dispense punishment to truly deserving offenders. The theory advanced in this paper obligates us to do justice. That requires our constant diligence in striving for a truly just system. In the meantime, it is better to do rough justice than to do no justice at all.

V. CONCLUSION

In this paper I have examined whether there might be a distinctly Latter-day Saint perspective on criminal law, particularly its imposition of the punitive sanction. I have suggested that if such a perspective exists, it appears grounded in concepts of justice that flow from Latter-day Saint insights into the eternal principles of agency and personal accountability. If this argument is sound, it commits Latter-day Saints to strive for and uphold systems of criminal law that do justice. Such a commitment does not, however, necessarily obligate Church members to advocate the death penalty; indeed, it may even lead them to oppose it.

87. Lempert, *supra* note 77, at 1183 n.16.

